



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 480 OF 2015

JAMES MUTHUSI.....1ST CLAIMANT
HAMISI A. MWASEREYE.....2ND CLAIMANT
EPHAS S. MUNALA.....3RD CLAIMANT
GEOFFREY N. KAGO.....4TH CLAIMANT
BAILE FAMAU.....5TH CLAIMANT
SAMSON M. KIMULI.....6TH CLAIMANT
JARIM ONDEGO.....7TH CLAIMANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants are all employees of Kenya Ports Authority, having been employed in various positions and rising through the ranks to the position of Engine Room Assistant Job Grade HG1, at the time material to this claim.
2. By their Memorandum of Claim filed in court on 14th July 2015, the Claimants claim that sometime in 2008, they were orally appointed to act in the higher position of Senior Engine Room Assistant, Job Grade HM4 but were not paid acting allowances. This is the substance of their claim before the Court.
3. The Respondent filed a Response on 25th August 2016 denying the Claimants' respective claims.
4. When the matter came up for hearing, the 6th Claimant, Samson M. Kimuli testified on his own behalf and on behalf of his co-claimants. The Respondent called Georgina Akinyi from the Rewards and Job Evaluation Section. The parties also filed written submissions.

The Claimants' Case

5. The Claimants state that prior to 31st July 2008, they were working as Engine Room Assistants (ERA). On 31st July 2008, they were appointed to perform the duties of the higher position of Senior Engine Room Assistants (SERA).
6. The Claimants further state that the duties of SERA were separate and distinct from those of the position of ERA, with the higher position demanding a higher degree of responsibility and initiative.
7. The Claimants performed the duties of SERA in acting capacity until 31st December 2011 where they were confirmed. They claim that their entitlements were communicated to the Personnel Manager by the Chief Marine Engineer on diverse dates.
8. The Claimants also wrote to the Head of Human Resource on 24th November 2012 demanding their respective acting allowances and on 19th March 2014, two of the Claimants sought audience with the General Manager (Engineering Services) but no solution was reached.

9. The Claimants state that their acting allowances are made up of the following:

- a) Salary allowance;
- b) House allowance;
- c) Extra hours worked allowance;
- d) Meals allowance; and
- e) Shift allowance.

10. Their respective claims are as follows:

- a) James Muthusi.....Kshs. 5,356,984.94
- b) Hamisi A. Mwasereye.....5,134,021.88
- c) Ephas S. Munala.....5,291,884.73
- d) Geoffrey N. Kago.....5,291,884.73
- e) Baile Famau.....5,346,735.62
- f) Samson M. Kimuli.....5,411,914.38
- g) Jarim Ondego.....5,313,492.85

11. The Claimants also ask for costs plus interest.

The Respondent's Case

12. In its Response dated 24th August 2016 and filed in court on 25th August 2016, the Respondent states that by letter dated 20th May 2010, the Chief Marine Engineer recommended that the Claimants be considered for payment of acting allowances.

13. In its response dated 21st December 2010, the Human Resource Department asked the Chief Marine Engineer to justify payment of the acting allowances against non- established posts.

14. Relying on Section B.12(b) of its Human Resources Manual 2008, the Respondent maintains that acting appointments ought to be in writing and in an established post. The Respondent points out that this was not the case with regard to the Claimants. Further, the Chief Marine Engineer had no power to call upon the staff to work or perform duties in a post not designated for the particular staff without prior authority from the Human Resource Department.

15. The Respondent draws attention to letter dated 12th January 2011 from the Chief Marine Engineer admitting that no staff shall draw acting allowance unless they are serving in the immediate lower grade and prior approval has been granted.

16. The Respondent concludes its Response by raising a preliminary objection on the ground that the Claimants' claims are statute barred.

Findings and Determination

17. In the final part of its Response, the Respondent states that the Claimants' claims are statute barred. This being a substantive preliminary issue, which goes to the jurisdiction of the Court to deal with the claim before it, I am required to address it first.

18. In the final submissions filed on behalf of the Respondent on 2nd October 2019, it is clarified that in advancing its objection, the Respondent relies on Section 90 of the Employment Act and Section 66 of the Kenya Ports Authority Act.

19. The two provisions bear verbatim reproduction. Section 90 of the Employment Act states:

90. Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.

20. In similar fashion, Section 66 of the Kenya Ports Authority provides that:

66. *Limitation*

Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following shall have effect-

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent;

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof.

21. The Respondent further drew the attention of the Court to the decision in ***Kenya Ports Authority v Cyrus Maina Njoroge [2018] eKLR*** where the Court of Appeal affirmed Section 66 of the Kenya Ports Authority Act as the applicable limitation law in employment claims against the Respondent.

22. In their supplementary submissions filed on 17th October 2019, the Claimants take a firm position that their claims fall within the cadre of ‘*continuing injury or damage*’ as defined in the foregoing statutes.

23. Counsel for the Claimants made strenuous effort towards persuading the Court that his clients’ claims were not statute barred. In this regard, it was submitted that because the Claimants were still in the Respondent’s employment, their claims which were the nature of ‘*continuing injury or damage*’ are current and time could not therefore be said to have run out against them.

24. I must admit that this was an interesting argument. However, the veracity of legal argument must be tested against the law. In order to determine the issue of running of time, the Court must ask the question as to what is the cause of action in this case.

25. What constitutes a cause of action was defined by the Court of Appeal in ***Attorney General & another v Andrew Maina Githinji & another [2016] eKLR***, as the act that causes a claimant to complain. In the case now before me, the reason for the Claimants’ complaint is that they performed duties in acting capacities but were not paid acting allowances.

26. The 6th Claimant, Samson M. Kimuli testified that he and his colleagues acted in the position of Senior Engine Room Assistant from 31st July 2008 until December 2011. It follows therefore that the cause of action accrued from December 2011. The Claimant’s claim was filed on 14th July 2015. It follows therefore that even if one were to take the three year limitation period under Section 90 of the Employment Act, as the applicable limitation period, the claim would still be time barred.

27. Indeed, the Claimants themselves appear to have been aware that their claims were statute barred as far back as July 2015, when they filed an application for extension of time but which they withdrew a year later, in August 2016.

28. What is clear is that the Claimants’ entire claim is statute barred and the Court has no jurisdiction to entertain it. As a result, the said claim is dismissed.

29. In light of the persisting employment relationship between the parties, I direct that each party will bear their own costs.

30. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Gitonga for the Claimants

Mr. Cheruiyot h/b Mr. Dena for the Respondent