



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 597 OF 2014**

**SAMUEL OTIENDE LUKOKO.....CLAIMANT**

**v**

**SHINERS GIRLS HIGH SCHOOL.....RESPONDENT**

**RULING**

1. Samuel Otiende Lukoko (Claimant) filed a Memorandum of Claim against Shiners Girls High School (Respondent) on 18 November 2014 alleging unfair termination, *underpayment of wages* and nonpayment of overtime.
2. The Respondent filed its Response on 23 December 2014 denying the Claimant's pleas.
3. On 12 January 2015, the Respondent filed a Preliminary Objection on the grounds that the Cause was vexatious, an abuse of the Courts process, fatally defective and unsustainable and that the suit offended section 90 of the Employment Act, 2007.
4. The Claimant filed a Response to the Preliminary Objection on 22 January 2015 and the objection was taken on 20 February 2015.
5. Mr. Karanja who took the Respondent's objection submitted that the cause of action relating to underpayments prior to 2011 should be struck out for being filed outside the 3 years set out in section 90 of the Employment Act, 2007.
6. The Respondent contended that the claim was not a *continuing injury* and that every underpayment constituted a different cause of action.
7. The Respondent filed and relied on the decisions in *Peter Musembi Nzioka v Barclays Bank Kenya Ltd* (2013) eKLR, *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* (2013) eKLR, *Mary Kasiwa v Scorpio Enterprises Ltd* (2013) eKLR, *Fred Mudave Gogo v G4S Security (K) Ltd* (2014) eKLR and *Nicodemus Marani v Timsales Ltd* (2014) eKLR.
8. The Claimant's contention on the other hand was that the Claimant's services were terminated on 22 July 2014, and the Cause was filed on 18 November 2014 within time.
9. Ms. Kibiru for the Claimant submitted that the Claimant's service was continuous.
10. The Respondent limited its submissions on the head of claim relating to underpayments prior to 2011.
11. The Suit herein is based on distinct causes of action. There is the cause of action alleging *unfair termination*. There is also a cause of action which exists independently and is distinct from unfair termination, and it is based on the statutory entitlement of employees to a minimum wage.
12. This later cause of action derives from section 48 of the Labour Institutions Act which provides

48(1) Notwithstanding anything contained in this Act or any other written law-

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

2) An employer who fails to—

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order,

commits an offence.

13. In the Memorandum of Claim, the Claimant sought for underpayments on the prescribed minimum wages and overtime running from the year 2000 to 2014.

14. Determination of the preliminary objection in real sense requires a discussion of a narrow legal issue and that is whether underpayments (below the minimum wage) is a *continuing injury* for purposes of section 90 of the Employment Act, 2007.

15. I had occasion to discuss the question of continuing injury in *Stephen Kamau Karanja v Family Bank Ltd* (2014) eKLR. In that decision I stated that

23. It would be appropriate for me therefore to make reference to other reputable sources. Black's Law Dictionary, ninth edition defines *continuing injury* as

*An injury that is still in the process of being committed - An example is the constant smoke or noise of a factory.*

24. To the examples given, I would add payment of wages below the prescribed minimum rates would be a continuing injury.

16. The parties herein did not present before me any precedent which would make me reach a different conclusion from that I expressed case mentioned above that underpayment of wages constitute a continuing injury.

17. The authorities cited by Mr. Karanja dealt with the more general question regarding limitation in causes of action in complaints of unfair termination whereas a narrow question is posed here, and as I have stated, underpayments below the minimum prescribed wages is a cause of action on its own and can survive independently of a claim for unfair termination.

18. Mr. Karanja's submission that each underpayment is distinct is correct in my view and I would agree with him that each underpayment would constitute a different cause of action.

19. And where the underpayments continue, the cause of action in respect of all the underpayments would be statute barred 12 months after the cessation of the injury.

20. In the instant Cause, the Claimant alleges that his employment was terminated on 22 July 2014, and he is seeking underpayments up to 30 June 2014. The Cause was filed on 18 November 2014 well within 12 months.

21. Payment of wages below the prescribed minimum wages is also a criminal offence. To my mind, though, it is also open to debate, whether a person can seek to defeat an action based on his illegality on the basis of limitation law.

22. Considering the above the Court overrules the preliminary objection and orders that the Cause proceed to hearing on the merits.

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of March 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Kibiru instructed by Korongo & Co. Advocates

For Respondent Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates