



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 18 OF 2012**  
**(Originally Nairobi Cause No. 211 of 2011)**

**ISSA BISI**

**CLAIMANT**

**v**

**ANARWALI & BROTHERS LTD**

**RESPONDENT**

**JUDGMENT**

1. Issa Bisi (Claimant) acting in person, filed a Memorandum of Claim against Anarwali & Brothers Ltd (Respondent) in Nairobi on 16 February 2011. The Claimant was seeking salary arrears and gratuity.
2. On 8 November 2011 Kituo cha Sheria filed a Notice of Appointment of Advocate on behalf of the Claimant.
3. On the same day Ms. Wokabi for the Claimant applied that the Cause be heard in Mombasa.
4. After several mentions without any appearance for the parties, Mr. Nduna appeared in Court on 21 March 2013 and informed me that he had filed a Response on behalf of the Respondent. The Court directed the Deputy Registrar to notify the Claimant to appear in court on 11 April 2013 for directions.
5. The Claimant however did not appear, but Mr. Nduna informed me that his son Abdallah Issa was in court. The son informed the court that the Claimant was seriously sick.
6. Due to the nature of the case and the illness of the Claimant, the Court ordered the County Labour Officer to examine the Respondent's records and make a report on the Claimant's complaints.
7. The County Labour Officer did not file the report within the time set but eventually a report was filed on 3 July 2013. On 10 July 2013, Mr. Nyange for the Claimant informed the Court he did not agree with the report and the Court therefore set hearing for 22 August 2013.
8. On 22 August 2013, Mr. Nyange informed the Court that he was not ready to proceed with the hearing because the Claimant was unable to attend Court due to blindness. The Respondent suggested that the Cause could be determined on the basis of pleadings and the County Labour Officer's report.
9. On 1 October 2013, the parties informed the Court that they had agreed to have the Cause determined on the basis of pleadings and written submissions as a result of which the Court directed the Claimant to file and serve his submissions by 4 October 2013 and the Respondent to file and serve its submissions by 11 October 2013. The submissions were to be highlighted on 16 October 2013. Rule 21 of the Industrial Court (Procedure) Rules, 2010 permit this type of approach.
10. On 16 October 2013, although the Court did not sit, the Cause was mentioned before the Deputy Registrar. The Claimant's advocate was reported as ill but he had not served the Respondent with

- his submissions.
11. On 11 November 2013, the Court directed that the submissions be highlighted on 3 December 2013. On this day again Mr. Nyange was reported as ill and the Court directed the submissions to be highlighted on 26 February 2014. For unexplained reasons on this latter date, Mr. Nyange indicated he was seeking a judgment and was not interested in highlighting the submissions.
  12. The Claimant filed further submissions in reply on 4 February 2014 without leave or informing the court.

### **Issues for determination**

13. Having considered the primary pleadings, documents, County Labour Officer's report and the parties respective submissions, the issues arising for determination are whether the Claimant is owed salary arrears for April to June 2007, whether the Claimant is entitled to gratuity for 24 years, whether the Claimant is entitled to one month pay in lieu of notice, whether the Claimant is entitled to accrued leave for 7 years and whether the claim is statute barred.
14. In the course of addressing the issues the court will also traverse on the question of employment status, termination of the claimant and applicable law.

### ***Whether the Claimant is owed salary arrears for April to June 2007***

15. The Claimant seeks a total of Kshs 78,876/- being unpaid salaries for April to June 2007.
16. The Respondent refutes this head of claim because according to the Respondent the Claimant was not in its employment in the years 2005 to 2007 and that the Claimant's last day of employment was on 5 October 2004.
17. The documents produced and not challenged are that the Claimant was issued with a letter of appointment effective 1 September 1997.
18. The Respondent wrote a letter dated 9 March 1999 to National Social Security Fund informing the Fund that the Claimant had retired, and the Claimant's letter dated 31 August 1999 to the Fund appears to confirm this. The Respondent also exhibited a Certificate of Service dated 11 January 1999.
19. According to the Respondent, after the retirement of the Claimant, he was offered a 6 year contract upto December 2004, but the Claimant absconded duty in October 2004 due to illness. Consequent to this, the Respondent paid the Claimant Kshs 35,000/- as final dues on 13 November 2004. This is not disputed.
20. In December 2004 the Claimant through his advocates made a demand in relation to wrongful dismissal with a further follow up letter on 29 September 2006 alleging the Claimant had been given unpaid leave and was opting to retire on medical grounds.
21. On the basis of the documents produced, the Court is unable to reach a conclusion that the Claimant was in the employment of the Respondent from April 2007 to June 2007 and is owed any salary arrears.

### ***Whether the Claimant is entitled to gratuity for 24 years***

22. The Claimant seeks gratuity for 24 years totalling Kshs 606,880/-. In his written statement, the Claimant stated that he served the Respondent from 1 January 1993 to 17 April 2007, a total of 24 years.
23. According to the report by the County Labour Officer, the Claimant worked with the Respondent from 1 January 1993 to 31 October 1987, 15 May 1997 to 31 December 1998 and from 1 September 1999 to 31 October 2004.
24. At some point the Claimant worked with African Express Automobiles Ltd for seven years.
25. The service could not have been continuous as submitted by the Claimant. No nexus, factual or otherwise was laid between the Respondent and African Express Automobiles Ltd.
26. Payment of gratuity can either be contractual or statutory. The Claimant's letter of appointment did not make any provision for payment of gratuity and therefore the claim for gratuity has no contractual foundation in this case.
27. On a statutory foundation, the Claimant did not refer the Court either in the pleadings or

- submissions to which statute gave this claim for gratuity a statutory underpinning.
28. The relevant statutes were the Employment Act Cap 226 and the Regulation of Wages and Conditions of Employment Act Cap 229 (both now repealed) and none of them is applicable in the circumstances of this case.
29. At any rate the Claimant did not suggest any particular Regulation of Wages Order was applicable to him. The Regulation of Wages (Road Transport) Order did/does not provide for gratuity.

***Whether the Claimant is entitled to one month pay in lieu of notice***

30. The Claimant has failed to demonstrate that his services/contract was unlawfully or unjustifiably terminated by the Respondent. The material before the court only illustrates that the Claimant retired on reaching retirement age and applied to get his provident funds saved with the National Social Security Fund.

***Whether the Claimant is entitled to accrued leave for 7 years.***

31. The County Labour Officer examined the records kept by the Respondent regarding the employment of the Claimant. It found that the Claimant was entitled to Kshs 48,000/- as outstanding leave for the period 2001 to 2004. The Claimant submitted that the leave should have been calculated on the basis of a salary of Kshs 25,000/-.
32. The Court finds no factual basis for the submissions by the Claimant and finds that the Claimant is entitled to outstanding leave as found by the County Labour Officer.

***Whether the claim is statute barred***

33. The Memorandum of Response filed by the Respondent on 21 March 2013 did not advert to the Claim being statute barred. The Respondent raised the issue for the first time in its submissions filed on 8 November 2013. The issue takes up 3 pages of the submissions.
34. According to the Respondent the claim offends section 4(4) of the Trade Disputes Act (now repealed), that the claim should have been referred to the Minister for Labour and that the Claimant ought to have applied for leave to enlarge time.
35. With due respect to the Respondent, the Trade Disputes Act (now repealed) applied to trade disputes where trade unions were involved. During the material time, it was always open to parties who were alleging unlawful/unjustified dismissal to approach the civil courts on the basis of contract or common law.
36. On the issue of limitation, the Claimant was seeking arrears for 2007 and accrued leave for 7 years and was alleging that he worked until 17 April 2007. The Employment Act, cap 226 (now repealed) did not have a limitation clause and therefore the limitation set out in section 4(1) of the Limitation of Actions Act was applicable and the period set out therein for causes of action based on contract was 6 years.
37. The Court of Appeal has had the opportunity to address the issue of when a plea of limitation should be pleaded in the case of *Achola & another v Hongo & another* (2004) 1 KLR 462. The discussion therein related to the inter face between the civil procedure rules and the Limitation of Actions Act. The Court held that

*the second respondent having failed to plead limitation in its defence, it was not entitled to rely on that issue and base a preliminary objection on it and it was not entitled to rely on the defence during the trial of the suit unless it amended its defence.*

38. I would equally find that it is not open to the Respondent to raise a plea of limitation in its written submissions when it failed to warn the Claimant in its primary pleading document (Response) that it would seek to rely on the statute of limitation.
39. Before concluding the Court must express its disappointment at the reluctance by the Claimant to have the matter concluded expeditiously.

## **Conclusion and Orders**

- 40.The County Labour Officer found that the Claimant was owed leave for 2001 to 2004 and calculated the amount at Kshs 48,000/-.
- 41.In conclusion and in light of what has been discussed above herein the Claimant's claim must fail save for accrued leave and in this regard the Court awards the Claimant Kshs 48,000/- .
- 42.Each party to bear it costs.

**Delivered, dated and signed in open court in Mombasa on this 21<sup>st</sup> day of March 2014.**

**Radido Stephen**

**Judge**

### **Appearances**

Mr. Nyange instructed by

Kituo cha Sheria

for Claimant

Mr. Molenje, Senior Legal Officer

Federation of Kenya Employers

for Respondent