



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 14 OF 2012
(Originally Nairobi Cause No. 1572 of 2011)

DAUDI HAJI

CLAIMANT

v

KENYA PORTS AUTHORITY

RESPONDENT

JUDGMENT

1. Daudi Haji (Claimant) retired from Kenya Ports Authority (the Respondent) in the year 2008. At time of retirement he was a Master Harbour Tug.
2. In the course of employment the Claimant had to put in extra hours due to manpower shortage. It is not disputed that the Claimant put in a total of 4128 hours beyond the normal working hours. This fact was acknowledged by the Respondent's Principal Personnel Manager in a Memo dated 15 July 2009.
3. On 16 September 2011, the Claimant filed a Memorandum of Claim seeking Kshs 940,000/- for these extra hours which have been referred to as shorthand hours.
4. The Claimant bases his claim on section 17 of the Employment Act.
5. The Respondent's Personnel Manager recommended to the Managing Director on 6 July 2009 that the Claimant and others be paid an ex gratia payment of Kshs 50, 000/- each for the extra hours because payment of actual excess hours would result in high expenditure. The Respondent's Managing Director approved the ex gratia payment.
6. The Claimant worked the extra hours to cover all the shifts and ensure continuity of work upon acquisition by the Respondent of new tugs from Damen.
7. The Respondent case on the other hand is that there is no contractual foundation to the claim because no contract, circular or appointment letter incorporated a term for payment for the shorthand hours. The Respondent further asserted that there was no provision of law which could support the Claimants claim. The Respondent's Human Resources Manual 2008 had no provision for payment of the shorthand hours.
8. The Respondent also contended that the claim was time barred. I will deal with the issue of limitation first.

Whether the claim is time barred

9. According to the Respondent, the claim was time barred because section 66 of the Kenya Ports Authority Act provided that legal proceedings against the Respondent had to be commenced after

- giving one month written notice and within twelve months after the cause of action arose.
10. It is common cause that the shorthand hours claimed relate to the period 2003 to December 2006. The Memorandum of Claim was filed in Court on 16 September 2011.
 11. The relationship between an employer and an employee is one of mutual trust and confidence. It is a relationship of good faith. Fairness rather than legalism is at the core of the relationship. The internal processes of the Respondent only approved payment of an ex gratia to the Claimant and others sometime in 2009, some three years after the shorthand hours being claimed.
 12. The question of limitation law involving public authorities has been the subject of previous judicial determination. There are always good policy reasons for the legislature to provide for statutory limits in commencing legal proceedings.
 13. Thus the limitation set out at section 66 of the Kenya Ports Authority Act is perfectly legal and legitimate and meant to meet certain policy considerations which the legislature thought appropriate.
 14. But the true question is whether legal proceedings between the Respondent and its employees and or former employees in pursuance to the rights, conditions and terms of employment are subject to the limitation provision outlined in section 66 of the Kenya Ports Authority Act.
 15. To deal with this question it is necessary for me to set out verbatim the provisions of the section. The section provide

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 execution of this Act or of any such duty or Authority, the following provisions shall have effect-

(a) the action or legal proceeding 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 proceedings, 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 case of continuing injury or damage, within six months next after the cessation thereof.

16. For the purposes of this determination I will not discuss the effect of section 66(a) of the Kenya Ports Authority Act. I am aware that provisions similar to section 66(a) have been declared to be inconsistent with constitutional provisions and principles.
17. The pertinent issue is whether the act of the Respondent entering into contracts of service or employment contracts is an ***act done in pursuance or execution or intended execution of the 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.***
18. In my considered view the above cited proviso relates to legal proceedings commenced out of acts done by the Respondent in furtherance of its statutory powers as set out in section 12 of the Kenya Ports Authority Act and those acts done pursuant to sections 13 to 17 of the Act.
19. Any legal proceedings arising out of the employment relationship between the Respondent and its employees are therefore subject to the limitation clause of section 90 of the Employment Act and if a trade dispute as contemplated by the Labour Relations Act, to the timelines set out for dealing with trade disputes set out therein and not section 66 of the Kenya Ports Authority Act.
20. In the instant case, the cause of action arose before the commencement of the Employment Act, 2007 and therefore the limitation set out in section 4(1) of the Limitation of Actions Act would become implicated. Section 66 Of the Respondents Act therefore is not applicable.
21. And, if the conclusion on this point is not right I would still revert to the Constitutional indictment against slavery and forced labour in the repealed Constitution and provisions of the 2010 Constitution on fair labour practices and fair remuneration to hold that the Claim is not statute barred.
22. Although the Claimant did not bring his claim as one implicating violation of a constitutional right or freedom under the repealed or 2010 Constitution, by requiring him to work beyond the set

hours and failing to pay him for those extra hours, constitutional questions as regards the rights of workers and protection from slavery and forced labour become implicated. But I must make clear that not all failure or refusal to pay for extra or overtime hours worked would lead to constitutional intervention. It is when an employer refuses to pay and pleads that there is no contractual basis for such payment or like in the present case that the payment would result in high expenditure.

23. I would agree with Okwengu J's observation in *Harun Thungu Wakaba v Attorney General* (2010) eKLR that the correct legal position in terms of limitation where constitutional rights are concerned is that expounded in *Wachira Waheire v the Hon Attorney General* that

We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual, under the Constitution of Kenya. Indeed, Section 3 of the Constitution provides that the Constitution shall have the force of law throughout Kenya, and if any other law is inconsistent with the Constitution, the Constitution shall prevail. In our view, the provisions of the Public Authorities Limitations Act limiting the period for initiating actions against public authorities, is inconsistent with the Constitution, to the extent that it limits a party's rights to seek redress for contravention of his fundamental rights. The Public Authorities Limitations Act cannot override the Constitution and it cannot therefore be used to curtail rights provided under the Constitution. We therefore find and hold that the plaintiff's claim arising from violation of his Constitutional rights is not statute barred.

24. In my considered view the claim by the Claimant is not time or statute barred because of the constitutional injunctions of the repealed Constitution against slavery and forced labour and the fair labour practices provision of the Constitution, 2010.

Whether Claimant is entitled to be paid for shorthand hours worked

25. The primary legislation dealing with employment relationship from 2003 to 2006 was the Employment Act Cap 226 (now repealed). This statute did not have any provision for working hours. The other statute was the Regulation of Wages and Conditions of Employment Act Cap 229 (now also repealed). This statute through various Wages Regulation Orders set the working hours within certain sectors of industry. The Claimant did not suggest that any of these orders applied to him.

26. I must therefore turn to other sources and instruments to determine this question. The first source or instrument must be the Respondent's Manuals. The Respondent produced portions of the Kenya Ports Authority Revised Staff Regulations 2002. The part dealing with working hours and how to compensate the extra hours was not part of the extract produced. I would therefore assume as the Respondent submitted that there was no contractual basis for payment of this type of claim.

27. However this does not detract from the fact that the relationship between the Claimant and Respondent had a provision for working hours and how to compensate for any extra hours worked.

28. Chapter 5 of the repealed Constitution, which was in operation during the time the Claimant served the Respondent, made provision for Protection of Fundamental Rights and Freedoms of the Individual. The rights and freedoms set out under the chapter were not absolute but subject to rights and freedoms of others and public interest.

29. Section 73 of the repealed Constitution provided that

1. No person shall be held in slavery or servitude
2. No person shall be required to perform forced labour (subject to certain exceptions)

30. Article 41 of the Constitution has now explicitly provided that workers have a right to fair labour practices and are entitled to fair remuneration and reasonable working conditions.

31. It is worth noting that Kenya ratified the Forced Labour Convention, 1930 No. 29 on 13 January 1964.

- 32.Regulation of hours of work is one of the oldest concerns of labour legislation. Working excessive hours pose a danger to workers' health and to their families. The very first ILO Convention adopted in 1919 limited hours of work and provided for adequate rest periods for workers.
- 33.People work mainly to earn money. The Claimant did not volunteer to work the extra hours. He was asked to work the extra hours by the Respondent due to an acute shortage of staff who could handle the tug boats. To my mind failing to pay/compensate an employee for work done outside and beyond the normal agreed hours would amount to an unfair labour practice. It is a practice analogous to slavery, serfdom, bondage and servitude. It amounts to mobilizing labour for economic development unlawfully. The Respondent acknowledged that the Claimant worked extra hours. It paid him an ex gratia payment. This cannot equate to fair remuneration or reasonable working conditions.

Appropriate relief/Conclusion

34. In my view the Claimant has satisfied me that he deserves an order directing the Respondent to pay him for the 4128 shorthand hours worked. The hours should be calculated as if they were normal overtime hours.
- 35.No proper basis was laid for arriving at the figure of Kshs 940,000/-, though the Claimant in his submissions set out a formula of using the Claimant's basic salary divided by 30 to arrive at a daily rate which he multiplied by the total number of shorthand hours.
- 36.The overtime should be capable of precise mathematical calculation and I would order that the parties agree on the calculations within 7 days and on failure to agree the Claimant to furnish the County Labour Officer with a copy of the Respondents memo dated 15 July 2009 and this judgment to enable him tabulate the amount owing and due to the Claimant for the 4128 shorthand hours at normal overtime rate.
- 37.This matter should therefore be mentioned on 19 August 2013 for the parties/County Labour Officer to submit to the Court the agreed cash equivalent of the 4128 hours.
- 38.There will be no order as to costs.

Delivered, dated and signed in open court in Mombasa on this 26th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Okanga instructed by Okanga & Co. Advocates for Claimant

Mr. Kyandih instructed by Muthoni Gatere Advocate for Respondent