



IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 18/1961 SC/CIVL

BETWEEN: Charley Kalomala
First Claimant

AND: Martha Samuel Charley
Second Claimant

AND: Annie Rubbie Kalomala
Third Claimant

AND: Angela James Kalomala
Fourth Claimant

AND: Teouma Holdings Limited
First Defendant

AND: Moala Farm Limited
Second Defendant

AND: Terence John Kerr also known as Terry Kerr
Third Defendant

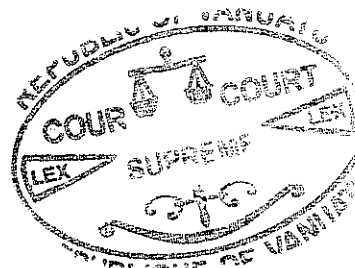
AND: Clarence Laviniya Ngwele
Fourth Defendant

Date: 4 December 2023
Before: Justice V.M. Trief
Counsel: Claimants – Mr E. Molbaleh
Defendants – Mr A. Bal

DECISION AS TO QUANTUM OF DAMAGES

A. Introduction

1. This was a claim for payment of severance allowance and outstanding salary and annual leave. The Defendants did not file a defence resulting in Default Judgment being entered on 13 September 2022 for an amount to be determined.
2. This is the decision as to quantum.

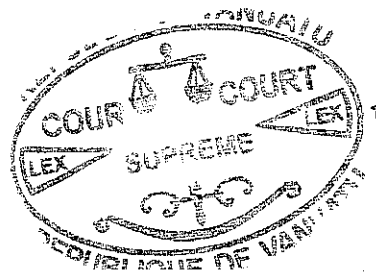


B. Pleadings

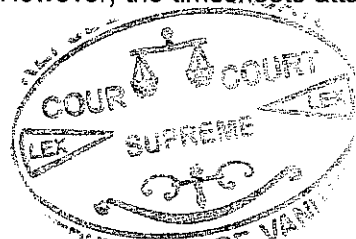
3. By the Amended Claim, the First-Fourth Claimants Charley Kalomala, his wife Martha Samuel Charley and daughters Annie Rubbie Kalomala and Angela Kalomala alleged as follows (the 'Claim'):
 - a. That they worked for the First and Second Defendants Teouma Holdings Limited ('THL') and Moala Farm Limited ('MFL'), which are companies owned by the Third Defendant Terrence John Kerr (also known as Terry Kerr) and the Fourth Defendant Clarence Laviniya Ngwele;
 - b. Mr Kalomala started work in January 2007 and the other Claimants started in 2010 and 2012;
 - c. Their employment was unlawfully terminated in September 2017; and
 - d. They were never given annual leave and have not been paid severance allowance.
4. The orders sought are for the payment of severance allowance to each Claimant, for outstanding salary and annual leave, damages for unlawful termination, general damages, interest and costs.

C. The Evidence

5. **Charley Kalomala** deposed in his Sworn statement filed on 19 July 2018 that he started working for the Defendants on 2 January 2007 until 2017 although his salary ceased in 2012.
6. Mr Kalomala deposed in his Sworn statement filed on 11 November 2022 that he worked for the Defendants from 2 January 2007 to 30 September 2017 as a supervisor for THL at Takara (tourism project) and as a supervisor at the MFL cattle farm at Puanangisu village, North Efate. THL paid his monthly salary of VT60,000 [copies of some pay slips starting from July 2009 in **Attachment "CK3"**]. The last of the pay slips are dated 1-31 April 2013 and 1-30 May 2013. The pay slips show that Mr Kalomala was paid a monthly salary of VT60,000 from July 2009 to July 2012, but in April 2013 and May 2013 he was only paid for the number of days worked (18 and a half days in April 2013, and 19 days worked in May 2013). He deposed that on 29 September 2017, Ms Ngwele dismissed him from employment without any reason and without notice.
7. He deposed in his Sworn statement filed on 18 January 2023 that Ms Ngwele told him on 28 September 2017 that they would stop working until THL's financial situation had improved. However, they have never been called back to work. He was not given annual leave during his 10 years of employment. From 2013-2017, he did not receive any salary from the Defendants but still worked every day because he was not told to stop working, until 2017 when Ms Ngwele told him to stop working.



8. Mr Kalomala attached to his Sworn statement filed on 25 April 2023 receipts for accommodation at Kalfabun Guest House where he stayed when he came to Vila to attend to this matter, for lunch meals, transportation from Takara to Vila and around Vila, and for typing, printing and photocopying.
9. He deposed in his Sworn statement filed on 25 May 2023 that he lives at Takara village at North Efate. In 2009, he took out a loan from the ANZ Bank to purchase leasehold property at Teoumaville subdivision. However when the Defendants stopped paying his salary in 2012, he could not pay the loan and the Bank seized the property which was valued at VT7,415,006.
10. **Martha Samuel Charley** deposed in her Sworn statement filed on 23 September 2023 that she worked for the Defendants as a cleaner from June 2010 to 28 September 2017. She lives at Takara village at North Efate. She was paid by THL at the rate of VT800 per day [copies of some pay slips in **Attachment "MS1"** with the earliest dated July 2010 and the last dated May 2013].
11. **Annie Rubbie Kalomala** deposed in her Sworn statement filed on 23 January 2023 that she worked for the Defendants as a gardener from 3 September 2012 to 28 September 2017. She lives at Takara village at North Efate. She was paid by THL at the rate of VT600 per day. She was not paid regularly in 2016 and not at all in 2017 so she stopped working for them on 28 September 2017.
12. **Angela James Kalomala** deposed in her Sworn statement filed on 23 January 2023 that she worked for the Defendants as a gardener from 2 January 2010 to 31 August 2012. She lives at Takara village at North Efate. She was paid by THL at the rate of VT800 per day.
13. **Ms Ngwele** deposed in her Sworn statement filed on 30 November 2022 that all the Claimants are personally known to her. She engaged them on an hourly basis to do certain jobs at the property at Takara owned by THL (which she is the sole shareholder of).
14. She deposed that she engaged Mr Kalomala on a daily basis from June 2007 to February 2009 at VT1,000 per day. From March 2009, he was on a monthly salary of VT60,000 but his earnings depended on the number of days worked. She attached timesheets showing Mr Kalomala's monthly salary of VT60,000 for March 2009 to November 2012 and then on a daily rate of VT2,727 per day from January 2013 to August 2013. He was never engaged by the Second Defendant MFL as a supervisor for Moala Farm. Further, that the Third Defendant Mr Kerr is not a shareholder of THL and ceased being a director of THL in 2005.
15. Ms Ngwele deposed that she employed Mrs Charley from March 2011 to August 2013 at VT800 per day (timesheets attached), Annie Rubbie Kalomala from August 2012 to August 2013 at VT800 per day (timesheets attached) and Angela Kalomala from January 2012 to July 2012 at VT800 per day. However, the timesheets attached show



Angela Kalomala was employed in March 2011, in June 2011, from September 2011 to July 2012, then in November 2012.

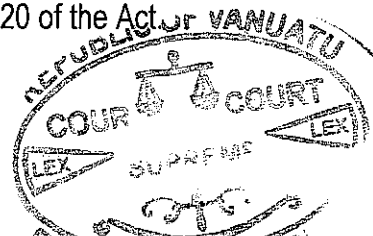
16. I accept the evidence of each witness where it is common ground between the Claimants and the Defendant and/or supported by documentary evidence.

D. Consideration

17. Ms Ngwele's evidence is that she purchased land at Takara, North Efate that was registered under THL's name and employed the Claimants to work there. I find that the Claimants were employed by the Fourth Defendant Ms Ngwele and not by the First, Second and Third Defendants.
18. I accept that the Claimants did not resign from their employment but that Ms Ngwele terminated their employment.
19. I now consider each Claimant's claim for outstanding salary and annual leave, severance allowance, then the question of damages (for unlawful termination and general damages).

First Claimant Mr Kalomala

20. Mr Kalomala's pay slips in his evidence were from July 2009 at the earliest to the last being for May 2013. Ms Ngwele's evidence attaching timesheets was that she employed him from June 2007 to August 2013.
21. The Claimants have not proved on the balance of probabilities that they were employed up to 2017 as claimed.
22. I find that Mr Kalomala was employed by Ms Ngwele from 1 June 2007 to February 2009 on a daily rated basis of VT1,000 per day, from March 2009 to November 2012 on a monthly salary of VT60,000, then from December 2012 to August 2013 on a daily rated basis of VT2,727 per day. The total period of his employment from 1 June 2007 to 31 August 2013 was 6 years 3 months.
23. Mr Kalomala is claiming for unpaid salary from September 2013 to 2017. However, is that statute-barred?
24. Section 20 of the *Employment Act* [CAP. 160] (the 'Act') provides as follows:
20. *No proceedings may be instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates.*
25. The initiating Claim in the present matter was filed over 3 years from the end of the period for which outstanding salary is claimed. Accordingly, Mr Kalomala's claim for outstanding salary is statute-barred pursuant to s. 20 of the Act.



26. Paragraph 29(1)(a) of the Act provides as follows:

- 29 (1) *Every employee shall grant to an employee who has been in continuous employment with the same employer for:*
- (a) *a period of 1 to 6 years annual – leave on full pay at the rate of 1.25 working days per month for each year of employment; ...*

27. Section 33 of the Act provides as follows:

33. *After leaving the service of his employer any employee may avail himself of his annual leave and travel, if any, within 6 months counting from the date on which he ceased to work for that employer:*

Provided that travel shall only be paid for by the employer if the employee actually makes the journey.

28. Mr Kalomala was entitled to annual leave under para. 29(1)(a) of the Act. However, there is no evidence that Mr Kalomala had asserted a claim for untaken annual leave within the six month period which underlies s. 33 of the Act therefore he is out of time to make a claim for outstanding annual leave: *Benard v Republic of Vanuatu* [2012] VUCA 4 at [46]-[49].

29. Paragraph 54(1)(a) of the Act provides as follows:

54. (1) *Subject to section 55, where an employee has been in the continuous employment of an employer for a period of not less than 12 months commencing before, on or after the date of commencement of this Act, and –*

(a) *the employer terminates his employment; ...*

...

the employer shall pay severance allowance to the employee under section 56 of this Act.

(my underlining)

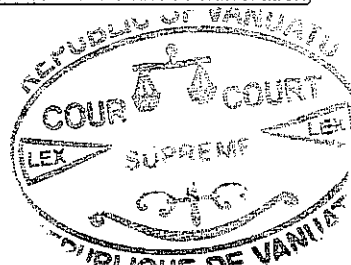
30. At the time that Mr Kalomala's employment ceased in August 2013, he had been in the continuous employment of Ms Ngwele for 6 years and 3 months. As she terminated his employment, he is entitled to severance allowance pursuant to para. 54(1)(a) of the Act.

31. Section 56 of the Act provides for the amount of severance allowance payable as follows:

56. (1) *Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).*

(2) *Subject to subsection (4) the amount of severance allowance payable to an employee shall be -*

(a) *for every period of 12 months – 1 months remuneration;*



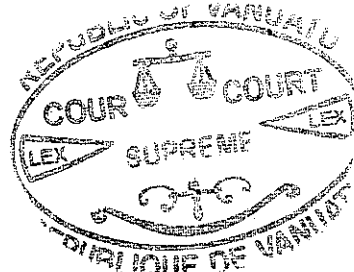
- (b) for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.
- (3) Where remuneration is fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the remuneration shall, for the purposes of this section, be computed in the manner best calculated to give the rate at which the employee was being remunerated over a period not exceeding 12 months prior to the termination of his employment.
- (4) The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).
- (5) Any severance allowance payable under this Act shall be paid on the termination of the employment.
- (6) The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.
- (7) For the purposes of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to the employee at the time of the termination of his employment.

(my underlining)

32. The remuneration payable to Mr Kalomala when his employment ended on 31 August 2013 was VT2,727 per day. A month's remuneration at that rate is VT59,994 (VT2,727 x 22 working days). Accordingly, Mr Kalomala is entitled to severance allowance of VT374,963 for the 6 years and 3 months that he was employed ((VT59,994 x 6) + (VT59,994 /12 x 3) = VT359,964 + VT14,999 = VT374,963).
33. There is no evidence to support Mr Kalomala's claim that he was unlawfully terminated in September 2017. His employment had already ended on 31 August 2013. There is no basis for an award of damages.

Second Claimant Mrs Charley

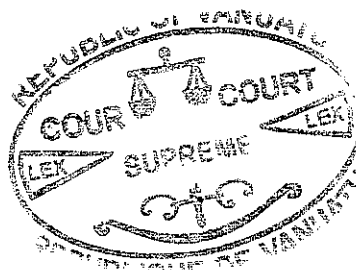
34. Mrs Charley's pay slips in her evidence were from June 2010 at the earliest to the last being for May 2013. Ms Ngwele's evidence attaching timesheets was that she employed Mrs Charley from March 2011 to August 2013.
35. I find that Mrs Charley was employed by Ms Ngwele from 1 June 2010 to 31 August 2013 (3 years 3 months) on a daily rated basis of VT800 per day.
36. Mrs Charley is claiming for unpaid salary from September 2013 to 2017. However, the initiating Claim in the present matter was filed over 3 years from the end of the period for which outstanding salary is claimed. Accordingly, her claim for outstanding salary is statute-barred pursuant to s. 20 of the Act.



37. Mrs Charley was entitled to annual leave under para. 29(1)(a) of the Act. However, there is no evidence that she had asserted a claim for untaken annual leave within the six month period which underlies s. 33 of the Act therefore she is out of time to make a claim for outstanding annual leave: *Benard v Republic of Vanuatu* [2012] VUCA 4 at [46]-[49].
38. At the time that Mrs Charley's employment ceased in August 2013, she had been in the continuous employment of Ms Ngwele for 3 years and 3 months. As Ms Ngwele terminated her employment, she is entitled to severance allowance pursuant to para. 54(1)(a) of the Act.
39. The remuneration payable to Mrs Charley on 31 August 2013 when her employment ended was VT800 per day. A month's remuneration at that rate is VT17,600 (VT800 x 22 working days). Accordingly, Mrs Charley is entitled to severance allowance for the 3 years and 3 months that she was employed of VT57,200 ((VT17,600 x 3) + (VT17,600 /12 x 3) = VT52,800 + VT4,400 = VT57,200).
40. There is no evidence to support Mrs Charley's claim that her employment was unlawfully terminated in September 2017. Her employment had already ended on 31 August 2013. There is no basis for an award of damages.

Third Claimant Annie Rubbie Kalomala

41. Ms Annie Rubbie Kalomala did not attach any pay slips to support her evidence. Ms Ngwele's evidence attaching timesheets was that she employed Ms Annie Kalomala from August 2012 to August 2013.
42. I find that Ms Annie Kalomala was employed by Ms Ngwele from 1 August 2012 to 31 August 2013 (1 year 1 month) on a daily rated basis of VT800 per day.
43. Ms Annie Kalomala is claiming for unpaid salary from September 2013 to 2017. The initiating Claim in the present matter was filed over 3 years from the end of the period for which outstanding salary is claimed. Accordingly, her claim for outstanding salary is statute-barred pursuant to s. 20 of the Act.
44. Ms Annie Kalomala was entitled to annual leave pursuant to para. 29(1)(a) of the Act. However, there is no evidence that she had asserted a claim for untaken annual leave within the six month period which underlies s. 33 of the Act therefore she is out of time to make a claim for outstanding annual leave: *Benard v Republic of Vanuatu* [2012] VUCA 4 at [46]-[49].
45. At the time that Ms Annie Kalomala employment ceased on 31 August 2013, she had been in the continuous employment of Ms Ngwele for 1 year 1 month. As Ms Ngwele terminated her employment, she is entitled to severance allowance pursuant to para. 54(1)(a) of the Act.



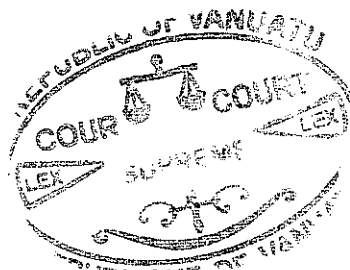
46. The remuneration payable to Ms Annie Kalomala when her employment ended on 31 August 2013 was VT800 per day. A month's remuneration at that rate is VT17,600 (VT800 x 22 working days). Accordingly, Ms Annie Kalomala is entitled to severance allowance of VT19,067 for the 1 year and 1 month that she was employed ((VT17,600 x 1) + (VT17,600 /12) = VT17,600 + VT1,467 = VT19,067).
47. There is no evidence to support Ms Annie Kalomala's claim that her employment was unlawfully terminated in September 2017. Her employment had already ended on 31 August 2013. There is no basis for an award of damages.

Fourth Claimant Angela James Kalomala

48. Ms Angela James Kalomala did not attach any pay slips to support her evidence. Ms Ngwele's evidence attaching timesheets was that she employed Ms Angela Kalomala continuously from September 2011 to July 2012.
49. I find that Ms Angela Kalomala was employed by Ms Ngwele from 1 September 2011 to 31 July 2012 (10 months) on a daily rated basis of VT800 per day.
50. Ms Angela Kalomala is claiming for unpaid salary from August 2012 to 2017. The initiating Claim in the present matter was filed over 3 years from the end of the period for which outstanding salary is claimed. Accordingly, her claim for outstanding salary is statute-barred pursuant to s. 20 of the Act.
51. Ms Angela Kalomala was not entitled to annual leave as she had not been in continuous employment with Ms Ngwele for 1 year: para. 29(1)(a) of the Act.
52. Ms Angela Kalomala was also not entitled to severance allowance as she had not been in continuous employment with Ms Ngwele for 12 months or more: para. 54(1)(a) of the Act.
53. There is no evidence to support Ms Angela's Kalomala's claim that her employment was unlawfully terminated in September 2017. Her employment had already ended on 31 July 2012. There is no basis for an award of damages.

E. Interest

54. Interest of 5% per annum was sought in the Claim. However, given the relatively low sums involved for the successful Claimants' severance allowance claims but which were not paid and that the Claimants have had to sue for its payment, I consider it fit to order under subs. 56(6) of the Act that Ms Ngwele pay interest at the rate of 12% per annum from 31 August 2013 (the date of the terminations of employment) to the date of payment of the judgment sum.



F. Result and Decision

55. Judgment is **entered** for the First-Third Claimants as follows:

a. The Fourth Defendant is to pay to the First-Third Claimants their severance allowance entitlement totaling VT451,230 (the 'judgment sum'):

i. First Claimant VT374,963;

ii. Second Claimant VT57,200; and

iii. Third Claimant VT19,067.

56. The Fourth Defendant is to pay to the First-Third Claimants interest on the judgment sum from 31 August 2013 until the judgment sum is fully paid, at the rate of 12% per annum.

57. The Fourth Defendant is to pay the costs of the First-Third Claimants as agreed or taxed by the Master. Once set, the costs are to be paid within 21 days.

58. The costs of the Fourth Claimant and the First-Third Defendants are to lie where they fall.

G. Enforcement

59. This matter is listed for Conference **at 8.25am on 30 January 2024** for the Fourth Defendant to inform the Court: (i) that she has paid the judgment sum or (ii) to explain how she intends to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for enforcement action.

60. For that purpose, this judgment must be personally served on the Fourth Defendant and proof of service filed.

**DATED at Port Vila this 4th day of December 2023
BY THE COURT**

VM Trief
Justice Viran Molisa Trief

