



**Mbithi v Board of Management Tala High School (Appeal E367 of 2024)
[2025] KEELRC 2510 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2510 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E367 OF 2024
JW KELI, J
SEPTEMBER 18, 2025**

BETWEEN

MICHAEL NGUTA MBITHI APPELLANT

AND

THE BOARD OF MANAGEMENT TALA HIGH SCHOOL RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. D.N. Sure (SPM)
delivered on 26th November, 2024 in Kangundo MCELRC/E005/2021)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. D.N. Sure (SPM) delivered on 26th November, 2024 in Kangundo MCELRC/E005/2021 between the parties filed a memorandum of appeal dated the 20th of December 2024 seeking the following orders:-
 - a. The Appeal be and is herein allowed.
 - b. The judgment of the trial court delivered on 26th November 2024 in CMEL NO. E005 of 2021 be set aside.
 - c. The Honourable Court be pleased to award the Appellant the terminal dues and compensation as prayed in the Appellant's statement of claim filed in the lower court amounting to Kshs. 1,785,306.70 or such amount as the Honourable Court may deem fit and just.
 - b) The costs of the appeal and the lower court be awarded to the Appellant.
 - c) The Honourable Court do issue such orders and relief as it may deem fit and just to grant.



GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law and in fact by purporting to sit on appeal and overrule a court of concurrent jurisdiction in holding that the suit was statutorily time barred under Section 90 of the *Employment Act* 2007; whereas this issue had been raised as a preliminary objection and overruled by the Hon. Martha Opanga (SRM) vide a ruling dated and delivered on 25th January 2022.
3. The Honourable Magistrate erred in law and in fact by holding that there were no documents in support of the Appellant’s claim whereas the same were on record and were adopted and produced during the hearing without requiring the Appellant to produce them; if the Honourable Court had misplaced their copies and hence leading to the miscarriage of justice.
4. The Honourable Magistrate erred in law and in fact by dismissing the entire claim against the weighty evidence on record and the law applicable in respect to employees’ terminal benefits.
5. The Honourable Magistrate erred in law and in fact by failing to award the Appellant basic wages, house allowance and underpayments amounting to Kshs. 1,443,568.80
6. The Honourable Magistrate erred in law and in fact by failing to award the Appellant his claim for annual leave of Kshs. 284,137.90.
7. The Honourable Magistrate erred in law and in fact by failing to award the Appellant National Social Security Fund (NSSF) contributions amounting to Kshs. 57,600.00.
8. The Honourable Magistrate erred in law and in fact by holding that the claimant was not entitled to the claims since they were time barred.
9. The Honourable Magistrate erred in law and in fact by failing to award the Appellant unpaid public holidays that he worked.
10. The Honourable Magistrate erred in law and in fact by failing to consider and have due regard to the Appellant’s case and to the facts and evidence presented in support thereof.

Background To The Appeal

11. The Appellant filed a claim against the Respondent vide a statement of claim dated the 21st of April 2021 seeking the following orders:-
 - a. That this Honourable Court finds and declares that, with a clean record of employment for the thirteen (13) consecutive years that the claimant served the respondent up to the date he was retired, the claimant was entitled to legal and contractual employment rights, privileges and benefits of the Collective Bargaining Agreement (CBA) between the Ministry of Education and KUDHEIHA workers, NSSF Act and the Regulation of Wages (General) Amendment Orders, whichever was favourable.
 - b. That this Honourable Court finds that despite being retired, the respondent retained the claimant in the respondent’s employment for twelve (12) consecutive years with a clean record of employment and so the claimant was entitled to all employment legal rights, privileges and benefits.
 - c. That this Honourable Court finds and declares that for the twenty five (25) consecutive years of service with a clean record of employment, the respondent denied the claimant his legal and contractual (CBA) rights, privileges and benefits amounting to Kshs.2,807,351.70.



d. That the respondent be and is hereby ordered to pay the claimant Kshs. 1,022,045.00 with interest at the rate of 14% per annum for his thirteen (13) consecutive years of service, being:
Part "A" Claims:

- a) Basic Wages+House Allowance Underpayment Kshs. 677,090.00
 - b) Earned Annual Leaves with full pay Kshs. 154,635.00
 - c) Pay in Lieu of Retirement Notice per CBA Kshs. 35,635.00
 - d) Contractual (CBA) Service Gratuity Kshs. 154,635.00
- Total Kshs.1,022,045.00

e. That the respondent be and is hereby ordered to pay the claimant Kshs. 1,785,306.70 with interest at the rate of 14% per annum for his twelve (12) consecutive years of service being:
Part "B" Claims:

- a) Basic Wages + House Allowance Underpayments Kshs. 1,443,568.80
 - b) Earned Annual Leaves with full pay Kshs.284,137.90
 - c)National Social Security Fund (NSSF) Contributions Kshs. 57,600.00
- Total Kshs.1,785,306.70

f. That the respondent be and is hereby ordered to pay the claimant costs of the suit.

g. That the Honourable Court be please to order any other appropriate relief not prayed for herein that it deems fit to grant.

(see pages 8-12 of the ROA dated the 9th of May 2025)

- 12. The Appellant also filed her verifying affidavit, list of witnesses, claimant's evidence by Affidavit, and list of documents (pages 13-218 of ROA).
- 13. The Respondent opposed the claim, entered appearance, and filed a statement of defence dated 15th July 2021 (pages 219-220 of ROA). They also submitted a Notice of Preliminary Objection dated 15th July 2021, which was later amended and dated 2nd September 2021 (pages 221-224 of ROA).
- 14. The Claimant's/Appellant's case was heard on 3 September 2024, where she testified relying on her witness statement, produced documents, and was cross-examined by Respondent's counsel, Mr. Watuka (pages 436-442 of ROA).
- 15. The Respondent did not call a witness or produce documents. (pages 443-444 of ROA).
- 16. The parties took directions on the filing of written submissions after the hearing. The parties complied.
- 17. The Trial Magistrate Court delivered its judgment on the 26th of November 2024, dismissing the Claimant's claim for the reason that the same was time-barred under Section 90 of the *Employment Act* 2007, with no orders as to costs (Judgment at pages 412-419 of ROA).

Determination

- 18. The appeal was canvassed by way of written submissions. The Appellant filed, but at the time of writing this judgment, the Respondents are yet to file theirs.
- 19. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An



appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

21. In his submissions dated the 23rd of June 2025, the Appellant identified the following issues for determination: -
- i. Whether the learned Magistrate erred in law and fact by holding that there were no documents in support of the Appellant's claim.
 - ii. Whether the learned Magistrate erred in law and fact by purporting to sit on appeal and overrule a court of concurrent jurisdiction in holding that the suit was statutorily time barred under Section 90 of the *Employment Act* 2007.
 - iii. Whether the Appellant is entitled to the claim for terminal dues pleaded.
 - iv. Who should be awarded costs of this appeal.
22. On their part, the Respondents identified the following issues for determination in their submissions dated 25th July 2025:-
- i. Whether the learned trial Magistrate erred in law and fact by purporting to sit on appeal and overrule a court of concurrent jurisdiction in holding that the suit was statutorily time barred under Section 89 (formerly Section 90) of the *Employment Act* (Revised 2024).
 - ii. Whether the learned trial Magistrate erred in law and fact by failing to award the Appellant the terminal dues sought before the trial court.
 - iii. Whether the learned trial Magistrate erred in law and in fact by holding that documents in support of the Appellant's claim were not on the court record.
 - iv. Who should bear the costs of the appeal.
23. The court finds that the parties were in agreement on the issues for determination on appeal. The issue of whether the claim was statute time barred goes to the root of the jurisdiction of the trial court and ought to be determined first thus the issues are stated as -



- a. Whether the learned Magistrate erred in law and fact by purporting to sit on appeal and overrule a court of concurrent jurisdiction in holding that the suit was statutorily time barred under Section 90 of the Employment Act 2007.
- b. Whether the learned Magistrate erred in law and fact by holding that there were no documents in support of the Appellant's claim.
- c. Whether the Appellant is entitled to the claim for terminal dues pleaded.
- d. Who should be awarded costs of this appeal.

Whether the learned Magistrate erred in law and fact by purporting to sit on appeal and overrule a court of concurrent jurisdiction in holding that the suit was statutorily time barred under Section 90 of the Employment Act 2007.

24. Section 90 (now 89) of the Employment Act provides for time limitation in employment claims as follows: -“ 89. Limitations Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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 the cessation thereof.”

Appellant's submissions

25. On this issue My Lady, it is the Appellant's humble submission that contrary to the trial court's position, this suit was not statutorily time barred under section 90 of the Employment Act, 2007. Section 90 was correctly interpreted by the learned Judge Onesmus N. Makau, ELRC Court Nyeri in Petition E011 of 2023 Wariahe v Teachers Service Commission where he stated: -“The correct interpretation of section 90 of the Employment Act is that a cause of action founded on employment or contract of service arises at the time when an employee is notified that his/her employment has been terminated. It is at that time when the aggrieved party acquires the right to approach the court.”
26. The appellant further submitted that the issue of whether the suit was time barred was determined by the trial magistrate's predecessor Hon. Martha Opanga SRM in her Ruling dated and delivered on 25th January 2022. In that ruling, which appears on page 283 of the Record of Appeal, the Court in paragraph 2, page 5 of 7 held that: -“On the 2nd issue for determination, the cause of action arose on 11th May 2018 when the claimant was dismissed from work as such the same is not time barred.”
27. That it is trite law that decisions from the lower court can only be overturned by the High Court. Even though this Ruling was appealed against in the High Court on grounds that the lower court had determined it had no jurisdiction to hear the matter, the issue of the Appellant's suit being time-barred was never appealed against. Hence, the determination by the Hon. Martha Opanga SRM on 25th January 2022 on whether the suit was time barred remains in force to-date. It therefore follows that the trial Magistrate Hon. Daffline Nyaboke erred in law and in fact by purporting to sit on appeal and overrule a court of concurrent jurisdiction in holding that the suit was statutorily time barred under section 90 of the Employment Act, 2007. Particularly because this issue had been raised as a preliminary objection and overruled by the Hon. Martha Opanga (SRM) in the ruling delivered on 25th January 2022. The appellant urged the Honourable Court to find as such and overrule the trial court's determination that this suit is time barred.



Respondent's submissions

28. The Appellant alleges that the trial Magistrate erred in law and in fact by making a finding that the Claim before the trial court was time barred. However, what the Appellant fails to address is the fact that the Appellant's claim is in the nature of a continuing injury and that it is on that basis that the Trial Magistrate found the Appellant's suit to be time barred. What therefore is a continuing injury? The Black's Law Dictionary defines a continuing injury as follows;-"An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory."In the case of *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR the Employment and Labour Relations Court sitting at Nairobi defined a continuing injury as follows:-
- '10. The Appellant alleges that the trial Magistrate erred in law and in fact by making a finding that the Claim before the trial court was time barred. However, what the Appellant fails to address is the fact that the Appellant's claim is in the nature of a continuing injury and that it is on that basis that the Trial Magistrate found the Appellant's suit to be time barred.
11. What therefore is a continuing injury? The Black's Law Dictionary defines a continuing injury as follows; "An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory."
12. In the case of *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR the Employment and Labour Relations Court sitting at Nairobi defined a continuing injury as follows, 'the logical meaning of continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues.....'
29. In the trial court, the Appellant claims terminal dues that were allegedly due and owing to him throughout his twenty-five (25) year period of service with the Respondent. A quick glance at the Appellant's prayers in his Amended Statement of Claim proves that the Appellant was seeking compensation for among other things, underpayments he alleges persisted from the commencement of employment until he left service in 2018. It then follows that the Appellant was, before the trial court, seeking compensation for an 'injury' he purports persisted from 1993 to 2018, essentially a continuing injury. Having noted that the doctrine of a continuing injury was applicable in the case before the trial court, what then was its implication on the case. The *Employment Act* (Revised 2024) under Section 89 (formerly section 90) provides as follows in this regard;- "Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), 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 the cessation thereof."
30. The respondent relied on the decision of the Court of Appeal in the case of *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (2018) e KLR - About the doctrine of continuing injury and its interlink with Section 89 (formerly section 90) of the *Employment Act* (Revised 2024);"Regarding a 'continuing injury', the provision to section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof... The learned Judge did not determine when the continuing injury ceased for purposes of computing the twelve months period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the Claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred." The Respondent urged the Honourable Court to be additionally guided by the following binding legal authorities;



- a) Chang'awa v Gertrude's Children Hospital (Cause 2203 of 2016) [2023] KEELRC 414 (KLR) (16 February 2023) (Ruling)
 - b) John Kiiru Njiiri v University of Nairobi [2021] eKLR.
31. The continuing injury in the Appellant's case before the trial court ceased on 30th April 2018. Consequently, in line with the provisions of Section 89 (formerly section 90) of the Employment Act (Revised 2024) limiting the filing of claims based on a continuing injury to within one (1) year after the cessation thereof, the Appellant's claim before the trial court ought to have been filed on or before 30th April 2019 however, the Appellant's claim before the trial court was filed on 21st May 2021, more than two (2) years later after the expiry of the limitation period. The Appellant's suit before the trial court was therefore a non-starter and could not be sustained. Further the respondent relied on the decision of Employment and Labour Relations Court sitting at Kakamega in the case of Shitoshe v Shivanga Secondary School & another (Cause E023 of 2024) [2024] KEELRC 2222 (KLR) (18 September 2024) where the learned Trial Judge held as follows;

“The claimant alleged he was not paid his salary or house allowance for 60 months which is the entire period of his engagement as a teacher from 2010 to 2014. Nonetheless, even if the Claimant's claim for back pay and house allowance was to qualify as a continuing injury under Section 89 of the Employment Act, the termination having occurred in December 2017, for claim of continuing & injury as relates withheld pay and house allowances, the same cause of action was to be filed within 12 months after his employment was terminated. The Claimant did not file his suit within the said statutory period and his claim became statute time barred.

In the upshot, the Notice of Preliminary Objection dated 25th July 2024 is upheld and the memorandum of claim dated 1st July 2024 dismissed for being statute time barred pursuant to the provisions of section 89 (formerly section 90) of the Employment Act (Revised 2024).”

32. Further, contrary to the allegations by the Appellant, Hon Martha Opanga, in her Ruling dated 25th January 2022 never addressed the issue of claims arising from a continuing injury which are distinct from other ordinary claims whose statutory limit is three (3) years.

Decision

33. The appellant pleaded in statement of claim dated 21st April 2021 that he retired on the 12th May 2006. That he was retained in employment post retirement vide letter dated 22nd May 2006 upto 30th April 2018. He pleaded that he served unbroken period of 25 years. he further pleaded that the respondent used to give him intermittent contract agreement post retirement with the last dated 1st October 2016. The claimant asked the court for payment of terminal dues post retirement for service of 13 years and for the subsequent service of 12 years as follows:-

“THAT, the Respondent be and is hereby ORDERED to pay the Claimant Kshs 1,022,045.00 with interest at the rate of 14% per annum for his thirteen (13) consecutive years of service, BEING:

PART "A" CLAIMS:

- a) Basic Wages + House Allowance Underpayment - Kshs. 677,090.00
- b) Earned Annual Leaves with full pay-Kshs. 154,635.00



- c) Pay in Lieu of Retirement Notice per CBA-Kshs. 35,635.00
- d) Contractual (CBA) Service Gratuity -Kshs. 154,635.00

TOTAL =Kshs. 1,022,045.00

THAT, the Respondent be and is hereby ORDERED to pay the Claimant Kshs. 1,785,306.70 with interest at the rate of 14% per annum for his twelve (12) consecutive years of service BEING:

PART "B" CLAIMS:

- a) Basic Wages + House Allowance Underpayments - Kshs. 1,443,568.80
- b) Earned Annual Leaves with full pay - Kshs. 284,137.90
- c) National Social Security Fund (NSSF) Contributions - Kshs. 57,600.00

TOTAL- Kshs. 1,785.306.70

34. The appellant relied on the decision of Hon. Opanga dated 25th January 2022 where the Learned Magistrate held that – ‘ on the 2nd issue for determination the cause of action arose on 11th May 2018 when the claimant was dismissed from work as such the same was not time barred’ (page 430 of ROA). The Hon. Magistrate held she had no jurisdiction and dismissed the suit. On appeal Justice Ndolo held that Hon. Opanga erred in finding she had no jurisdiction. The issue of the time limitation was not subject of the appeal. (Ruling Judge Ndolo at page 384 of ROA). The trial court held the claims to be time barred which the appellant stated it was against the principle that she could not sit on appeal of her co-equal, Hon. Opanga.
35. The court finds that Hon. Opanga held she had no jurisdiction and declined to hear the matter on merit. The finding that the claims were thus not time barred could not bind the trial magistrate who considered the matter on merit as ordered by Judge Ndolo on appeal. Secondly, this being the appellate court on merit had duty to re-evaluate the evidence before the lower court and reach own conclusion on the issue of whether or not the claims were time-barred.
36. It was not in dispute that the Appellant retired formally on 12th May 2006 as pleaded in the claim. He was then issued with contract employment by same employer and the last one terminated on 1st May 2018 (page 211 of ROA) The claim was dated 30th April 2021. It was thus filed in court within 3 years of the termination of the new contract. Section 89 of the Employment provides for time Limitations of employment claims as follows:-
- ‘Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), 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 the cessation thereof.’
- The claimant had claims of back pay before retirement in 2006. The trial court held they had expired under section 90 (now 89) of the *Employment Act* as follows: " The claimant stated that he was not paid his retirement benefits from 1993 to 2018, and he was also not paid his dues from 2018 to when he retired. However, the claimant's claim falls into 3 categories:
- i. Temporary employment between 1993 to 1995
 - ii. Permanent employment between 1995 to 2006
 - iii. Contractual employment between 2006 to 2018



Before I delve on the above categories, the parties alluded to the CBA between the Ministry of Education and KUDEIHA workers but this was not part of the proceedings. I have considered the law and the relationship between the claimant the respondent is governed by the [Employment Act](#) (2007). I have poked at Section 37 and it disallows casual employment where the employee has: Worked for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month:

Performed work that cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more.

However, the claimant approached this court on 30th April 2021 and that is about 28 years later. The claim for benefit between the period 1993-1995 is time-barred under Section 90 of the [Employment Act](#). This brings me to the 2nd category where the claimant was a permanent employee from 1995 to 2006. The claimant conceded he received the retirement letter. Other than what he stated, there was no evidence the respondent failed to pay his terminal dues and the action that he took before he accepted a fixed-term contract that was renewable several times before he ceased his employment.

In the case of KITSAPHA -VS- TEACHERS SERVICE COMMISSION & ANOTHER (Cause 71B of 2022) [2023] KEELRC 804 (KLR) (28 March 2023) (Ruling) it was held "Even where the claimant were to claim that the 1st respondent has accepted to pay part of his pension benefits, which acceptance is not attached in these proceedings, the Supreme Court of Kenya Petition No 3 of 2016 (2018) eKLR the court held that "the retirement Benefit Act is the statute which provides for the establishment of retirement benefits schemes, regulates their operations and in addition, provides for disputes resolution mechanisms arising from the operation of such schemes. Any pension claims such as the claimant is seeking to address herein ought to be addressed under such framework and not as herein done.

The claim under the 2nd category will fail considering the above, Further Section 90 bars this court from entertaining the claim.

This takes me to the 3rd category and the claimant stated that upon his retirement, he was offered a contract which was renewed severally. As noted above. I did not have the benefit of looking at these letters/contracts but I take the position that after 2006, the claimant entered into fixed-term contracts with the respondent.

In the case of Mbatia -vs- Kirinyaga Water & Sanitation Company (kiriwasco)) (Employment and Labour Relations Cause 851 of 2022) [2023] KEELRC 3364 (KLR) (14 December 2023) (Judgment) it was held that "The Claimant's acceptance of the new position of Procurement Manager extinguished her previous contract of Procurement Officer. With this acceptance, the Claimant lost the permanent and pensionable terms that she was enjoying under the position of Procurement Officer and entered into an entirely new three year fixed term contract with the Respondent as Procurement Manager,"

It follows, therefore, that the terms of employment were governed by the contract and when it ended by effluxion of time, any claim ought to have been under the terms and not under the [Employment Act](#).

In the case of Mbatia -vs- Kirinyaga Water & Sanitation Company(supra), it was held that "The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise."

37. The court agreed with the Learned Trial Magistrate that all claims falling under the permanent contract of which the claimant retired formally on the 12th May 2006 had expired by time of filing claim in 2021. The continuation of employment under contract of 22nd May 2006 was on different terms. The court



- upheld the decision relied on by the trial court in *Mbatia -Vs- Kirinyaga Water & Sanitation Company (KIRIWASCO)*) (Employment and Labour Relations Cause 851 of 2022) [2023] KEELRC 3364 (KLR) (14 December 2023) (Judgment) where it was held that- "The Claimant's acceptance of the new position of Procurement Manager extinguished her previous contract of Procurement Officer. With this acceptance, the Claimant lost the permanent and pensionable terms that she was enjoying under the position of Procurement Officer and entered into an entirely new three year fixed term contract with the Respondent as Procurement Manager," The appellant ought to have filed any claims under the permanent contract within 3 years of retirement. The court upheld the decision of the trial court.
38. Regarding claims under the post-retirement contract, the appellant was issued a contract of employment dated May 22, 2006, which stated that the school had decided to retain him on temporary terms after he reached the mandatory retirement age and offered a cumulative salary of Kshs. 6,040. The claimant then made claims for underpayment of basic salary and house allowance, leave, and NSSF contributions for the period 2006-2018. The claimant stated that he was issued intermittent contracts, with the last dated October 1, 2016. The court, applying the *Mbatia Case* above, finds that the only claim valid before the court was under the contract of October 1, 2016, as all other claims expired three years after the end of the former contract. The respondent submits that the claims were continuing injury and ought to have been filed within 12 months of termination and not three years under section 89 of the [Employment Act](#) and relied on several decisions starting with the Court of Appeal decision in the case of *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (2018) eKLR on the doctrine of continuing injury and its interlink with Section 89 (formerly section 90) of the [Employment Act](#) (Revised 2024); "Regarding a 'continuing injury', the provision to section 90 of the [Employment Act](#) requires that the claim be made within 12 months next after the cessation thereof... The learned Judge did not determine when the continuing injury ceased for purposes of computing the twelve months period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the Claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred." The Respondent further relied on the decisions in *Chang'awa v Gertrude's Children Hospital* (Cause 2203 of 2016) [2023] KEELRC 414 (KLR) (16 February 2023) (Ruling) and *John Kiiru Njiiri v University of Nairobi* [2021] eKLR.
39. The Respondent submitted continuing injury in the Appellant's case before the trial court ceased on 30th April 2018. Consequently, in line with the provisions of Section 89 (formerly section 90) of the [Employment Act](#) (Revised 2024) limiting the filing of claims based on a continuing injury to within one (1) year after the cessation thereof, the Appellant's claim before the trial court ought to have been filed on or before 30th April 2019 however, the Appellant's claim before the trial court was filed on 21" May 2021, more than two (2) years later after the expiry of the limitation period. The Appellant's suit before the trial court was therefore a non-starter and could not be sustained. In support, we refer this Honourable Court to the decision of the Employment and Labour Relations Court sitting at Kakamega in the case of *Shitoshe v Shivanga Secondary School & another* (Cause E023 of 2024) [2024] KEELRC 2222 (KLR) (18 September 2024) where the learned Trial Judge held as follows; "The claimant alleged he was not paid his salary or house allowance for 60 months which is the entire period of his engagement as a teacher from 2010 to 2014. Nonetheless, even if the Claimant's claim for back pay and house allowance was to qualify as a continuing injury under Section 89 of the [Employment Act](#), the termination having occurred in December 2017, for claim of continuing & injury as relates withheld pay and house allowances, the same cause of action was to be filed within 12 months after his



employment was terminated. The Claimant did not file his suit within the said statutory period and his claim became statute time barred.

In the upshot, the Notice of Preliminary Objection dated 25th July 2024 is upheld and the memorandum of claim dated 1st July 2024 dismissed for being statute time barred pursuant to the provisions of section 89 (formerly section 90) of the *Employment Act* (Revised 2024)."

40. The appellant did not submit on whether or not his claims were continuing injury but relied on the decision of Hon. Opanga. The court finds that Hon Opanga did not address her mind on the issue of whether the claims before the court were continuing injury or not.
41. Whether the claims for underpayment and backpay for leave were in the nature of continuing injury? The issue of continuing injury is now settled by the Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- "There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of "a continuing injury" as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase "a continuing injury" and whether the respondent's claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes "a continuing injury." From the record, we note that the respondent's counsel only cited the definition of "back pay" in the *Black's Law Dictionary* 9th Edition at page 159 which defines it as "the wage or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary" to support her claim that back pay was a continuing state of affairs." The Court adopted with approval the elaborate definition of continuing injury claims in *M. R. Gupta v Union of India*, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of "continuing wrong" and "recurring wrongs" and reversed the decision. It held:- "The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred...." Applying the foregoing decision of the Court of Appeal which is binding on this court, the court holds that with respect to claims for 2006-2018 a fresh cause of action arose every month when the appellant was paid his monthly salary on the basis of a wrong computation made contrary to the CBA as alleged. The claims for underpayment



were continuing injury and as per section 89 of the *Employment Act* expired within 12 months post termination of contract. The contract was terminated on 1st May 2018. The claim was filed on 30th April 2021. The claims were thus time-barred. On the claims under NSSF, the same ought to have been pursued with the regulatory body.

42. In the upshot, the appeal is held to be without merit. The court found no basis to interfere with the decision of the trial court (*Mbogo v Shah*). The judgment and Decree of the Hon. D.N. Sure (SPM) delivered on 26th November, 2024 in Kangundo MCELRC/E005/2021 is upheld. To temper justice with mercy, taking into account the long period of service of the appellant with the respondent, the court makes no order as to costs on appeal.

43. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF SEPTEMBER , 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant – Ms. Kimani h/b Nyabena.

Respondent: Watuka

