Ogutu v Kenya Airports Authority (Cause E025 of 2024) [2025] KEELRC 2932 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2932 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E025 OF 2024

NZIOKI WA MAKAU, J

OCTOBER 29, 2025

BETWEEN

BERNARD ODHIAMBO OGUTU .... CLAIMANT

AND

KENYA AIRPORTS AUTHORITY .... RESPONDENT

JUDGMENT

1. Bernard Odhiambo Ogutu (the Claimant) was initially employed by Kenya Airports Authority (the Respondent) as an Assistant Resident Engineer on a 15-month contract beginning 2nd January 2012 at a gross monthly salary of Kshs. 300,000/-. The appointment related to the Respondent's Kisumu Airport Expansion Project Phase II, under which it sought to recruit a Resident Engineer, an Assistant Resident Engineer, and other support staff. The Claimant was to work under a Resident Engineer. However, upon reporting to duty, he discovered that no Resident Engineer had been appointed. The Claimant averred that on 26th July 2012, the Respondent advertised the positions of Resident Engineer and Surveyor, but for one reason or another the positions were not filled. Consequently, the Claimant's contract was extended periodically until 31st of October 2016. On 7th November 2016 he was formally employed by the Respondent on permanent and pensionable terms. He avers that sometime later, via Kisumu High Court Criminal Case No. 68 of 2014, the Claimant was convicted of manslaughter and sentenced to two years' imprisonment. Following this conviction, the Respondent issued him with a summary termination letter dated 5th March 2018, citing its Human Resource Manual. Despite appeals for re-engagement none was successful.

2. In his Amended Memorandum of Claim dated 2nd August 2024, the Claimant attributed the events leading to his conviction to Schizophrenia, which he claimed was triggered by excessive work pressure. He contended that the Respondent's failure to recruit a Resident Engineer despite numerous requests, coupled with the delayed employment of an Engineering Surveyor nine months later, compelled him to shoulder multiple responsibilities. This, he said, led to overwhelming workload and stress, marking

the onset of his mental health problems. The Claimant further stated that his condition was aggravated when the Respondent expanded the project's scope beyond what had been advertised, and by its failure to investigate underlying site challenges such as existing graves, a high-water table, and black cotton soil along the parallel taxiway. He maintained that these circumstances, combined with the Respondent's failure to take into account his previous exemplary service record that led to his confirmation on permanent and pensionable terms, rendered the termination unfair. He emphasized that he had never been cautioned at work, asserting that the incident leading to his conviction was unrelated to his work. It was his further case that the Respondent should have sought advice from its legal department and the workers' union before resorting to summary dismissal. He also pointed to his distinguished career prior to joining the Respondent including his involvement in the construction of the Kisumu and Busia Law Courts as evidence that the Respondent should have investigated the circumstances surrounding his conviction before taking disciplinary action. The Claimant asserted that he was neither afforded an opportunity to defend himself nor given a fair hearing. Consequently, he averred that the termination was both substantively and procedurally unfair, and sought the following reliefs:

i. A declaration that the termination of his employment was unlawful;

ii. An order directing issuance of a certificate of service;

iii. Payment of Kshs. 19,020,000/- in view of executing extra responsibilities as Resident Engineer during the temporary contract scheme;

iv. Payment of Kshs. 3,205,340/- for the execution of extra responsibilities of Resident Engineer while he was employed on permanent and pensionable terms;

v. Payment of Kshs. 787,026/- expended on treatment of Schizophrenia and attendant injuries.

vi. 12 months' salary compensation for unfair termination amounting to Kshs. 4,305,804/-;

vii. Interest on (iii), (iv) and (v) above;

viii. Costs of the suit; and

ix. Any other relief the court may deem fit.

3. In its Amended Memorandum of Response dated 4th November 2024, the Respondent maintained that the summary dismissal was lawful and consistent with its Human Resource Manual and section 44(4)(f) of the *Employment Act*. It explained that although the position of Resident Engineer remained vacant, the functions of that office were handled by engineers seconded from the parent Ministry of Transport. The Respondent asserted that the decision to summarily dismiss the Claimant was informed by his criminal conviction and was made in accordance with the terms of his employment. The Respondent further averred that the Claimant's medical condition did not arise from the work environment but manifested in his personal life. It added that issues such as delayed recruitment of an Engineering Surveyor, changes to the project's scope, and alleged failure to investigate site conditions could not form a legitimate cause of action, nor did they fall within the jurisdiction of this Court.

4. The Respondent maintained that the Claimant was the author of his own misfortune and that it bore no contractual obligation to settle his medical expenses. It also contended that it was not bound by the fee scales prescribed by the Engineers Board of Kenya. Consequently, the Respondent urged the Court to dismiss the claim with costs.

5. During the hearing, the Claimant called four witnesses while the Respondent called one. At the close of the hearing, both parties filed written submissions.

Claimant’s Submissions

6. In support of his case the Claimant identified the following issues for determination:

   a. Whether he is entitled to payment for execution of extra responsibilities as Resident Engineer;

   b. Whether the Respondent is liable for his Psychiatric Schizophrenia; and

   c. Whether his termination of employment was unfair.

7. On the first issue, the Claimant submitted that he performed duties of a Resident Engineer. He asserted that rather than filling the Resident Engineer’s position, the Respondent unilaterally expanded his job description to include duties ordinarily reserved for that office. He cited, among others; his approval of work/quality and levels for all pavement layers for the entire contract period, chairing bi-weekly site meetings, approval of the quality and quantity of materials delivered to the Respondent by signing delivery notes, measurement and approval of work for the Respondent by signing the measurement sheet all evinced by documents 24-29 in his bundle.

8. The Claimant further relied on the testimonies of Miss Maurine Achieng Onchoka (CW2) and Mr. Fredrick Ouma Owino (CW3), who confirmed that he performed the duties of a Resident Engineer, and that Eng, Malaba and Eng. Mukui, who occasionally visited the site once a month, functioned as Project Engineers rather than Resident Engineers.

9. The Claimant submitted that the unilateral alteration of his duties contravened section 10(5) of the *Employment Act*, entitling him to additional remuneration. He contended that since the salary for a Resident Engineer was Kshs. 550,000, he was entitled to the difference of Kshs. 250,000 per month for the period he executed those duties.

10. On the Respondent’s liability for his psychiatric condition, the Claimant submitted that the employer bore the duty to provide a reasonable and safe work environment. He relied on the decision in Menginya Salim Murgani v Kenya Revenue Authority [2008] eKLR in which it was observed:

> “ In so far as the employee spends the bulk of his or her time in the service of the employer there is little other livelihood, in the employee outside the framework of the employment relationship. Of this fact, this court takes judicial notice; and it must then be considered that the status of employment relationship inherently vests in the employee both normal rights and legitimate expectations.”

11. The Claimant submitted that upon being employed he passed a medical test confirming that he was fit and was not hallucinating. However, the combination of increased workload, additional responsibilities, such as overseeing grave relocations and unexpected site challenges like black cotton soil and a high-water table subjected him to excessive stress. This, he asserted, triggered Paranoid Schizophrenia in 2014, ultimately leading to the incident involving his wife’s death. He produced prescriptions and a psychiatric report linking his condition to work-related stress, supported by the Claimant’s brother Mr. Dan Odhiambo Ogembo (CW3) and clinical physician Raphael Wambura’s (CW4) testimonies.

12. The Claimant submitted that based on these facts, the Respondent should bear the cost of his treatment, having failed to provide reasonable working conditions. On the issue of fairness of the termination, the Claimant submitted that it violated both substantive and procedural fairness under Article 47(1) of *the Constitution* and as outlined in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR. He maintained that his appeal was dismissed without a hearing. He

further submitted that the Respondent's reliance on clause N8(7) of its Human Resource Manual conferred discretion on the Board, which was to be exercised in compliance with section 4 of the *Fair Administrative Action Act*. He asserted that the Respondent's failure to conduct internal investigations rendered the dismissal unfair. He relied on the case of Nicholas Muasya v Famchem Ltd [2012] eKLR, which emphasized the need for investigations prior to termination. He urged that had such investigations been conducted, his mental health issues would have been discovered, warranting a more lenient sanction. Accordingly, he prayed that the claim be allowed as prayed.

Respondent's Submissions

13. The Respondent framed the following issues for determination:

    i. Whether the Claimant's suit was statute barred;

    ii. Depending on (i) above, whether the Claimant's terms of service changed from Assistant Resident Engineer to Resident Engineer;

    iii. Whether the Claimant's termination was procedurally and substantively fair and lawful;

    iv. Whether the Claimant is entitled to the remedies sought.

14. On the first issue the Respondent submitted that this suit was statute barred having been filed 3 years after accrual of the cause of action, contrary to section 89 of the *Employment Act*. It highlighted that the summary dismissal took place on 29th November 2017 and asserted that the wording in the *Employment Act* was couched in mandatory terms. Reliance was placed on Michira & 41 others v Aegis Kenya Limited t/a Leopard Beach Hotel [2023] eKLR and Bosire v Telkom Kenya Limited & another (Cause E038 of 2024) [2024] KEELRC 2410 (KLR). Regarding the alleged change in employment terms, the Respondent submitted that the Claimant's appointment letter clearly outlined his duties and that no addendum modifying them existed. It insisted that all tasks performed were consistent with his role as Assistant Resident Engineer, and no evidence showed that he undertook duties reserved for the Resident Engineer. The Respondent was adamant that it was its role to prepare a contract spelling out the job description for the employee, not the other way round.

15. The Respondent referred to CW2's and RW1's testimonies, both of which confirmed that Engineer Malaba was the Resident Engineer, and that oversight was provided by officers from the parent Ministry in Nairobi. On the fairness of termination, the Respondent maintained that it complied with the Human Resource Manual. It asserted that a criminal conviction constituted a valid ground for summary dismissal under sections 43 and 45 of the *Employment Act*. It further submitted that due to the Claimant's incarceration, a physical disciplinary hearing was impracticable, and the process was conducted through correspondence, which satisfied the requirements of section 41 of the Act. Reliance was placed on Postal Corporation of Kenya v Andrew Tanui [2019] eKLR and Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, where written communication was deemed a sufficient disciplinary procedure. On remedies sought, the Respondent contended that the Claimant was not entitled to any reliefs. Concerning compensation, it maintained that the dismissal was both substantively and procedurally fair. It however acknowledged that issuance of a certificate of service was a statutory entitlement under section 51 of the *Employment Act*. On the claim for additional pay, the Respondent reiterated that the Claimant's job description never changed, making that prayer untenable. Regarding the claim for medical expenses, the Respondent submitted that the Claimant was covered under a comprehensive medical scheme, as confirmed by RW1's testimony. In respect of the claim for interest, the Respondent asserted that none was awardable as the suit was unmeritorious. In conclusion it urged the court to dismiss the suit with costs.

Claimant's Supplementary Submissions

16. In his supplementary submissions dated 22nd September 2025, the Claimant responded that the limitation period had been extended by an order in Kisumu ELRC Misc. No. E001 of 2024, a ruling he produced as document 74. On the contention that he did not perform the duties of Resident Engineer, the Claimant reiterated that he carried out contract administration, project organization, cost control, and quality assurance, all duties listed under the Resident Engineer's role in the Respondent's own advertisements. Responding to the assertion that Engineer Malaba was the Resident Engineer, the Claimant maintained that she was a Project Engineer, as shown in the organogram (document 18). He explained that she only visited the site once every one or two months contrary to the daily presence expected of a Resident Engineer. He further pointed out that the Respondent advertised the Resident Engineer position while she was still in employment, confirming that she did not hold that role. He cited CW2 and CW3's testimonies to this effect and referred to documents such as the Resident Engineer's vehicle maintenance request (document 38) and the measurement sheets (document 29). On the issue of medical cover, the Claimant clarified that the comprehensive medical scheme only came into effect after his confirmation to permanent and pensionable terms, whereas his mental condition developed earlier. Finally, he contended that the correspondence relied upon by the Respondent began only after his dismissal had already been effected, meaning he was denied a fair hearing. He therefore urged the Court to allow his claim in full.

Disposition

17. The Court has considered the rival positions and the testimony adduced as well as the law in coming to this determination. The Claimant asserts he was unfairly terminated. As noted at the opening of the Judgment, his termination arose after he was incarcerated for the murder of his spouse. The conviction on manslaughter charges prompted the termination which he in turn blames on the job he held at the Respondent. His brother indicated that the Claimant complained of hearing voices which was the assertion the Claimant made in his criminal trial. His evidence was that he suffered from paranoid schizophrenia which led him to do what he did on that fateful night in October 2014. According to the Claimant, he had been suffering from paranoid schizophrenia, an affective disorder since March 2014. No prior report was adduced other than the report in 2019 and 2023. The Claimant was charged with murder which as indicated was reduced to manslaughter thanks to the medical reports made by Dr. Gichinga and the clinicians.

18. The Claimant annexed as part of his evidence, a series of reports and copies of correspondence where Eng. Malaba issued instructions as Resident Engineer while based in Nairobi (page 73, 74 and 75) minutes where the Eng. Raphael Mukui and Eng. Malaba referred themselves as outgoing and incoming project engineers. The Claimant avers that he served as the resident engineer and therefor is entitled to payment for executing that role for the entirety of the project. The Respondent countered that the role of resident engineer was performed by engineers from the parent ministry – Ministry of Transport.

19. During his cross examination by the lawyer for the Respondent, Mr. Ogutu indicated that he had no document to show he served as resident engineer. He asserted that the HR at Kisumu and project engineer were aware he was performing the role of resident engineer. The Claimant sought a myriad of reliefs including salary for role of resident engineer for 58 months, gratuity for 6 years – Kshs. 1,800,000/- and unpaid leave difference of Kshs. 25,000/- as well as medical expenses – Kshs. 806,040/-. This was before he amended his claim to include additional reliefs as set out at page 2 of this judgment.

20. The *Employment Act* has a limitation period for continuing injury (non-payment of salary being key among them) and sets 3 years for claims per section 90. The said section provides 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.

21. I therefore find and hold that section 90 of the *Employment Act* provides a three-year statute of limitation. Action contemplated in the section includes suits for recovery/relief for breach of contract or any other employment dispute arising under the Act. Put another way, an employee has an outer limit of three years from the end of their employment to initiate a lawsuit.

22. The dismissal of the Claimant took place on 5th March 2018. The Claimant ought to have filed suit on or before 5th March 2021. This suit was initiated on 4th April 2024 way past the limitation period provided for in law. I am divested of jurisdiction notwithstanding the attempt by the Claimant to breath life to a stale and unavailable suit. There is no wriggle room to extend or otherwise alter the provisions of section 90 of the *Employment Act*. In the case of Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] KEELRC 890 (KLR) Radido J. held as follows:-

> 31. Section 4(1) of the *Limitation of Actions Act* was amended partly by section 90 of the *Employment Act*. Section 90 provides for a limitation of three years but it has no provision for extension of time to bring a claim out of time.
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> 32. This Court has in the recent past dealt with the question whether it has power or jurisdiction to extend time.
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> 31. The Court's answer and what I understand to be the correct legal position is that the Court has no jurisdiction to extend time to commence claims arising out of contract, employment contract included once time has expired or lapsed.
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> 33. And the authority for this holding is the Court of Appeal decision in Divecon v Samani (1995-1998) EA 48. The Court held itself thus to us, the meaning of the wording of section 4(1) ......is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action...... A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked (my emphasis).
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> 35. To my mind, similar principles in respect of what the Court of Appeal stated about section 4(1) of the *Limitation of Actions Act* apply in respect of section 90 of the *Employment Act* and I would for the sake of clarity state that no employee has the right or power to bring after the end of three years from the date of dismissal or termination, an action founded on a contract of service and that the Industrial Court has no right or power to entertain such claims or extend time for bringing such action.

36. I state so bearing in mind that the *Employment Act*, 2007 has no provision for grant of leave to institute claims out of time or to extend time within which to commence such actions.

23. I agree with the surmise of the Learned Judge as he held there is no provision for the grant of leave to institute claims out of time or to extend time within which to commence such actions. This is reinforced by other decisions of this Court and those of the Court of Appeal which would not need to be recited here as Radido J. has expounded on the subject sufficiently in the decision I have cited above. My finding and conclusion in the matter before me is that as the claim was time barred by the time suit was filed, I have no option but to strike out the suit for want of jurisdiction and order each party to bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF OCTOBER 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE