REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E031 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

KENYA INSTITUTE OF MANAGEMENT..... APPELLANT

VERSUS

GERALD WERE WAKHANU.....RESPONDENT

JUDGMENT

This is an appeal from the Judgment of Hon. Maureen Nyigei (PM) in Kisumu MCELRC No. E125 of 2024 **Gerald Were Wakhanu V Kenya Institute of Management** delivered on 20th May 2025.

The brief facts of the case before the trial court are that the claimant was engaged by the respondent as a part-time lecturer effective 6th October 2003 and the lectureship contract was continuously renewed until 30th May 2019, when he was engaged as a full-time lecturer, Kisumu Branch at a consolidated salary of Kshs.50,000 per month for 2 years, which was renewed for a further 2 years and was scheduled to end on 31st May 2023.

The claimant's case was that the respondent failed and/or refused to pay the sum due to him as salary, partime teaching, gratuity and leave, total Kshs.1,298,675.00.

By a response dated 13th September 2024, the respondent denied owing the claimant any dues but admitted that he was a former employee on part time and full-time basis.

It is pleaded limitation of time for the amounts owed prior to May 2021, faulted the claimant's computations and proposed mediation.

After considering the evidence placed before the court and submissions by counsel, the court awarded Kshs.1,082,275 comprising 9 months arrears on full-time teaching arrears for part-time teaching from August 2017 to August 2019, gratuity, costs and interest.

This is the judgment appealed against.

The appellant faults the judgment of the trial court on two (2) grounds; that the court erred in law and fact by

1. *Finding the respondent liable to pay the sum of Kshs.1,082,275.00*
2. *Failing to find that the claimant's claim was statute barred.*

Appellant's submissions

As regards the sum of Kshs.1,082,275 award, counsel for the appellant submitted that the respondent had not discharged the burden of proof as by law required under the Evidence Act and the claim ought to have been dismissed.

Reliance was placed on **Kipkebe Limited V Peterson Ondieki Tai [2016] KLR**.

As to whether the claim was statute barred, counsel submitted that the claim or a substantial part of it was time barred by dint of the provisions of Section 89 of the Employment Act, namely arrears for part-time teaching Kshs.622,475.00 as the suit was filed on 13th September 2024.

Reliance was placed on the sentiments of the court in **Mary Kasiwa V Scorpio Enterprises Ltd [2013] eKLR, Maersk Kenya Ltd V Murabu Chaka Tsuma [2017] eKLR, John Kiiru Njiiri V University of**

Nairobi [2021] eKLR, Mathew Kamanu Mwaura V Permanent Secretary Office of the President Provincial Administration & 2 Others [2018] eKLR and G4S Security Services (K) Ltd V Joseph Kamau & 468 others [2018] eKLR and Wilson Nyabuto Areri V Postal Corporation of Kenya [2018] eKLRS among others to urge that the claim for salary arrears for part-time teaching was statute barred.

These decisions underline the proposition that limitation of actions was not a procedural technicality but a principle of substantive law as it implicated the court's jurisdiction to hear and determine the suit before it.

Counsel submitted that claim is statute barred and the law did not provide for extension of time.

Respondent's submissions

As to whether the claim is statute barred, reliance was placed on the provisions of Section 23(3) of the Limitation of Actions Act on acknowledgement of a debt to urge that the limitation period begun a fresh.

Reliance was placed **Patrick S. K. Kimiti V John Ngugi Gachau & another [2015] eKLR** and **Lochab**

Transport Ltd V Kenya Arab Orient Insurance Ltd [1986] eKLR, to urge that the appellant's letter dated 5th September 2023 acknowledging the indebtedness revived the debt and the letter was admitted in evidence citing Majanja J in **Condisons International Kenya Ltd V Innovation & Growth Academy BV** [2022] KEHC 16417 (KLR).

Reliance was also placed on the provisions of Article 159(2)(d) of the Constitution of Kenya on administration of justice without undue regard to procedural technicalities to urge that the debt had been admitted.

On reliefs, counsel submitted that the respondent was entitled to all the reliefs as claimed in the trial court.

Analysis and determination

It is common ground that the respondent was engaged by the appellant as a part time lecturer from August 2003 and became a full-time lecturer in 2019 and served until September 2022 but the appellant owed him part-time teaching dues and unpaid salary for 9 months.

It is unclear as to when the suit was actually filed but the statement of claim was dated 24th May 2024. Court

records reveal that attempts to settle the matter out of court failed in 2024 and in 2025 and the suit was canvassed by way of written submissions.

Being a first appeal, the court is alive to its role as that of retrial of the case as expounded in previous decisions.

In **Gitobu Imanyara & 2 Others V Attorney General** [2016] KECA 557 (KLR), the Court of Appeal held:
"This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.
Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its won conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

See also **Selle & another V Associated Motor Boat Co. Ltd** [1958] EA 123, **Peters V Sunday Post [1958 EA 424 and Williams Diamonds Ltd V Brown** [1970] EA.

The related issues for determination are whether the award of Kshs.1,082,275 by the trial court was justified and whether part of the respondent's claim was statute barred.

On the 1st issue, the learned trial magistrate reasoned that because the appellant had committed itself to settle the amount in writing and admitted it was owing, but failed to pay, the agreement was binding.

The trial court relied on the sentiments of the court in **Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro [2017] eKLR**.

Copies of emails on record on the part-time arrears availed by the respondent revealed that the sum had been outstanding for a long time. The oldest email was dated 14th October 2021, claiming the sum of Kshs.622,475.00. However, most of the emails were written in 2022.

The respondent admitted the outstanding debt and promised to pay by instalments vide letter dated 5th September 2023 written on a "without prejudice" basis. It

is unclear how the court navigated its production and reliability as evidence.

Be that as it may, nothing turns on the issue as it did not arise.

The crux of the matter is that no payment had been made by the time the suit was filed in 2024.

It is common ground that the appellant is principally contesting the arrears for part-time teaching incurred from August 2017 to August 2019.

From the claim dated 24th May 2024, it is discernible that the respondent's employment was not unfairly terminated, but his dues were outstanding.

It is also surmisable that the respondent was not undertaking part-time teaching after August 2019. This is important granted that he was a full-time employee from May 22nd 2019. All the claims for part-time teaching predate the full-time lectureship contract which shows that the claim for arrears for part-time teaching are traceable to the part-time teaching contracts and arguably had separate and distinct accrual dates on

account that salary arrears for full-time teaching (9 months) were incurred up to December 2022 and the accrual date was the last date of employment 31st December, 2022.

Deductively, the respondent's suit for full-time teaching salary arrears up to December 2022 was filed within the prescribed limitation period.

Section 89 of the Employment Act provides:

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 foregoing provision is couched in mandatory tone and in the negative for emphasis that no civil actions or proceedings based or arising from a contract of employment ought to be filed after three years of the alleged event or occurrence.

Notably, the provisions of Section 89 of the Employment Act apply to all contracts of employment and no action based or arising from such a contract is enforceable after 3 years whether salary arrears are admitted or not.

Contrary to the respondent counsel's submission, salary is due and payable under the provisions of Section 17 of the Employment Act.

Significantly, the principle of limitation of actions is not a procedural technicality but one of substantive law as it implicates the court's jurisdiction to hear and determine the suit before it and a court has no jurisdiction to hear or determine a statute barred claim.

This principle serves a salutary purpose.

In **Gattoni V Kenya Co-operative Creameries Ltd** [1982] KECA 10 (KLR), the Court of Appeal held:
"The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest...But, rightly or

wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance do not do what the informed citizen would reasonably have done."

See also **Attorney General & another V Andrew Maina Githinji & another** [2016] KECA 817 (KLR).S

In determining whether a claim or suit is state barred, it is elemental to determine when the cause of action accrued because it is in turn determines when time started running.

The prevailing jurisprudence is that in employment relationships the cause of action accrues on the date of termination of employment or separation, as held in **G4S Security Services (K) Ltd V Joseph Kamau & 468 others** (supra).

Concerning the respondent's salary arrears for full-time teaching and as adverted to elsewhere in this judgment, time started running at the end of December 2022 and the claim was not statute barred.

However, the claim for arrears for part-time teaching from August 2017 to August 2019 was different in that it

was grounded on a different contracts of employment and the sums were due and payable at different times with the latest in August 2019 when time started running and the three years lapsed in August 2022 and the suit was filed in May 2024, almost 2 years later.

In **Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye & another** [2016] eKLR, the Court of Appeal held;

"For us it is clear from our reading of ***section 90*** *aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case, the respondents have not specified when the injury or damage ceased for time to have began to run. Secondly, the learned Judge did not rely on the continuing injury or damage but on the fact that the parties engaged in negotiations. Those negotiations began when time had began to run following the termination of the respondents' services... Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to*

bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service...

Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time".

The foregoing sentiments apply with equal force to the circumstances of this case. The respondent ought to have sued for the arrears from part-time teaching by the end of August 2022, but did not.

The claim was stale by the time the suit was instituted in May 2024.

The sentiments of the court in **Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro** (supra) cited by the trial court would appear to apply where the benefits related to the same contract of service under which the benefits accrue. In this case, the arrears arose from part-time teaching arrangements. Thus, the arrears of part-time teaching and arrears of full-time teaching cannot have

the same accrual date as part-time contract ended earlier in time and time started running.

It is the considered view of the court that the learned trial magistrate fell into error on this issue.

The claim for arrears for part-time teaching August 2017 to August 2019 was statute barred by dint of Section 89 of the Employment Act.

As regards gratuity, the court is guided by the sentiments of the Court of Appeal in **Bamburi Cement Co. Ltd V William Kilonzi** [2016] KECA 546 (KLR) thus;

"...the first thing we must emphasize is that gratuity as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment, the contract of employment may provide that the employer shall not pay

gratuity if the termination of employment is through dismissal arising from gross or other misconduct...”

Unlike service pay which is statutory, gratuity is only payable where it is contractually provided for by the employment contract or under the terms of a Collective Bargaining Agreement.

In this case, none of the letters of appointment of the respondent as a part-time lecturer from 9th October 2003 to May 22nd 2019 when he was engaged on a full-time basis had a provision for gratuity.

The trial court justified the award on the respondent’s service of 19 years which could not justify the award in law.

The award lacked a contractual underpinning.

The award was unmerited in this instance.

As adverted to elsewhere in this judgment, having been filed within 3 years, the salary arrears for full-time teaching were recoverable, the sum of Kshs.376,200.

On leave, the court is in agreement with the findings of the trial court coupled with the fact that neither the written witness statement dated 24th May 2024, nor the claim itself provided the relevant particulars.

The claim was unsubstantiated and unmerited.

From the foregoing, it is discernible that the court is satisfied that the appellant has made a case for interference with the exercise of discretion by the learned trial magistrate in the circumstances articulated in **Price and another V Hilder** [1996] KLR 95 and **United India Insurance Co. Ltd & 2 others V East African Underwriters (Kenya) Ltd** [1985] EA 898 as follows:

(a) *The award of **Kshs.622,475.00** as arrears for part-time teaching from August 2017 to August 2019 is set aside.*

(b) *The award of **Kshs.83,600.00** as gratuity is set aside.*

(c) *Parties shall bear their own costs of this appeal.*

(d) *Respondent shall have costs in the lower court at half scale.*

(e) *Other awards of the trial court are affirmed.*

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 13TH DAY OF NOVEMBER, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE