IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: NYAMWEYA, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E127 OF 2022

BETWEEN

G4S SECURITY SERVICES (K) LTD.....APPELLANT

AND

BENARD MOMANYI ONGORI.....RESPONDENT

(Being an appeal from the Judgement of the Employment and Labour Relations Court of Kenya at Mombasa (Nzei, J.) delivered on 28th April 2022

in

Mombasa ELRC No. 429 of 2028)
****

JUDGMENT OF THE COURT

1. In this appeal, G4S Security Services (K) Limited ***(the appellant)*** is challenging the Judgement and Decree of ***Nzei,***

J. dated and delivered on 28th April 2022 in ***Mombasa Employment and Labour Relations Court (the ELRC) Cause No. 429 of 2018***. The learned Judge held that Benard Momanyi Ongori's ***(the respondent)*** summary termination from employment was unfair, and that he was entitled to payment in lieu of leave, compensation for unfair termination of employment, salary for the month of October 2017 and one month's salary in lieu of notice, all amounting to Kshs. 354,756.60.

2. The brief facts germane to this dispute are as follows: On 26th January 1998, the appellant offered the respondent temporary employment for a period of one month as a security guard with effect from 1st February to 28th February 1998. By a letter dated 4th September 2002, the respondent's employment was confirmed on a permanent basis with effect from 1st September 2002. The respondent was assigned different duties, including being a security guard at KCB Mwembe Tayari Branch where he worked until 8th November 2017 when his employment was allegedly terminated illegally. He pleaded that, at the time of his termination, he was earning a gross salary of Kshs.22,000 per month.

3. It is common ground that the respondent contracted an occupational disease in mid-2017, and that he underwent medical treatment, including an operation on 14th August 2017. The doctor recommended a ten (10) days medical rest, but the same was extended over time until 10th October 2017. The respondent was also recommended to have weekly check- ups at the hospital. When the appellant's contract of service in the Mombasa region with its various clients terminated, the appellant transferred the respondent to Nairobi with effect from 11th October 2017. As fate would have it, the respondent was allegedly attacked by unknown persons when leaving the appellant's office where he had gone to pick his transfer letter, which forced him to seek further treatment at the Coast General Hospital.

4. Following this unfortunate incidence, the respondent was

unable to relocate to Nairobi by 11th October 2017. It is then that the appellant concluded that the respondent was absent

from work with effect from 10th October 2017. It subjected him to disciplinary action, and thereafter summarily terminated him from service with effect from 8th November 2017 allegedly without according him a fair hearing. On the part of the respondent, he asserted that he never absconded from duty without reason; and that it was due to his illness, a fact that was within the knowledge of the appellant, including being privy to documentary evidence in that respect.

5. The above grievances by the respondent led him to file Mombasa Employment and Labour Relations Court Cause No. 429 of 2018 for relief. In the Statement of Claim dated 20th June 2018, the respondent sought:

"a) A total sum of Ksh. 867,020.00 comprised of:

i)	***18 years of unpaid leave at Kshs. 22,220***	***Kshs.399,960.00***
ii)	***12 months' pay for unfair termination***	***Kshs.222,640.00***
iii)	***gratuity Kshs.22,220/2 x 18years***	***Kshs.199,980.00***
iv)	***notice in lieu of termination***	***Kshs. 22,220.00***
v)	***unpaid salary for October 2017***	***Kshs. 22,220.00***
	Total	***Kshs.867,020.00***

b) A declaration that the claimant was employed on permanent basis;

c) An order directing the appellant to issue the respondent with Certificate of Service and recommendation letter;

d) Costs of the suit and interest; and

e) Any other relief as the court may deem just."

6. In its Statement of Response dated 6th March 2019, the appellant conceded that the respondent was its employee, and that, at the time of his termination, he was earning a basic salary of Kshs.14,412 and a house allowance of Kshs.2,163.15. The appellant defended its decision to terminate the respondent's employment on the grounds that he failed to follow lawful instructions requiring him to report to their Nairobi Office; that it was not true that the respondent suffered from an occupational disease; that, instead, the respondent developed a swelling on the arm, which was surgically removed; and that he fully recovered from the swelling. The appellant was not particularly pleased by the respondent's withdrawal of his earlier submitted medical report from the Coast General Hospital and his attempt to replace it with another medical report from Nyali Bridge Hospital, which stated that he had a chronic kidney disease. To the appellant, the respondent weaved a web of lies to avoid his transfer to Nairobi.

7. It was contended that the respondent did attend the disciplinary hearing held on 8th November 2017, and that he made his representations which were considered by the disciplinary panel before a decision to terminate his employment was made on the ground of breach of his employment contract; and that, therefore, the termination was justifiable, and that it was done for a lawful cause.

8. The appellant averred that it computed the respondent's dues

comprised of eight (8) days worked and eight (8) days of house

allowance up to 8th November 2017, which amounted to Kshs.4421. In addition, the appellant deducted Kshs. 4,440 being the computation of the days the respondent was absent from work, essentially leaving the respondent with a negative pay of Kshs.19, which the appellant claimed the respondent owed.

9. Further, the appellant contended that the respondent signed a discharge voucher dated 13th December 2017 confirming that he would make no further claims in respect of his service with the appellant prior to 5th December 2017; and that it issued the respondent with a Certificate of Service dated 17th November 2017.

10. The appellant maintained that the respondent was not entitled to: accrued leave days since he had taken leave from 1st - 30th April 2017; damages for unfair termination; gratuity because his employment does not fall under the provisions of the Regulation of Wages (Protective Security Services) Order, 1998; and payment in lieu of notice; and that the respondent was paid for the days worked in October 2017. The appellant asked that the respondent's claim be dismissed with costs for the reasons that his employment was properly terminated, and that he was not entitled to the sum of Kshs.867,020 as claimed.

11. The suit proceeded to hearing by way of *viva voce* evidence with the respondent testifying as ***CW1***. The respondent adopted his witness statement dated 14th May 2018. He further produced a list of documents dated 20th June 2018, which were marked as ***PEXH 1 - 11***. His testimony was that

he was employed in the year 1998, and that he worked until the year 2017, making a total of 19 years; that his work involved guarding banks and at times supervising other guards; that he worked from 6 a.m. to 6.00p.m., but that he was never paid overtime; and that he never took leave.

12. On his health challenges, the respondent testified that his hand swelled when he was still stationed at KCB Mwembe Tayari; that he was permitted by his supervisor to seek medical help; that he underwent surgery in 2017 at Nyali Bridge Hospital and was discharged after two days; that, when he took his sick sheet leave to the office, he was informed that he had been transferred to Nairobi; that he did not report to Nairobi as required; and that, instead, he was informed that he had been summarily dismissed on 8th November 2017.

13. On cross-examination, he stated that he had a persistent kidney problem, but that the swollen hand was an emergency which needed immediate medical attention; that he was initially given fourteen (14) days sick off; that the sick-off was extended by a further twenty (20) days; that, by the time he was called to the office, the managers had already decided his fate; and that he was not given an opportunity to be heard or to avail a witness.

14. Ms. Annete Mombo ***(DW1),*** the Human Resource Business Partner in charge of the Coastal Region, testified on behalf of the appellant. She adopted her witness statement dated 6th March 2019 and produced the exhibits in the list of documents of even date as ***PEXH 1 - 8***. She reiterated

that

the respondent failed to follow lawful instructions and report to work on 10th October 2017; that the respondent was given an opportunity to be heard and explain as to why he did not report on duty upon being given the transfer letter before being terminated; that there were five (5) people present at the meeting; that, although the appellant did not issue a notice to show cause to the respondent, the reasons for the intended dismissal were given; that the respondent took his leave for the period he worked with the appellant; and that the appellant followed proper procedure in terminating the respondent's employment. The appellant denied that the respondent was discriminated on account of being sick.

15. In a judgment dated 28th April 2022, ***Nzei, J***. held that the appellant failed to demonstrate that the alleged grounds of the respondent absenting himself from duty and failure to obey lawful instructions given by his immediate supervisor constituted gross misconduct as spelt out under Section 44
(4) & (3) of the Employment Act, Cap. 226 ***('the Act')***; that the fact that the respondent was not issued with any notice to show cause, and the invitation to the disciplinary proceedings was done by a telephone call, any resulting proceedings were outside the procedural requirement; and that, therefore, the dismissal was invalid and the proceedings were unfair. Ultimately, the termination of the respondent's employment was found to be both procedurally and substantially unfair.

16. The learned Judge found that it was not demonstrated that

the respondent understood the contents of the discharge voucher indicating that a sum of Kshs.4,421 was due to him, and she therefore disregarded it.

17. The learned Judge further held that there was no dispute as to the number of years the respondent had worked; that the appellant did not produce evidence of the leave forms to demonstrate that the respondent was granted leave days; and that failure to allow the respondent to take leave for the entire period during which he worked constituted a continuous injury as contemplated under Section 90 of the Act, which ceased upon the respondent's termination of employment on 8th November 2017.

18. The respondent was awarded payment in lieu of leave for 21 days for each year of service for the 18 years amounting to Kshs.181,704.60, 10 months' salary for unfair termination, being Kshs.144,210, October salary for the days worked until 8th November 2017 and one month's salary in lieu of notice. The claim for gratuity payment was declined as the employment did not result from redundancy. The claim for a Certificate of Service was also declined since it was proved that the same was issued on 8th November 2017, and that he (the appellant) signed it on 17th November 2017.

19. Those findings aggrieved the appellant which precipitated the instant appeal. In a Memorandum of Appeal dated 24th November 2002, the appellant is aggrieved that:

> ***"i. The learned Judge erred in law in disregarding the provisions of Section 90 of the Employment Act and making a finding that the prayer for 18 years' accrued leave pay constituted a continuous injury. The learned Judge should have found that:***
>
> ***a) a claim for leave accrued in each year that it fell due; and***

b) any claim for leave pay said to have accrued before June 2015 is time barred under Section 90 of the Employment Act, the suit having been filed on 21st June 2018 and that the court did not have jurisdiction to deal thereof;

ii. In the circumstances, the award of 18 years' leave pay amounting to Kshs.181,704.60 was made without jurisdiction."

20. The appellant therefore prays that *we allow the appeal; set aside the award of Kshs. 181,704.60/=, being 8 years' leave pay as per the judgement of the Employment and Labour Relations Court at Mombasa* ***(Nzei, J.)*** *delivered on 28th April 2022; and substitute therefor an award of Kshs. 43,263 for 3 years' leave pay, being the claim filed within time.*

21. We heard this appeal on 30th May 2025. Learned counsel ***Mr. Adiwo*** appeared for the appellant while learned counsel ***Mr. Ajigo,*** holding brief for ***Mr. Twere,*** appeared for the respondent. The appellant relied on submissions dated 12th September 2023 and a further supplementary digest and bundle of authorities dated 29th April 2025 while the respondent relied on submissions dated 1st April 2024 and a list of authorities of even date. Counsel also highlighted their respective submissions orally.

22. The appellant isolated the issue for determination to be whether the respondent's claim for 18 years continuing injury justified the trial court's award on the same. While referring to the decision of this Court in ***Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited*** ***(2015)***

KECA 286 (KLR), the appellant asserted that, since leave accrues annually and

at intervals, every year an employee fails to settle the leave dues that have accrued, where leave is not taken, that failure constitutes a new and separate cause of action; and that the accrued leave days that are not taken do not constitute continuing injury.

23. To further emphasise on this submission, the appellant contended that this decision settles the issue as to what constitutes a continuing injury, which the Court defined in accordance with the *Black's Law Dictionary* as an injury which is still in the process of being committed; that, flowing from this definition, the Court made a finding that, once employment relationship has been severed, any claims arising therefrom could no longer be termed as a continuing injury; and that, given that the respondent has since severed his relationship with the appellant, it followed that the award of accrued leave allowance of eighteen (18) years was time- barred as it was made more than a period of three years before the date of filing suit. The appellant's argument is that leave dues that have accrued over extended and distinct periods of time do not result to a continuous injury claim by an employee.

24. Highlighting the appellant's submissions, Mr. Adiwo contended that, for the 18 years of the respondent's employment, he earned different salaries at different times; and that there was, therefore, no basis in law of awarding leave allowance of the last 18 years based on the last salary. We were thus urged to set aside the decision of the trial court on this aspect, and, consequently, allow the appeal as prayed.

25. On the part of the respondent, it was submitted that he pleaded that, for the entire period that he worked for the appellant, he was not given leave or leave pay allowance in lieu thereof; that this is the basis on which the learned Judge found that he was entitled to leave allowance pay for the entire period that he worked; that the appellant did not raise the issue of limitation of time or at all in its pleadings and in its witness' statement; that neither was a preliminary objection raised on this issue at the commencement of the trial; and that, therefore, evidence ought not to be introduced at the submission stage as was held by the High Court in the cases of ***Erastus Wader Opande vs. Kenya Revenue Authority & another – Kisumu HCCC No. 46 of 2007*** and ***Nancy Wambui Gacheru vs. Peter W. Wanjere Ngugi - Nairobi HCCC No. 36 of 1993*** *(both unreported)*; and this Court's cases of ***Daniel Toroitich arap Moi vs. Mwangi Stephen Muriithi & another (2014) eKLR*** for the proposition that submissions cannot take the place of evidence; and ***Avenue Car Hire & another vs. Slipha Wanjiru Muthegu – Civil Appeal No. 302 of 1997*** in which it was held that no judgment can be based on written submissions, and that if such judgment is written, it is a nullity since submissions are not a mode of receiving evidence.

26. The respondent conceded that Section 90 of the Act addresses the issue of continuing injury; that, that notwithstanding, the appellant ought to have raised it before the hearing of the trial and not in this appeal; that, therefore, this appeal being largely premised on the

principle of

continuing injury is largely an afterthought, more so taking to mind that the employment contract between the appellant and the respondent provided for the time when the respondent should proceed on leave; that, in the absence of evidence (leave forms) showing that the respondent ever proceeded on leave, nothing stopped the trial court from awarding him leave allowance pay.

27. The respondent also submitted that it was an error on the part of the trial court to tabulate the leave allowance based on a pay of Kshs.10,000.00 because, at the time of his termination, the respondent was earning a salary of Ksh.14,421.00, which figure we should adopt in tabulating the leave allowance.

28. Finally, the respondent urged us to take judicial notice of the fact that it is difficult for an employee to sue his employer while he/she is still in employment, more so at any time that he (the respondent) was expected to take leave for the obvious reason that the employee is very vulnerable while he/she is in employment.

29. We have accordingly considered the record of appeal, the submissions by both parties, the authorities cited by each party and the law.

30. As a first appellate court, our duty as encapsulated under ***rule 31(1) (a)*** of this ***Court's Rules, 2022*** is to re-appraise and reanalyse the evidence on record afresh and to draw our own inferences of fact. Even as we exercise this mandate, we have to bear in mind that we neither had the advantage of

seeing or hearing the witnesses testify so as to assess their demeanour for which we should give due allowance.

31. In ***Kenya Ports Authority vs. Kuston (Kenya) Ltd (2009) 2 EA 212,*** the role of a first appellate court was explained as follows:

> ***"This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…"***
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> See also ***Selle vs. Associated Motor Boats Co. Limited & Others (1968) EA 123*** and ***Peters vs. Sunday Post Limited [1958] EA 424.***

32. The Supreme Court of Nigeria in the case of ***Tsokwa Motors***

(Nig) Ltd vs UBA Plc (2008) LPELR- 3266(SC) held as follows:

> ***"In appeals on findings on facts, the attitude of the appellate Court is now well established; it is one of caution and of reluctance in interfering with the facts found by the trial Courts. But where there is an obvious or patent error in appraisal of oral evidence and ascription of probative value to such evidence or even where there is an improper or imperfect use by the trial Judge of the opportunity he had in seeing and hearing the witnesses or where he has reached a wrong conclusion on proved or accepted facts, the appellate Court in such circumstances, is duty bound in law to interfere and set aside such perverse findings."***

33. The fate of this appeal rests upon our determination of two main issues as to:

i. ***whether the respondent's claim for accrued leave days constituted a continuous injury claim; and***

ii. ***the appropriate salary to be used to compute the claim for leave allowance.***

34. The uncontested facts are that the appellant employed the respondent as a security guard. The relationship between the parties went sour leading to the respondent's dismissal from employment *vide* a letter dated 8th November 2017, the reasons therefor being absent from duty without lawful authority or official leave from 10th October 2017. To our minds, the appellant does not appear to contest the propriety of the trial court's finding that the respondent's employment was unfairly terminated under ***Sections 44(3)*** and ***(4)*** of the ***Act.*** We also find nothing to suggest that the appellant contests the respondent's entitlement to the unpaid accrued leave days, save that it ought not to have accrued prior to the year 2015. The appellant's main grievance is that the respondent's claim for the unpaid accrued leave days prior to the year 2015 cannot be termed as a continuous injury, but that, instead, that claim is statute barred by virtue of having been lodged outside the statutory limitation period as provided for under ***Section 90*** of the ***Act***.

35. On his part, the respondent argues that it was not plausible to sue every year when the cause of action arose. He maintains that failure to pay him his entitlement of the accrued leave days constitutes a continuing claim, which crystalised upon his unlawful termination. Hence, this is a fit and proper case to be termed as a continuous

injury, which cannot be deemed as time barred.

36. In addressing this issue, the learned Judge delivered herself thus:

> ***"22. Although the Respondent (appellant herein) testified that the Claimant (respondent herein) took leave during the entire period of employment, no leave forms/records were produced in that regard by the Respondent, despite the fact an employer is the custodian of the employment records. The Respondent did not dispute the number of years worked. I award the Claimant payment in lieu of leave for twenty-one days per each served year for eighteen years, which is Ksh. 10, 094.7 * 18 = 181,704.6. It is to be noted that failure by the Respondent to allow the Claimant to take leave for entire period of employment was a continuing injury as contemplated in Section 90 of the Employment Act, 2007, and that the same ceased at the point of termination of employment on 8th November 2017. The suit herein as filed (sic) on 21st June 2018."***

37. As to whether the respondent's claim prior to the year 2015 is time barred, ***Section 90*** of the ***Act*** is instructive. It provides:

> ***"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, 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."***

38. The law is clear that a claim arising out of an alleged

continuing injury or damage must be instituted within one (1) year after the cessation thereof. Before we determine

whether the complaint of the unpaid accrued leave days was filed within twelve months, central to this finding is the meaning of the phrase *"continuing injury."* As we grappled with this issue, we did appreciate that there is paucity of decisions touching on the subject of the doctrine or principle of *'continuing injury'* in the context of employment claims, and especially in this court. On the other hand, before the superior court of the Employment and Labour Relations Court, there are different views/conflicting decisions on the subject.

39. While there have been attempts by this Court to elucidate on the doctrine of *continuing injury* in the employment context, the same has eluded in-depth analysis. For instance, in the case of ***Ol Pejeta Ranching Limited vs. David Wanjau Muhoro*** ***(2017) KECA 329 (KLR),*** the issue before the appellate bench was whether the continued discrimination of employees in the appellant's employment on account of race and the different salaries being paid, resulting to the violation of the right to equal pay for equal work, fell within the purview of a continuous injury claim as contemplated under ***Section 90*** of the ***Act.*** This Court held that the appellant's contention that the alleged discrimination complained of was statute barred as it was raised after one year, was an afterthought as it was not a defence or an issue canvassed before the trial court, and that no new issues could be raised on appeal. Secondly, the claim being one of violation of constitutional rights could not be said to be statute barred.

40. In ***Mary Kitsao Ngowa (supra)*** and ***G4S Security***

Services (K) Limited vs. Joseph Kamau & 468 others (2018) KECA

827 (KLR), the Court, differently constituted, agreed that *'unpaid terminal benefits',* which includes salary underpayments, unpaid house allowance, annual leave and/or overtime, do not constitute continuing injury as contemplated under ***Section 90*** of the ***Act***, and especially after the employment relationship had been severed.

41. However, in the recent decision of this Court in the case of ***The German School Society & another vs. Ohany & another (2023) KECA 894 (KLR),*** the Court dived into this subject further. Whilst acknowledging as we do that there is little jurisprudence on this subject at the appellate level, the Court, while invoking ***Article 259*** of the ***Constitution***, referred to decisions emanating from foreign jurisdiction, particularly from India. We shall shortly revert to this decision after considering comparative jurisprudence on what constitutes a continuing injury.

42. The appellant's argument suggests that, for every year it failed to pay the respondent his entitlement of accrued leave, it should be regarded as a single wrongful act giving rise to one cause of action as opposed to a continuous injury causing damage each day. A distinction between the two is made, namely that a wrongful act giving rise to a one-off cause of action is a completed wrongful act with or without continuing injurious effects. On the other hand, a continuous wrong result in a series of wrongful acts as long as the wrongful act endures.

43. In ***M. Siddiq (D) Thr Lrs vs. Mahant Suresh Das &***

Ors ***(2020) 1 SCC 1,*** the Supreme Court of India examined the

principle of continuing wrong as a defence to a plea of limitation. It observed that:

> ***"In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a legal injury is founded in a breach of an obligation. A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong.***
>
> ***arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature…What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation." (emphasis ours)***

44. Making further reference to the decision of the Supreme Court of India in ***Union of India vs. Tarsem Singh, (2008) 8 SCC 648,*** the Judges held:

> ***"It is important to bear in mind in this context the distinction between an injury caused by a wrongful act and the effect of such injury. What is to be seen is whether the injury itself is complete or is continuous. If the injury is complete, the cause of action accrues and is complete; the clock starts ticking for the purposes of limitation, notwithstanding the fact that the effect of such injury continues even thereafter."***

45. In its decision in ***Ghelf vs. Town of Wheatland C.A.7 (Wis.) March 10, 2025 132 F.4th 456,*** the United States Court of Appeals, Seventh Circuit, distinguished between a continuing violation act and one where the act is complete as follows:

> ***"This doctrine is a special accrual rule under which a claim accrues not just once but repeatedly as a defendant continually wrongs a plaintiff. However, when a defendant commits numerous transgressions, but each act is "wrongful independent of other events," each act is considered discrete and has its own period of limitations."***

46. The United States Court of Appeals of the first Circuit in ***Muniz - Cabrero vs. Ruiz (91 Ed. Law Rep. 467),*** was of the view that there are two variations of continuing violations, namely serial and systematic, where the former violating action constitutes a complete action while for the latter is not an identifiable discrete action. The Court held

that:

> ***“There are two varieties of continuing violations: serial and systemic. Serial***

violations are composed of a number of discriminatory acts emanating from the same discriminatory animus, each act constituting a separate, [actionable] wrong. Plaintiff bears the burden of demonstrating that at least one discriminatory act occurred within the limitations period. It is not enough to show that plaintiff is merely feeling the effects of some earlier discriminatory action. In other words, there is a critical distinction between a continuing act and a singular act that brings continuing consequences in its roiled wake. Systemic violations, on the other hand, need not involve an identifiable discrete act of discrimination transpiring within the limitation period. Rather, what must be shown is that plaintiff has been harmed by the application of a discriminatory policy or practice and that such policy continues into the limitations period."

47. Back to ***The German School Society & another (supra),*** the decision of the Court arose from two consolidated appeals where the main complaint by the 1st respondent (as cited in Kenya law reports) was the underpayment of salary during her employment stint with the appellant. As earlier noted, the Court considered decisions from the Indian jurisdiction, being ***Balakrishna S.P. Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan AIR 1959 SC 798***; ***M. R. Gupta vs. Union of India (1995) (5) SCC 628;*** and ***M. Siddiq (supra),*** after which it rendered itself thus:

"Normally, a belated service-related claim will be rejected on the ground of delay and

laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service-related claim is based on a

continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90."

48. The very essence of a continuing injury is that the enforcement of the claim is not a one-time off action, but that, it is such that the events giving rise to the injury linger over long periods of time, and the clock in time does not freeze since it would be unreasonable to expect the claimant to sue at an early stage in a continuing course of conduct. The converse is true; where the injury complained of is susceptible to being broken into independent and distinct events or wrongs, each time a claimant is injured by an act, a cause of action accrues warranting him to recover damages.

49. The complaint in this appeal concerns the accrued unpaid leave allowance. Leave entitlement is underpinned under ***Section 28*** of the ***Act*** as follows:

28. Annual leave

(1) An employee shall be entitled-

(a) after every twelve consecutive

months of service with his

employer to not less than twenty- one working days of leave with full pay.

50. The provision being worded in mandatory term by use of the word ***"shall"*** means that the entitlement to leave is akin to a non-derogable right.

51. On the other hand, ***section 10(3)(a)(i)*** of the ***Act*** provides that one of the components in a contract of employment are the terms and conditions relating to, among others, entitlement to annual leave. It reads:

> ***10(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—***
>
> ***(a) any terms and conditions relating to any of the following—***
>
> ***(i) entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);***

52. ***Section 74*** of the ***Act*** further amplifies this position by making it a mandatory requirement that an employer is required to keep a written record of its employees, including the particulars of an employee's annual leave entitlement, days taken and days due as specified in ***Section 28*** as follows:

> ***(1) An employee shall be entitled-***

(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three- quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

(2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.

(3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.

(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be

taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in

respect of which the leave entitlement arose.

(5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.

53. Consequently, the right to leave is a statutory entitlement granted to employees. It is also trite that, during the period the employee is on leave, he/she is entitled to full pay as if they were on duty.

54. In ***Sash Window Workshop Limited vs. King (2018) IRLR 142,*** the Court of Justice of the European Communities (CJEU) underscored the importance of the right to leave and payment of the annual leave as follows:

> "***…right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by" the 2003 Directive itself…the right to paid annual leave is expressly set out in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties." Furthermore, that "any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave***"

55. The Supreme Court of India in ***State of Jharkhand & Others vs. Jitendra Kumar Srivastava & Another***

(AIR (2013) SC 3383 equated the employment benefits, such as pension and leave encashment (which is an equivalent of

accrued leave pay) as property of an employee of which he/she cannot be deprived once earned without following the due process of the law. It was held that:

> ***"Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."***

56. A perusal of the contract of employment between the appellant and the respondent dated 4th September 2002 indicates that there was no proviso to the entitlement of leave days, which is a requirement under the Employment Act. On the other hand, and as we have sufficiently demonstrated and established, entitlement to leave is sacrosanct, and by dint of its statutory backing, failure to grant an employee his right to leave for each year of service certainly constitutes a continuing wrong or injury.

57. We thus agree with the position taken by this Court in ***The German School Society & another (supra)*** that this being a service-related claim, relief can be sought even if there is a delay in seeking remedy since the state of affairs remained as they were; that is to say that, irrespective of whether the respondent had left the employment of the appellant, he still was entitle to be

paid his leave allowance, leave entitlement

being a mandatory statutory right. Thus, failure by the appellant to grant the respondent his entitlement to leave days with full pay as it was obliged to do under the law, constituted a continuous wrong.

58. ***Section 90*** of the ***Act*** sets the limitation period for bringing claims of continuous injury to be one year from the date of the cessation of the act. In this instance, the cessation period was when the respondent's services were terminated on 8th November 2017, and this is when the first right to sue accrued. The suit was filed on 20th June 2018 well within the statutory period. Therefore, the appellant's argument and attempt to take away the respondent's entitlement of the accrued leave without pay, under the umbrage of it being a statutory barred claim post the year 2015, cannot hold, and we accordingly reject it. In the same vein, we add that the appellant did not plead the statutory limitation under Section 90 as a defence, and is raising it for the first time on appeal, which is un-procedural.

59. We now address ourselves on the issue as to the propriety of the trial Judge adopting Kshs.10,094.70 in calculating the respondent's entitlement to pay in lieu of leave. Mr. Ajiwo, learned counsel for the respondent asked us to use the sum of Kshs.14,421 and proceed to make an award in that regard. Counsel submitted that the figure of Kshs.10,094.70 adopted by the Judge was an error apparent on the face of the record. At this point, we may point out that it would have been prudent for Mr. Ajingo to file a cross-appeal in this regard or apply to the trial court

to rectify the anomaly under the *‘slip rule.’*

60. That aside, the payslips produced by the appellant for the months of July to September 2017 indicate that the respondent, earned a basic salary of Kshs.14,421 at the time of his termination. The gross pay oscillates differently between the months of July to September 2017. For instance, in July 2017, the gross pay was Kshs.23,381.17; in the month of August 2017, the gross pay was Kshs.16,641.68; and, in the month of September 2017, the gross pay was Kshs.16,639.80. Further, the net pay which is commonly referred to as the 'take-home salary' after the mandatory statutory deductions and other voluntary deductions, such as loans or retirement contributions, also varied for the different months. In the month of July 2017, the respondent earned Kshs.10,350; in the month of August 2017 the respondent earned Kshs.6,710; and, in the month of September 2017, he earned Kshs.2,870.

61. Be that as it may, we have observed that, when an employee is on leave, they are entitled to their basic salary as if they were at work. In this regard, and having found that the continuing injury persisted and the injurious act continued until the cause of action arose, and in this case, at termination, it was not conceivable for the respondent to have sued the appellant for every year of leave denied. In the circumstances, we find that the proper remuneration to be applied was the respondent's basic pay at the time of exit.

62. It is trite law that a plea for accrued leave days is basically a claim for special damages, which must be specifically pleaded and strictly proved. There is no grey area when

a party is

making such a claim requiring us to explore. The last payslip of the respondent before his termination is one of September 2017 in which his basic pay was Kshs.14,421, which we find as what the trial court ought to have adopted in computing the accrued leave days.

63. Although the respondent did not file a cross-appeal, we are alive to the fact that our duty as a first appellate court is to re-evaluate and reanalyse the evidence afresh and come to our independent conclusion. As we do so, we take to mind that any claim based on one's salary is calculated against the basic pay. We are then at a loss how and why the respondent complains that the trial court did not calculate the entitled leave allowance based on the last basic pay of Kshs.14,421.00. On this, the trial court partly held:

> ***"… I award the Claimant payment in lieu of leave for twenty-one days per each served year for eighteen years, which is Kshs.10, 094.7 * 18***
> ***= 181,704.6. It is to be noted that failure by the Respondent to allow the Claimant to take leave for entire period of employment was a continuing injury as contemplated in Section 90 of the Employment Act, 2007, and that the same ceased at the point of termination of employment on 8th November 2017. The suit herein as filed (sic) on 21st June 2018."***

64. The figure of Ksh.10,094.7 arises from the calculation of*:*

basic pay of Kshs.14,421 x 21 divide by 30 days

=Ksh.10,094.7, which is then multiplied by 18 which is the number of years worked. The only error on the

part of the good Judge was failure to explain how she arrived at the

figure of Kshs.10,094.7, otherwise the calculation for all intent and purposes was right.

65. In view of the foregoing, we find and hold that we have no reason to disturb the decision of the trial court. Accordingly, we uphold the Judgment of the Employment and Labour Relations Court (ELRC) in Mombasa ***(Nzei, J.)*** dated and delivered on 28th April 2022. Consequently, the appeal herein is unmeritorious and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 21st day of November, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR