



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISUMU**

**APPEAL NO. E042 OF 2025**

EVANS KARUGA MWAI.....**APPELLANT**

**VERSUS**

BIKASH CARRIERS.....**RESPONDENT**

*(Being an appeal from the judgment of Hon. F. M. Rashid (PM) delivered on 23<sup>rd</sup> June 2025 in Kisumu CMELRC No. E322 of 2024)*

**BETWEEN**

EVANS KARUGA MWAI.....**CLAIMANT**

**VERSUS**

BIKASH CARRIERS.....**RESPONDENT**

**JUDGMENT**

1. Mr. Evans Karuga Mwai (the Appellant) instituted legal proceedings before the Kisumu Magistrate's court on 25<sup>th</sup>

November 2024 alleging unfair termination of employment and breach of contract. In a judgment delivered on 23<sup>rd</sup> June 2025 the Trial Magistrate dismissed the suit on the ground that it was time barred under section 90 of the Employment Act. The Trial Court noted that the cause of action accrued on 1<sup>st</sup> December 2021, while the suit was filed on 25<sup>th</sup> November 2024. The Appellant was aggrieved and he lodged a memorandum of appeal dated 15<sup>th</sup> July 2025 contending that:

- (a) The Learned Magistrate erred in law and fact by finding that the claim offended section 90 of the Employment Act despite the suit having been instituted within three years from the date the cause of action arose.
- (b) The Learned Magistrate erred in law and fact by failing to appreciate that his claim dated and filed on 25<sup>th</sup> November 2024 was filed before 1<sup>st</sup> December 2025 which was before the lapse of three-years.
- (c) The Learned Magistrate erred in law and fact by failing to consider his submissions and authorities thereby arriving at a wrong decision.

(d) The Learned Magistrate erred in fact and law by finding that the Appellant's claim does not comply with section 90 of the Employment Act.

(e) The Learned Magistrate erred in law and fact by dismissing his suit for being time barred.

2. On the strength of these grounds, he urged the Court to allow the appeal set aside or vary the Trial Court's Judgment and allow his claim before the Trial Court. He also sought the costs of the appeal as well as any other relief the court may deem fit to grant.

3. The Appeal was canvassed by way of written submissions.

#### Appellant's Submissions

4. The Appellant submitted that his suit was filed within time as required under section 90 of the Employment Act. He referred the Court to his Memorandum of Claim in which he indicated that he was terminated from employment on 25<sup>th</sup> November 2021 and that the suit was filed on 25<sup>th</sup> November 2024, being within the three-year limitation period. He faulted the Trial Magistrate for finding that the suit was filed

on 1<sup>st</sup> December 2021 and for failing to appreciate that no preliminary objection was raised, nor any evidence adduced, to demonstrate that the claim was time barred. The Appellant further submitted that the Trial Magistrate failed to consider his submissions and evidence. In particular, he asserted that his account of abduction while transporting sugar was ignored and that the Court failed to appreciate that his termination, effected without a suspension letter, amounted to constructive dismissal. In support of his case, he relied on **Selle v Associated Motor Boat Co. [1968] EA 123**, **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, **Peter v Sunday Post Ltd [1958] EA 424** and **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, which underscored the role of an appellate court to re-evaluate, re-assess and re-analyze the lower court record and come up with its own conclusions.

5. He submitted that the Respondent's failure to pursue the criminal proceedings in which it was the complainant was a

clear indication that his dismissal was unlawful. He consequently urged the Court to allow the appeal as prayed.

#### Respondent's Submissions

6. In opposition to the appeal, the Respondent urged the Court to re-evaluate and re-analyse the evidence before the trial court and reach its own independent conclusion, while exercising caution as required of a first appellate court. It relied on **Peter v Sunday Post Limited [1968] EA 123**, where the court held that although an appellate court has jurisdiction to review the evidence, such power must be exercised cautiously, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. The Respondent submitted that the Trial Magistrate correctly found that the Appellant's suit was time barred. It pointed out that in his statement of claim the Appellant indicated that he was suspended on or about 1<sup>st</sup> December 2021, and that time therefore began to run from that date. It further asserted that the Appellant's explanation that he awaited the conclusion of the criminal case was untenable, noting that he

filed the claim nearly two years after the criminal proceedings concluded on 7<sup>th</sup> November 2022.

7. Additionally, the Respondent submitted that the Appellant's fixed-term contract was not renewed beyond 10<sup>th</sup> August 2022, and that it therefore had no further obligations towards him thereafter. Reliance was placed on **Transparency International Kenya v Teresa Carlo Omondi [2023] eKLR**, where the court held that upon the lapse of a fixed-term contract, an employer is under no obligation to justify termination of employment on grounds other than the expiry of the contract. In conclusion the Respondent submitted that the appeal lacked merit and urged the Court to dismiss it with costs.

#### Disposition

8. This being a first appeal, I am obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd**

**[1968] EA 123** where the Court of Appeal outlined the duties of a first appellate court as follows:

*"I accept counsel for the respondent's proposition that this court is not not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of 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 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."*

[Emphasis supplied]

9. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence they presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.
  
10. The issues that this Court distils for determination are:

- (a) Whether the claim was presented before it became stale
- (b) If the claim was filed within time what remedies lie.

11. The claim was presented to the Chief Magistrates Court at Kisumu on 25<sup>th</sup> November 2024 and assigned No. MCELRC E322 of 2024. Limitation of actions in employment matters is provided for under section 90 of the Employment Act. The 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."*

12. If we take the Appellant's reckoning, the claim accrued on 25<sup>th</sup> November 2021. 3 years from that date bring us to 25<sup>th</sup> November 2024. It therefore follows that if the claim accrued

on 25<sup>th</sup> November 2021 as indicated in the claim, the Appellant filed his claim on the very last possible date to do so. He filed the claim at around 10.00am leaving lots of time before the expiry of his claim. If we take the reckoning by the Respondent, the cause of action accrued on 1<sup>st</sup> December 2021. It therefore means the Appellant filed his claim with about 6 or so days to spare before the claim became stale or time barred. It is the finding of this Court that the suit before the Magistrate's Court was filed within the time set for filing of a claim seeking remedies for alleged unlawful termination of employment. It is my finding that the Trial Court thus fell into error in determining that the cause of action was time barred in terms of section 90 of the Employment Act.

13. The remedies available to the Appellant in this Court is simple. The Court sets aside the Judgment and decree of the Learned Magistrate made on 23<sup>rd</sup> June 2025. Having vacated the decision made, this Court hereby remits the case back to the Magistrate's Court at Kisumu for the case to be heard by any other Magistrate other than the Hon. Fatuma Rashid

(SPM). The costs shall abide the outcome of the determination of the Magistrate's Court that will hear the claim afresh.

Orders accordingly.

**Dated and delivered at Kisumu this 20<sup>th</sup> day of January.**

**2026**

**Nzioki wa Makau, MCI Arb.  
JUDGE**

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