

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E046 OF 2025

BETWEEN

BATIAN SECURITY COMPANY
LIMITED.....APPELLANT

AND

FRANCIS ORERO
GICHANA.....RESPONDENT

(Being an appeal against the judgment of Hon. F.K. Munyi at Nyeri law courts delivered on 26th August 2025 in MCELRC No. E060 of 2023)

JUDGMENT

1. The Respondent instituted a suit against the Appellant before the Chief Magistrate’s Court at Nyeri, being CMEL Cause No. 60 of 2023. In the trial Court, he averred that he had been employed by the Appellant as a security guard from 2019 until 2022, when his employment was summarily terminated without adherence to the rules of natural justice. He contended that he was not invited to any hearing or accorded an opportunity to be heard prior to the termination.

2. The Respondent further asserted that throughout his employment, he was not granted any leave. He also asserted that the Appellant failed to pay him terminal dues or damages upon termination. Consequently, he sought the sum of **Kshs 432,077/-** comprising notice pay, underpayments, accrued leave, service pay, gratuity, as well as unremitted National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) contributions. In addition, he sought a declaration that his termination was unlawful and unfair, payment of his terminal dues in full, compensation for unfair termination, issuance of a certificate of service, and costs of the suit together with interest.
3. The Appellant opposed the claim through a Statement of Defence dated 13th December 2023. While admitting that the Respondent had been employed as a security guard, the Appellant denied that the termination was summary in nature.
4. It was the Appellant's case that the Respondent voluntarily resigned through a letter dated 17th May 2022. The Appellant further averred that the Respondent took his leave and off days as they fell due and was compensated for any accrued days not taken. The Appellant also denied any failure to remit statutory deductions, including NHIF and NSSF contributions.

5. The Appellant further contended that the claims for overtime, underpayment, unpaid leave, and off days were statute-barred under Section 90 of the Employment Act, as they constituted continuing injuries that had been brought more than twelve months after the cessation of employment.
6. The matter proceeded for hearing before the trial Court, with both parties tendering oral evidence. The Respondent testified in support of his case, while the Appellant called James Wanjohi Maina as its witness. Upon conclusion of the hearing, parties filed written submissions, after which the trial Court evaluated and analysed the evidence on record.
7. Ultimately, the trial Court entered judgment in favour of the Respondent and awarded him **Kshs 218,617.20** together with interest at court rates. The Court further directed the Appellant to issue the Respondent with a certificate of service within 45 days from the date of judgment.
8. In its judgment, the learned Magistrate found that the Respondent had not been unfairly terminated, but had instead resigned voluntarily. However, with regards to the claim for underpayment, the Court held that it did not constitute a continuing injury and found that the Respondent had indeed been underpaid, awarding him **Kshs 180,817.20**. Additionally, the Court awarded the Respondent **Kshs 37,800.00** in respect of unpaid leave and off days.

The Appeal

9. Aggrieved by the findings and orders of the trial Court, the Appellant lodged this Appeal, setting out the following four (4) grounds as enumerated in the Memorandum of Appeal:

- 1) The trial magistrate erred in law and fact in finding that the claims for underpayment, unpaid leave and off days were not continuing injuries within the meaning of section 90 of the Employment Act, 2007, and were thus time-barred.**
- 2) The trial court erred in law and fact in finding that the limitation period for the claims above was 3 years and not 1 year.**
- 3) The trial court wholly misapprehended the proviso to section 90 of the Employment Act, 2007 and thereby arrived at a wrong decision.**
- 4) The trial court erred in law and fact in awarding a sum of Kshs. 218, 617.20/= to the respondent against the law and evidence adduced.**

10. Accordingly, the Appellant seeks the following orders from this Court:

- 1) That this appeal be allowed.**
- 2) That the decision of the trial court be set aside and replaced with an order dismissing the claim entirely.**
- 3) Costs of this appeal**

Submissions

11. The Appeal was canvassed by way of written submissions. At the time of writing this Judgment, the Respondent's submissions were not available either in the Court's physical file or on the online portal, notwithstanding that the Court had granted the Respondent fourteen (14) days on 11th February 2026, within which to file the same.

12. On its part, the Appellant submitted that the trial Court erred in law by holding that the claims for underpayment, as well as unpaid leave and off days, did not amount to continuing injuries within the meaning of Section 90 of the Employment Act.

13. Relying on the decisions in *G4S Security Services (K) Limited v Joseph Kamau & 468 others (2018) eKLR* and *Thuita v Dedan Kimathi University of Technology (2014) KEELRC 208 (KLR)*, the Appellant argued that the claims for underpayment and unpaid leave and off days were statute-barred, having been instituted outside the twelve (12) months period prescribed under the proviso to Section 90 of the Employment Act.

14. The Appellant further argued that the claims being time-barred, no monetary award could properly issue in favour of the Respondent, and that the trial Court therefore fell into error in making the award.

Analysis and Determination

15. As this is a first appeal, the Court is under a duty to re-evaluate the evidence that was presented before the trial Court, together with the Judgment, and to arrive at its own independent determination on whether the Appeal is merited. In so doing, the Court is entitled to subject the entire evidence to fresh scrutiny and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This principle was articulated in *Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123*.

16. Guided by the foregoing authority, this Court is obliged to reconsider and analyse the evidence on record afresh, with a view to reaching an independent conclusion, while taking into account that it neither saw nor heard the witnesses during their testimony.

17. Upon reviewing the record before me, the Appellant's submissions, and the applicable law, the central issue that stands out for determination is whether the

trial Court erred in holding that the claims relating to underpayment, off days, and leave days did not constitute continuing injuries.

(i) Underpayments

18. At the trial Court, the Respondent was awarded **Kshs 180,817.20** on account of underpayment of salary. In reaching this decision, the trial Court held that underpayment is not a continuing injury but a right that accrues in the same manner as other terminal benefits, provided the claim is instituted within three (3) years from the date the cause of action arose.

19. The Appellant, both at the trial Court and on appeal, has maintained that a claim for underpayment amounts to a continuing injury and, as such, ought to have been filed within twelve (12) months from the date of termination of employment, which was not the case herein.

20. In light of the foregoing, it becomes necessary to examine at the outset what amounts to a continuing injury.

21. According to **Black's Law Dictionary (10th Edition, p. 906)**, a continuing injury is defined as: ***“An injury that is still in the process of being committed.”***

22. In considering the concept of a continuing injury, the Court of Appeal in ***The German School Society & another v Ohany & another [2023] KECA 894 (KLR)*** stated as follows:

“The principles underlying continuing wrongs and recurring/successive wrongs have been applied in employment disputes. A ‘continuing wrong’ refers to a single wrongful act that results in a continuing injury, while ‘recurring or successive wrongs’ are those that occur periodically, with each instance giving rise to a distinct and separate cause of action.”

23. The Learned Judges of Appeal further referenced the decision of the ***Supreme Court of India in Balakrishna S.P. Waghmare v Shree Dhyaneshwar Maharaj Sansthan AIR 1959 SC 798***, where the concept was explained thus:

“It is the very essence of a continuing wrong that it creates a continuing source of injury and renders the wrongdoer responsible and liable for the continuance of the said injury. If the wrongful act causes an injury that is complete, there is no continuing wrong, even though the resulting damage may persist. However, if the wrongful act is such that the injury itself continues, then it constitutes a continuing wrong.”

24. Further, the Court of Appeal cited with approval the decision in ***M.R. Gupta v Union of India (1995) 5 SCC 628***, where it was held as follows:

“The appellant’s grievance that his pay was not fixed in accordance with the rules constituted a continuing wrong, giving rise to a recurring cause of action each time he received a salary that was wrongly computed. So long as the appellant remained in service, a fresh cause of action arose every month when he was paid on the basis of the erroneous computation.”

25. In addition, the Court relied on the case of *M. Siddiq v Suresh Das (2020) 1 SCC*, where the Indian Supreme Court held that:

“A continuing wrong arises where there exists a legal, contractual, or other obligation to act or refrain from acting in a certain manner. The breach of such an obligation extends beyond a single act or omission, giving rise to a legal injury of a continuing nature.”

26. What can be drawn from the foregoing authorities is that a continuing injury denotes a wrong that is not confined to a single, isolated act or breach, but one that persists and is committed over a period of time.

27. Accordingly, in the case herein, for as long as the Respondent remained in employment of the Appellant, a fresh cause of action accrued each month he

received a salary below the prescribed minimum wage under the applicable Regulation of Wages (General) (Amendment) Order.

28. To this end, the Court finds that the breaches complained of by the Respondent concerning underpayment of salary constituted continuing injuries, as he alleged that the Appellant persistently underpaid him over a period of thirty-six (36) months.

29. **Section 89 (formerly Section 90) of the Employment Act** prescribes the limitation period applicable to employment claims, including those arising from continuing injuries, in the following terms:

“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 of, or in the case of a continuing injury or damage, within twelve months next after the cessation thereof.” (Emphasis added)

30. In essence, the Employment Act stipulates a limitation period of twelve (12) months for claims founded on a continuing injury, to be computed from the date the injury ceases, that is, when the breach or wrongful act comes to an end.

31.It follows, therefore, that a claim based on a continuing injury must be filed within twelve (12) months from the date the alleged breach or injury ceases.

32.In the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR*, the Court of Appeal considered the import of Section 89 in relation to continuing injuries and expressed itself as follows:

“Regarding a ‘continuing injury’, the proviso to Section 90 of the Employment Act requires that the claim be made within twelve months next after the cessation thereof. Further, upon the claimant’s dismissal, any claim based on a continuing injury ought to have been filed within one year, failing which it became time-barred.”

33.Turning to the present case, it is apparent from the record that the Respondent’s employment ended on 17th May 2022, when he tendered his resignation. Accordingly, under Section 89 of the Employment Act, the Respondent had until 17th May 2023 to file a claim for the alleged underpayments.

34.However, the Respondent instituted his suit in the trial Court on 23rd August 2023, which was after the expiry of the limitation period prescribed for claims

based on continuing injuries. As such, the claim for underpayment was statute-barred at the time of filing.

35. In light of the above, the Respondent's claim for underpayment could not be sustained at the trial Court, having been filed outside the period allowed under Section 89 of the Employment Act.

36. Consequently, the Court finds that the learned trial Magistrate erred in holding that the claim for underpayment did not constitute a continuing injury.

(ii) Leave days and off days

37. The trial Court further awarded the Respondent the sum of **Kshs 37,800.00** as compensation for unpaid leave and off days. In his Memorandum of Claim, the Respondent had sought **Kshs 78,110.00** in respect of 103 days.

38. It is notable that the Respondent did not provide a breakdown of the 103 days to distinguish between untaken leave days and off days. Given that this claim is specific in nature, the Respondent ought to have clearly pleaded what he was claiming as off days and leave days. However, this was not so, as the Respondent presented a global claim.

39. Further to the foregoing, the trial Court did not separate the elements of unpaid leave and off days. Instead, it made a lump sum award to cover both elements. This is notwithstanding the fact that the two components attract different rates of payment.

40. What's more, there is no evidence that the Respondent demonstrated at the trial Court that he worked beyond normal working hours without receiving due compensation. On this point, the Court concurs with the decision in the case of ***Rogoli Ole Manadiegi v General Cargo Services Limited (2016) eKLR***, where it was held that while the employer is the custodian of employment records, the employee bears the burden of proving any hours or days worked in excess of the legal maximum.

41. As such, the Respondent in this case bore the burden of establishing that he worked beyond the statutory maximum hours without being remunerated accordingly.

42. In any event, the employment records exhibited by the Appellant at the trial Court indicate that the Respondent received overtime pay. Notably, the Respondent did not claim or demonstrate that this payment was below his entitlement.

43. In view of these findings, the trial Court's award to the Respondent with respect to off days and leave days cannot be sustained.

Order

44. In the final analysis, the Court finds the instant Appeal to be meritorious and consequently allows it.

45. Accordingly, the Judgment of the trial Court in Nyeri CM ELRC No. E060 of 2023, delivered on 26th August 2025, is hereby set aside.

46. Each party shall bear its own costs both in this Court and at the trial Court.

DATED, SIGNED and DELIVERED at NYERI this 24th day of March 2026.

.....

STELLA RUTTO

JUDGE

In the presence of:

For the Appellant

Mr. Kimunya

For the Respondent

No appearance

Court Assistant

Ndati

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 had 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.

STELLA RUTTO

JUDGE