

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT BUNGOMA**  
**APPEAL NO. E001 OF 2025**

*(Being an appeal arising from the judgment of Hon. Mercela A. Onyango (Senior Resident Magistrate) delivered on 27th January 2025 in Bungoma Chief Magistrates' Court ELRC No. 18 of 2021)*

JAYNE NASIMIYU WASIKE..... APPELLANT

VERSUS

KENYA INSTITUTE OF MANAGEMENT.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

**JUDGMENT**

**I. INTRODUCTION**

1. In a judgment dated and delivered on 27th January 2025 the trial court awarded to the Appellant (the Claimant in the lower court) a sum of Kshs187,000/= plus costs of the cause.
2. Subsequently, a decree was drawn and issued on 17th March 2025.
3. Dissatisfied with the judgment, the Appellant, through Makokha Wattanga & Luyali Associates, filed a memorandum of appeal dated 10th February 2025 seeking that the entire judgment by the trial court be set aside and asking this court to re-evaluate the claim and make its own findings.

4. The appeal is based on the following grounds –

1. *THAT the Trial learned Magistrate erred in law and in fact in failing to award the Appellant the sum of Kshs.1,306,200/= when the same had been proved in accordance with the standard of proof.*
2. *THAT the Trial learned Magistrate erred in law and in fact by failing to find that the Appellant was constructively dismissed by the Respondent herein leading to a miscarriage of justice.*
3. *THAT the Trial learned Magistrate erred in law and in fact for finding that part of the claim was time barred and hence leading to miscarriage of justice and sitting on appeal against the decision of the court of similar jurisdiction that had ruled that the claim was time barred delivered on 18<sup>th</sup> September 2023.*
4. *THAT the Trial learned Magistrate erred in law and in fact for failing to find that the appellant had fulfilled the conditions in section 90 of the Employment Act which provided that the default on the part of the respondent was a continuing injury or damage.*
5. *THAT the Trial learned Magistrate did not explain how he arrived at the sum of Ksh.187,000/= and hence arriving at the erroneous decision leading to miscarriage of justice.*

6. *THAT the Trial learned Magistrate erred in law and in fact for failing to find that the appellant had proved her case on balance of probability as per the requirement of the law.*
5. The Appellant is seeking that –
- a) That this appeal be allowed as prayed.*
  - b) The Honourable court be pleased to make its own decision and set aside the Judgment of the Lower court.*
  - c) Costs of this appeal be awarded to the appellant.*
6. The appeal is opposed by the Respondent through Kiarie Kariuki & Githii Advocates.
7. By consent recorded on 1st October 2025, the court directed that the appeal be canvassed by way of written submissions. Mr. Makokha for the Appellant filed written submissions dated 7th October 2025 and Miss Watiri for the Respondent filed written submissions dated 4th November 2025.

## **II. SUBMISSIONS BY COUNSEL**

8. Counsel for the Appellant submitted that this being a first appeal this court has a duty to re-evaluate the evidence and the entire cause and arrive at its own independent findings and holdings.
9. It is further submitted that the oral and documentary evidence adduced by the Appellant in support of the claim during the trial was not challenged as the Respondent did not call any witness or evidence in court.

10. It is submitted that out of the Kshs1,508,200/= owed by the Respondent to the Appellant, only a sum of Kshs202,000/= was paid leaving a balance of Kshs1,306,200/=. It is thus submitted that the trial court ought to have entered judgment in favour of the Appellant in the sum of Kshs1,306,200/=.
11. It is submitted that after the Respondent closed its campuses in Kakamega and Mumias, the Appellant was left without a job as she was a lecturer in the two campuses and hence she was left jobless arising from constructive dismissal.
12. It is emphasized that contrary to the holding by the trial court, no part of the Appellant's claim was filed out of time and no part thereof was time-barred.
13. The court is requested to allow the appeal with costs.
14. Counsel for the Respondent identified the following issues for determination in this appeal –
- i. Whether the claim was time barred;*
  - ii. Whether the lower court included a claim that was time barred;*
  - iii. Was the claimant unfairly terminated?*
  - iv. Whether the claimant was entitled to the prayers sought.*
15. On the first issue, it is submitted that **Section 89 of the Employment Act** provides that actions based on contract of service or employment shall only be filed within three years next after the act complained of or, within 12 months of cessation in case of a continuing injury. It is

thus submitted that the trial court was correct in finding and holding that the claims by the claimant on contracts for work done in 2016 and 2018 were statute-barred.

16. On the second issue, it is submitted that it is upon the finding that part of the claim was statute-barred that the trial court excluded that part and then considered the amounts that had already been paid leaving the awarded balance of Kshs187,000/=. It is submitted that a sum of Kshs93,000/= was erroneously included in this award as the same related to the period from 1st September to 3rd November, 2018. It is submitted that this amount ought to be deducted from the award leaving a balance of Kshs94,000/=.
17. On the third issue, it is submitted that the Appellant did not adduce evidence in support of the allegation that her last contract was terminated. It is submitted that the last contract terminated through effluxion of time.
18. On the award of Kshs187,000/= the court is urged to deduct a further sum of Kshs93,000/= that was erroneously awarded and a further sum of Kshs2,104/= as the sum admitted as paid was Kshs202,104/= and not Kshs200,000/=.
19. The court is requested to dismiss the appeal with costs.

### **III. ISSUES FOR DETERMINATION**

20. The factual background of this matter is that the Appellant was an employee of the Respondent as a part-time lecturer in its Kakamega

and Mumias Campuses, teaching a variety of courses, for the period from 2013 to 2020. In 2020 the Respondent closed down the two campuses rendering the claimant disengaged. It is the Appellants case, as pleaded in the memorandum of claim, that she was constructively dismissed following the said closure.

21. The gist of the Appellants case as pleaded in paragraph 7 of the memorandum of claim – pgs. 4-33 of the record of appeal – is to the effect ***“That at the time of this constructive dismissal, the consolidated Gross emoluments amounted to Kshs1,508,200/- and out of which the Respondent paid the claimant the sum of Kshs202,000/- leaving an outstanding balance of Kshs1,306,200/-.”***

22. Further, the Appellant pleaded that the termination was unfair and unlawful both in substance and procedure. The Appellant prayed for

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- a) That this Honourable court be pleased to find that the termination was constructive dismissal by the Respondent and was unjustified, unlawful, unfair, wrongful and illegal.***
- b) Outstanding salary and emolument arrears of Kshs.1,306,200/=.***
- c) Costs of this suit.***
- d) Interest at court rates.***
- e) Any other relief this Honourable court may deem fit and just to grant.***

23. In response to the claim – pgs. 84-86 of the record of appeal - the Respondent denied each and every allegation contained in the claim and more so, that the Appellant was constructively or otherwise terminated or dismissed and or that she was entitled to the claimed sum of Kshs1,306,200/= by the Respondent.
24. The matter came up for hearing before the trial court on 25th November 2024 when the Appellant testified and produced the documents filed as exhibits and she closed her case. The Respondent did not attend the hearing and adduced no evidence in response.
25. Subsequently, the trial court delivered the judgment in the terms set out in the introductory part of this judgment. That is the judgment that is challenged in this appeal.
26. Notwithstanding that the Respondent did not call any evidence during the trial, it was upon the Appellant to prove her case on a balance of probabilities as required by the law.
27. This being a first appeal, this court has duty and obligation to evaluate the evidence adduced, and indeed all the materials presented to the trial court, but also considering that it neither conducted the trial, nor saw or heard the witness testify.
28. In my considered view, the issues for determination by this court are the following –
- (i) Did the Appellant prove her case as pleaded?***

***(ii) Did the trial court err in the awards that it granted to the Appellant?***

***(iii) What orders should this court make in disposal of this appeal?***

***(iv) Costs.***

29. On the first issue, the Appellant produced as an exhibit her last contract with the Respondent dated 7th December 2019 – pgs. 20-30 of the record of appeal - that was to run from that date until 31st March 2020. The necessary implication is that the Appellant was so engaged with the Respondent until the end of the contract period and hence any termination before the end of the contract, unless done in accordance with law and the terms in the contract, was bound to be unlawful.

30. The Appellant pleaded in the memorandum of claim that she was terminated in 2020, without giving the specific date. As stated above, it was upon the Appellant to prove her case. ***Sections 107, 108, & 109 of the Evidence Act*** are clear that he who alleges shall prove. In my considered view, the right presumption is that since the Appellant testified that she was disengaged in 2020, the same was as a result of expiry of the last contract through effluxion of time. No evidence was tendered in the support of the allegation and pleading that the Appellant was terminated or constructively dismissed or otherwise.

31. The trial court was thus right in holding that the Appellant failed to prove that she was unfairly or unlawfully terminated or dismissed

and the court has no reason for interfering with that finding and holding.

32. The second aspect of this issue is whether the Appellant proved that she is entitled to the claimed sum of Kshs1,306,200/=. In support of this claim, the Appellant exhibited a spreadsheet – pgs. 23-30 of the record of appeal – arriving at the ultimate balance claimed above. The account runs for the periods from 2016 to 2019.
33. In that regard, it was upon the Respondent as the employer to rebut this claim by providing a different account showing what was owed to the Appellant and what was paid during the entire period of engagement. **Sections 10 & 74 of the Employment Act** place a duty on an employer to keep employment records and to avail such records whenever required or necessary.
34. In absence of an alternative record or statement from the Respondent confirming payments made to the Appellant and other relevant details on the courses taught, as to compare with what was filed by the Appellant, the court finds and holds that the Appellant proved that she was indeed owed the claimed amount of Kshs1,306,200/=.
35. The next consequential question is whether the entire claim as filed by the Appellant was filed within the statutory period as provided for under **Section 89 of the Employment Act (formerly Section 90)**.

36. This appeal raises the ever-looming issue of what constitutes a continuing injury as envisaged under **Section 89**. For ease of reference, **Section 89 of the Employment Act** 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.”***

37. On 22nd July 2019, the Appellant was paid a sum of Kshs202,104/= - pg. 31 of the record of appeal. The payment voucher in support thereof does not indicate what the payment was covering or whether there was any balance left.

38. The trial court was of the opinion and held that the claims based on the alleged payment arrears for the period from 2013 to 2018 could not be paid, as a claim based on the same was time-barred by the time the claim was filed in court on 15th November 2021 – pg. 124 of the record of appeal. In my considered view, the trial court partly arrived at the right and lawful conclusion but also made an error in that by the time the claim was filed in court a period of over three years had not lapsed since the 2018 contract expired on 13th

November 2018. The trial court, therefore, ought to have considered the claim based on the 2018 contract on merits rather than dismissing the same as time-barred.

39. However, from the memorandum of claim and the oral testimony in the trial court, the Appellant neither pleaded nor proved the specific arrears for each contract of service. The lump sum claimed of Kshs1,306,200/= is said to relate to the period of engagement from 2016 to 2019. The court has studied the record filed as produced by the Appellant and established that the claims for 2018 amounts to Kshs1,037,600/= (193,000/= + 96,000/= + 90,000/= + 93,000/= + 193,600/= + 96,000/= + 90,000/= + 93,000/= + 93,000/=).

40. The claim for the 2019 contract amounted to Kshs294,000/= (72,000/= + 102,000/= + 120,000=). Therefore, as at the end of the 2019 contract, the Appellant ought to have received a total of Kshs1,037,600/= + Kshs294,000/= making a total of Kshs1,331,600/=.

41. As stated above, it was upon the Respondent, as the employer and custodian of employment records, to avail records to counter and rebut the evidence by the Appellant. It was also upon the Respondent to avail records to controvert the Appellant's position that while the above sum was pending she was only paid a sum of Kshs202,104/= as per the payment voucher she availed in court as evidence. Again, the Respondent did not do that.

42. In the circumstances, the court finds and holds that the trial court erred in fact and law in failing to consider the scenario discussed above. I find and hold that the Appellant is thus entitled to Kshs1,331,600/= less Kshs202,104/= paid leaving a balance of Kshs1,129,496/=.
43. The Appellant alleged that she was constructively dismissed or terminated after the Respondent closed its Kakamega and Mumias campuses. However, she did not indicate exactly when that happened as to help the court determine whether it was before or after her 2019 contract expired through effluxion of time on 31st March 2020. In the circumstances, the court finds and holds that the employment relationship extinguished legally when the last contract expired.
44. Consequently, the appeal succeeds and the award by the trial court in the sum of Kshs187,000/= is hereby set aside and substituted with an award of Kshs1,129,496/=.

## **VI. ORDERS**

- (i) A declaratory order be and is hereby issued that the employment relationship between the parties herein expired through effluxion of time.***
- (ii) The award of Kshs187,000/= by the trial court is hereby set aside and substituted with an award of Kshs1,129,496/=.***
- (iii) The Appellant is awarded costs for the trial in the trial court and for this appeal.***

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 27<sup>TH</sup> DAY OF APRIL 2026.**

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**DAVID NDERITU**  
**JUDGE**

ORIGINAL