**Ng'onga v Maseno University (Appeal E035 of 2024)**
**[2025] KEELRC 92 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 92 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL E035 OF 2024**

**JK GAKERI, J**

**JANUARY 27, 2025**

**BETWEEN**

**DR BILLY GEORGE NG'ONGA ..... CLAIMANT**

**AND**

**MASENO UNIVERSITY ..... RESPONDENT**

## JUDGMENT

1. This is an appeal against the Judgment of the Chief Magistrate's Court (Hon. Maureen Nyigei, Principal Magistrate) at Kisumu on 27th June, 2024 in MC. CC 443/2007.

2. In that judgment, the learned trial Magistrate found that the appellant was the 3rd grievant in the Industrial Court of Kenya Cause NO. 814 'N' of 2009, Universities Academic Staff Union V Maseno University and held that the decision of Wasilwa J. in that case rendered the claim for salary in lieu of leave res judicata and dismissed the suit with costs.

3. The appellant's suit before the Magistrate's Court had a long and chequered history. The original plaint dated 16th July, 2007 was filed on 18th July, 2007 and the total sum claimed as salary in lieu of leave was Kshs.560,244.00.

4. The appellant's case was that as he had not proceeded on leave since 1996 at the instance of the respondent and was entitled to salary in lieu of leave. He contended that leave was denied to ensure that the university conducted a trimester system.

5. The respondent's statement of defence dated 27th August, 2007 was filed on even date denying all the claimants averments and alleging that the leave allowance was duly paid.

6. It denied owing the appellant the amount claimed and no demand or notice of intention to sue had been served.

7. Subsequently, the respondent filed a Notice of Preliminary Objection on the Court's jurisdiction on account of the Kshs.80,000 gross salary limit under Gazette Notice No. 6024 dated 22nd June, 2018 res judicata and limitation of time but the same was not successful in dislodging the appellant's claim. The appellant attached the ruling which dismissed the Preliminary Objection.

8. Strangely, the appellant's witness statement was signed on 22nd November, 2019, more than 12 years after the suit was filed. Sometime in late November, 2020 and the 1st half of 2021 both parties amended their pleadings. While the respondent's amendment was precipitated by the need to incorporate details in Industrial Court Cause No. 11 of 2013, Kisumu Appeal No. 1 of 2014 and Nairobi High Court Misc. Application 527 of 2007, the appellant's amendment stemmed from a change of Advocates and need to embellish the claim on termination, claim for gratuity and salary in lieu of leave from October, 2006 to May 2009.

9. The sum claimed rose to Kshs.999,328.40 and as a consequence the respondent amended its statement of defence again in July, 2021 and filed a witness statement, almost a year later.

10. However, page 2 of the Amended plaint is missing at page 68 of the Record of Appeal.

11. The appellant's response to the amended statement of defence raised no new issue.

12. Notably, the appellant attached evidence to prove that in 2003 and 2004, he sought accumulated annual leave of 200 days and 64 days respectively but both applications were not approved by the Head of Department nor forwarded to any other officer for action.

13. Similarly, evidence on record showed that senior officers of the University including the Vice-Chancellor and Deputy Vice-Chancellors were paid in lieu of leave for 35 days in 2006.

14. Puzzlingly, an application dated 4th August, 2021 seeking to transfer the suit to the Employment and Labour Relations Court on account of Gazette Notice No. 6024 failed on 11th November, 2021 when it was dismissed with costs.

15. The appellant testified that his letter of appointment was dated 17th August, 1994 and was employed by the respondent until 29th May, 2009 when his employment was terminated and had risen from a Tutorial Fellow to a Lecturer.

16. He admitted that he was invited to attend a disciplinary committee hearing but was not informed about being accompanied by a colleague and denied the charge of having placed an advertisement in the Nation Newspaper advising students not to report to the University as the strike was still on. That he was at Nakuru at the time editing conference papers.

17. That the advertisement was not signed by anyone but had his name and participated in the UASU meeting that discussed the advertisement and was privy to its contents and was not surprised by its contents or its publication and was thus guilty as charged.

18. That he received a letter of termination of employment dated 28th May, 2009 signed by the Deputy Finance Minister and copied to the Vice-Chancellor and no valid reason was given and the procedure was not adhered to.

19. It was his testimony that the National Committee of UASU held a meeting at Maseno on 10th November, 2006 and resolved to put up an advertisement advising students not to report until the strike issue was resolved and signed the minutes.

20. That the minutes showed that he was not in Kisumu at the time and one Mary Gorrette who placed the advertisement swore an affidavit denying that she was advised by the appellant.

That she was the Treasurer UASU Maseno Chapter.

21. It was the appellant's testimony that they were directed by the National Executive Committee of UASU to put up the advertisement and they had no choice and undisclosed persons provided drafted the draft notice and money for the task.

22. In contradiction of earlier evidence, the appellant testified that the notice was outside the knowledge of the committee including himself.

23. That he was contesting the 2nd dismissal on 28th May, 2009 and the respondent refused to attend conciliation meetings despite being invited.

24. The appellant admitted that the sum of Kshs.3,200,084 was deposited in his account in 2nd August, 2017 and was expecting salary from October 2006 to 30th May, 2009 and 3 months salary in lieu of leave.

25. The appellant could not deny that the payment included his terminal dues and could not confirm what the amount encompassed.

26. It was his testimony that he had not proceed on leave for 15 years as the University had a trimester system and was not compensated and was thus discriminated.

27. That he was entitled to gratuity at 30%.

28. The appellant testified that he was a member of the pension scheme but had not provided a copy of the pay slip.

29. According to the appellant, the case instituted by the union had 5 grievants and he was not the plaintiff and did not address the issues in the instant case.

    He testified that leave was approved by the Head of Department.

30. After the appellant was recalled following the filing of documents by the respondent, he confirmed that he received the sum of Ksh.3,211,914.00 in his account and payment begun in November, 2006 and the instant case partly related to the dismissal in 2009 and the dismissal in 2006 was dealt with.

    That although the instant suit was initially about leave, it was amended.

31. According to the appellant, he was not involved in the earlier case initiated by the union (814 of 2009) and the respondent is yet to pay all his money but could not tell how much or what has not been paid for.

**Respondent's evidence**

32. RWI, M/s Judy Akoth Akinyi admitted that the respondent paid more than 9 million in the case filed by the union and the appellant was one of the grievants in the case.

33. That the sum of Kshs.3.2 was paid to the appellant pursuant to the Judicial Review that quashed the summary dismissal for the period November, 2006 to May 2009 and the respondent did not owe the appellant any dues as he was not entitled to gratuity being on permanent and pensionable terms.

34. That the appellant was paid Kshs.1.8 million by the Federation of Kenya Employers (FKE) which represented the respondent in UASU V Maseno University.

35. On pay in lieu of leave, RWI testified that she could not tell whether the appellant took leave. That the sum of Kshs.3.2 million was in respect of withheld salary of 2006 to 2009 paid in 2017 but not interest was paid as the Court did no so direct and no compensation was awarded.

**Submissions**

36. The appellant submitted on whether:

    i. The suit is res judicata.

    ii. Termination of employment was unfair and unlawful.

    iii. The appellant is entitled to salary in lieu of leave.

37. On res judicata the appellant argued that the amended claim included interest on the 3.2 million paid and gratuity and was thus not res judicata. That the termination of employment was unfair as he was targeted for participating in union activities and was thus entitled to maximum compensation for the termination of employment having served for 15 years.

38. The Respondent on the other hand, submitted that the appellant was not entitled to gratuity as it had a pension scheme and thus Section 35(6)(d) of *Employment Act* disqualified the appellant from gratuity.

39. On payment of terminal dues, the respondent submitted that the appellant was paid Kshs.3,211,914 for termination of employment and admitted the same.

40. On res judicata the respondent cited Section 7 of the *Civil Procedure Act* as well as UASU V Maseno University, Industrial Court Cause NO. 814 of 2009 to argue that the sum of Kshs.8,848,577.60 was paid for salary in lieu of leave and part time teaching.

41. Reliance was made on the Court of Appeal decision in John Florence Maritime Services Ltd and Another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR to urge the element of res judicata and submit that the suit was res judicata since the union represented the appellant and his evidence was relied upon.

42. The respondent argued that the appellant was seeking a second bite at the cherry which the Courts flown upon and the suit ought to be struck out.

43. On proof of the case on a balance of probabilities, the respondent argued that the appellant had not proved entitlement to gratuity as he was employed on permanent and pensionable terms and the leave application forms filed had no signature of the Registrar Administration and the respondent had availed evidence showing that payments were made.

44. Reliance was made on the sentiments of the Court in CMC Aviation Ltd V Crusair Ltd (No.1) [1987] KLR 103 to urge that pleadings are not evidence unless admitted.

45. After considering the evidence produced by the parties, the learned trial Magistrate framed four (4) issues for determination on appellant's eligibility to gratuity, whether terminal dues were paid, res judicata and prove of the case on a balance of probabilities.

46. The court dealt with the issue of res judicata only, and relying on the decisions in Industrial Court Cause No. 814 of 2009 UASU V Maseno University, Nairobi High Court Misc. Civil Application No. 417 of 2012 Dr. George Billy Ng'ong'a V Maseno University, High Court Misc. Application No. 527 of 2007 Dr. Billy George Ngong'a V Maseno University and Kisumu Civil Appeal No. 1 of 2014 Maseno University V Universities Academic Staff Union and in particular the decision in Industrial Cause No. 11 of 2013 (formerly HCC No. 814 of 2009) found that the instant suit was res judicata and dismissed it with costs.

    This decision that precipitated the instant appeal.

47. The appellant faults the trial Magistrate on 5 grounds set forth in the Memorandum of Appeal.

48. That the learned Magistrate erred in law and fact by:

    1. Failing to appreciate the evidence adduced by the parties, exhibits and the law and arrived at a wrong judgment.

    2. Finding that the suit was res judicata without distilling the issues in the case and in the earlier case.

    3. Finding that the appellant had been fully paid leave allowance and gratuity without congent evidence from the respondent.

    4. Failing to appreciate that an employee is entitled to gratuity even if he is a member of a pension scheme and NSSF if the same is provided for in the contract of employment or Collective Bargaining Agreement (CBA).

    5. Narrowly addressing on the issue of res judicata among other issues and thus arriving at a manifestly flawed decision.

49. These grounds may be condensed into two namely: failing to appreciate and apply the evidence in totality and res judicata

50. The appellant prays for setting aside of the judgment and decree of the learned trial Magistrate and allow the appeal with costs.

**Appellant's submissions**

51. On res judicata the appellant argues that the suit was not res judicata as the causes of action were different and this was the 1st case. That the respondent relied on HCC Misc. App. No. 47 of 2021, a contempt application to urge that the suit was res judicata yet there was claim for leave pay. That UASU V Maseno University (Supra) was based on unfair termination of 5 persons including the appellant and leave earned was not sought and in any case all the cases were filed after the instant suit.

52. The appellant contends that the threshold for res judicata as espoused by the Court of Appeal in John Florence Maritime Services Ltd and Another V Cabinet Secretary Transport & Infrastructure & 3 Others (Supra) had not been met, to submit that the finding of the trial Magistrate that the claim for unpaid leave, gratuity and interest were res judicata was not based on the evidence on record.

53. Concerning entitlement to pay in lieu of leave the appellant submits that he was not allowed to proceed on leave for the period worked and availed documents of the same and top officials were paid in lieu of leave.

54. Reliance was made on Section 28 of the *Employment Act* on leave and the sentiments of the Court in Shatora V Orange Garage for World Ltd [2024] KEELRC 842 (KLR) to urge that annual leave is a statutory entitlement.

55. On interest on the sum of Kshs.3,211,714.00, the appellant urges that since the amount was due in 2009 and was paid in 2017, it was imperative to compensate the appellant with interest owing to inflation as no explanation was given and the respondent gave no plausible reason for the 8 years delay.

    That the appellant was claiming Kshs.3,597,535.09 as interest.

56. Being a first appeal, it is trite law that the duty of the Court is re-evaluate and reconsider the evidence afresh and arrive at its own conclusions bearing in mind that it neither saw nor heard the witnesses as

held in Selle & Another V Associated Motor Boat Co. Ltd [1968] EA 123, Abok James Odera t/a A. J. Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR and Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR among others.

57. As to whether the learned trial Magistrate ought to have considered all the other issues including res judicata and find that the suit was indeed res judicata as she did, the principles that govern the doctrine of res judicata are well settled.

58. Section 7 of the *Civil Procedure Act* provides that:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

59. In The Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others [2017] eKLR, the Court of Appeal held as follows:

60. For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised...

61. The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice".

62. Similarly, in C.K. Traders Ltd & 2 Others V Kennedy Mwangi & Another [2021] eKLR E. C. Mwita stated as follows:

> ...The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
>
> > Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier

judgment, which may have determined the questions of law as well as of fact between the parties..."

See also Tee Gee Electronics & Plastics Co. Ltd V Kenya Industrial Estates Ltd [2005] KLR 97.

63. The foregoing sentiments of the Courts succinctly capture the essence of the doctrine of res judicata. In the instant case, the learned trial Magistrate is faulted for having singled out res judicata among a myriad of other issues.

64. It is not in dispute that learned trial Magistrate isolated four issues for determination but dealt with res judicata first, which is understandable as it is a threshold issue.

65. Would it have been efficient use of judicial time for the learned Magistrate to consider all the issues raised and come to the conclusion that the suit was res judicata?

66. Further, assuming that the trial Court was correct in its finding on res judicata, what would have been the need to address issues which the Court was satisfied had arisen and dealt with by another court?

67. In sum, the Court is not persuaded that the learned trial Magistrate ought to have determined all the other issues raised having come to the conclusion that the suit or issues before the Court were res judicata.

68. Concerning entitlement of the appellant to gratuity, the respondent averred that he was not and RWI testified that the appellant was employed on permanent and pensionable terms and the respondent had a contributory pension scheme and the appellant admitted having been a member in addition to the compulsory National Social Security Fund (NSFF) membership.

69. Strangely, the appellants written witness statement dated 22nd May 2019 makes no reference to any claim for gratuity or the amount due or how he qualified for the same.

70. Notably, although paragraph 4A of the appellants Amended Plaint states that he was entitled to gratuity at the rate of 15 days wages for the 15 years served, and pay in lieu of annual leave.

71. However, as mentioned elsewhere in this judgment, page 68 which is page 2 of the Amended Plaint, and which perhaps contained the tabulations referred to by the Court of Appeal in Maseno University V UASU (Supra) was not filed.

72. From the record, it is unclear to Court how the appellant justified his entitlement to gratuity under clause 28.2 of the respondents Terms of Service for Academic, Senior Library and Administrative Staff, 2001, a copy of which the appellant availed.

73. Under clause 28.2.1 only staff appointed on contract could opt out of the membership of the pension scheme where the Superannuation Scheme Rules permitted and with agreement of the pension scheme.

74. The appellant tendered no shred of evidence to show that he was employed on contract and had opted out of the respondent's pension scheme.

75. A copy of the current letter of employment and a written agreement or intimation that the appellant had opted out of the pension scheme in consonance with the Superannuation Scheme Rules would have effortlessly proved that the appellant was not a member of the respondent's pension scheme.

76. The foregoing is critical as Section 35(6) of the *Employment Act* disqualifies payment of service pay, if the former employee was a member of the NSSF and/or a registered Pension Scheme regulated by the Retirement Benefits Authority.

77. Alternatively, the appellant could have provided a copy of the CBA between UASU and Maseno University to show that academic staff were entitled to gratuity.

78. In the absence of any contractual term entitling the appellant to gratuity including the rate or verifiable evidence of compliance with clause 28.2 of the respondents Terms of Service for Academic Senior Library and Administrative staff, the appellants claim for gratuity had no factual or legal basis for award.

79. In the Court's view, the learned trial Magistrate did not err in law or fact by failing to appreciate that gratuity is payable to an employee if provided for in the contract of employment or a CBA. The appellant provided none of the above.

80. It is also not lost to the Court that the claim for gratuity at the rate of 15 days for each year, which is essentially service pay under Section 35 of the *Employment Act* was included in the Amended claim dated 19th April, 2021, almost six (6) years after the Court of Appeal set aside the award of terminal benefits at 15 days for each year awarded by Wasilwa J in Universities Academic Staff Union V Maseno University (Supra), which in the Courts view was an attempt to test the waters before the learned Magistrate.

81. The learned trial Magistrate is also faulted for finding that the appellant had been fully paid leave allowance and gratuity.

82. On this issue, while RWI, Joy Akoth testified all payments due to the appellant had been made, the appellant testified that the respondent had not paid all his dues.

83. It is common ground that the appellant was dismissed from employment on two separate occasions in 2006 and May 2009 and after the termination was quashed by the High Court, in Misc. Application No. 527 of 2007, the respondent paid the sum of Kshs.3,211,914.00 to the appellant as salary and house allowance entitlement and he admitted having received the cash in his bank account.

84. In his evidence, the appellant testified that although the amount was styled as terminal dues, it was exclusively wages as per the respondent's internal memo dated 22nd June, 2017.

85. Similarly, the appellant was the 3rd grievant in Universities Academic Staff Union V Maseno University (Supra) and the Court awarded him the sum of Kshs.1,812,112.00 comprising the sum of Kshs.1,260,000.00 as compensation for unlawful termination of employment and Kshs.55,512.50 as terminal benefits at 15 days for each year worked.

86. The latter was set aside by the Court of Appeal in Kisumu Civil appeal NO. 1 of 2014, Maseno University V UASU (Supra).

87. The amount due to the appellant was paid through the Federation of Kenya Employers (FKE) which represented the appellant in the case.

88. The respondent tendered no evidence to prove any other payment to the appellant other than on account of the Judicial Review No. 527 of 2007 and the Court of Appeal decision dated 6th November, 2015.

On leave allowance the appellant admitted that he was paid annually.

89. Ground 3 of the Memorandum of Appeal faults the trial Magistrate for finding that leave allowance had been fully paid yet the appellant did not contest leave allowance, which is essentially leave travelling allowance, which is payable once a year whether an employee has proceeded on annual leave or not.

90. The appellant provided documentary evidence to show that senior officials of the respondent including the Vice-Chancellor claimed pay in lieu of leave for 35 days in 2006, an allegation, the respondent did not controvert.

91. Equally, the appellant availed copies of Leave Application Forms by which he had sought annual leave in 2003 and 2004 for 200 and 64 days respectively but the same was declined by the Head of Department.

92. It is general practice in both private and public institutions that the supervisor is required to approve the suggest leave timings of the supervisee to ensure that services are rendered seamlessly.

93. Refusal by the Head of Department to approve an employee's leave renders the application otiose unless the denial is overruled by a higher authority such as the Vice-Chancellor in the case of a university scenario as was the case here.

94. More significantly, the respondent tendered no evidence to prove that the appellant proceeded on annual leave during the duration of his employment.

95. Under the terms of employment, the appellant was entitled to 36 working days leave every calendar year and application for leave was formal, by filling in the prescribed form to ascertain the number of days sought and taken.

96. Under Clause 13.2.4, leave was not accumulable save will prior permission of the Vice-Chancellor and leave not taken was forfeited.

97. The two Leave Application Forms on record show that the appellant sought leave 2 times only and it was declined and did not follow up with the Vice-Chancellor for accumulation of the days as per the terms of employment.

98. Without verifiable evidence that annual leave was denied in 2005 and 2006, it is evidentiary difficult to sustain a claim for pay for untaken leave for the duration claimed.

99. Similarly, denial of annual leave gave the appellant a cause of action for that year only and the provisions of the *Limitation of actions Act*, applied up to 1st June, 2008.

100. Although the appellant could not demonstrate how the amount claimed per year was arrived at, it is arguable that he had an enforceable cause of action if he had actually sought leave and the same was denied as in the two (2) instances demonstrated.

101. As matters stand, the only sustainable claims are for 2003 and 2004 36 days per year, a total of 72 days.

102. As regards appreciation of the evidence on record, the trial Court set out the averments of the parties and summarised the facts of the case at page 2 of the judgment. A wholist reading of the decision reveal that the trial Court was alive to the evidence before it and appreciated its implications.

103. The absence of detailed analysis of the evidence on specific issues is principally because, the Court deemed that exercise unnecessary having found that the suit was res judicata.

104. Finally, as to whether the suit is res judicata, the appellant contends that it is not as it was filed before the others cited by the respondent as the basis of res judicata and neither a claim for pay in lieu of annual leave or gratuity nor interest was litigated in the others.

105. In any case the appellant submits HCC Misc. Application NO. 417 of 2012 and HCC Misc. Application No. 527 of 2007 involved contempt of court and prerogative writs respectively, which are not substantive issues.

106. Puzzlingly, the appellant made desultory reference to the Employment and Labour Relations Court decision in UASU V Maseno University (Supra) which was the basis on which the trial court grounded its finding that the instant suit was res judicata.

107. A detailed analysis of how Industrial Court Cause No. 11 of 2013 formerly NRB HCC No. 814 n OF 2009 raised different issues from the instant suit and how the trial magistrate erred would have given the Court an incisive appreciation of the appellant's contention, that indeed the suit was not res judicata.

108. An allegation that the causes of action are different, is respectfully, patently insufficient.

109. In Universities Academic Staff Union (UASU) V Maseno University (Supra), the union sued the university on behalf of 5 grievants namely, Professor Adhiambo Odhuno, Dr. Mary Goretti, Dr. Bill G. Ngong'a (the appellant Professor Inyani K. Simala and Mr. Elvestone C. Zenge Mwangombe for unfair termination of employment and the union sought:

    a. Immediate and unconditional reinstatement.

    b. Payment of all withheld dues from November, 2006.

    c. Payment of salary up to retirement.

110. The Court found the termination unfair and awarded compensation and terminal dues but did not reinstate the grievants.

111. On appeal by the respondent, the Court of Appeal found that the termination was unfair under the provision of the repealed *Employment Act*, Cap 226 and the repealed Trade Disputes Act, the applicable law.

112. According to the Court of Appeal, the grievants were treated unfairly and unjustifiably.

113. The Court further found that the trial court had no justification to ward terminal benefits as evidence showed that it had been computed and paid out to those entitled.

114. The Court further held;

> On the cross appeal, the main issue is the payment in lieu of leave, unpaid claims for part time teaching and others which they said were pleaded and proved.

115. Although I find, contrary to the submission of the appellants that the claimants did actually make such claims in the main body of the amended memorandum of claim, and attached annexures, tabulating how the amounts were arrived at, there was paucity of evidence adduced to support the same and that would explain why the learned Judge did no award the said sums. I do not have sufficient evidence before me to enable me award the claims in question as prayed in the cross appeal"

116. From the foregoing sentiments, it is decipherable that the union (respondent) had in its amended memorandum of claim itemized the terminal dues payable to the grievants and they included pay in lieu of leave and part-time teaching among others, which would explain their incorporation in the Cross-Appeal.

117. Instructively, in their original claim, the 3rd grievants prayed for withheld dues from 2006.

118. Contrary to appellant's evidence that he was not involved in Industrial Court Cause No. 814 'N' of 2009 and was not its prosecutor, he was, as he did not deny that he was grievant Number 3 and testified in the case.

119. More significantly, the claimant union filed the case on behalf of its 5 members, consistent with the provisions of Section 22 of the *Employment and Labour Relations Court Act* on representation before the Court.

120. The appellant cannot be heard to say the averments, evidence and findings of the Court in that matter did not affect his instant case.

121. He is estopped and cannot wish away the situation. He is bound hook, line and sinker and as the Court of Appeal found, the claimant union itemised the claims it was making on behalf of the grievants tabulating the amounts it was claiming on their behalf but availed no evidence for the trial court or the Court of Appeal to grant the claims.

122. Indeed, these claims were the gravamen of the union's cross-appeal which the Court of Appeal found unmerited.

123. In his evidence in chief the appellant testified that the phrase "terminal benefit" encompassed all accrued benefits, wages, allowances, bonus, arrears, leave in lieu of notice, all put together.

124. It follows that the fact that the claimant union itemized and tabulated the amounts due to the grievants in the body of its amended claim (the relevant page was not filed), would appear to suggest that all terminal dues including gratuity, if any ought to have been claimed and the issue was litigated before the Court.

125. The appellant's argument that the instant case was the first appear to ignore the fact that the appellant filed the instant suit before the Magistrates Court on 18th July, 2007 and made no effort to prosecute the same until 2019 when a written witness statement was filed. It is unclear when the suit was indeed served on the respondent and in the meantime other matters affecting to the appellant were filed and determined including Industrial Court Cause No. 814 'N' of 2009, whose judgment was delivered on 18th September, 2013.

126. In the Courts view, one of the issues litigated in Industrial Court Cause No. 814 'N' of 2009 and Kisumu Appeal No. 1 of 2014 was the terminal dues payable to the appellant and failed for want of proof as observed by the Court of Appeal.

127. In an attempt to salvage the instant case, the appellant amended the claim in April 2021 to include a claim for gratuity and interest on the amount paid in 2017 resulting from an earlier decision.

128. Clearly, none of these additions made after the Court of Appeal decision, which overturned the award of service pay as terminal benefits, changed the complexion of the case.

129. A claim for gratuity and pay in lieu of annual leave in a dismissal or termination of employment is a claim for terminal dues or benefits due to the employee.

130. Finally, on the issue of res judicata it is discernible that the issue of terminal dues or benefits due to the appellant was directly and substantially in issue in UASU V Maseno University (Supra), the appellant was party to both cases, litigation under the same title and the Court that heard and determined the former suit had jurisdiction to hear and determine the subsequent case.

131. Instructively, Section 7 of the *Civil Procedure Act* uses the terms "former suit" and "subsequent suit" or the suit in which such issue has been subsequently raised, thus the terms make no reference as to when the suit was filed.

132. In contra distinction, Section 6 of the *Civil Procedure Act* on 'stay of suit' uses the phrase "previously instituted suit" or "proceeding" which is grounded on which suit was filed before the other.

133. See the explanation 1 under Section 7 of the *Civil Procedure Act* under the subject Res judicata.

134. The appellant's argument that the instant suit was filed earlier lacks persuasion as the appellant took no demonstrable step to prosecute his case from July 2007 to 2019 when it filed a witness statement.

135. Finally, the learned trial Magistrate summarized the case as follows:

> The case herein is akin to one where a party sustains injuries in an accident and decides to file a different case for each injury sustained when one case would have sufficed. The plaintiff is being dishonest and is out to unjustly enrich himself and, as rightly put by the defendant; this case is res judicata, issues herein having been determined by Courts of competent jurisdiction..."

136. As held in Miriam Waithira Githengi Mwicigi V George Mwicigi Githengi [2019] eKLR, the overarching principle is that parties cannot be allowed to litigate in installments as public policy demands that litigation has to come to an end.

137. The upshot of the foregoing is that the appellant's suit is res judicata Industrial Court Course No. 814 'N' of 2009, Maseno Universities Academic Staff Union (Supra).

138. The instant appeal lacks merit and it is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF JANUARY, 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.