



Omwonga v Teachers Service Commission (Employment and Labour Relations Appeal E170 of 2023) [2025] KEELRC 868 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 868 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E170 OF 2023**

**JW KELI, J
MARCH 14, 2025**

BETWEEN

GEOFFREY MARENDI OMWONGA APPELLANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

(Being an Appeal from the Ruling of the Honourable S.A Opande (Mr.) (PM) delivered at Nairobi on the 30th August 2023 in Nairobi MCELRC E1040 of 2022)

JUDGMENT

1. The Appellant, dissatisfied with the Ruling of the Honourable S.A Opande (Mr.) (PM) delivered at Nairobi on the 30th August 2023 in Nairobi MCELRC No. E1040 of 2022 between the parties filed a Memorandum of Appeal dated 7th September 2023 seeking the following orders:
 - i. That the Appeal be allowed and the ruling of the learned trial Magistrate be set aside;
 - ii. That the Honourable court do proceed to order That matters proceeds for hearing at the lower court;
 - iii. Costs of Appeal be borne by the Respondent; and
 - iv. The Court do grant such further orders or directions as it may deem fit.

The Grounds Of The Appeal

2. That the learned magistrate erred in law and in fact by striking out the Memorandum of Claim on the ground That it was filed out of time.
3. That the learned magistrate erred in law and in fact by determining That the Memorandum of Claim had been filed out of time which was not true.



4. That the learned trial magistrate erred in law and in fact to determine That time started running after the Appellant's Appeal challenging his dismissal had been determined.
5. That the learned trial magistrate erred in law and in fact to determine That the Memorandum of Appeal could not be lodged when there was an active Appeal ongoing before the Respondent.
6. That the learned trial magistrate misdirected himself in law and in fact in not taking cognizance and applying the established principles when passing the ruling.
7. That the learned trial magistrate erred in law and by failing to consider adequately or at all the submissions by the Appellant, placed before him.

Background To The Appeal

8. The Claimant/Appellant filed claim against the Respondent vide a memorandum of claim dated 3rd June, 2022 seeking the following orders:-
 - a. A declaration That the dismissal of the Claimant's from employment was unfair and unlawful;
 - b. General damages for unfair and unlawful dismissal in the sum of Kshs. 369,108/= being equivalent of 12 months' salary at rate of Kshs. 30,759/= per month.
 - c. Unpaid salary until age of retirement which is Kshs. 30,759 X 12 months X 7 years = Kshs. 2,583,756/=.
 - d. Unpaid leave allowance from the date of unlawful dismissal upto retirement age pegged on the applicable payable leave allowance amount in the entire period.
 - e. An order directing the Respondent to issue a certificate of service to the Claimant.
 - f. Interest thereon
 - g. Costs of this suit.
 - h. Any other relief the Court does fit to grant.
9. The Claimant filed his verifying affidavit, his Witness statement, and list of Witnesses all of even date, and the list and bundle of documents dated 3rd July, 2022 (see pages 7-23 of ROA).
10. The claim was opposed by the Respondent who entered appearance and filed a Respondent's Defence Statement dated 26th July, 2022 (pages 24-29 of ROA), Respondent's list and bundle of documents of even date (Pages 30-115 of ROA).
11. The Respondent filed a Notice of preliminary Objection dated 26th July, 2022(Pages 116 of ROA) against the Claimant Statement of Claim on ground That the Claimant's suit was time barred and offended mandatory provisions of Section 90 of the Employment Act, 2007 thus the Court had no jurisdiction to hear and determine the Claim.
12. The Preliminary Objection was canvassed by way of Written Submissions wherein the parties filed their respective submissions on the same.
13. The Trial Magistrate Court delivered its Ruling on the Preliminary Objection on 30th August, 2023 striking out the Claimant's Memorandum of Claim dated 3rd June, 2022 with costs. (Ruling at pages 213-216 of ROA).



Determination

14. The appeal was canvassed by way of written submissions. Both parties complied.
15. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 That:-
“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are That the 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. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either That he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
16. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: “I think it is well settled That this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied That its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Issues for determination

17. The Appellant/Claimant and the Respondent submitted on the merits of the Appeal.
18. The court, having perused the grounds of appeal, was of the considered opinion That the issue for determination in the appeal was whether the claim before the trial court was statutory time-barred.
19. The grounds of appeal were:-That the learned magistrate erred in law and in fact by striking out the Memorandum of Claim on the ground That it was filed out of time. That the learned trial magistrate erred in law and in fact to determine That time started running after the Appellant’s Appeal challenging his dismissal had been determined. That the learned trial magistrate erred in law and in fact to determine That the Memorandum of Appeal could not be lodged when there was an active Appeal ongoing before the Respondent. That the learned trial magistrate misdirected himself in law and in fact in not taking cognizance and applying the established principles when passing the ruling.
20. The Respondent in its statement of defence stated That the claim was time-barred as the claimant was dismissed on the 9th October 2014 and thus offended the provision of section 90 of the [Employment Act](#) and the court had no jurisdiction in the claim (page 29 of ROA). The respondent further raised a Notice of Preliminary Objection dated 26th July 2022 on the same issue of the claim being time-barred.
21. The trial court upheld the Notice of Preliminary Objection and relied on several decisions of the Court of Appeal as to when time starts running in employment claims under section 90 of the [Employment Act](#) (now 89(amendments of 2024) to be on termination of employment.
22. The appellant submitted That the effective date of his dismissal was 2nd August 2018 when he received the letter of dismissal dated 15th October 2014. That on the 24th June 2021 he wrote a letter for review of the decision (page 22 of the ROA) and received a letter dated 24th June 2021 from the respondent indicating it was willing to review the decision on deposit of Kshs. 2000 at its bank which the appellant complied. That the decision for review was issued vide letter dated 3rd November 2021 (pages 23 and 110 of ROA) upholding the dismissal and his removal from the register of teachers.



23. The appellant contended That time stopped running from the date he requested for review to the date he received a decision on the review of 3rd November 2021.

Article 159 encourages parties to settle disputes out of court and in view of the review process it cannot be That time had lapsed.

24. The Respondent reiterated its submissions on the preliminary objection before the trial court and asserted That the trial court decision was right and there was no error.

Decision.

25. It is not in dispute That the claim was filed post 3 years of termination. What was in contention is whether time stopped running upon filing of the review to the date of letter of decision on the review dated 3rd November 2021. The claim was filed on the 10th June 2022.

26. The court found there was a dispute as to the termination date the appellant contending it was 21st February 2018 when the outcome of 9th October 2014 was communicated (page 20/101 of ROA). The respondent produced the dismissal letter dated 15th October 2014 (page 100 of ROA). The trial court noted the contention and stated That even if the claimant was dismissed on the 7th August 2018 the claimant's case file 10th of June 2022 was still time-barred.

27. The Court finds That the trial court properly addressed the issue of time limitation under section 89 (then 90) of the *Employment Act* to effect That time start running from the date of dismissal/ termination to wit :- "89. Limitations

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."

28. The claimant had relied on the Court's decision of 2013 in Tom Joseph Orina v Kenya Bureau of Standards & another [2013]eKLR WHERE it was held:- "The issue for determination and which issue closes the matter is when the time for limitation started running. It is trite law and practice That this would begin when all channels and processes of appeal are exercised and closed. The applicant submits That he launched an appeal in terms of the 1st respondent's Human Resource Policy, 2008 and this process of appeal was exhausted by a dismissal of the appeal were on 30th November, 2010. Mr. Omwange, Advocate advised him That this is the time the limitation period began to run. I agree. The limitation period began to run when all avenues for appeal were exhausted, That is, on 1st December, 2010."

29. The trial court applied the subsequent decision of the Court of Appeal to the contrary position. In Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another [2016] eKLR the Court of Appeal overturned a favourable ruling to the claimant where in separate *ex parte* rulings rendered on the same date, Rika, J. appreciated That the 3 year limitation was a jurisdictional issue fixed by law and could not be extended by the court. However, he was of the view That the respondents were not yet out of time and That as such the application for time enlargement was unnecessary; That the period spent on negotiations by the parties would be excluded in computing time within which the cause of action could be said to have arisen; overturning the decision the Court of Appeal then held:- "For us it is clear from our reading of section 90 aforesaid That there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought



within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case the respondents have not specified when the injury or damage ceased for time to have begun to run. Secondly the learned Judge did not rely on the continuing injury or damage but on the fact That the parties engaged in negotiations. Those negotiations began when time had begun to run following the termination of the respondents' services."

30. The Court of Appeal overturned another decision of the court upholding claims beyond the 3 years limit in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] KECA 827 (KLR) it observed: -

" [15] It is not in dispute That the alleged causes of action arose in the years 2008, 2009 and 2010 upon the respondent's termination of employment by their employer. Pursuant to the provisions of Section 90 of the *Employment Act*, those claims became time barred in 2011, 2012 and 2013 respectively, three years after the respective causes of action arose.

(17) 17] The learned Judge heard the preliminary objection and dismissed it on the ground That the claims were not time barred notwithstanding That they were filed outside the three year limitation period stipulated in the *Employment Act*. The learned Judge found That the respondents' claims was for unpaid terminal dues which constituted a continuing injury. He defined 'continuing' based on the English term as 'remain in existence, operation or a specified state'. The learned Judge on this basis held That the terminal benefits once accrued, remained due and owing to the employees continuously until paid.

(18) This position is fortified by the decision of this Court in the case of *Attorney General & another v Andrew Maina Githinji and another* [2016] eKLR where in upholding a Preliminary Objection based on Section 90 of the *Employment Act*, Waki JA held as follows:

...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by That dismissal, but they did not. Having found That the cause of action arose on 2nd February 2010 and That the claim was filed on 16th June 2014, it follows by simple arithmetic That the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold."

31. The Trial court relied on the foregoing Court of Appeal decisions which are binding on this court to the effect That time starts running from date of termination of employment. The court agreed with the trial court That even if the date of termination was taken to be of 7th august 2018 the claim filed on the 10th June 2022 was statutory time barred. The Respondent being a national employee needs to find solutions to ensure reliable delivery of dismissal letters taking into account the provisions of section 89 of the *Employment Act* and also ensure timely response to employees. In the instant case the request for the decision was in 24th January 2017(within timelines. See reference to the claimant's letter at page 101 of ROA) and the response on 21st February 2018 (outside the 3 years). This was not an issue for determination in the instant case and as stated by the trial court the claim was time-barred even if the court was to factor in the date the claimant alleged was the official dismissal date on receipt of the dismissal letter.



32. The Court holds That the request of review or appeal post termination of employment or the invocation of any alternative dispute resolution mechanism does not affect the time limitation for filing employment claims as held in the foregoing decision of the Court of Appeal. The time starts running on the date of dismissal/ termination of the employee. The employee should always bear That in mind despite any other subsequent internal/outside court mechanisms or pending criminal cases.
33. The appeal is dismissed and the Ruling of the Honourable S.A Opande (Mr.) (PM) delivered at Nairobi on the 30th August, 2023 in Nairobi MCELRC E1040 of 2022 upheld. The court to temper justice with mercy makes no order as to costs in the appeal.
34. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Appellant : -Okumu h/b Nyangito

Respondent: Jusa h/b Manyasa

