



REPUBLIC OF KENYA



Dismas v Board of Management Namachanja High School (Appeal E005 of 2024) [2025] KEELRC 818 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 818 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
APPEAL E005 OF 2024
DN NDERITU, J
MARCH 13, 2025**

BETWEEN

SIFUNA DOUGLAS DISMAS APPELLANT

AND

**THE BOARD OF MANAGEMENT NAMACHANJA HIGH
SCHOOL RESPONDENT**

(Being an appeal from the judgment and decree issued in Bungoma Chief Magistrate's Court ELRC Cause No. E004 of 2023 by Hon. T. M. Olando (PM) delivered on 28th February, 2024)

JUDGMENT

I. Introduction

1. In a judgment dated and delivered on 28th February, 2024 the appellant's cause mentioned above against the respondent was disallowed except for an order that he be issued with a certificate of service.
2. Thereafter, the appellant commenced this appeal vide a memorandum of appeal dated 6th March, 2024 stating 13 grounds of appeal and seeking for the following orders –
 - i. The appeal herein be allowed
 - ii. The some of the judgment delivered on 28/2/2024 be set aside and be submitted proper finding/judgment.
 - iii. The respondent to pay in magistrate court costs and in this particular appeal costs.
 - iv. Any other relief that might deem fit and just to grant.
 - v. The respondent is ordered to issue a certificate of service should be retained.



3. By consent, the appeal was canvassed by way of written submissions. The appellant acting in person filed his written submissions dated 3rd June, 2024 while Ms. Masengeli, counsel for the respondent, did not file any submissions as ordered and directed by the court on 10th December, 2025.

II. Submissions By The Appellant

4. It is submitted by the appellant that the lower trial court decided the cause against the weight of the evidence that he adduced and hence arrived at the wrong decision. It is the appellant's position that the trial court ignored his oral and documentary evidence adduced during the trial. It is further submitted that the lower trial court disregarded the written submissions by the appellant and only considered those by the respondent's counsel in the judgment. It is alleged that the trial court was biased against the appellant and only considered the evidence and submissions for the respondent totally ignoring the appellants case, evidence, and submissions.
5. It is further submitted that the lower trial court failed to list the issues for determination and ignored the authorities cited by the appellant in his submissions and as such the court rendered unfair judgment against the appellant.
6. The court is urged to overturn the decision of the trial lower court and allow this appeal with costs.
7. As it was noted above, there are no submissions on record by counsel for the respondent.

III. Issues For Determination

8. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by the appellant as summarized above. In my considered view, the following issues commend themselves to the court for determination –
 - a. Was the claim by the appellant in the lower trial court filed out of time and hence statutorily time barred?
 - b. Did the lower trial court arrive at the right decision?
 - c. Is there any reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?
 - d. What appropriate orders should this court make in regard to the above issues and on costs?

IV. Employment

9. As the court of first appeal, this court is obligated to evaluate the evidence and arrive at its own conclusions bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle V Associated Motor Boat Co. Ltd* (1968) EA 123.
10. In his memorandum of claim in the lower trial court dated 6th February, 2023 received in court on even date, the appellant pleaded that he was employed by the respondent as a cook in 2002 and remained in such employment until 30th August, 2016 when he voluntarily resigned.
11. He further pleaded that he started at a monthly salary of Kshs2,400/= and the same had risen to Kshs14,897.37 as at the time of his resignation. He pleaded that he was not paid salary for August, 2016 and that he was denied leave for the entire period of his employment.
12. The appellant claimed a sum of Kshs279,168.67 from the respondent made up as follows –
 - a. One month salary arrears - Kshs.14,897.87/=



- b. 1 months salary in lieu of notice - Kshs.10,000/=
 - c. House allowance for 1 months - Kshs.2,800/=
 - d. NSSF allowance for 1 months - Kshs.400/=
 - e. NHIF contributions for 1 months - Kshs.500/=
 - f. Leave allowance for 14 years - Kshs.42,000/=
 - g. Service/gratuity fee - Kshs.208,570.80/=
- Total - Kshs.279,168.67/=

13. He also prayed for a certificate of service, costs, and interest. He attached supporting documents to the claim including a letter of appointment dated 15th March, 2002 and his notice of resignation dated 29th June, 2016.
14. In response to the claim, the respondent raised a preliminary objection (PO) dated 21st March, 2023 to the effect that the claim was time barred under Section 4 of the Limitation of Actions Act and hence filed in abuse of the court process.
15. Further, the respondent filed a statement of defence dated 11th September, 2023 after the PO was dismissed on 8th June, 2023. It was pleaded in the defence that the appellant resigned as from 1st and not 30th of August, 2016 as per his notice of resignation.
16. It was further pleaded that the appellant had utilized all his leave days and that all his terminal dues were paid in the sum of Kshs87,000/=. It is pleaded that the appellant did not qualify for gratuity under Section 36 of the Employment Act as the respondent remitted his pension to the National Social Security Fund (NSSF).
17. In his testimony during the trial, the appellant produced his filed documents as exhibits. In cross examination, he conceded that his notice of resignation indicated that he terminated his employment with the respondent effective from 1st August, 2016.
18. In the defence hearing the respondent called Hellen Anyango, the principal, as a witness (DW1). She adopted her filed statement and produced the filed document as exhibits for the defence. She emphasized that the respondent resigned voluntarily with effect from 1st August, 2016 as per the notice issued by the appellant and as such the issue of payment of his salary for August, 2016 did not arise. She stated that long after the appellant had left employment and paid his dues, he showed up in 2023 claiming for more payments to which he was not entitled.
19. In a judgment dated and delivered on 28th February, 2024 the lower trial court held that since it is the appellant who issued and served a notice of resignation, he had no legal basis upon which to claim pay for August, 2016 in lieu of notice. It was further held that the appellant had not worked in August, 2016 and as such there was no basis for him being paid a salary for that month. In conclusion, the court found that the claim by the appellant was not merited except for the prayer for a certificate of service which the court ordered that it be issued to him. Each party was ordered to meet own costs.
20. The court has read and evaluated the pleadings filed, the proceedings, and the judgment by the lower trial court as summarized above. The court would have agreed with the said judgment except for the following very serious omission by the learned trial magistrate.
21. In the ruling on the PO alluded to above, the lower trial court rather casually dismissed the same on the alleged basis that the issue of employment relationship between the parties could only be canvassed



in the hearing through evidence. The court however notes that the pleadings as summarized above did not contest employment of the appellant by the respondent. In fact, the only contested issue in that regard was whether the appellant left employment with effect from 1st or 30th August, 2016.

22. Although the respondent was very clear that the issue in the PO was that the claim had been filed out of time and hence time barred, the lower trial court wished and pushed the issue away purportedly waiting for evidence to have the matter canvassed during the trial. That approach by the lower trial court was wrong as the issue raised in the PO went into the very fundamental question of jurisdiction for which the trial court ought to have given serious consideration – see Nyarangi J in *Owners of the Vessel Lilian S V Caltex Kenya Limited*.
23. Although the alleged limitation was based on erroneous citing of the applicable law as Section 4 of the *Limitation of Actions Act* instead of Section 89 of the *Employment Act*, the trial lower court ought to have properly addressed itself to that very fundamental and germane issue before taking any further step in the matter.
24. The applicable law on limitation in matters and employment and labour relations is Section 89 of the *Employment Act* which 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.
25. It is amazing that neither the counsel for the respondent nor the court raised the issue of limitation of the claim after the PO on the issue was dismissed as stated above.
26. From the pleadings, proceedings, and the entire record of appeal, the appellant voluntarily resigned vide a notice dated 29th June, 2016 wherein he categorically indicated that he was leaving employment as from 1st August, 2016. The evidence on record is that he did not report to work as from that date. Based on Section 89 of the *Employment Act* cited above, that is the date from which any claim or action that the appellant held against the respondent crystallized and time started running. Any such action or claim ought to have been filed in court within three years of that date.
27. The record shows and confirms that the cause by the appellant in the lower trial court was commenced by way of a memorandum of claim dated 6th February, 2023 received in court on the same date. That is way outside the three years provided for in the law cited above. Consequently, the cause by the appellant was filed out of time and the same was statutorily time barred, bad in law, misconceived, and stale. Had the lower trial court addressed its mind to this issue, the matter ought not to have gone to hearing and ought to have been dismissed in le mine. The hearing of the same was an exercise in futility.
28. Notwithstanding that the respondent had cited the wrong provisions of the law in the PO, that did not bar the lower trial court from applying the right provisions of the law and arriving at the right legal position at that preliminary stage thereby saving precious judicial time.
29. Without making any further interrogation, the court has said enough in demonstrating that the claim by the appellant was filed out of time, and the same was therefore bad in law, misconceived, and in total abuse of the court process.
30. Ultimately, the court finds that this appeal is bad in law and without merits and the same is hereby dismissed.



- 31. There is no gain in considering the other issues mentioned above as the same would only have been ripe for consideration if the issue of limitation determined above was in favour of the appellant. It is an exercise in futility for the court to engage in such an adventure.
- 32. Ultimately, the judgment of the lower trial court is hereby set aside and for the reasons stated above this appeal is hereby dismissed.

V. Orders

- 33. Flowing from the foregoing, the court makes the following orders –
 - a. The claim by the appellant in the lower trial court was filed out of time and ought to have been struck out in le mine.
 - b. This appeal is hereby dismissed in its entirety and the judgment of the lower court set aside.
 - c. Costs of this appeal and those in the lower trial court to the respondent.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 13TH DAY OF MARCH 2025.

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DAVID NDERITU
JUDGE
JUDGMENT

