



REPUBLIC OF KENYA



KENYA LAW
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**Board of Management Siburi Mixed Secondary v Odek (Appeal
E039 of 2024) [2025] KEELRC 1459 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1459 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E039 OF 2024
NZIOKI WA MAKAU, J
MAY 15, 2025

BETWEEN

BOARD OF MANAGEMENT SIBURI MIXED SECONDARY APPELLANT

AND

JOSEPH ONYANGO ODEK RESPONDENT

*(Being an appeal from the judgment and decree of Hon. K. Cheruiyot (SPM)
in KISUMU CMELRC No. E226 of 2021 delivered on 31st May 2024)*

JUDGMENT

1. In a judgment delivered on 25th May 2024, the Learned Magistrate found in favour of the Respondent and awarded him a total of Kshs. 652,072.75 in underpayments. Dissatisfied with the decision, the Appellant filed a Memorandum of Appeal dated 19th August 2024, raising several grounds. First, the Appellant argued that the Learned Magistrate erred both in law and fact by awarding the Respondent underpayments for the years 2014 to 2018—periods which were neither specifically pleaded nor legally enforceable due to the lapse of time under section 90 of the *Employment Act*. Secondly, the Appellant contended that the Court failed to consider the terms of the Respondent’s employment, as outlined in the signed offer letter. According to the Appellant, the offer explicitly stated the salary to be paid and clarified that any review of remuneration would depend on the availability of funds, not academic qualifications attained. The third ground of appeal focused on the Magistrate’s decision to award underpayments beginning in 2014, despite such claims constituting a continuing injury and thus being time-barred. Fourth, the Appellant challenged the total award of Kshs. 652,072.75 with costs and interest, asserting that this was erroneous both in fact and in law. Lastly, the Appellant claimed the Learned Magistrate had failed to give due consideration to its written submissions, supporting evidence, and legal authorities, all of which were duly provided. Consequently, the Appellant sought to have the judgment of the Learned Magistrate set aside and replaced with an order dismissing the



Respondent's suit entirely. Additionally, the Appellant requested that it be awarded the costs of both the appeal and the case before the Magistrate's Court.

2. In compliance with directions issued by the Court, the Appellant filed its written submissions on 19th February 2025, while the Respondent filed his submissions on 13th March 2022.

Appellant's Submissions.

3. The Appellant submits that the Magistrate's award of Kshs. 652,072.75 was erroneous and unfounded, asserting that the claim for underpayment was neither specifically pleaded or proven. Furthermore, the Appellant contends that underpayments are in the nature of special damages which must be specifically pleaded and proven. The Appellant also submits that the minimum wage orders cited by the Respondent was inapplicable, as the Respondent served as an accounts clerk not a general clerk and the school was not located within any area formerly designated as a municipality.
4. On the issue of limitation, the Appellant asserts that underpayments amount to a continuing injury, as defined under section 90 of the *Employment Act*. It relied on the case of Samuel Otiende Lukiko v Shiners Girls High School [2015] eKLR and submitted that each underpayment constitutes a separate cause of action, and when such injuries continue unaddressed, the claims become time-barred 12 months after cessation. Accordingly, the Appellant submits that only the period between March 2020 and March 2021 should be considered in issuance of underpayments. In conclusion, the Appellant urges the court to allow the appeal in the interest of justice.

Respondent's Submission.

5. In response, the Respondent submits that the underpayment claims were not time-barred, as alleged. He asserts that since the issue of limitation was not raised before the Trial Court, the Appellant cannot now raise it on appeal. In support of this position, the Respondent relies on Order 2 Rule 4 of the Civil Procedure Rules, which mandates that any defence based on a statute of limitation must be specifically pleaded in any pleading subsequent to the Plaintiff. He also cites case decision in the case of Town Council of Awendo v Nelson Oduor Onyango & 13 others [2013] eKLR, where the court, applying Order 2 Rule 4(1), held that a party cannot rely on the defence of limitation unless it has been expressly pleaded. To further reinforce his position, the Respondent submits that his claim was filed within the permissible statutory period. He notes that he exited employment on 24th March 2021, thereby having until 24th March 2022 to lodge a claim premised on a continuing injury. Having filed the claim on 27th October 2021, he submits that it was well within the prescribed three-year limitation period. In support, he relies on the case of Shitoshe v Shivanga Secondary & another [2024] KEELRC 2222 (KLR), where the court stated:

“The cause of action for unfair termination and claims for terminal benefits arises with the end of employment being the last day the employee exits the shop floor. Any accruing dues or claims concerning the termination must then be brought to court within 3 years of exit from service and any continuing injury claim within 12 months.”

6. Moreover, the Respondent references the Court of Appeal decision in The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment), which held:

“Normally, a belated service-related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service-related claim is based on a continuous wrong, relief can be granted



even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrong contemplated under section 90."

7. In light of the foregoing, the Respondent urges the court to find the Appellant's position on limitation to be flawed and without merit.

Disposition.

8. The Court being the first appellate Court must consider the case through the lenses of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 which is that this 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 the claim before this Court an issue of limitation has arisen. The Appellant asserts the claims for underpayment are time barred. In the case of *The German School Society & another v Ohany & another* (supra) the Court of Appeal held inter alia that a belated service-related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service-related claim is based on a continuous wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. [Emphasis supplied]
9. In my considered view, the decision of the Learned Magistrate contemplated the continuing injury in the manner it was presented and correctly held the claim lay and awarded relief. On appeal, I affirm the continuing wrong suffered by the Respondent was capable of redress in the matter before the Learned Magistrate and the findings on the same are sound. I reject the notion of limitation.
10. In as far the issue of amounts due, the sums claimed and awarded were proper for the level of engagement as bursar. The salary of a bursar is set by the Ministry and the award before this Court is not more than what the Ministry of Education provides for the position. As such the Court affirms the award with the result the Court declines the invitation to reverse the Learned Magistrate on any of the grounds advanced in appeal. The Appeal is dismissed with costs to the Respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

