



**Mutinda v Styroplast Limited (Cause 1818 of 2017)
[2025] KEELRC 1306 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1306 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1818 OF 2017**

CN BAARI, J

MAY 8, 2025

BETWEEN

NGALA MUTINDA CLAIMANT

AND

STYROPLAST LIMITED RESPONDENT

JUDGMENT

1. The Claimant's Memorandum of Claim is dated 11th September, 2017 and filed in court on even date. The Claimant seeks payment of his terminal dues comprising of overtime and unpaid leave amounting to Kshs. 651,421.33/-.
2. The Respondent lodged a Memorandum of Reply dated 8th February, 2018, denying the Claimant's claim, and further contending that it paid the Claimant all leave earned throughout his employment, and had issued him with pay slips as prove of such payments.
3. The suit was first heard on 25th October, 2025 by Hon. Justice Rika, when the Claimant partly testified in support of his claim. The hearing proceeded before the same Judge on 27th September, 2023, when the Claimant's cross-examination was concluded, culminating in the close of the Claimant's case.
4. The Respondent's case was heard on 21st November, 2024, before this Court, with Mr. Shailesh Shah testifying in support of the Respondent's case. He adopted his witness statement and produced the Respondent's documents as exhibits in the matter.
5. The Respondent filed submissions, the Claimant did not.

The Claimant's Case

6. The Claimant states that sometime in the year 2006, he was employed by the Respondent as a machine operator, on an initial monthly salary of Kshs.7,012/=.



7. It is his case that through out the employment relationship, he worked for 15 hours every Sunday, for 4 days in a month about 60 hours per month for the 8 years he was in the service of the Respondent.
8. The Claimant states that he did not go on leave at all during his 8 years of working with the Respondent. He avers that on or around 12th September 2014, he ceased working for the Respondent, after giving the Respondent ample notice of his resignation.
9. He avers further that through out the employment relationship, he never received any warning letter from the Respondent as pertains his performance, as he always rendered impeccable service to the Respondent.
10. The Claimant states that he worked hard, diligently, was honest, loyal and responsible throughout the existence of the employment contract. It is his further case that after he terminated employment with the Respondent, the Respondent arbitrarily, illegally and without lawful cause refused, neglected and/or avoided paying his final dues.
11. It is his case that at the time of termination of the employment relationship, he was earning Kshs.17,043/=. That his claim against the Respondent is for Kshs.545,376/= made up as follows: -
 - a. Overtime for 15 hours every 4 Sundays in a month for 5 years Kshs.545,376.00
 - b. Unpaid leave for 8 years at the rate of 21 days per year..... Kshs.106,045.33
 Total KShs.651,421.33
12. The Claimant avers that it is clear that the Respondent's action has no foundation in law and is contrary to the provisions of good industrial relations.
13. He avers that despite demand and notice of intention to sue being issued, the Respondent has refused to make good the Claimants' claim, and therefore making this suit necessary.
14. On cross-examination, the Claimant told court that he was paid overtime by vouchers, and that before the vouchers, he was paid in cash. He further testified that his October, 2014 pay slips indicates a payment of Kshs.5,700/- on account of overtime and a further Kshs.5,700 for Sunday/holiday pay, and that the September, 2014 pay slips show that the same items were paid for.
15. It is the Claimant's evidence that he signed the payroll in acknowledgement, and confirmation of payment. It is his further testimony that from the payroll produced in evidence, March, 2014 shows that leave was paid for and that by a petty cash voucher, he was paid the difference of overtime pay amounting to Kshs.13,000/-.
16. In re-examination, the Claimant's position is that what he claims is rest day pay. He further asserts that he was paid Kshs.9,000 for leave in 2014, while he was entitled to 21 days of leave, hence payment was not made in full.
17. He concludes that he is in court over payments for Sunday overtime and leave that was not paid.
18. The Claimant urges the court to allow his claim as prayed.

The Respondent's Case

19. It is the Respondent's case that the Claimant was employed as a general worker sometime in 2006, and later promoted to machine operator before his voluntary resignation in 2014.



20. The Respondent states that in terms of the fixed term contracts signed by the Claimant in the course of his employment, he was paid at the rate of 1.5 times per hour for any overtime worked, and 2 times per hour for work done on any rest day or public holiday as the need for his services arose.
21. It states that the Claimant's contracts also provided for leave entitlement of 1.75 days for any month worked, which leave was paid for when not taken, and specifically at the lapse of any independent fixed term contract.
22. That during the aforesaid period of employment, the Respondent remunerated the Claimant as particularized in the payslips and payrolls attached in the Respondent's list of documents.
23. The Respondent avers that any overtime work on rest day/public holidays was paid for as per the terms of the Claimant's independent fixed term contracts, and that leave earned throughout his employment was paid for at the automatic lapse of any independent fixed term contracts.
24. It is the Respondent's case that it issued the Claimant with monthly pay-slips that particularized his payments including basic pay, house allowance, overtime payments, rest day/public holiday and leave payment, and which the Claimant has mischievously excluded in his bundle of documents.
25. The Respondent prays that this suit be dismissed with costs to the Respondent.

The Respondent's Submissions

26. It is the Respondent's submission that its witness took the court through its muster pay roll from 2006 to December 2013, which payroll enumerated both the Claimant's leave and overtime entitlements on every row with his name on the front page and acknowledging signature on the flip sides of pages.
27. The Respondent submits further that their witness pointed out the 2014 pay slips from page 8 to 15 of the Respondent's bundle of documents that had leave payments along with overtime payments @1.5 (normal overtime) and overtime @2 (overtime worked on rest days/holidays, which were well listed and more so in the October, September, August, June, May, April and March pay slips.
28. The Respondent submits that the payment vouchers as produced by the Claimant, equally had this particularization including big payments for overtime on some vouchers and not others, as the Respondent witness testified that the Claimant only earned overtime on some months when there was work overload, case in point being the vouchers for 2/2/2013; 1/10/2010; 1/7/2011; 9/11/2011; 14/3/2010; and 7/12/2007.
29. The Respondent submits that the payments claimed herein, fall under the aspect of continuing injuries, thus the Claimant is time barred under Section 90 of the [Employment Act](#), since even if the court was to abide by the Claimant's pleadings that he voluntarily terminated his contract of employment in September 2014, the statutory 12 months' period for suing for continuing injury benefits such as leave and overtime unfortunately lapsed in September 2015, while the Claim was lodged in September, 2017.
30. The Respondent placed reliance in the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR for the holding that:-

“...Regarding 'a continuing injury', the proviso to Section 90 of the [Employment Act](#) requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve-month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim



based on a continuing injury ought to have been filed within one year failing which it was time barred."

31. The Respondent finally urges this Court to find that the Claimant is not entitled to any of the prayers sought, and to consequently dismiss the entire Claim with costs to the Respondent.

Analysis and Determination

32. I have considered the pleadings in the matter, the witnesses' testimonies and the Respondent's submissions. The issues for determination are: -
 - i. Whether the Claimant is entitled to the reliefs sought
 - ii. Whether the suit is statute barred.

Whether the Claimant is entitled to the reliefs sought

33. The Claimant's position is that through out the employment relationship with the Respondent, he worked for 15 hours every Sunday, for 4 days in a month, which comes to about 60 hours per month for the 8 years he was in the service of the Respondent.
34. It is his further assertion that he did not go on leave at all during his 8 years of working with the Respondent, and that after terminating his employment with the Respondent, the Respondent arbitrarily, illegally and without lawful cause refused, neglected and/or avoided paying his final dues.
35. On its part, the Respondent states that the Claimant's contracts provided for leave entitlement of 1.75 days for any month worked, which leave was paid for when not taken at the lapse of any independent fixed term contract, having been on various fixed terms contracts.
36. It is the Respondent firm assertion that in the period the Claimant was in their employ, it remunerated him as particularized in the payslips and payrolls produced in evidence before this court.
37. It is not disputed that the Claimant worked on Sundays, going by the pay slips produced in evidence. The only issues is which months were paid for and which ones were not.
38. The Claimant did not dispute the payroll/muster roll, and the pay slips produced in evidence as prove that his overtime pay and leave pay were actually remitted to hm.
39. The Claimant did not lead any evidence to show the particular months when overtime and leave pay were not remitted, noting that the Respondent's documents comprising of the muster roll and the pay slips, showed that overtime and leave were paid for.
40. The Court further notes that the Claimant picked all the months of all the years that he worked for the Respondent as the period when overtime and leave were not been paid, while evidence before court tell a different story.
41. Further, the Claimant confirmed to this court in cross examination, that overtime arrears that had been wrongly under-calculated in the muster payroll was actually re-calculated as per the leave arrears' handwritten sheets attached to his claim, with the actual payment of Kshs.13,778/- made through the petty cash voucher of 3rd November 2014, that he did sign in acknowledgement of receipt of the money in arrears.
42. It then follows, that nothing in the evidence before this court suggest that the Claimant is owed by the Respondent on account of both leave and overtime pay, both having been accounted for in the Respondent's evidence and which evidence was not controverted.



43. I therefore find and hold that the Claimant is not entitled to the relief sought.

Whether the suit is statute barred

44. The Respondent submitted that the payments claimed herein, fall under the aspect of continuing injuries, hence the claim is time barred under Section 90 of the Employment Act. It is the Respondent's argument that the Claimant voluntarily terminated his contract of employment in September, 2014, and the statutory 12 months' period for suing for continuing injury benefits such as leave and overtime lapsed in September 2015, while the Claim was lodged in September, 2017.

45. Section 90 of the Employment Act provides: -

“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, 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. Emphasis own”

46. In *Ol Pejeta Ranching Limited v David Wanjau Muhoro* (2017) eKLR the Court explained a continuing injury as follows: -

“The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January 2011, and the Claim to enforce the full range of benefits was filed on 11th August 2011, well within the period created under section 90 (of the Employment act 2007).”

47. Further, the Court of Appeal in the case of *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) held that the principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. “A continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action.

48. The Supreme Court of India further explained the concept of continuing wrong in *Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798 as follows: -

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

49. Borrowing from the foregoing court decisions on what constitutes a continuing injury, and considering that the Claimant continued to work under the same circumstances that he now complains of, I find and hold that the claims of overtime and leave pay give rise to a legal injury which assumes the nature of



a continuing wrong, and which squarely falls within the ambit of a continuing wrongs contemplated under Section 90 of the *Employment Act*, 2007.

50. It then follows that the Claimant having resigned from the service of the Respondent in September, 2014, this claim should then have been filed by September, 2015- one year after the cessation of the wrong complained of herein.
51. The Claimant lodged his claim on 11th September, 2017, which then means that the same is statute barred.
52. I proceed to find the Claimant's claim statute barred, and is hereby struck out with no orders on costs.
53. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 8TH DAY OF MAY, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Njoroge h/b for Mr. Muhia for the Claimant

Mr. Mudao present for the Respondent

Ms. Esther S- C/A

