



**Wanyonyi v Seneca East Africa Limited (Appeal E178 of 2023)
[2025] KEELRC 1353 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1353 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E178 OF 2023
NJ ABUODHA, J
MAY 5, 2025**

BETWEEN

MARTIN WAMALWA WANYONYI APPELLANT

AND

SENECA EAST AFRICA LIMITED RESPONDENT

(Being an appeal from the Ruling of the Honourable M.W Murage (Ms.) (PM) delivered on 28th July 2023 in Nairobi Chief Magistrate's Court CMEL NO. E1687 of 2021)

JUDGMENT

1. Through the Memorandum of Appeal dated 18th September, 2023 the Appellant appeals against the Ruling of Honourable M.W Murage delivered on 28th July,2023 in Milimani Chief Magistrates' Court CMEL No. E1687 of 2021.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law by allowing the Respondent's preliminary objection dated 20th February,2023 as it had no legal basis.
 - ii. The Learned Magistrate erred in law by misinterpreting the provision of section 90 of the Employment Act and ruling that the Claimant's claim was time barred.
 - iii. The Learned Magistrate misdirected herself by dismissing the Appellant's claim for unpaid salary to pay for his uniform, savings and gratuity from 2009 to 2021 despite the fact that the claim was filed only 8 months after termination of the employment contract.
 - iv. The Learned Magistrate was misguided in her reasoning that the Appellant is not entitled to lodge his claim against the Respondent for terminal dues because the claim did not arise from a continuing injury.



- v. The Learned Magistrate misdirected herself in her ruling by dismissing the entire suit despite the fact that the Respondent's preliminary objection was only addressing part of the Appellant's claim.
 - vi. The Learned Magistrate erred in law by failing to consider and be bound by the jurisprudence of this Honourable court and the Court of Appeal that supports the Appellant's right to claim unpaid dues from the Respondent arising from Appellant's entire period of employment from 2009 to 2021 as long as the claim is filed within 3 years from the date of termination of the employment contract.
3. The Appellant prayed that the appeal be allowed with costs; the Learned Magistrate's ruling and order for costs appealed against be set aside and the Appellant's suit be reinstated in the trial court and heard on its merits.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant through his Advocates MAW Advocates LLP filed written submissions dated 24th October, 2024. On the grounds 1-4 on the issue of the Appellant claim for underpayment being a continuing injury as per section 90 of the *Employment Act*, counsel submitted that the Appellant retired from the Respondent's employment on 5th January, 2021. That the period between when he retired and the Memorandum of Claim filed was 8 months and 10 days.
6. Counsel submitted that under paragraph 4 of the claim the Appellant prayed for unpaid salary for the month of January, 2021 from 1st to 8th January, 2021 of Kshs 3,200/=, unpaid leave days for the year 2020 of Kshs 8,400/=, underpayment of salary from 2015 to 2021 of Kshs 126,885.60/=; the amount deducted from the Appellant's salary for purchase of security guard's uniform of Kshs 46,000/= and savings deducted from the Appellant's monthly salary from 2009 to 2021 of Kshs 43,200/=.
7. Counsel submitted the Respondent filed their memorandum of response dated 4th October, 2022 denying the Appellant's claim. That the Appellant filed an amended memorandum of claim dated 16th September, 2021 before close of pleadings. That Paragraph 4(vi) of the amended memorandum of claim the Appellant prayed for statutory gratuity as per regulation 17 of the Regulation of Wages (Protective Security Services) in the amount of Kshs 125,794.20/=.
8. Counsel submitted that the Respondent filed a preliminary objection to the Appellant's Memorandum of claim on the grounds that part of the Appellant's Amended Memorandum of Claim was time barred as per section 90 of the *Employment Act*. That the trial court in its ruling on the preliminary objection dismissed the Appellant's entire claim on the basis that the Appellant's claim was time barred.
9. Counsel submitted that the trial court in its ruling relied on the case of Mary Kitsao Ngowa and 36 Others v Krystalline Limited (2015) eKLR which counsel submitted was distinguishable from the Appellant's case on the grounds that the issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. That the appellate court held that it only had jurisdiction to determine issues that were presented before the trial court in the first instance.
10. Counsel submitted that the Appellant's claim for underpayment was a continuing injury by definition of section 90 of the *Employment Act*. Counsel relied on the recent court of Appeal case of The German School Society & Another v Ohany & Another 2023 eKLR where the court of Appeal in defining



a continuing injury relied on the Supreme Court of India in Balakrishna S.P Waghmare v Shree Dhyaneshwar Maharaj Sansthan AIR 1959 Sc 798 and another.

11. Counsel submitted that the Regulation of Wages(General) (Amendment) Order of 2015,2017 and 2018 imposed upon the Respondent an obligation to pay the Appellant a set minimum wage for a security guard working in Nairobi in the respective periods. That the Respondent breached that duty and the breach subsisted until the Appellant retired. That by the Court of Appeal determination as discussed above which counsel submitted applied to the Appellant's case the Respondent's persistent breach of duty created a continuing wrong and hence the Appellant has a defence to the plea of limitation of actions within meaning of section 90 of the Act.
12. Counsel also relied on the case of G4S Security Services (K) Limited v Joseph Kamau & 468 Others (2018) eKLR where the court held that Respondents were able to sustain claims for outstanding employee benefits that had accrued more than three years before the termination of their employment contracts. Counsel also relied on the case of Vipingo Ridge Limited v Swalehe Ngonge Mpita(2022) eKLR on continuing injuries being filed 12 months after cessation of employment. That the Appellant was entitled to claim underpayment of salary from the year 2015 to 2021 as the same is a continuing injury. That the Appellant filed his claim within 12 months after cessation of the continuing injury as per provision of section 90 of the act.
13. On grounds 5 and 6 whether the dismissal of the Appellant's claims in paragraph 4(v) of the amended Memorandum of Claim was erroneous which was savings deducted from salary from 2009 to 2021 of Kshs 43,000/= counsel submitted that the Respondent argued that the Appellant was time barred from claiming remittance of savings deducted from his own salary over a period of 12 years. That the Appellant was entitled to claim savings deducted from his salary from 2009 to 2021 at Kshs. 300 every month. That the Respondent deducted the savings from the Appellant's salary for a period of 12 years with intention of remitting it to the Appellant at the end of his employment contract.
14. Counsel further submitted that from the payslip and the pleadings it was not clear if the savings were deducted as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for labour to which an employee has agreed to contribute as provided for under section 19 of the Act and the Appellant did not consent to such deduction. That the Respondent's failure to pay the Appellant the deducted salary as savings was tantamount to wage theft and infringement of his labour rights. That he is therefore entitled to the same.
15. On the issue of dismissal of Appellant's claims in paragraph 4(i) (ii)(iv) (vi) of the memorandum of claim was erroneous and has no basis in law counsel submitted that the Appellant in his amended Memorandum of claim made the claims of unpaid salary for 8 days in January 2021, unpaid leave for 21 days, refund of Kshs 46,000 which was deducted from the Appellant's salary to pay for a security guard's uniform and statutory gratuity as per Regulation 17 of the Regulations of Wages(Protective Security Services) Order.
16. Counsel submitted that the claims were filed timeously within the statute of limitations as submitted above. That the Respondent's preliminary objection did not encompass these claims which fact is proved by the Respondent's own submissions on the preliminary objection. That the trial court did not give any reasons in its ruling as to why these claims were dismissed hence misguided and without any basis in law. That the dismissal of the same should be set aside and the same be determined in the trial court on its merits.



Respondent's Submissions

17. The Respondent's Advocates Chimei & Malenya Company Advocates filed the Respondent's submissions dated 20th January, 2025 and submitted on the role of the first appellate court while relying on among another the case of *Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR* as to re-evaluate and re-appraise the evidence in order to arrive at its own conclusion.
18. Counsel submitted that the only issue for determination was whether the Appellant's claim is time barred. That the claim as filed by the Appellant offends the provisions of section 90 of the [Employment Act](#). That the Act limits claims that date back to more than three years after the act or default complained of occurred except when the same is a continuing injury in which case the limit is twelve months.
19. Counsel relied on the case of *Vipingo Ridge Limited v Swalehe Ngonge Mpita (2022) eKLR* on definition of continuing injury. Counsel also relied on the case of *Mary Kitsao Ngowa & 36 Others v Krystalline Limited (2015) eKLR* on definition of continuing injury. That a cause of action that is dependable on periodic payments is deemed to have arisen each time the said periodic payment ought to be done. That each of such causes of action shall be independent and separable from the rest and thus cannot be termed as a continuing injury. That since the employment relationship was already terminated then the claims could not be under the umbrella of continuing injury.
20. Counsel submitted that the Appellant in his claim sought a bundle of terminal benefits under paragraph 4 of the amended statement of claim particularly the claim of underpayment which dated back since 2015 to 2021 and savings for like 12 years. That the suit was initiated in September, 2021 and it follows that since the claims do not fall under the ambit of continuing injuries then the Appellant ought to have laid claim within three years next after the act or default complained of occurred. Counsel relied on the case of *Wilson Nyabuto Areri v Postal Corporation of Kenya (2018) eKLR* on these assertions.

Determination.

21. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by the parties herein. The appeal is not over the main appeal but over the Ruling of the trial court on the Preliminary Objection dated 20th February, 2023 was allowed with the consequence that the Claimant's claim dated 16th September, 2021 was dismissed with costs. The trial court found that by dint of section 90 of the [Employment Act](#) the reliefs sought by the appellant were time barred. They were not continuing injuries and the claim was instituted after the Claimant had already retired from employment.
22. The Appellant was aggrieved by the above ruling and he fronted six grounds in his Memorandum of Appeal dated 18th September, 2023. This court will treat them as a single issue of whether the trial court erred in finding that the Appellant's claims were time barred for being non-continuing injuries and the suit being filed after the Appellant had retired.
23. It was not in dispute that the Appellant was employed by the Respondent in 2009 and he retired on 8th January 2021 as per retirement letter dated 12th December, 2021. The Appellant filed his claim on 16th September, 2021 which was around 8 months after the cessation of employment. The claim was further amended on 19th January, 2023 with the only new claim being Gratuity of Kshs 125,794.20/=. The other claims of unpaid salary, unpaid leave, underpayment, refund of deducted amounts and savings remained as per initial claim.



24. This court therefore will analyse the principle of continuing injury as envisaged under section 90 of the *Employment Act* which requires claims to be filed within three years after they arose with an exception of continuing injuries which are to be filed within 12 months after the cessation of employment. The claims as pleaded that is underpayments, leave, savings have been held to be continuing injuries by courts with the claim for gratuity, unpaid salary and refund of amount deducted being claims to be raised within three years after cessation since they are not continuing injuries. The same were filed within three years since the amendment of January 2023 of the gratuity was still within the three year period.
25. The trial court therefore erred by dismissing the whole claim as time barred yet the claims which were filed within three years were not continuing injuries and were valid. The same could not be grouped as the those of continuing injuries and to the worst the trial court could then allow the claims for the three years it stated instead of dismissing the whole claim on account of the fact that the Appellant could not claim them past three years and that he had since retired.
26. In the court of Appeal in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR the court held as follows:-

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.

27. In the Recent 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) while relying on India decisions the court had this to say :-

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 continuing 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 wrongs contemplated under section 90.

28. Lastly Lady Justice Jemimah Keli while relying on the above court of Appeal decisions in *S S Dhillon Transporters (K) Ltd v Wamiti* (Appeal E041 of 2023) [2024] KEELRC 13620 (KLR) (18 December 2024) (Judgment) stated as follows: -

The appellant admitted and even in submissions that the respondent was not granted the right to annual leave on the basis of off days. Annual leave is a basic right of employees that cannot be taken away on the basis of off days which was not even proven. The court has in various decisions held that leave falls under continuing injury claims hence accrued every



year is not granted as long as the employee was not allowed to take the same. Where the employee had a chance to take leave and fails to do so the same is limited to 18 months under section 28(4) of the *Employment Act* as held in *Abongo v Chemelil Sugar Co Ltd (Appeal E051 of 2022)* [2023] KEELRC 2591 (KLR) (25 October 2023) (Judgment) Justice Radido in a claim for untaken leave for 76 days...

In the instant case the Appellant admitted that the Respondent had no chance to take leave. Annual leave is a claim in the nature of continuing injury. The Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) considered cases of continuing injury ...

29. From the above propositions it is now settled that some of the above claims like the unpaid leave, underpayment and unpaid savings forms part of continuous injuries. The claim for the same has to be filed within 12 months after the cessation thereof. In this case the Appellant filed within 8 months after he retired hence within the limitation period hence the trial court misinterpreted the provisions of section 90 of the *Employment Act* and given the recent case laws on the same. It does not matter that the same are claimed past three years so long the claim was filed within the required period of 12 months
30. In the upshot the Appeal is found merited and succeeds with costs to the Appellant with the ruling of the trial court delivered on 28th July, 2023, set aside. The suit is hereby remitted to the trial court for hearing on merit.
31. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2025

DELIVERED VIRTUALLY THIS 5TH DAY OF MAY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

