



Ponders Limited v Kihumba (Employment and Labour Relations Appeal E049 of 2024) [2025] KEELRC 1699 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1699 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E049 OF 2024**

**AN MWAURE, J
JUNE 12, 2025**

BETWEEN

PONDERS LIMITED APPELLANT

AND

GLADYS WAITHERA KIHUMBA RESPONDENT

(Being an Appeal from the Judgment of Honourable Ruth Kefa Chebesio, Principal Magistrate, delivered on 29th May, 2024 in Nakuru MCELRC Case No. E077 of 2023)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and decree of Honourable Ruth Kefa Chebesio, Principal Magistrate, filed this appeal vide a Memorandum of Appeal dated 25th April 2024 on the following grounds that:
 1. The learned trial Magistrate erred in law and in fact in awarding claims that were time-barred by Section 91 of the *Employment Act*.
 2. The learned trial Magistrate erred in law and fact when she awarded the Respondent Kshs.284,615/= when the Respondent admitted that she walked away from employment.
 3. The learned Magistrate erred in law and fact when she wrongfully evaluated the evidence of the Respondent that she had been advised that she had been replaced, and there was no such evidence in the Respondent's pleadings and oral evidence.
 4. The learned Magistrate erred in law and fact when she awarded the Respondent Kshs.75,000/= for maternity leave, yet this was time-barred, being brought to court more than 4 years after it became due.



5. The learned Magistrate erred in law and fact when she awarded the Respondent unpaid leave when there was no proof that she had not been paid for leave taken.
 6. The learned magistrate erred in law and fact when she awarded the Respondent compensation for wrongful dismissal for Kshs.150,000/= when it was a fact that it is the Respondent who left employment on her own volition, and was excessive in the circumstances.
 7. The learned Magistrate erred in law and fact when she reached the conclusion that the Respondent had been wrongfully dismissed.
 8. The learned Magistrate erred in law and fact when she wrongfully interpreted the law on dismissal under the *Employment Act*.
 9. The learned Magistrate erred in law and fact when she wrongfully interpreted section 49 of the *Employment Act* and made the award of Kshs.75,000/=to the Respondent, which was time barred.
 10. The learned Magistrate erred in law and fact when she disregarded the Appellant’s pleadings, evidence and documents.
2. The Appellant prays that:
1. The appeal herein be allowed.
 2. The Judgment of Honourable Ruth Chebesio, Principal Magistrate in Nakuru MCELRC Case No. E077 of 2023 between Gladys Waithera Kihumba versus Ponders Limited be set aside.
 3. The Appellant’s costs in this appeal are to be paid by the Respondent.
3. Parties herein disposed of the appeal by written submissions.

Appellant’s written submissions

4. The Appellant submitted that Section 91(1) of the *Employment Act* provides that any claims arising from employment should be instituted within three (3) years from the date the cause of action accrued.
5. The Appellant submitted that the Respondent’s employment ended on 16th March 2022, placing the case within the statutory limitation period. Additionally, the Appellant contended that the claims for maternity leave compensation of Kshs.75,000/= for 2018 and 2019, as well as leave entitlements for 2019, 2020, and 2021, exceeded the three-year limitation period. According to the Appellant, the trial court’s decision to grant these claims were erroneous.
6. The Appellant relied on the cases of Republic V Industrial Court; Mumias Sugar Co. Ltd. Ex parte Peter Mula [2022] eKLR, Ologe V Agricultural Finance Corporation and another [2023] KEHC 21392, and Dive Site Limited V Jane Njeri Nganga, where the courts expressed that statute limitation cannot be extended or waived by the court.
7. The Appellant submitted that the trial court misapplied Section 49 of the *Employment Act*, awarding compensation for claims extinguished by limitation, further underscores the legal infirmity of the



judgment. In *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 others* [2014] KECA 782 (KLR), where court stated as follows:

“The purpose of the limitation of action is to ensure legal certainty and predictability. It is a matter of public policy that litigation should be concluded within a reasonable time.”

8. The Appellant relied on the case of *Stephen Kamau Karanja & another V Family Bank Ltd* [2014] KEELRC 1387 (KLR), where the court stated that unpaid leave should not fall under continuing wrong as it is a one-time event. In *Beatrice Wanjiku Mbugua V Kenyatta National Hospital* [2022] eKLR and *Central Bank of Kenya V James Oduor Omondi* [2018] eKLR, the courts stated that the continuing wrong doctrine applies to ongoing breaches.
9. The Appellant submitted that the claims for unpaid leave and maternity leave were time-barred and raised in defence early in the proceedings. Additionally, the Appellant denied terminating the Respondent and stated that the Respondent absconded from work without notice. The Appellant maintained that all salaries and leave entitlements were duly paid in accordance with the law. The trial court’s failure to properly consider these arguments, particularly the statutory limitation under Section 91(1) of the *Employment Act*, led to a misapplication of legal principles.
10. The Appellant submitted that the Respondent’s own testimony confirms voluntary cessation of employment rather than dismissal, making the trial court’s finding of wrongful termination a misdirection and relied on the cases of *Bernard Mugo Ndegwa V James Nderitu Githae*[2010] eKLR, in support of that proposition. The Appellant contends that compensation for wrongful dismissal and unpaid leave lacks legal basis, as proof of unfair termination was absent. The Appellant further submitted that the trial court relied on unproven allegations instead of properly evaluating the evidence.
11. The Appellant urged this Honourable Court to find that the appeal is merited and allow the same as prayed.

Respondent’s written submissions

12. The Respondent submitted that the trial court’s finding on the cessation date of her employment is undisputed. While the Appellant argued that the awarded maternity leave and annual leave claims are time-barred. The Respondent relied on Section 91(1) of the *Employment Act*, stating that the court did not err in granting the claims for maternity leave and annual leave. Although maternity leave is not considered a continuing injury under Section 90 of the *Employment Act*, the Respondent’s unpaid maternity leave for 2018 and 2019 qualifies as unpaid terminal dues, which remained claimable within three years from the cessation of employment.
13. The Respondent relied on the Court of Appeal case in *G4S Security Services K Limited V Joseph Kamau & 468 Others* [2018] KECA 827 (KLR) which clarified that unpaid terminal dues do not constitute a continuing injury under section 90 of the *Employment Act* but must be claimed within three years of employment termination. The court upheld claims for employees terminated within this timeframe while dismissing those filed beyond the limitation period. Additionally, still in *G4S Security Services K Limited V Joseph Kamau & 468 Others* (Supra), the Court of Appeal cited the case of *Vipingo Ridge Limited V Swalehe Ngonge Mpitta* [2021] KEELRC 616 (KLR), where the court established that leave entitlements arise annually, meaning claims for unpaid leave can be pursued within three years of termination, even if they span multiple years.



14. The Respondent submitted that in her testimony, she stated that she was unfairly terminated, which remained unchallenged, as the Appellant failed to present witnesses or documentary evidence to refute the claim. The Respondent relied on section 3 of the Evidence Act, which defines evidence as follows:

“Evidence denotes that means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally includes statements by the Accused persons, admission and observation by the Court in its judicial capacity.”
15. In *Shanneebal Limited V County Government of Machakos* [2018] KEHC 5921 (KLR), the court cited the case of *CMC Aviation Ltd V Cruisair Ltd (No.1)* [1978] KLR 103; [1976-80] KLR 835, where Madan J (as he then was) expressed himself stating that pleadings contain averment of parties’ claims and defences, but they do not constitute evidence until proven, disproven, or admitted. Evidence is the means by which facts are investigated and established as truth. Until verified, pleadings remain unproven and cannot form the basis of a legal decision. Proof is essential for transforming allegations into credible evidence.
16. The Respondent also relied on Section 45 of the Employment Act prohibits unfair termination, while Section 41 of the Employment Act outlines the required procedure for fair dismissal, including providing reasons and allowing representation. Since the Respondent testified to unfair termination, the burden shifted to the Appellant to prove compliance with these legal provisions, which it failed to do.
17. The Respondent submitted that the Appellant incorrectly argued that the burden of proving unpaid leave rested with the Respondent. In contrast, section 74 of the Employment Act places this responsibility on the employer as the custodian of employee records. Since the Appellant failed to present witnesses or documentary evidence to refute the Respondent’s claims, the trial court justified allowing the claim for unpaid leave.
18. The Respondent urged this Honourable Court to find that the appeal lacks merit and should be dismissed with costs.

Analysis and determination

19. The court, having carefully perused the record, and the rival submissions by both counsels, the issue for determination is whether the appeal before this court is merited.
20. Section 89 of the Employment Act 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.”
21. In the Court of Appeal case of *Attorney General & another V Andrew Maina Githinji & Another* [2016] KECA 817 (KLR) Waki JA held that the repealed Employment Act, Cap 229, lacked detailed provisions on termination and dismissal, with time limits governed by the Limitation of Actions Act,



sometimes extending up to 12 years. Section 90 of the current *Employment Act* was introduced to prevent prejudice arising from delayed claims when evidence may be lost or witnesses unavailable. The section strictly limits actions to three years, ensuring timely resolution. In the instant case, the cause of action arose on 2nd February 2010, but the claim was filed on 16th June 2014, exceeding the limitation period. As a result, the claim was time-barred as of 1st February 2013.

22. In *G4S Security Services K Limited V Joseph Kamau & 468 others*(supra) the Court of Appeal 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.”

23. In this appeal, the Respondent was seeking compensation for unpaid leave for the years 2019, 2020 and, 2021, amounting to Kshs.60,576.92/=, unpaid maternity leave for the years 2018 and 2019, amounting to Kshs.150,000 and compensation for unfair termination amounting to Kshs.300,000. The claims for unpaid leave, unpaid maternity, and compensation for unfair termination were raised within the time, and therefore, the learned magistrate did not err in awarding the said reliefs sought as the claims were unchallenged.

24. The Appellant, on the other hand, argued that its pleadings were not considered. Looking at the trial court proceedings, the Appellant did not present any witnesses to testify and to back up the allegation lodged against it. In *Ongera V Gianchore Tea Factory Co. Limited* [2025] KECA 88 (KLR), the Court of Appeal stated as follows:

Section 47 (5) of the *Employment Act* provides as follows;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Before any party to the proceedings proves unlawful termination, evidence must be led to prove first the fact of termination. It is our considered opinion that since it was the appellant who contended that he was terminated, the burden lay on him to prove, first, that his services were terminated and second, that the said termination was unfair by virtue of being constructively dismissed. This view is fortified by sections 107 and 108 of the *Evidence Act*, Chapter 80, Laws of Kenya, which provides that:

- “ 107. Whoever desires any court to give judgment as to any legal right or
- (1) liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.



108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

25. In this appeal, the Appellant was to justify its decision in terminating the Respondent, but failed to do so as it did not present any witnesses to testify. Even though parties are bound by their pleadings and any evidence produced by the parties which is not supportive of, or is at variance with, what is stated in the pleadings must be disregarded as set out in the Court of Appeal case of *Mwinyihaji V Mwebeyu & Another* [2025] KECA 868 (KLR) where the court cited the case of *Independent Electoral and Boundaries Commission & Another V Mule & 3 Others* [2014] KECA 890 (KLR) where the court stated that parties are bound by their pleadings and any evidence produced by the parties which is not supportive of or is in variance with what is stated in the pleadings must be disregarded.

26. In the case of *CMCC Aviation Ltd-VS- Cruisair Ltd* 1(1978) KLR the court held as follows:-

“The pleadings contain the averments of the parties concerned. Until they are proved, or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain un-proven. Averments in no way satisfy, for example, the following definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

27. In view of the foregoing, this court finds that the Appellant did not disapprove the decision of the trial court. The appeal therefore lacks merit and it is therefore dismissed and hence this court upholds the judgment of the trial court.

28. The court however on the matter of remedies awarded upholds all the awards except the unpaid maternity leave as there was no evidence of the claimant having been on maternity leave and not paid her salary. It is also time barred having happened over three years before filing of the suit.

The total awarded therefore will be: -

Kshs.284,615.40 less Ksh.75,000/=

= Kshs.209,615.40 plus interest at 14% per annum from date of this judgment until full payment.

29. Costs of the lower court trial and costs of the appeal go to the Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF JUNE, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article



159(2)(d) of the [Constitution](#) which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the [Constitution](#) and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

