



**Kenya Union of Domestic Workers, Educational Institutions  
Hospitals and Allied Workers (KUDHEIHA) v Mudanya (Appeal  
E269 of 2024) [2025] KEELRC 2348 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2348 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E269 OF 2024**

**JW KELI, J  
JULY 30, 2025**

**BETWEEN**

**KENYA UNION OF DOMESTIC WORKERS, EDUCATIONAL INSTITUTIONS  
HOSPITALS AND ALLIED WORKERS (KUDHEIHA) ..... APPELLANT**

**AND**

**GEOFFREY CHUNGULI MUDANYA ..... RESPONDENT**

*(Being an Appeal from the whole of the Judgment and Decree of the Hon. A. Nyoike (SPM) delivered on 9th September, 2024 in MCELRC/E2464/2019)*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. A. Nyoike (SPM) delivered on 9th September, 2024 in Milimani MCELRC No. E2464 of 2019 between the parties filed a memorandum of appeal dated the 13<sup>th</sup> of September 2024 seeking the following orders:-
  - a. The Appeal be allowed.
  - b. The judgment and subsequent decree of the Learned Senior Principal Magistrate’s Court at Nairobi of the Learned Hon A. Nyoike Ms. delivered on 9<sup>th</sup> September, 2024 in CMEL Suit No. 2464 of 2019 be set aside, only to the extent that it awarded the claimant the sum of Kshs. 1,000,000/- in form of damages, plus half the costs of the suit.
  - c. The judgment and subsequent decree of the Learned Senior Principal Magistrate’s Court at Nairobi of the Learned Hon A. Nyoike Ms. delivered on 9<sup>th</sup> September, 2024 in CMEL Suit No. 2464 of 2019 be dismissed, only to the extent that it awarded the claimant the sum of Kshs. 1,000,000/- in form of damages, plus half the costs of the suit.
  - d. The Appellant be paid the costs of this appeal.



- e. That such further or other order be made as the court may deem just.

### **Grounds of the Appeal**

2. The decision of the Learned Senior Principal Magistrate's Court at Nairobi of the Learned Hon A. Nyoike Ms. delivered on 9<sup>th</sup> September, 2024 in CMEL Suit No. 2464 of 2019 is plainly wrong, only to the extent that it awarded the claimant the sum of Kshs. 1,000,000/- in the form of damages, plus half the costs of the suit.
3. The decision of the Learned Senior Principal Magistrate's Court at Nairobi of the Learned Hon A. Nyoike Ms. delivered on 9<sup>th</sup> September, 2024 in CMEL Suit No. 2464 of 2019 is contrary to the law. The claim was purely a tortious claim.
4. The claim was statutorily time-barred and suffers want of jurisdiction of the court.
5. The decision of the Learned Senior Principal Magistrate's Court at Nairobi of the Learned Hon A. Nyoike Ms. delivered on 9<sup>th</sup> September, 2024 in CMEL Suit No. 2464 of 2019 is contrary to the established doctrine of privity of contract.

### **Cross-Appeal**

6. The Respondent/Cross Appellant filed a cross-appeal dated 5<sup>th</sup> March 2025 seeking the following Orders as against the Appellant: -
  - a. The Honourable Court be pleased to set aside the finding that the suit was time-barred and that the court lacked jurisdiction to entertain the matter.
  - b. The Honourable Court be pleased to affirm the award of Kshs. 1,000,000/- as general damages to the cross-appellant.
  - c. The Honourable Court be pleased to award costs of this cross-appeal to the cross-appellant.
  - d. The Honourable Court be pleased to award the reliefs sought.
  - e. The Honourable Court be pleased to grant any other relief this Honourable Court deems just and fit to grant.

### **Grounds of cross-appeal**

7. That the Honourable Trial Magistrate erred in law and in by holding that it lacked jurisdiction to hear and determine the matter, despite the contractual relationship between the Respondent and the Appellant.
8. That the Honourable Trial Magistrate misdirected itself in finding that the claim was time-barred without properly considering the continuing nature of the Respondent's grievances and the Appellant's ongoing representation efforts.
9. That the Honourable Trial Magistrate misdirected itself in finding that the appellant was not entitled to the reliefs sought.
10. That the Honourable Trial Magistrate correctly awarded Kshs. 1,000,000/- as general damages for the appellant's failure to diligently represent the Respondent, and we affirm the award.



## **Background to the Appeal and The Cross-appeal**

11. The Respondent/Cross-Appellant filed a claim against the Appellant vide a statement of claim dated 23<sup>rd</sup> December 2019 seeking the following orders:-
  - a. Kshs. 17,988,883/- together with interest.
  - b. Costs of this suit.
  - c. Interest on (a) and (b) above.
  - d. Any other relief that this Honourable Court may deem fit and expedient to grant.  
(clear copy on pages 290-292 of Appellant's ROA dated 25<sup>th</sup> October 2024).
12. The Respondent/Cross-Appellant filed his verifying affidavit, list of documents together with the bundle of documents attached, and his witness statement (see pages 4-115 of Cross- Appellant's ROA dated 12<sup>th</sup> May 2025).
13. The claim was opposed by the Appellant who entered appearance and filed a response to the statement of claim dated 14<sup>th</sup> December 2020 (pages 116-118 of Cross- Appellant's ROA dated 12<sup>th</sup> May 2025). They thereafter appointed the law firm of Nchoe, Jaoko & Company Advocates to represent them, who filed a memorandum of response dated 9<sup>th</sup> March 2023 (pages 184-189 of Cross- Appellant's ROA dated 5<sup>th</sup> March 2025). They also filed a list of witnesses dated 9<sup>th</sup> March 2023, witness statement of Colonel Oundah dated 9<sup>th</sup> March 2023, and list of documents dated 9<sup>th</sup> March 2023 with the bundle of documents attached (pages 190 -213 of Cross- Appellant's ROA dated 5<sup>th</sup> March 2025, and 122-163 of Cross- Appellant's ROA dated 12<sup>th</sup> May 2025).
14. The Respondent/Cross-Appellant's case was heard on the 18<sup>th</sup> of January 2024 where the claimant testified in the case, relied on his witness statement as his evidence in chief, produced his documents, and was cross-examined by counsel for the Appellant Mr. Jaoko (pages 181-185 of Cross- Appellant's ROA dated 12<sup>th</sup> May 2025).
15. The Appellant's case was heard on 27<sup>th</sup> March 2024 where RW1 Colonel Ounda testified, relied on his filed witness statement as his evidence in chief, and produced the appellant's documents. He was cross-examined by counsel for the Respondent/Cross-Appellant Mr. Mutoyi (pages 187-190 of Cross- Appellant's ROA dated 12<sup>th</sup> May 2025)
16. The parties took directions on filing of written submissions after the hearing. The parties complied.
17. The Trial Magistrate Court delivered its judgment on the 9<sup>th</sup> of September 2024. It held that the relationship between the Respondent/Cross-Appellant and the Appellant was contractual. It also held that the Appellant had failed to demonstrate that it acted in good faith and had failed to offer the Appellant necessary financial or legal assistance. It awarded the Respondent/Cross-Appellant Kshs. 1,000,000/- as damages against the Appellant (judgment at pages 164 to 171 of Cross- Appellant's ROA dated 12<sup>th</sup> May 2025).

## **Determination**

18. The appeal was canvassed by way of written submissions. Both parties filed.
19. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-  
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles



upon which the Court of Appeal acts are that the 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 particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

### **Issues for determination**

21. In their submissions dated the 21<sup>st</sup> of May 2025, the Appellant submitted generally on the grounds of appeal and cross appeal.
22. The Respondent/Cross-Appellant in his two sets of submissions both dated 21<sup>st</sup> May 2025, filed against the Appellant's appeal, and in Support of his Cross-Appeal, identified the following collective issues for determination:
- i. Whether the trial court had jurisdiction to hear and determine the claim;
  - ii. Whether the claim was time-barred;
  - iii. Whether the claim was a civil claim grounded in contractual and statutory obligations or tort-based in nature;
  - iv. Whether the trial court erred in awarding the claimant Kshs. 1,000,000/- and/or whether the award of damages was proper in law;
  - v. Whether the trial court failed to apply the doctrine of privity of contract appropriately.
  - vi. Whether the trial court misdirected itself in finding that the Respondent was not entitled to the reliefs sought;
23. The court finds from the grounds of appeal that the issues for determination in the appeal are:-
- a. Whether the trial court had jurisdiction to hear and determine the claim and whether the claim was time barred;
  - b. Whether the claim was a civil claim grounded in contractual and statutory obligations or tort-based in nature;
  - c. Whether the Whether the trial court misdirected itself in finding that the Respondent was not entitled to the reliefs sought;(cross-appeal)



## **Whether the trial court had jurisdiction to hear and determine the claim and whether the claim was time barred;**

### **The appellant's submissions**

24. The appellant submits that the decision of the Honourable Learned Senior Principal Magistrate's Court at Nairobi of the Learned Hon. A. Nyoike MS. Delivered on 9th September, 2024 in CMEL Suit No. 2464 of 2019 is Contrary to the Law. The claim was purely a tortious claim. The claim is/was statutorily time-barred and suffers want of jurisdiction of the Court. (see the record of appeal at pages; 26-36, 130- 150, 243-276, read with pages: 290-294, 344.
25. That the Honorable Court was competently constituted, though lacked the requisite jurisdiction to hear and determine the matter conclusively. The nature of the claim as pleaded by the claimant "Statement of Facts", (Page 290) is that the claimant lodged in Court a claim that is clearly statutorily time-barred and suffers want of jurisdiction of the Court. A close perusal of the claim at paragraphs; "Statement of Facts", 1, 2, 3, 4,5, 6, 5, it starts with "the claimant informed the respondent of the said unfair termination of his employment, and the respondent Negligently failed to initiate any negotiations nor seek legal redress". .it continues to paragraph 6 of the claim.
26. The appellant submits that a claim founded on an alleged tort and is based on the substance of the claim as set out in the pleadings, such was founded on an alleged tort. It is trite Law that an alleged "Breach of the statutory duty of care is not a breach of the contract but breach of duty of care in tort and therefore subject of the limitation period prescribed (see the record of appeal at pages :075- for actions based on tort. 150). That the respondent submits that the time prescribed is 3 years' period of limitation under section 4 (1) of the Limitations of Actions Act. The claimant pleaded a claim for negligence, which is purely a tort and is subject to 3 years Limitation period of time.
27. The Appellant submits and relies in Court's decision in Kiamokama Tea Factory Company Ltd v Joshua Nyakoni KSI HCCA No. 169 of 2009 [2015] eKLR, (see pages 4-9), that a breach of statutory duty, as pleaded by the respondent, is a tort (see also Kenya Cargo Handling Services Ltd v David Uggwang NRB CA Civil Appeal No. 64 of 1984 [1985] eKLR). The court held that, 'My view is further fortified by Black's Law Dictionary (8th Ed.) which defines tort as, "a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons on an employer to his employee is clearly a tort." A claim cannot be two faceted. It is either a contract or a tort, but not both."
28. The appellant submits that if at all this existed as claimed exists, though there is really no any actionable claim in this suit, the claim could only have legally arisen in the year 2009 as is clearly pleaded at paragraphs; 4(1), 4(2), 4(3), 4 (4), of the claim filed in Court on 23rd December, 2019 and dated the same dated. It is time barred. That the lower court was competently constituted though, lacked the requisite jurisdiction to hear and determine the matter. The respondent relies in the case of Owners of Motor Vessel Lilian 'S'-VS- Caltex Oil Kenya Ltd [1989] KLR Nyarangi, JA as he then was in this landmark ruling stated inter alia;"That jurisdiction is everything without it, a Court has no power to make one more step where a Court has no jurisdiction that could be no basis for a continuation of proceedings pending other evidence. A Court of law down its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."
29. The appellant submits that the Honorable Court as was Competently constituted though, lacked the requisite jurisdiction to hear and determine the matter. Upon perusal of the claim, the claimant has pleaded at paragraph 6(i-xii) (See Record of Appeal Pages: 291), that he is claiming the sum of 17, 988,883/=. He is also claiming at paragraph 7 (b), the costs of the suit. The Pecuniary jurisdiction of



the Court handling matter is exceeded by the amount claimed by far. Since the Honorable Court's Jurisdiction was Limited to Kshs. 10,000,000/=.

30. The appellant submits that claim is founded on an alleged tort and is based on the substance of the claim as set out in the pleadings. This leaves no doubt that the claim was founded on an alleged tort. It is trite Law that an alleged "Breach of the statutory duty of care is not a breach of the contract but breach of duty of care in tort and therefore subject of the limitation period prescribed for actions based on tort". Under the law, the time prescribed is 3 years' period of limitation under section 4 (1) of the Limitations of Actions Act.

### Respondent's submissions

31. The Constitution of 2010, which mandates the establishment of courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. Pursuant to this provision, Parliament enacted the Employment and Labour Relations Court Act, which under Section 12(1)(b) vests exclusive jurisdiction in the Employment and Labour Relations Court (ELRC) to hear and determine disputes between a trade union and a member thereof. Section 12(1) reads in part:- "The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including...(b) disputes between an employer and a trade union; a trade union and a member thereof..."
32. The respondent submits that jurisdiction, however, is not exclusively retained by the ELRC in all instances. On 10th June 2018, the Chief Justice, pursuant to powers granted under the said Act, issued Gazette Notice No. 6024, which appointed certain magistrates of the rank of Senior Resident Magistrate and above as Special Magistrates empowered to handle designated employment and labour disputes. In *Kudheha Workers Union v Pinewood Beach Resort & Spa* (Cause E013 of 2023) [2023] KEELRC 1204 (KLR) (27 April 2023) (Ruling), the High Court sitting at Mombasa held that:-

“The appointment of magistrates to preside over employment and labour relations claims does not remove the primary and original jurisdiction of the court to hear and determine such claims pursuant to Article 162(2)(a) of the Constitution.” Therefore, to determine whether the subordinate court had jurisdiction, the following questions must be addressed:

  - a) Was the matter a trade dispute as defined under the Labour Relations Act?
  - b) Was the dispute within the scope of matters assignable to a subordinate court under Gazette Notice No. 6024? Section 2 of the Labour Relations Act defines a trade dispute broadly to include disputes: "...between trade unions and their members..." However, this definition is not mechanically applied to every disagreement between a union and its member. The substance, relief sought, and pre-litigation steps taken are all critical factors in determining whether a dispute qualifies as a "trade dispute."
33. This position was clearly articulated in *Kenya Plantation & Agricultural Workers Union v Mahee Flowers Limited* (Cause E013 of 2021) [2024] KEELRC 307 (KLR), where the court observed: "31....a claim does not qualify as a trade dispute merely because a trade union or an employer organization is a party in the proceedings. The defining feature is the nature of the claim and the steps taken prior to litigation."
34. That the matter before the trial court did not concern a dispute between workers and their employer, nor did it relate to collective bargaining, recognition, or industrial action. Rather, it involved a



member's individual claim against a registered trade union for failure to discharge statutory and fiduciary duties, including the duty of fair representation and care despite continued subscription. The claim was not preceded by conciliation under the *Labour Relations Act* as would be required for a formal trade dispute. Instead, it was a civil claim for breach of statutory and fiduciary obligations squarely falling within the civil and employment jurisdiction of the trial court as designated under Gazette Notice No. 6024.

35. The Respondent's salary at the material time fell within the statutory threshold of Kshs. 80,000, satisfying the monetary condition for the trial court's jurisdiction. Furthermore, the cause of action was neither collective in nature nor a representative union-employer conflict, but an individualized claim of neglect and bad faith by a union against a member. That the learned trial magistrate had both territorial and subject-matter jurisdiction to entertain the matter. To hold otherwise would be to oust the jurisdiction of courts mandated to offer access to justice in employment matters under Article 48 of the *Constitution*.
36. Whether the claim was time-barred- The Appellant alleges that the Respondent's claim was statute-barred under Section 90 of the *Employment Act*. With respect, the Appellant conflates two distinct relationships. The primary dispute here is not between employer and employee but between a trade union and its member. The inaction by the Appellant was not a single isolated omission, but a continuing failure to act, spanning from 2009 through to 2018. In law, a continuing breach gives rise to a continuing cause of action. Consequently, limitation does not begin to run until the cessation of the breach. It is therefore legally erroneous to peg the limitation period on the original date of termination. The cause of action arose from the Appellant's failure to act, an omission of a continuous nature that spanned several years. Consequently, limitation must be construed as continuing until the cessation of such neglect, in line with Section 4 of the *Limitation of Actions Act* and the principle elucidated in *Divecon v Samani* (1995-1998) EA 48, which stated:-Section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt, and that the section meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The trial court's holding that the claim was time-barred overlooked that this was not an employment contract claim, and limitation should have been assessed under general civil and administrative law. The decision in *Seth Panyako v KUDHEIHA* [2013] KLR supports the proposition that unions owe continuing duties to members, which, when breached, give rise to enforceable claims. The plea of limitation is therefore untenable and should be rejected

## Decision

37. The Claimant's claim against the Respondent is for Kshs.17,988,883/- which is outstanding and owing, and as tabulated as follows:
- I. Unfair termination-Kshs. 2,000,000/-
  - II. Salary arrears-Kshs. 2,731,356/-
  - III. Salary compensation for 12 months-Kshs.910,452/-
  - IV. Salary underpayment (room service head)-Kshs. 1,429,000/-
  - V. Barclays bank loan resettlement (1,314,000/-)-Kshs. 1,314,000/-
  - VI. HELB loan-Kshs. 79,000/-
  - VII. Worked annual leave days for 2015-Kshs. 75,871/-
- Compensation for unfair termination-Kshs.3,700,000/-



- IX Punitive damages-Kshs.455,226/-
- X Unlawful suspension-Kshs.4,300,000/-
- XI Unpaid tax-Kshs. 155,139/-/-
- XII Commission @5%\* 16,776,781/-Total- Kshs. 838.839/-  
Kshs. 17,988,883

38. The Appellant was not the employer of the respondent as pleaded at paragraph 3 of the claim dated 23<sup>rd</sup> December 2019. The claimant was employed by Sarova Stanely Hotel at a gross pay of Kshs. 75871. He stated that his services were unfairly terminated. So why sue the Respondent. In the claim the claimant stated as follows as stated in paragraph 4 of the claim- ‘1) The Claimant informed the Respondent of said unfair termination of his employment, and the Respondent negligently failed to initiate any negotiations nor seek any legal redress on his behalf as required by law,’”
39. The Claimant stated he filed a case at the Employment and Labour Relations Court No. 2080 of 2016 against Sarova Stanley Hotel. That after receiving the instructions from the Claimant, the appellant failed to recover the Claimant’s claim, seek legal redress in due time on behalf of the claimant and offer financial support to our Claimant as required by law which led to the Claimant’s misfortunes and financial constraints. That the Claimant herein was not given any reason for the lack of assistance by the Respondent as was required by law to assist. That the Claimant has suffered damages as a result of the un-recovery of the sum due.”
40. What the court deduced from the claim was that having failed to succeed in the court case filed in 2016 or whatever may have happened, the claimant then sued the union in place of the employer. The jurisdiction of magistrate’s court in matters under the court is limited as per the following Gazette Notice-

Gazette Notice No. 6024

The *Employment And Labour Relations Court Act* (No. 20 of 2011)

Appointment of Magistrates’ Courts to Hear Matters

Relating to Employment and Labour Relations

In Exercise of the powers conferred by section 29 (3) and (4)(b) of the *Employment and Labour Relations Court Act*, 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
2. Matters relating to the following specific areas—
  - (i) offences under the *Work Injury Benefits Act*, 2007
  - (ii) offences under the *Employment Act*, 2007
  - (iii) offences under the *Labour Institutions Act*, 2007



(iv) offences under Occupational Safety and Health Act, 2007; and

(v) offences under the Labour Relations Act, 2007.

The conferment under Gazette Notice No. 9243 is revoked.

Dated the 10th June, 2018.

David K. Maraga,

Chief Justice/President, Supreme Court of Kenya.”

41. A court cannot act without jurisdiction. In the instant case the claims under paragraph 4(5) of the statement of claim were all claims for breach of the contract. The basis of the claims being brought under the union /appellant and not the employer, was alleged negligence for failure to represent the claimant under the Labour Relations Act. The gazette notice gave jurisdiction to the Magistrates of limited ranks restricted to employment claims.
42. What was the nature of dispute before the lower court? A trade dispute is defined under the labour relations act as follows:- “trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;” The court finds the dispute was not a trade dispute. It is true among the functions of the union is to use the union dues to represent members in legal proceedings as per section 39( c) of the Labour Relations Act to wit-“(c) the prosecution or defence of any legal proceedings to which the trade union, employers’ organisation or federation or any member thereof is a party, when the prosecution or defence is undertaken for the purpose of securing or protecting its rights or the rights of any member in any matter concerning employment or the application of any employment law; the conduct of trade”The court agreed with trial court that claimant could sue for negligence by the union in this Court(ELRC) and not the Magistrate court as per the limited jurisdiction under the Gazette notice.
43. The reliefs sought before the trial court were related to the contract of employment and there was no privity of contract between the claimant and the respondent. claim of unfair termination can only be lodged against the employer under section 45 of the Employment Act to wit:- ‘45. Unfair termination
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employees conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.
  - (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated”



43. Going back to the Gazette Notice(supra) I find and hold that the claim for non-representation under the *Labour Relations Act* was outside the limited jurisdiction of the Magistrate's court. Further, the claims related to the employment could not be brought against the respondent as it was not the employer.
44. Was the claim time barred? The respondent submitted that this was not a claim under section 90 of the *Employment Act*. That the Respondent's salary at the material time fell within the statutory threshold of Kshs. 80,000, satisfying the monetary condition for the trial court's jurisdiction. Furthermore, the cause of action was neither collective in nature nor a representative union-employer conflict, but an individualized claim of neglect and bad faith by a union against a member. That the learned trial magistrate had both territorial and subject-matter jurisdiction to entertain the matter. To hold otherwise would be to oust the jurisdiction of courts mandated to offer access to justice in employment matters under Article 48 of the *Constitution*.
45. That the Appellant alleges that the Respondent's claim was statute-barred under Section 90 of the *Employment Act*. With respect, the Appellant conflates two distinct relationships. The primary dispute here is not between employer and employee but between a trade union and its members. The cause of action arose from the Appellant's failure to act, an omission of a continuous nature that spanned several years. Consequently, limitation must be construed as continuing until the cessation of such neglect, in line with Section 4 of the *Limitation of Actions Act* and the principle elucidated in *Divecon v Samani* (1995-1998) EA 48, which stated:-Section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt, and that the section meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. That the trial court's holding that the claim was time-barred overlooked that this was not an employment contract claim, and limitation should have been assessed under general civil and administrative law. The decision in *Seth Panyako v KUDHEIHA* [2013] KLR supports the proposition that unions owe continuing duties to members, which, when breached, give rise to enforceable claims. The plea of limitation is therefore untenable and should be rejected.
46. The trial court held as follows:- 'this court lacks jurisdiction to entertain this matter with the result of dismissal thereof'(page 42 of the ROA). The court in the instant case having held it lacked jurisdiction and proceeded to award general damages for negligence. The Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR held-' Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'" The Hon Magistrate having held that she lacked jurisdiction on all fronts had no judicial authority to take another step out of mistaken sympathy to award unpleaded general damages of Kshs. 1,000,000 against the respondent. The cross-appellant relied on the decision in *Seth Panyako v Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers* (2013)e KLR where the court held as follows:- '24. As stated in the recent South African case of *Food and Allied Workers' Union v. Ngcobo* [353/ 12] 2013 [ZASCA] 45 [28<sup>th</sup> March 2013], "a trade union is liable for damages if it fails to perform the mandate which it accepted to represent its members.'" The quantum of damages should be just and equitable. The Court has taken into account that the Claimant is pursuing compensation for unfair termination against the Hospital in a separate claim, which may mitigate the overall effects of dismissal. In redressing the injury occasioned by the Trade Union however, the Court is concerned about bringing the Trade Union to account, and in making appropriate amends to the Claimant for breach of mandate. This remedy of damages against the Respondent cuts across delictual and contractual breaches, and ought to be just and equitable. It is important that Shop



Stewards are protected by their Trade Unions, and equally important that Trade Unions understand the right to organize comes with a responsibility to fairly represent. The Court is convinced that the Respondent acted in utmost bad faith, and did not give the Claimant the necessary legal or financial assistance, despite having recruited him as a Member and received monthly subscription fees from him for years. The Court does not agree with the Claimant's prayer for what he terms as maximum special compensation of 12 months' salary at Kshs. 1,065,168 for unfair termination; this is properly a remedy he ought to pursue against the hospital, and which perhaps he has done in the other claim. The Court does also not agree that he is entitled to damages based on his anticipated salaries for the remainder of 23 years he expected to work for the Hospital, calculated at a staggering Kshs. 51,891,323. This again is an unlikely remedy he should pursue from his former employer, not the Respondent. It is not proper that the Claimant comes to this Court and prays to be paid what he may have sought against his former employer before another forum. The prayer for imposition of fine is misplaced. The breach by the Respondent against the Claimant, as acknowledged by his filing of two separate Claims, is distinguishable from his cause of action against his former employer. The Court is however satisfied that it has the jurisdiction under the Industrial Court Act to remedy the injury suffered by the Claimant by a just and equitable Award of general damages, which the Court grants at Kshs. 850,000. The amount shall be paid to the Claimant by the Respondent, within 30 days of the delivery of this Award. The Parties shall bear their own costs."(emphasis given). The decision is distinguished as this was a case before the Court (ELRC) hence original jurisdiction in employment and labour relations matters, secondly in that cause the claimant had pleaded for general damages as follows:- "[c] A declaration that the Respondent failure to represent the Claimant was in contravention of the Respondent's constitution, bad in law and fact, and an illegal abdication of their leadership responsibilities;

(d) An order to issue for payment of the entire Claimant's Terminal Benefits, Special and General Damages;" In the instant case the prayers were for Kshs. 17,988,883 together with interest whose particulars were stated in paragraph 4(6) of the claim highlighted above and correctly held by the trial court to be claims for unfair termination and terminal dues. The court noted in the witness statement of the cross-appellant he stated that he had filed a claim in the court No. 2080 of 2016(page 5 of the cross-appeal). The claimant did not disclose the outcome of the case. If he had filed the claim how could the union then file another case on the same cause? I find the award of Kshs. 1 million on account of negligence not only to be without jurisdiction as held by the lower court but also not merited on account of the statement of the claimant of having filed a suit against employer in 2016 post the termination.

47. In the upshot the court finds the appeal is merited and is allowed. The Judgment and Decree of the Hon. A. Nyoike (SPM) delivered on 9<sup>th</sup> September, 2024 in Milimani MCELRC/E2464/2019 is set aside that in place submitted with an order that the claim is dismissed for want of jurisdiction. The cross- appeal consequently is disallowed.

48. The court to temper justice with mercy taking into account that the respondent/ cross-appellant was a member of union, I order each party to bear own costs in the claim, appeal and cross-appeal.

49. It so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>th</sup> DAY OF JULY, 2025.**

**J.W. KELI,  
JUDGE.**

In the presence of:



Court Assistant: Otieno

Appellant – Jaoko

Respondent/Cross-Appellant: Ms Kerubo

