



**Council, Kisii University & another v Ndege (Appeal E031 of 2023)  
[2024] KEELRC 2550 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2550 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E031 OF 2023  
JK GAKERI, J  
OCTOBER 23, 2024**

**BETWEEN**

**THE COUNCIL, KISII UNIVERSITY ..... 1<sup>ST</sup> APPELLANT**

**THE VICE CHANCELLOR, KISII UNIVERSITY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HENRY ONYANGO NDEGE ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, Kisii University brought this appeal being aggrieved by the Judgment of Hon. J. N. Wambilyanga, SPM delivered in Kisumu CMELRC No. 24 of 2020 on 28<sup>th</sup> April, 2023 which granted the Claimant Kshs.783,314.00 and costs of the suit.
2. Briefly, the facts of the case are that the Appellant employed the Respondent as a Part-time Lecturer on 15<sup>th</sup> September, 2015, at the rate of Kshs.25,000.00 for certificate courses, Kshs.60,000.00 for undergraduate courses and Kshs.90,000.00 for masters courses per course unit before tax per semester with a prorated amount for classes of less than 15 students and served until April, 2018.
3. The Respondent tabulated the course units taught in different semesters from May, 2015, to October, 2018 claiming a sum of Kshs.1,128,644.00 as outstanding dues.
4. The Respondent attached appointment letters, class attendance lists, Examination Attendance sheets, claim forms and cover page of dissertations and thesis supervised.

The Respondent's claim was tabulated as follows;

May – August 2015 Kshs.16,000.00

September – December 2015 Kshs.169,076.00

January – April 2016 Kshs.184,329.00



May – August 2016 Kshs.212,331.00  
September – December 2016 Kshs.175,998.00  
January – April 2017 Kshs.161,328.00  
May – August 2017 Kshs.120,666.00  
May – August 2017 Kshs.24,666.00  
September – December 2017 Kshs.56,250.00  
January – October 2018 Kshs.8,000.00  
Total Kshs.1,128,644

5. For unexplained reasons the Appellant did not include copies of the Response to the Claim or witness statements in its Record of Appeal dated 15<sup>th</sup> April, 2024, which made it difficult for the Court to understand the pith and substance of its case before the trial Court.
6. However, based on the oral testimony of Mr. Seth Onguti, the Appellants Legal Officer admitted that the Respondent was the Appellants Part-time Lecturer under written contracts of service and the Respondent had to claim for the course units taught by completing the necessary forms. That the claim form had to be accompanied by the appointment letter, student examination attendance sheet and the examination processing form and the Respondent did not do so per semester.
7. That the Claimant taught and was not paid. That appointment was by a written contract. That after a claim was filed, it had to pass through other stages before payment and the Respondent had copies of claim forms he did not submit and the Dean was not invited to confirm whether the claims were received.
8. After weighing the Claimant’s case against that of the Respondent and based on the evidence availed, the learned trial Magistrate found that the Respondent had discharged the burden of proof on a balance of probabilities and made an award of Kshs.783,314.00 and costs of the suit.
9. This is the decision the Appellant is appealing against. The Appellant faults the trial Court variously; that it erred in law and fact for;
  - a. Finding that the Respondent had proved his case on a balance of probabilities.
  - b. Failing to evaluate, consider and determine all the issues raised by the defence.
  - c. Failing to consider that the Respondent did not follow the prescribed procedure in claiming his dues.
  - d. Failing to consider the pleadings and evidence and occasioning miscarriage of justice.
  - e. Failing to evaluate the entire evidence and submissions and hence arrived at an erroneous Judgment.
  - f. Failing to find and hold that the suit was time barred.
  - g. Awarding the Respondent Kshs.783,314.00 without justification as opposed to dismissing the suit.
  - h. Failing to appreciate that the Appellant had institutionalized a procedure for submission of claims for payment and the Respondent failed to do so as no complete claim with the requisite attachments was availed.



9. The Appellant prays that the Judgment of the trial Court be set aside and/or the Respondent's claim be dismissed with costs.

### **Appellant's submissions**

10. Counsel submitted on proof of the Respondent's employment from September 2015 to April 2018, whether the Appellant breached the terms of employment, whether the Respondent's suit was statute barred and whether the award was justified.
11. On the first issue, Counsel submitted that based on the appointment letter on record and payment to be made, the Respondent had no letters for May – August 2015, September – December 2016, May – August 2017 and January - October 2018, a fact the Respondent conceded.
12. Counsel submitted that the letters of appointment were for a fixed term and lapsed on expiry of the term and a claim accrued on expiry of the contract. Counsel faults the trial Court for holding that the Respondent worked for the entire period, that appointment letters did not contain all the courses/units the Respondent claimed to have taught.
13. Counsel submitted that the Respondent had failed to prove that he was employed by the Appellant for the entire period.
14. On whether the Appellant breached the terms of employment, Counsel urges that it did not as it had a claim processing procedure as elaborated by PW1, Mr. Ong'uti and all forms necessary were available online to all part-time Lecturers and the Lecturers copy of the claim would be stamped by the University and payment was based on the SSP Policy.
15. That the Respondent availed no claim form stamped by the Appellant as evidence of receipt of the claim.
16. That without lodging a claim as required, the relevant department would not process the same for payment.
17. Reliance was made on the sentiments of the Court in Seth Osundwa Cholwa V Kisii University [2021] eKLR and George Morara Ontumbi v Moi University to urge that the Respondent ought to have submitted his claims as prescribed if he expected payment.
18. The decision in National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR was cited to underline the proposition that parties are bound by the terms of the contract between them.
19. As to whether the Respondent's suit was time barred, Counsel submitted that the claims between September, 2015 and February, 2017 were statute barred by reason of Section 90 of the [Employment Act](#) yet the trial Court dismissed the issue on the ground of its being raised too late in the day.
20. Counsel submitted that the issue could be raised by either party at any time and even suo motu by the Court and cited the sentiments of the Court of Appeal in Kenya Ports Authority v Modern Holding (EA) Ltd [2017] eKLR on the centrality of jurisdiction in the administration of justice.
21. Counsel submitted that since the Respondent's claims were based on fixed term contracts that ended on respective dates and not continuous as the trial Court held, the trial Court's finding was erroneous as the claims for September 2015 to February, 2017 were time barred.
22. Reliance was made on the decision in Charles M. Kiget v Majani Mingi Group of Companies Ltd [2019] eKLR.



23. Finally, as to whether the award of Kshs.783,314.00 was justified, Counsel submitted that it was not as the Court did not interrogate each claim and compute the amount due to the Respondent as part of the claim was statute barred.
24. In addition, some courses or units were not proved as they were not in the appointment letter and payment depended on the unit/course level and the number of student's taught and examined, variables the Court did not consider.

**The Respondent did not file submissions.**

**Analysis and determination**

25. The grounds of appeal may be condensed into three, namely; failure to evaluate and consider the evidence on record in its totality, whether the Respondent's suit was time barred and justification of the award.
26. This being a first appeal the Court is guided by the sentiments of the Court of Appeal in *Selle & Another v Associated Motor Bod Co. Ltd & Others* [1968] EA 123 as follows;  

“...An appeal to this Court ... is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect”.
27. Before delving into the salient grounds of appeal highlighted above, it is essential to dispose of the question of nature of the Claimants employment which the Appellant's Counsel raised.
28. From the letters of appointment on record, it is clear that the Respondent was employed by the Appellant as a part time Lecturer for particular courses or units per semester and at times in different departments.
29. It is discernible that engagement was semester based and payment depended on the level of training and number of students.
30. The letters on record reveal that the Respondent was first engaged for the September 2015 to December 2015 semester. Consistent with his claim, the letters of appointment were issued after the semester had ended as RW1 admitted on cross-examination.
31. The standard letters on record identify the course/unit(s) assigned, School or Department, the commencement and end of the semester and payment was based on the SSP Policy for the period 2014 – December 2014.
32. It is discernible that these were distinct fixed term contracts which lapsed by effluxion of time and the Respondent was only entitled to pay for the course/unit(s) taught and examined or project or thesis or dissertation supervised.
33. Counsel for the Appellant faulted the trial Court for holding that the employment was continuous. Both paragraphs 11 and 12 of the Judgment of the trial Court make reference to the length of the Respondent's service that he “worked until September 2017” and “was engaged with the 1<sup>st</sup> Respondent from 2015 to 2018”.



34. These phrases would appear to suggest that the Respondent served continuously until 2017 or 2018 which was not the case as he served under distinct fixed terms of engagement.
35. As regards the dates of engagement as adverted to elsewhere in this judgment, the Respondent was first engaged in September, 2015 and the claim for the May to August 2015 semester contradicts the statement of claim and the witness statement.
36. Having found that the Respondent was engaged by the Respondent under distinct fixed term contracts, a claim accrued as soon as the students were examined and results forwarded to the Head of Department as no salary was due to the Respondent.
37. The first claim accrued in December 2015. From the documentary on record, it is decipherable that the Respondent conducted student examinations in at least 62 instances between September 2015 and October 2018.
38. The number of student Attendant Registers are too few as is evidence of thesis, dissertations or projects supervised. Claim forms are also countable.  
The record has at least 15 appointment letters.
39. Needless to belabour, part-time teaching in public and private Universities in Kenya and colleges is an issue in the public domain and in all cases part-time Lecturers are paid for units/courses taught, examined and a claim for payment made through the Head of Department and the claim must be supported by relevant documents.
40. In the very organized institutions, claims for part-time teaching must be made by a particular date for payment to be guaranteed at the end of the month, but in all cases, a claim ought to be made for all courses taught and examined in a semester. As testified by RW1, evidence the Respondent did not controvert, the Appellant had a formula of making claims for payment.
41. That a completed claim form had to be submitted, accompanied by the original appointment letter, Examination Attendance Sheets and examination processing form. Although the Respondent testified that he did not know what the examination processing form was, he did not allege that it was not availed to him on request.
42. It is simply evidence of the performance by candidates. RW1 testified that for every complete claim made, the Lecturer retained a copy of the claim form duly stamped by the Appellant as evidence of receipt of the claim and although the Respondent testified that he made his claims as and when they fell due, he had no stamped claim form for or other verifiable evidence of having made a claim for payment from December 2015 to April 2018.
43. The Appellant maintains that the Respondent did not submit any claim for payment in the manner prescribed and was thus not paid yet it acknowledges that he taught as RW1 confirmed on cross-examination.
44. The Court is at a loss how the Respondent was shuttling from one class to another, sometimes in different department and schools for income but failed to lodge claims for payment and even assuming he did in 2015, 2016 and 2017 and no payment was forthcoming, what reasonable steps did he take, and if none why?
45. From the documents on record, there is not a single claim form to prove that the Respondent lodged a single claim with the Appellant at any point or followed up lodged claims.



46. It is puzzlingly that from the evidence on record, the Respondent appears to have been contended with the state of affairs until he filed the instant suit on 12<sup>th</sup> February, 2020.
47. Documentary evidence of the fact of having made any claim or showing attempts made to follow up on the claims made would have demonstrated the Respondent's vigilance in safeguarding his right to fair remuneration as guaranteed by Article 41 of *the Constitution* of Kenya.
48. The absence of a letter of inquiry from the Respondent or a written response by the Appellant would appear to suggest, in the Court's view, that no claim(s) was made or was outstanding.
49. Having worked for the Appellant as a Part-time Lecturer since September, 2015, the Respondent was aware and cannot be heard to contend that he was unaware of the Appellants claim process yet he alleges that he made claims. How did he do it if he did?
50. The absence of a copy of a single complete claim made by the Respondent or follow up for the duration served is intriguing.
51. In the Court's view, the process was not onerous and no allegation has been made that the Appellant had financial challenges.
52. The Court is guided by the sentiments of the Court in *Seth Osundwa Cholwa V Kisii University* (Supra) cited by the Appellant that the Lecturer would have to fill a claim form and attach the letter of appointment and the examination sheet to prove that teaching took place and an examination was not only conducted but invigilated and there were results and the claim would be approved by other officials of the University.
53. The Court considers the claim processing procedure reasonable and fair as it ensures payment for the services rendered and the Appellant retained the request evidence for purposes of any query or accounting which is a requirement.
54. This far, the Respondent has failed to demonstrate that the non-payment for services rendered from September 2015 to October, 2018 was attributable to any other person but himself.
55. A review of the documents on record reveal that the average number of students taught and examined by the Respondent per class or course unit was one (1) or two (2) and the number did not exceed the threshold of 15 students in more than 2 instances, which would suggest that save for the few instances where the threshold of 15 students was met, payment would be prorated in all other cases.
56. Regrettably, neither the written statement nor the oral testimony or the claim itself itemises the specific amount claimed for each course/unit.
57. A clear computation of the specific amounts due per course would have demonstrated the efforts made to convince the Court that the global sum may be correct in light of the too many units/courses in a semester and the prorating of payment.
58. For instance, during the January to April, 2016 semester, the Respondent taught 9 units, May – August 2016 10 units, September to December 2016, 8 units January to April 2017 a total of 22 units and May to August 2017 17 units. It is only for the January – October 2018 semester that the Respondent taught a single unit, SBT 412.
59. A table showing the course/unit taught, semester, number of students and amount claimed would have effortlessly enabled the Court confirm with the letters or other documents on record, the true state of affairs. The individual totals per semester except in three (3) cases is difficult to ascertain how it was arrived at.



60. It is unclear to the Court how the trial Court confirmed the claim in 7(b), 7(c), 7(d), 7(f) and 7(i) and awarded the same. In the Court's view, there were too many variables to be extrapolated before the amount claimed was arrived at.
61. As regards the burden of proof, the trial Court was satisfied and found that the Respondent had proved his claim on a balance of probabilities as provided by law.
62. A bird's eye view of the documentary and oral evidence adduced in Court reveals that while the Respondent proved that he was engaged by the Appellant as a Part-time Lecturer and taught many units/courses at the Appellant's Kisumu Campus under distinct fixed term.
63. Contracts pegged on the semester, he was evidentiary unable to demonstrate the actual amount owing and when he claimed for the same and what transpired between the lodgement of the claim and February, 2020 bearing in mind that the last engagement was in October, 2018.
64. From the foregoing, it is the finding of the Court that the learned trial Magistrate did not evaluate and critically consider the import of the evidence availed by the Respondent as countered by the Appellant.
65. This is fortified by the fact that the Appellants uncontroverted evidence was that it had a prescribed approach to claiming for payment and the Claimant did not follow the procedure.
66. As a member of teaching staff, the Respondent could not claim payment otherwise. The Respondents assertion in Court that he filed his claims lacked supportive evidence whether direct or circumstantial as he had neither a timeline nor evidence of presentation of any claim or follow up.
67. In the Court's view, the Respondent failed to discharge the burden of proof that the Appellant owed him Kshs.1,128,644.00 as arrears. Counsel for the Appellant faults the trial Court for failing to make a finding that the Respondent's suit against the Appellant was time barred.
67. Counsel argues that all claims for the period September, 2015 and February 2017 were statute barred on account of Section 90 of the Employment Act as no action was filed to enforce them within the 3 years.
68. On this issue, the learned trial Magistrate reasoned that the issue was raised too late and the Respondent worked until September, 2017 and was thus within time in February, 2020 and in any case, such a defect could be cured by Article 159 (2)(d) of the Constitution of Kenya, but did not explain how.
69. The Court did not explain why an amount due and payable in 2015 or 2016 and not paid was enforceable in 2020 more than 4 years thereafter.
70. The trial Court appear to have reasoned that the amount claimed was salary arrears due at the end of each month.
71. In terms of rendering of services, the Appellant did not deny that the Respondent did so until October 2018. Reliance on Article 159(2)(d) of the Constitution of Kenya sounds unconvincing and elicits a comment.
72. Clearly, the Article was not intended to abolish procedural technicalities or requirements but to enjoin courts not to grant procedural technicalities disproportional or unwarranted or unjustifiable consideration in the administration of justice.
73. Respectfully, the Court is not persuaded that the invocation of Article 159(2)(d) of the Constitution of Kenya was warranted for the simple reason that a claim that a suit is time barred implicates the Court's jurisdiction to hear and determine the suit which is determinative of the suit as "Jurisdiction



is everything” as exquisitely capture by Nyarangi JA in Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd [1989] KLR 1.

74. It is discernible that the question whether the suit before the trial Court was statute barred was not accorded the seriousness it deserved and a finding made. The argument that the issue was raised late in the day lacks persuasion or justification.
75. It is common ground that an issue which implicates a Court’s jurisdiction should arouse the Court’s interest irrespective of when or how it is raised, including by way of submissions, notwithstanding the fact that it had not been raised hitherto. It can be raised by either party or by the Court suo motu if none of the parties does so.

See Pauline Wanjiru Thuo v David Mutegi Njuru CA No. 2778 of 1998.

Section 90 of the *Employment Act* provides that;

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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

76. This provision is couched in mandatory terms and in the negative to accentuate the fact that no action ought to be instituted three (3) years after the act, event or occurrence complained of in contracts of employment.
77. In other words, no action ought to be instituted 3 years after the cause of action accrued, whether it is a summary dismissal, termination of employment, redundancy, resignation, mutual separation or other method of separation including desertion.
78. In Attorney General v Andrew Maina Githinji & Another [2016] eKLR for instance the court of Appeal held that;

“The Respondents had a clear cause of action against the employer when they received their letters of dismissal on 2<sup>nd</sup> October, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved...”.
79. Similarly, in G4s Security Services (K) Ltd v Joseph Kamau & 486 Others [2018] eKLR the Court of Appeal relied on the provisions of Section 90 of the *Employment Act* to hold that the claims of 464 Respondents were time barred on account of not being filed within three years.
80. The Court further held that time does not stop running by reason of initiation of “reconciliation or other alternative dispute resolution mechanisms provided under *the Constitution* or any other law”.
81. In the instant suit, it is common ground that the Respondent was engaged as a Part-time Lecturer of the Appellant from September 2015 under separate contracts of service based on Academic semesters and was obligated to claim payment for work done by completion of a claim form and submitting the same and other attachments to the Head of Department, facts the Respondent was aware of as he had no salary and did not teach during University holidays.
82. This is a decipherable from the contents of the standard letter of appointment that payment depended on the number of courses taught and examined, level whether Certificate, Diploma, Undergraduate or



Post Graduate. It follows that the Respondent had an enforceable cause of action after every successful cycle of teaching and examination as the contract of engagement lapsed.

83. Strangely, the Respondent has not alleged that he received any payment from the Appellant from September 2015 to October 2018 or any other time nor did he demonstrate when he demanded any payment and it was denied.
84. Based on teaching cycle or semester system, the Claimant had different causes of action accruing at different times and becoming statute barred at different times.
85. The last cause of action for instance accrued in October 2018. Regrettably, the Respondent did not institute any claim until 12<sup>th</sup> February, 2020.
86. It therefore follows that all claims due and enforceable by February 2017 and no action had been taken became statute barred. In the Court's view, the only enforceable claims or causes of action are those that accrued after 12<sup>th</sup> February, 2017.
87. Consequently, the Respondent's claims for services rendered prior to February 2017 were statute barred and unenforceable by the Court for want of jurisdiction.
88. On whether the Appellant has demonstrated a case to justify the Court's interference with the exercise of discretion by the trial Court, the Court is guided by the sentiments of the Court of Appeal in *Mbogo v Shah & Another* [1968] EA as follows;  

“An appellate Court will not interfere with the exercise of the trial Court's discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice”.
89. See also *United India Insurance Co. Ltd v East Africa Underwriters (Kenya) Ltd* [1985] EA. In the instant case it is discernible that the learned trial Magistrate failed to consider the fact that the Respondent was engaged under separate fixed term contracts and the amount due to him was payable at different times and thus causes of action arose at different times. That the Respondent had claims for the September to December 2015 semester which was statute barred as were all other claims due and payable in 2016.
90. Similarly, the trial Court failed to appreciate the fact that the amounts claimed in paragraph 7 of the memorandum of claim ought to have reflected individual courses/units taught since the level varied as were the number of students taught and examined.
91. Without evidence as to how claims for individual courses or units were computed, it is difficult for the Court to understand how the sub totals per semester were arrived at which the trial Court awarded.
92. In sum, the trial Court had no jurisdiction to hear and determine any claim due and payable before 12<sup>th</sup> February, 2017.
93. In the circumstances, the Court is satisfied that a case has been demonstrated to interfere with the awards made by the trial Court.
94. In the end, the judgment of the trial Court dated 28<sup>th</sup> April, 2023 is set aside in its entirety and in its place an order is made directing the parties to compute the Respondent's entitlements for services rendered from 12<sup>th</sup> July, 2017 to October 2018 within 30 days for adoption by the Court.



Parties shall bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 23<sup>RD</sup> DAY OF OCTOBER, 2024**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

