



**Kisii University v Ondieki (Appeal E025 & E026 of 2022 (Consolidated))
[2023] KEELRC 2633 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E025 & E026 OF 2022 (CONSOLIDATED)
CN BAARI, J
OCTOBER 26, 2023**

BETWEEN

KISII UNIVERSITY APPELLANT

AND

DR STEVE NYANAMBA ONDIEKI RESPONDENT

(Being an appeal from the judgment of Hon. S. N. Abuya, Hon. Senior Principal Magistrate delivered on 29th June, 2022 in Kisii CMELR Cause No. 20 of 2020 and Kisumu ELRC Appeal No. E026 being a cross appeal from the same judgment)

JUDGMENT

1. The appeal herein arises from the judgment delivered on 29th June, 2022, where the Trial Court found that the Appellant is liable to pay the Respondent outstanding salary arrears of Kshs.5,332,970.00, plus costs and interest at Court rates from the date of judgment until payment in full.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on 27th July, 2022.
3. The appeal is premised on the grounds that:
 - i. The Learned Trial Magistrate erred by failing to apply the provisions of Section 90 of the *Employment Act* – CAP 226 of the Laws of Kenya, and thereby failed to exclude claims presented with respect to years 2012 to August, 2017.
 - ii. The Learned Trial Magistrate erred by holding that the law applicable to Kisii CMC Employment Cause No. 20 of 2020 was Section 4 of the Limitation of Action Act – Cap 22 of the Laws of Kenya, which restricts the life of a cause of action based on employment contract to 6 years.



- iii. The Learned Trial Magistrate erred by failing to find that the Respondent's employment was subservient to a practice which the Respondent was bound by within the meaning and intendment of Section 5(8)(c) of the Employment Act – Cap 226 of the Laws of Kenya requiring submissions and verification of claims before payment.
 - iv. The Learned Trial Magistrate failed to find and to hold that in the absence of evidence of verification of the Respondent's claims, the Appellant's liability to settle the same had not arisen, wherefore the filing of Kisii CMC Employment Cause No.20 of 2020 was premature, and ill advised.
 - v. The Learned Trial Magistrate erred by purporting to hear and to entertain unverified claims by the Respondent. The Court usurped the exclusive role of the Appellant to process claims before payment.
 - vi. The Learned Trial Magistrate erred by holding that the sum of Kshs.5,332,970.00 was payable to the Respondent without any verifiable basis, and notwithstanding the fact that the said monies constituted in large part claims which were time barred and unverified.
 - vii. The Learned Trial Magistrate failed to hold and to find that the only sum payable to the Respondent which was verified in the course of and during the hearing of Kisii CMC Employment Cause No. 20 of 2020 was the sum of Kshs.1,712,717.00 in any event, and with respect to which the filing of Kisii CMC Employment Cause No. 20 of 2020 was unnecessary.
 - viii. The Learned Trial Magistrate erred by failing to consider legal authorities submitted to her which were binding on her pursuant to the doctrine of stare decisis.
 - ix. The judgment of the Learned Trial Magistrate was against the weight of evidence and constituted a miscarriage of justice.
4. The Appellant prays that this Honourable Court be pleased to vacate the judgment entered in Kisii CMC Employment Cause No. 20 of 2020 in its entirety, and to instead, enter judgment dismissing Kisii CMC Employment Cause No. 20 of 2020 with costs, and to award the Appellant costs in both Kisii CMC Employment Cause No. 20 of 2020 and of this appeal.
 5. The Respondent also dissatisfied with the decision of the Trial Court, filed a cross-appeal premised on the following grounds:
 - i. That the learned Trial Magistrate erred in law and fact and/or applied the wrong principles and parameters by finding, holding and/or implying that the outstanding amount of Kshs. 5,332, 970.00 awarded to the Claimant/Appellant is in respect of services rendered by the Claimant/Appellant to the Respondent between January, 2012 and August, 2020.
 - ii. That the Learned Magistrate erred in law and fact and/or applied wrong principles and parameters in considering the Claimant/Appellant's claim for the period between 2012 and August, 2020.
 6. The Respondent/Appellant seeks that the Court reviews the judgment of the Lower Court, and make a finding that the amount of Kshs. 5,332, 970.00 awarded to him relates to the services rendered by him between September, 2014, and August, 2020, or in the alternative, find that the Claimant/Appellant warrants the award of Kshs. 5, 332, 970.00 given by the Trial Court.
 7. Parties canvassed the appeal and the cross appeal through written submissions. Both parties filed their submissions.



The Appellant's Submissions

8. It is submitted for the Appellant that the Trial Court misdirected itself by treating the Respondent's Claim as an ordinary breach of contract whose limitation period was 6 years as opposed to Section 90 of the *Employment Act*, 2007 which limited time to three years from the accrual of the course of action.
9. The Appellant submits that the Trial Court held that the cause of action accrued in year 2020 and that the period to file suit will end in 2026, which is a gross misdirection on the part of the Trial Court because this position was not supported by the pleadings because the Respondent pleaded that his claims first arose from January — April, 2012.
10. It is the Appellant's submission that the Trial Court had no jurisdiction to reframe the pleadings in its judgment, because issues are framed by pleadings and once filed, pleadings are binding on the parties and the court. Reliance was placed in *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014)* eKLR to support this position.
11. It is submitted that the Claim before the Trial Court was lodged in September, 2020, meaning that the only claims with respect to which the Respondent could seek redress, if at all, were claims which fell within the period September, 2017, to September 2020, as prescribed by Section 90 of the Act.
12. It is the Appellant's further submission that all claims before September, 2017, were time barred and could not be considered, hence the Court had no jurisdiction to entertain the same in any event. They sought reliance in the case of *Owners of Motor Vessel "Lilian S" v. Caltex Oil (K) Ltd (1989)* KLR to buttress this position.
13. It is the Appellant's submission that the learned Trial Magistrate erred by holding that the sum of Kshs.5,332,970/= was payable to the Respondent without any verifiable basis, and notwithstanding the fact that the said monies constituted in large part, claims which were time barred and unverified. It is further submitted that the pleadings confirmed that the Respondent could not of himself tell which claim was payable to him as at the time of filing suit.
14. It is submitted for the Appellant that the Respondent informed the Trial Court in his oral evidence that he did not have documents to support his claims for years 2014 to 2017, and some claims for year 2018 yet amounts claimed for the said years formed part of the awarded monies
15. The Appellant submits that a cursory glance of the judgment reveals that the Trial Court did not take into account amounts which had been knocked off on account of a preliminary objection which the University took at the onset of the claim, and which the Respondent had freely admitted, hence the sum eventually awarded was erroneous.
16. The Appellant finally submits that the judgment and decree of the Trial Court amounted to a miscarriage of justice.
17. It is the Appellant's prayer that the appeal before this honourable Court be upheld in terms of prayers (1) - (3), thereof and that the cross petition which was an admission of the appeal be dismissed with costs as the filing of the same was unnecessary.

The Respondent's Submissions

18. The Respondent submits that the Appellant did not plead limitation under Section 90 of the *Employment Act*, and it was unfair for it to raise the issue through its closing submissions.



19. It is the Respondent's further submission that parties are bound by their pleadings and that a Court of law cannot determine a matter that is not raised through pleadings. That pleadings are central to litigation and underpin on the right to fair hearing. The Respondent sought to rely in *Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited [2019]* eKLR to support this assertion.
20. The Respondent prays that the Court finds the alleged limitation under Section 90 of the *Employment Act* was not raised in the primary suit, and cannot be raised on appeal, as doing so will be an upfront to the right to fair hearing. It will deny the Respondent the opportunity to adduce evidence to defend itself on this end, considering that no new evidence can be introduced on appeal. Reliance was placed in *The United Marketing Company -V- Hasham Kara [1963] EA 276* to support this position.
21. It is the Respondent's submission that the Court is at liberty to consider both facts and the law advanced in prosecuting the matter in the subordinate Court. They placed reliance in the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) for the holding that: -

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons.”
22. It is the Respondent's submission that the Appellant was under obligation to issue and/or produce the contracts of employment issued to the Respondent during the period of employment, and cannot pass the burden of proof to the Respondent.
23. The Respondent submits that he demonstrated on a balance of probability that he offered lecturing services in respect of all the units appearing on the Memorandum of Claim between September 2014, and August 2020.
24. It is the Respondent's further submission that on a balance of probabilities, he rendered service for the units he was assigned by the Appellant, including teaching, marking and submitting marks. The Respondent submits that he produced his bank statement in evidence demonstrating the amount paid to him by the Appellant, and that the Appellant also produced the same bank statement in evidence to demonstrate payment and no other evidence of payment was filed by the Appellant in the matter.
25. It is his submission that no policy or any other document therefore was produced by the Appellant to demonstrate that the Respondent was under obligation to submit claims for payment. It is his submission that he rendered service and submitted documents including payment claim forms for all the services he rendered.
26. The Respondent prays that this court finds that the Appellant's appeal lacks merit and dismiss it with costs.

Analysis and Determination

27. I have considered the Appellant's appeal, its Record of Appeal, the Respondent's Cross- appeal, the supplementary record of appeal and the submissions by both parties. The grounds for appeal and cross-appeal are summarized as follows:



- i. The Learned Trial Magistrate erred by failing to apply the provisions of Section 90 of the *Employment Act*, and instead applying Section 4 of the *Limitation of Actions Act* and thereby failed to exclude claims presented with respect to years 2012 to August, 2017.
 - ii. The Learned Trial Magistrate erred by purporting to hear and to entertain unverified claims by the Respondent. The Court usurped the exclusive role of the Appellant to process claims before payment.
 - iii. The Learned Trial Magistrate erred by holding that the sum of Kshs.5,332,970.00 was payable to the Respondent without any verifiable basis, and notwithstanding the fact that the said monies constituted in large part claims which were time barred and unverified.
28. Contrary to the Respondent’s assertion, the question of jurisdiction is not a new issue. The same was actually raised and addressed by the trial court, and it is that finding in the impugned judgment in relation to jurisdiction that is under challenged among other issues in this appeal.
29. The Trial Court made a determination on the issue of jurisdiction as its first issue in the impugned judgment. The finding in this regard reads as follows:
- “The law applicable to such claims is the *Limitation of Actions Act* Section 4 which restricts the life of a cause of action based on employment contracts to 6 years, from 2020 therefore, the 6 year period ends in 2026.”
30. In *Words and Phrases Legally Defined Vol. 3*, John Becroft Saunders defines jurisdiction as follows: -
- “By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
31. Further, Nyarangi, JA, in the celebrated case of *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989]* KLR 1 had this to say on the issue of jurisdiction: -
- “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...”
32. The Court of Appeal in *Jamal Salim v Yusuf Abdulabi Abdi & another Civil Appeal No. 103 of 2016 [2018]* eKLR stated as follows: - “Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited [2002]* 1 KLR 577, as follows;
- 1)
 - 2) The jurisdiction either exists or does not ab initio ...
 - 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.



- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal (emphasis mine)
33. The centrality of jurisdiction to any determination of a dispute cannot therefore, be gainsaid.
34. Limitation period in employment contracts is regulated under Section 90 of the *Employment Act*, 2007.
35. Section 90 of the *Employment Act* 2007, states;
- “Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act* (emphasis own), 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.”
36. This provisions expressly indicates the law on limitation applicable to employment related claim. It certainly, is not the *Limitation of Actions Act* as submitted by the Respondent.
37. Lawyers are presumed to know the law. That the wrong Section of the law was raised in relation to limitation of actions, and that the trial court upheld that provision, did not in any way give the Trial Court jurisdiction that it did not have under the applicable law.
38. It is immaterial that the question of jurisdiction was raised through submissions or that the objection was based on a wrong section of the law or the wrong statute all together.
39. The award to the Respondent related to claims occurring between the year 2012 and 2020. The suit before the trial court was lodged on 9th September, 2020. It then follows that only claims that fall within three years before September, 2020, are valid and for which the court can make a valid award.
40. Further, the Respondent’s cross appeal, where he seeks that the Court reviews the judgment of the Lower Court, and make a finding that the amount of Kshs. 5,332, 970.00 awarded to him relates to the services rendered by him between September, 2014 and August, 2020, cannot also stand premised on the three years limitation period prescribed under Section 90 of the *Employment Act*, 2007.
41. It then follows that the only part of the Respondent’s claims that falls within the jurisdiction of the court, are those occurring between September, 2017, to September, 2020. The award made by the trial court relating to the year 2012 to August, 2018, are set aside and the Appellant’s appeal succeeds in this respect.
42. On whether the Respondent is entitled to the rest of the award, it is not disputed that he was retained by the Appellant as a part time lecturer. It is also not in dispute that the Appellant’s only issue with the claims occurring within the limitation period is that they needed to be verified.
43. The Appellant was the employer. He by the express provision of Section 74 of the *Employment Act*, is obligated to keep employee records. That it did not; cannot be visited on the Respondent/employee.
44. I thus return that the entire of the Respondent’s claims on account of salary arrears from September, 2017 to September, 2020, is valid, due and owing. I thus uphold the finding of the trial court in this regard.
45. In whole, I make the following orders
- a. That the Appellant’s appeal partly succeeds.



- b. The cross-appeal is dismissed.
- c. The Trial Court's award of Kshs. 5,332,970/- on account of salary arrears is set aside, and the Respondent is instead, awarded three-year salary arrears at Kshs. 2,160,000/-
- d. The award of costs by the Trial Court is upheld
- e. Parties shall bear their own costs of the appeal on account of dismissal of the cross-appeal.

46. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26TH DAY OF OCTOBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Esibi h/b for Mr. Nyamurungi for the Appellant

Ms. Sabai present for the Respondent

MS. Christine Omolo & Erwin - Court Assistants.

