



Isandula v Friends Church (Quakers) Nairobi Yearly Meeting (Civil Appeal 35 of 2019) [2023] KEELRC 2513 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2513 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL 35 OF 2019
L NDOLO, J
OCTOBER 18, 2023**

BETWEEN

WYCLIFFE AMUGUNE ISANDULA APPELLANT

AND

**FRIENDS CHURCH (QUAKERS) NAIROBI YEARLY
MEETING RESPONDENT**

*(Appeal from the Ruling of Hon. P. Muholi, SRM delivered
on 4th September 2019 in Milimani CMEL No 151 of 2019)*

JUDGMENT

1. This appeal arises from the Ruling of Hon. P. Muholi, SRM delivered on 4th September 2019, in Milimani CMEL No 151 of 2019.
2. The subject of the impugned Ruling was a Preliminary Objection dated 19th March 2019, raised by the Respondent on the following grounds:
 - a. The Appellant's claim filed in the lower court is incompetent, fatally defective and an abuse of the court process as it offends the provisions of Section 90 of the *Employment Act*;
 - b. The Appellant's right to sue having lapsed, he lacks capacity to agitate any cause of action against the Respondent.
3. Being dissatisfied with the Ruling, the Appellant filed the present appeal.
4. In his Memorandum of Appeal dated 26th September 2019, the Appellant raises the following grounds of appeal:
 - a. That the learned trial Magistrate erred in fact and law in being satisfied that the Appellant's claim for unpaid salary during the course of his employment was time barred;



- b. That the learned trial Magistrate erred in law by finding that the claims before him were not subsisting injuries in the course of employment;
 - c. That the trial Magistrate erred in fact and in law in finding that the Appellant had not moved the court within the required time frame;
 - d. That the learned Magistrate erred in fact and in law by upholding the Respondent's Preliminary Objection in utter disregard of the Appellant's submissions and authorities.
5. In his written submissions in support of the appeal, the Appellant asserts that the unpaid salary which he claims had accumulated in the course of his employment and that his claim filed only four months after completion of his employment cannot be time barred.
 6. The Appellant points out that limitation of action under Section 90 of the *Employment Act* is twofold; 3 years for wrongful or unfair termination and 12 months for continuing injury.
 7. In advancing his case, the Appellant relies on the decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR where the Court of Appeal affirmed that a claim based on a continuing injury must be filed within one year after cessation.
 8. The Appellant further relies on the decision in *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR where this Court held as follows:

“The logical meaning of the phrase 'continuing injury or damage' would... be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. A typical memorandum of claim would normally contain a claim for compensation and payment of accrued dues. In my view, 'continuing injury or damage' would connote such accrued dues.”
 9. On its part, the Respondent relies on the decision in *E. Torgbor v Ladislaus Odongo Ojuok* [2015] eKLR where the Court of Appeal segregated specific claims that were time barred from the main claim that was within time.
 10. Although the Appellant raises four (4) grounds of appeal in his Memorandum of Appeal, they all revolve around the question whether the claims struck out by the learned trial Magistrate fall within the proviso in Section 90 of the *Employment Act*.
 11. The entire Section 90 merits reproduction:
 90. Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act*, 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.
 12. My reading of the latter part of this provision is that a party laying a claim of continuing injury or damage must do so within twelve months after the last episode of violation, which may or may not coincide with the date of leaving employment.
 13. In his claim before the lower court, the Appellant sought the following remedies:
 - a. Salary for July 1987-December 1989.....Kshs 976,314.00
 - b. Salary for November 1997 and December 1997.....67,332.00



- c. Salary for September 1999-December 1999.....134,664.00
- d. Leave pay for 7 years.....190,342.38
14. In his Ruling delivered on 4th September 2019, the learned trial Magistrate struck out all the claims for salary arrears on the ground that they were statute barred.
15. The Appellant pegs his claim for salary arrears on his retirement date being 30th October 2018. In this regard, he argues that time for these claims which he terms as ‘continuing injury or damage’ did not begin to run until his retirement.
16. With tremendous respect, this argument is misplaced because in his own Memorandum of Claim filed at the lower court, the Appellant gave the exact dates for which he claimed salary arrears. All these dates were way before his retirement date of 30th October 2018; in fact, they go as far back as 1987-1999.
17. The only logical conclusion to make in this case, is that the dates given by the Appellant in his Memorandum of Claim, and not his retirement date, constitute the accrual dates of his claims for salary arrears. That said, I must agree with the learned trial Magistrate that these claims are statute barred.
18. The decision by the trial court, upholding the Preliminary Objection raised by the Respondent is therefore confirmed and the appeal is dismissed.
19. The costs of this appeal will abide with the outcome of the trial in the lower court.

DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Onenga for the Appellant

Ms. Ouma for the Respondent

