



**Kenya Union of Domestic, Hotels, Education, Hospitals and Allied Workers (Kudheiha)
v Nzwili (Cause 2197 of 2016) [2022] KEELRC 1166 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1166 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2197 OF 2016**

SC RUTTO, J

MAY 27, 2022

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION, HOSPITALS AND
ALLIED WORKERS (KUDHEIHA CLAIMANT**

AND

ANN MUTETI NZWILI RESPONDENT

JUDGMENT

1. The core of the instant dispute revolves around underpayment of salary due to the grievant. The claimant avers through its statement of claim filed on 27th October, 2016, that the grievant was employed by the respondent on 3rd August, 2006 with the starting salary being Kshs 2,000 per month. That the said salary was not in accordance with prescribed rates. That as such, the grievant reported the issue to the claimant, who in turn advised the respondent vide a letter dated July 26, 2011, on the remuneration payable.
2. The claimant further states that the grievant and the respondent visited its offices on 11th August, 2011, with a view to getting a clarification on the letter dated July 26, 2011. That subsequently, the respondent directed the grievant to take leave with effect from 1st August, 2011 upto August 30, 2011 and to resume duty on September 1, 2011. That when she reported for duty on September 1, 2011, she was terminated verbally. That by then her salary had increased to Kshs 4,000/=.
3. It is against this background that the claimant has prayed for an award totaling the sum of Kshs 238,084/= being salary underpayment, notice pay, accrued leave days, compensation for loss of service and payment for years worked.
4. The respondent opposed the claim and denied the claimant's averments, through her response filed on 9th December, 2016. She asked the Court to dismiss the claim with costs.
5. The matter proceeded for hearing on January 17, 2022 and each side presented oral evidence.



6. The trial notwithstanding, it has not escaped the Court's attention, that the claimant avers that her termination was effected on September 1, 2011. Essentially, this means that the cause of action arose on that day. Accordingly, this issue takes me to Section 90 of the Employment Act which provides as follows;

“ [90] 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”

7. The import of the above provision, is that a time bar of three (3) years is placed on matters arising out of the Employment Act or on a contract of service, as the one herein. To this end, a matter becomes time barred if it is not filed within three (3) years from the date the cause of action arose. In this case and from the claimant's own admission, the grievant was terminated on September 1, 2011. This is the date the cause of action arose.

8. As per the determination of the Court of Appeal in Attorney General & another vs Andrew Maina Gitbinji & another [2016] eKLR, a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. It is the date when a person becomes entitled to complain against another person. In this case, that date was 1st September, 2011.

9. From the record, the matter herein was instituted on 27th October, 2016 which was almost five (5) years after the cause of action had arisen. Applying the provisions of section 90 of the Employment Act to the instant case, it is no doubt that the claim was time barred by then. The grievant had lost the right to bring the claim against the respondent by operation of law. The doors had been shut.

10. In the case of Thuranira Karauri vs Agnes Ncheche [1997] eKLR, the Court of Appeal held that the issue of limitation goes to jurisdiction. As a result, the issue of limitation ultimately determines whether the Court has jurisdiction to deal with the matter.

11. On the issue of jurisdiction, I am guided by the finding in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR, where Nyarangi JA (as he then was) rendered himself thus;

“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.”

12. In view of the precedent established above and having found that the matter herein is time barred, I cannot help but down my tools as this Court lacks the jurisdiction to proceed further and determine the same.

13. Accordingly, the claim is struck out in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

STELLA RUTTO

JUDGE

Appearance:



Mr. Gitonga for the Claimant

Mr. Ndege for the Respondent

Court Assistant: Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

