



**Bollore Africa Logistics Limited v Mwakimanga (Appeal E104 of 2023)
[2024] KEELRC 1414 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1414 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E104 OF 2023**

**M MBARŪ, J
MAY 16, 2024**

BETWEEN

BOLLORE AFRICA LOGISTICS LIMITED APPELLANT

AND

NGAO FAKII MWAKIMANGA RESPONDENT

*(Being an appeal from the judgment of Hon. R. N. Akee delivered
on 8 September 2023 in Mombasa CMELRC No.789 of 2019)*

JUDGMENT

1. The appeal herein arises from the judgment delivered on 8 September 2023 in Mombasa CMELRC No. 789 of 2019. The appellant is seeking that the judgment be set aside and the court to dismiss the claim by the respondent.
2. The respondent, Ngao Faki Mwakimanga filed his Memorandum of Claim before the trial court on the grounds that the appellant employed him as a rigger crane from 26 August 1992 to 14 June 2016 when his employment was unfairly terminated. At the time he was earning a wage of Ksh.29, 000 per month. He served for 24 years but in the year 2014, he fell ill and suffered a stroke. On 14 July 2014, he was admitted to the hospital and discharged on 30 July 2014 and placed under medication. The appellant was notified of the illness, hospital admission, and treatment and granted the respondent sick leave. On 23 April 2015, the respondent's doctor made a report indicating that he had made good progress on his health and the appellant could assign him light duties that he could perform using one hand and to continue with therapy. The appellant proposed to terminate employment by way of forced retirement.
3. The respondent's claim before the trial court was that on 14 June 2016, the appellant without due process terminated his employment through retirement on medical grounds. He was made to execute a discharge voucher to be paid terminal benefits which were transferred to his bank account on 7



September 2016. This unlawful process caused the respondent anxiety and affected his healing therapy. This amounted to discrimination and unfair treatment due to medical conditions. The respondent claimed that termination of employment lacked valid reasons, it had no fair procedure, and it was discriminatory on the grounds of incapacity and medical condition and due to failure to pay terminal dues. The appellant refused to reimburse the medical bills incurred despite the respondent being under a medical insurance cover with Jubilee Insurance for the sum of Ksh.256, 058. The respondent claimed the following;

- a. 12 months compensation for unfair termination of employment Ksh.384,000;
 - b. Unpaid annual leave for 24 years Ksh.487,200;
 - c. Medical expenses Ksh.292,558.60;
 - d. General damages on account of discrimination;
 - e. Costs.
4. In response, the appellant filed a Notice of Preliminary Objections dated 19 December 2019 on the grounds that;
- ... The suit should be dismissed on the grounds that;
- a. That this suit is statute-barred pursuant to Section 90 of the *Employment Act* and must be struck out with costs.
 - b. The court lacks jurisdiction to entertain a statute-barred suit.
5. The appellant also filed a response and admitted that the respondent was employed as a rigger crane until 14 June 2016. During the course of employment, the respondent was granted sick leave on full salary and when he exhausted his sick leave days, he was put on half pay. In a letter dated 23 July 2015, the Medical superintendent concluded that the respondent could not use his left arm. This notwithstanding, he resumed duty and was allocated light duties. The decision to terminate employment on medical grounds was informed by the recommendation of the Medical Board, Ministry of Health who found the respondent unfit for further service. The claim that there was unfair termination of employment is without proof because the respondent fell ill in the year 2014 and remained in employment until June 2016 on full pay and when he exhausted his sick leave days, he was placed on half pay. Despite the Medical Board recommending termination of employment through letter dated 23 July 2015, the appellant extended employment but noted the respondent could no longer use his left arm. His condition had continued to deteriorate and in and out of hospital. The Medical Board assessed him and on 7 January 2016 established he had suffered 75% permanent disability and therefore unfit for further service. Retirement on medical grounds was therefore lawful and justified.
6. The appellant further responded to the claimant and stated that the claim that the respondent was forced to sign a discharge voucher had no basis as he did so voluntarily. He agreed to discharge the appellant of any liability arising out of his employment. Present were two witnesses. The claim for pay for leave days accrued was exhausted by the year 2016. The claims made are incompetent and should be struck out.
7. In the judgment by the trial court, there was a finding that employment was terminated unfairly and the respondent was hence entitled to the prayers sought. The award was allocated in the following terms;

Conclusion



The upshot of my analysis is that the claimant is entitled to an award of Ksh.700, 000/= as General compensation for unprocedural termination, plus costs for the suit from the date of being instituted and interests from the date of judgment.

8. Aggrieved by the judgment, the appellant filed this appeal on the grounds that;
 1. The learned trial magistrate erred in law and fact in making a finding that the respondent's retirement on medical grounds was unprocedural; and substantively unfair.
 2. The learned trial magistrate erred in law and fact by holding the appellant liable without any evidence to that effect and contrary to the evidence on record.
 3. The learned trial magistrate erred in law and fact by failing to dismiss the defendant's claim.
 4. The learned trial magistrate erred in law and fact by failing to take into account the principles set out under the Employment Act in awarding compensation which was in any event, excessive in the circumstances.
 5. The learned trial magistrate erred in law and fact in failing to pay regard to the terminal dues of Ksh.203, 255.03 paid to the respondent at the time of his retirement on medical grounds.
 6. The learned trial magistrate erred in law and fact in allowing the respondent's claim despite the same being time-barred.
 7. The learned trial magistrate erred in law and fact in finding the appellant liable despite the respondent signing a discharge voucher discharging the appellant from any claim and or liabilities arising from the employment relationship.
 8. The learned trial magistrate erred in law and fact in arriving at a decision against the weight of the evidence on record.
9. Both parties attended and agreed to address the appeal by way of written submissions.
10. The appellant submitted that section 41, 43, 44, 45 and 47 of the Employment Act, 2007 (the Act) requires that for termination of employment to be fair, there must be a substantive reason and procedural fairness as held in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR. In this case, there was substantive justification upon the Medical Board recommending retirement of the respondent on medical grounds. There was fair procedure as he was taken for assessment by the board and notice issued and his terminal dues paid. In the case of Kennedy Nyangucha Omega v Bob Morgan Services Limited [2013] eKLR the court held that whereas the employer is allowed to terminate the employment of an employee due to illness, the employer must show sensitivity and due care. The employer must demonstrate what support was given to the employee to recover and be able to resume duty and once termination of employment is contemplated, the employee must be subjected to medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. The employer must give the employee notice of the impending termination. Hence under Section 45(4) of the Act, the appellant followed all these steps and paid terminal dues.
11. The respondent got sick from the year 2014 and up until June 2016 the appellant retained him as an employee, allowed him sick leave and continued to pay his wages. Before deciding to terminate employment, he was subjected to the medical Board assessment which established that he had suffered 75% disability and that he was unfit to serve and should be retired but the respondent



- continued working on light duties but his condition deteriorated leading to notice and termination of employment.
12. The appellant submitted that the trial court made a general award of Ksh.700, 000 in general compensation. The respondent had claimed Ksh.384, 000 for 12 months compensation. The claim and award are at variance without any justification. The question of quantum payable is discretionary but the same must be based on settled principles. In *Jobnson Evan Gicheru v Andrew Morton & Another*, Civil Appeal No.314 of 2000 the court held that to justify reversing the trial court award of damages, one must establish that the trial court acted upon a wrong principle of law or that the amount awarded was extremely high.
 13. Under Section 49 of the *Act*, the court is allowed to award up to a maximum of 12 months in compensation. The general award by the trial court at Ksh.700, 000 is not based on any principles of law and is extremely high. This is equivalent to 24 months wages.
 14. The respondent signed a discharge voucher and hence discharged the appellant from any liability from the employment relationship. He admitted this much in evidence and hence the claim ought not to have been allowed. In the case of *Coastal Bottlers v Kimathi Muthika* [2018] eKLR the Court of Appeal held that where parties have agreed on a discharge voucher, unless the court can discern misrepresentation, the same should be applied. In the case of *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR the court held that;
 15. The execution of the discharge voucher, we agree with the learned Judge, constitutes a complete contract. Even if payment by was less than the total sum, the appellant accepted it because he wanted payment quickly and the execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.
 16. The discharge voucher signed by the respondent discharged the appellant from any further liability. The trial court should have given effect to the agreement by the parties.
 17. The appellant submitted that the trial court failed to give due regard to the payment of terminal dues at Ksh.203, 225.03 which the respondent admitted having received and discharged the appellant from liability. This ought to have resolved the matter.
 18. The appellant submitted that the claim was time barred and should have been struck out. The respondent was retired through notice dated 14 June 2016 taking effect on 30 June 2016 but he filed his claim on 3 September 2019 outside the limitation period contrary to Section 90 of the *Act*. In the case of *Hirarion Mwabolo v Kenya Commercial Bank* [2013] eKLR the court held that a claim is fatally defective if filed outside the limitation period. In the case of *Attorney General & Another v Andrew Maina Githinji & Another* [2016] eKLR the court held that an employment claim must be filed in court within 3 years from the date the cause of action arose. In this regard the appeal should be allowed with costs.
 19. The respondent did not file any written submissions.***On 16 April 2024, parties attended court to confirm filed submissions, and the respondent was granted more time until 23 April 2024 to file written submissions. There was no compliance.

Determination

20. This is a first appeal. The mandate is to re-evaluate the entire record, analyses and make a conclusion, and take into account that the trial court had the opportunity to hear the witnesses who testified.



21. As outlined above, in response to the respondent's claim before the trial court, the appellant filed a Notice of Preliminary Objections dated 19 December 2019. It related to the claim being statute barred by operation of Section 90 of the Employment Act, 2007 (the Act).
22. On 21 April 2022, the learned magistrate delivered a ruling and held that employment was terminated through a notice dated 14 June 2016, effective 30 June 2019. Terminal dues were not paid and processed until 7 September 2016. This was the date when time started running. The respondent filed his claim on 3 September 2019 and was therefore within the 3 years limitation period under the provisions of Section 90 of the Act hence the objections filed were dismissed.
23. The matter proceeded to a hearing. As this is a legal issue and a matter addressed under clause (6) of the Memorandum of Appeal, this court is allowed to revisit this ruling.
24. Section 90 of the Act is couched in mandatory terms. The jurisdiction bestowed upon the Magistrates Court to hear employment claims is also regulated under the law. An employment claim must be lodged in court within 3 years from the date the cause of action arose.
25. The cause of action is the date the employment relationship ceased. In the case of Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel (Cause E088 of 2023) [2023] KEELRC 2551 (KLR) (19 October 2023) (Ruling) the court held that cause of action arise at the end of the employment relationship. The notice terminating employment is key;
26. The cause of action arises with end of employment. The last day the employee exits the shop floor, any accruing dues must to addressed within 3 years, any continuing injury must be addressed within 12 months.
27. The non-payment of terminal dues, even though part of the employment dues does not extend the time within which to file a claim. Even in a scenario where parties are engaged in conciliations or negotiations for a discharge voucher/agreement, such time after the date employment is terminated can serve as a reason to extend the limitation period set under Section 90 of the Act.
28. The learned magistrate in the ruling delivered on 21 April 2022 had this to say;

The letter of 14th June 2016 communicated the decision to retire the clamant on medical grounds. According to that letter the said decision would take effect on 30th June 2016 and not on the 14th June 2016. Further the same letter date reference to other questions to wit the question of final dues and clearance that were left pending,

My reading of letter of 14th June 2016 the claimant did not sew ties with the respondent on 14 June 2019 and he would be able to do so only after he had fully cleared with the company and received his final dues. His final dues were released to him on 7th September 2016 which date therefore marked the end of the relationship between the claimant and the respondent.
29. With respect to the learned magistrate, this was in error. A claim based on a contract of employment must be filed within 3 years from the date employment ceased. In this case, notice dated 14 June 2016 took effect on 30 June 2016. Payment of terminal dues after such date did not extend the employment relationship. The respondent should and ought to have filed his claim on or before the 29 June 2019. He only did so on 3 September 2019. The trial court and this court is denied jurisdiction to extend the time to file suits not lodged with the court within 3 years from the date the cause of action arose.
30. The claim ought to have been struck out at the point of the ruling on 21st April 2022.



- 31. All proceedings without jurisdiction are invalid. The appellant only lodged the appeal after the full hearing. This matter should not have waited until this point. Ground No. (6) On the Memorandum of Appeal should have been a matter of priority for the appellant.
- 32. The appeal is with merit save, for the lapse to expedite, no costs are due.
- 33. Before conclusion, it is imperative to address several items in the Memorandum of Appeal.
- 34. The appellant’s case is that the respondent executed a discharge voucher and hence ought not to have filed a claim. Indeed the Court of Appeal has had occasion to address this matter and the applicability of a discharge voucher as binding the parties to it as held in the case of *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR. however, with respect and paying fidelity to the law, under Section 35(4) of the *Act*, where an employee has a claim with regard to the lawfulness and fairness of termination of employment or a claim founded in law, such cannot be negated through a discharge voucher/agreement/clause; Nothing in this section affects the right—
 - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or (
 - b) of an employer or an employee to terminate a contract of employment without notice for any cause recognized by law.
- 35. Save, for want of jurisdiction, the respondent, with a lawful claim, had the right to pursue the same beyond the discharge voucher.
- 36. Without the trial court being seized with jurisdiction, the appeal must succeed. Judgment delivered on 8 September 2023 in Mombasa CMELRC No.789 of 2019 is hereby set aside. As outlined above, no party is entitled to costs.

Delivered in open court at Malindi on this 16 day of May 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

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