Kabiri v Haco Industries Kenya Limited (Civil Appeal 204 of 2018) [2022] KECA 666 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 666 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 204 OF 2018

S OLE KANTAI, HA OMONDI & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

JAMES MOMANYI KABIRI .... APPELLANT

AND

HACO INDUSTRIES KENYA LIMITED .... RESPONDENT

((Being an appeal against the Ruling of the Employment and Labour Relations Court at Nairobi (Maureen Onyango, J.) dated 13th April 2018 in Employment and Labour Relations Cause No. 864 of 2013))

JUDGMENT

1. The appellant (James Momanyi Kabiri) was employed by the respondent (HACO Industries Kenya Limited) as an assembly charge hand on 1st January 2001 and subsequently promoted to the position of production supervisor with effect from 1st January 2009. He continued in employment until 27th January 2010 when, by a letter dated 27th January 2010, the respondent purported to terminate his employment summarily on the grounds of gross negligence which, according to them, did not require notice.

2. A labour dispute having arisen between the appellant and the respondent, the appellant referred the matter to the District Labour Officer for conciliation on 11th February 2010 whereupon a conciliation meeting was held on 12th May 2010. However, the conciliation did not bear fruit.

3. Failing conciliation, the appellant filed a Statement of Claim in the then Industrial Court on 7th June 2013, being Industrial Court Cause No. 864 of 2013 claiming: 2 months salary in lieu of notice – KShs. 39,802; severance pay at the rate of 15 days for each year worked from 2001 to 2010 – KShs. 26,866.35; damages for unlawful termination –KShs.393,991.65; interest on the sums claimed until payment in full; and costs of the suit.

4. In its Response to the appellant's Statement of Claim dated 12th July 2013, the respondent contended that the appellant's claim was frivolous, vexatious, incompetent, and an abuse of the court process as the claim was statute barred by virtue of the limitation provisions in section 90 of the *Employment Act*, 2007; that the claimant's employment was terminated due to his suspected actions and omissions to act on the night of 14th January 2010, which led to theft at the respondent's premises; that the respondent did not owe any money to the appellant; and that the appellant acknowledged payment of all his dues and voluntarily appended his signature on the Certificate of Settlement of Final Dues dated 10th February 2010. It prayed that the appellant's claim be dismissed with costs to the respondent.

5. By a Notice of Motion dated 4th September 2015 supported by the affidavit of Caroline Kiambi (the respondent's Human Resource Manager) sworn on 4th September 2015, the respondent applied for orders that the appellant's claim and Memorandum be dismissed for being statute barred. It also prayed for costs. The appellant opposed the Motion vide his replying affidavit sworn on 18th September 2015.

6. On 8th September 2015, the appellant filed a Notice of Motion dated 7th September 2015, supported by his affidavit sworn on 7th September 2015, praying for orders that paragraph 4(i) of the respondent's memorandum in response (contending that his claim was statute barred) be struck out. He also sought a declaration that his claim was not statute barred, and for orders that the parties having commenced a conciliation process, the limitation period of 3 years did not begin to run until it was concluded. He asked the court to order that the costs of the application be in the cause.

7. Having considered the two applications and the written submissions of learned counsel for the appellant and for the respondent dated 5th May 2015 and 24th May 2015 respectively, the court delivered its Ruling on 13th April 2018 allowing the respondent's application and striking out the appellant's

claim on the grounds that it was statute barred. On the other hand, it dismissed the appellant's application with no orders as to costs.

8. Aggrieved by the ruling of ELRC (Maureen Onyango, J.), the appellant lodged the appeal before us. In his Memorandum of Appeal dated 25th June 2018, the appellant contended that the learned Judge erred in law and in fact by dismissing the appellant's claim on the grounds that it was time barred in disregard of the law and evidence placed before the court against the respondent's preliminary objection, and in support of the claim; and that in all the circumstances of the case, the findings of the learned trial Judge was not in line with *the Constitution*, the *Limitation of Actions Act*, fair labour practices or the evidence adduced. He prays that the appeal be allowed; that the impugned ruling be set aside; that the appellant's claim proceeds to full determination on its merits; and that the respondent be condemned to pay costs of the appeal.

9. The decisive issue in the appeal before us is whether the learned Judge erred in holding that the appellant's claim was time barred.

10. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited vs. West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.

11. In Selle's case, the Court held:

> " An appeal to this Court from a trial by the High Court is by way of 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, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Section 90 of the *Employment Act*, 2007 is conclusive on the issue of the period of limitation prescribed for the lodging of claims under the Act. It reads:

> " 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."

13. It is common ground that the appellant's employment was terminated on 27th January 2010. He lodged his claim in the Industrial Court (now ELRC) on 7th June 2013, almost 5 months after the 3 years period of limitation prescribed in section 90 of the Act. We do not agree with counsel for the appellant that the statutory period of limitation stopped to run from the date on which conciliation commenced until the date on which the conciliation broke down. The limitation period prescribed in section 90 of the Act is unqualified and makes no reference to any circumstances under which such time may be enlarged.

14. This Court in *Rift Valley Railways (Kenya) Ltd vs. Hawkins Wagunza Musonye & another* [2016] eKLR had this to say on the matter:

> " For us it is clear from our reading of section 90 aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof.
>
> Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service."

15. Having considered the record of appeal and the grounds on which it is anchored, the written and oral submissions of learned counsel for the appellant and learned counsel for the respondent together with the cited authorities, we find nothing to fault the Ruling of the learned Judge. Accordingly, we hereby order and direct that:

    (a) the appellant's appeal be and is hereby dismissed;

    (b) the Ruling of the ELRC (Maureen Onyango, J.) delivered on 13th April 2018 in ELRC Cause No. 864 of 2013 be and is hereby upheld; and

    (c) each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR