



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME J.J.A)

CIVIL APPEAL NO. 89 OF 2017

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

VERSUS

CYRUS MAINA NJOROGE.....RESPONDENT

(Being an appeal from Judgment of the Employment & Labour Relations Court of Kenya at Mombasa (Rika, J.) dated 17th February, 2017

in

E&LRCC.No. 215 of 2014)

JUDGMENT OF THE COURT

[1] Slightly over thirty years ago, Cyrus Maina Njoroge (the respondent), was employed by Kenya Ports Authority (the appellant), in its security department. He underwent several trainings and also got several promotions over the years.

[2] All this came to a halt following an incident that happened on the night of 31st August, 2005 when following a security breach, a container was stolen under his watch and he was held as a suspect in the theft. He was subsequently arraigned in court on 6th September, 2005 to answer charges related to theft of the said container. He was then suspended vide a letter dated 12th September, 2005.

[3] As the criminal case against the respondent was going on in court, the appellant established a committee to investigate the matter internally. The respondent was heard by that committee, and another one constituted subsequently but unfortunately for him, the committees were not convinced about his innocence and he was therefore dismissed from service vide the letter dated 17th August, 2007.

[4] He appealed against the dismissal vide his letter dated 10th September, 2007 but his appeal did not succeed and so he was formally dismissed from work on 17th August, 2007. Almost two years later, on 17th March, 2009 he was acquitted of the criminal charges against him.

[5] He therefore moved to court by way of plaint dated 8th March, 2010 in which he sued the Attorney General and the appellant for reliefs *inter alia*; that a declaration be made that his termination was unlawful and he should be reinstated; general, special and aggravated damages and costs of the suit and interest thereon at court rates. The claim against the Attorney General who was named as the 1st defendant was for unlawful and malicious prosecution.

[6] The suit was resisted by the appellant vide the statement of defence dated 19th April, 2010, in which the appellant denied that the respondent's termination was unlawful, and averred that if the respondent had suffered any humiliation and disgrace as alleged, then he was solely to blame for having engaged in the acts or omissions that led to his arrest and prosecution in the criminal case. The appellant also intimated that it would apply for the striking out of the suit for failure by the respondent to comply with **Section 66** of the Kenya Ports Authority Act, Cap 391 Laws of Kenya (the Act).

[7] The matter fell before **Rika, J.** for hearing and in a judgment rendered on 17th February, 2017, the learned Judge granted the following

orders:

“a) It is declared termination of the Claimant’s contract of employment was unfair and unlawful.

b) The 2nd Respondent shall pay to the Claimant: the equivalent of 12 months’ salary in compensation at Kshs.1,009,800; notice pay at Kshs.84,150; and arrears of salary at Kshs.1,391,395 – subtotal Kshs.2,485,345.

c) The 1st and 2nd Respondent shall pay to the Claimant damages for malicious prosecution at Kshs.2,500,000.

d) Claim is allowed at a total of Kshs.4,985,345.

e) Costs to the Claimant against both Respondents.

f) Interest granted at the rate of 14% per annum from the date of judgment till payment in full.

g) For avoidance of doubt, global award is subject to PAYE under the Income Tax Act, Cap 470 the Laws of Kenya.”

[8] Those are the orders that provoked this appeal in which the appellant through **Addraya Dena** Advocate filed an *omnibus* memorandum of appeal which is in prose form with no numbered grounds of appeal.

Before we go further, we must draw learned counsel for the appellant’s attention to **Rule 86(1)** of the Rules of this Court which provides as follows:

“86(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make. (Emphasis provided)

(2) The grounds of objection shall be numbered consecutively.

(3) A memorandum of appeal shall be substantially in Form F in the First Schedule and shall be signed by or on behalf of the appellant.”

We refer learned counsel for the appellant to Form F in the First Schedule and hope that in future he will not file memoranda of appeal that are not compliant with the Rules of this Court.

[9] From what we can decipher from the memorandum of appeal, the appellant faults the learned Judge for failing to consider the defence of limitation as provided for under **Section 66** of the Kenya Ports Authority Act; finding that there were no valid grounds justifying the termination of the respondent and finding that the termination was unfair. The memorandum of appeal has no prayers, but in his submissions dated 23rd March, 2018, learned counsel urges the Court to set aside the judgment of the Employment and Labour relations Court with costs to the appellant.

[10] The appeal was canvassed by way of written submissions with brief oral highlights, with the appellant filing its submissions on 23rd March, 2018, and the respondent filing his on 30th April, 2018. We observe that the appellant also filed a list of authorities while no authorities were filed on behalf of the respondent.

[11] In his written submissions, as well as his oral highlights, **Mr. Kyandih** learned counsel for the appellant started off with the issue of jurisdiction. He maintained that the respondent’s claim was time barred and the Employment and Labour Court had no jurisdiction to entertain it. He referred the Court to the provisions of **Section 66** of the Kenya Ports Authority Act which bars any claim filed more than 12 months after the accrual of the cause of action. According to Mr. Kyandih, the cause of action in this case accrued on 17th August, 2007 when the respondent was dismissed from service and not on the date he was acquitted of the criminal charges by the magistrate’s court.

[12] The defence of limitation was raised in the defence as well as in the amended defence dated 20th November, 2012. He faulted the learned trial Judge for finding that there was no clear date as to when the cause of action arose **“owing to the different dates when the 2nd respondent made various decisions against the claimant; and owing in part to the nature of the claim.”** The learned Judge’s conclusion on this point was as follows:-

“The court however finds the claimant did not bring the claim contrary to Section 66 of the KPA Act. The date when the cause of action arose is not clearly shown from the records of the employer, a state of affairs which can only be blamed on the 2nd Respondent. Internal processes were jumbled up, with no clear decision showing exhaustion of the internal mechanisms. The objection under Section 66 of the KPA Act is therefore declined.”

We shall advert to this issue later

[13] According to learned counsel, the date of the respondent’s dismissal was clear even from his own statement of claim where he indicated that he was terminated on 17th August, 2007. It was a misdirection therefore for the learned Judge to conclude that the accrual of the cause

of action was not clear. He maintained that where limitation of time is engrained in statute, the court would not have power to extend time. For this proposition, counsel placed reliance on this Court's decision in **Rift Valley Railways (Kenya) Limited v. Hawkins Wegunza Musonye and Another** (2016) eKLR where the Court expressed itself as follows:-

“Where a statute limits time for bringing an action no court has the power to extend that time, unless the statute itself allows extension of time.”

He also called in aid the Supreme Court's decision in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** (2012) eKLR. Counsel urged the Court to allow this appeal on that ground.

[14] In response to that issue, **Mr. Mutugi** learned counsel for the respondent, submitted that according to the letter of suspension dated 12th September, 2005, the respondent was suspended for having been arraigned in court, and not because of the theft. According to him therefore, the employer ought to have waited for the criminal process to be concluded before dismissing the respondent. The effective date according to Mr. Mutugi should be the date when the respondent was acquitted and not the date of the letter of dismissal.

[15] Mr. Kyandih however responded that the letter referred to was the one on suspension which was superseded by the letter of dismissal dated 17th August, 2007 and so the letter of suspension referred to was not relevant. He urged us to dismiss the appeal.

[16] We have considered the entire record of appeal like we are mandated to do by **Rule 29(1) (a)** of our Rules. In our view, however, we must deal with the issue of jurisdiction first. As the time honoured and tested decision of this Court in **The Owners of Motor Vessel “Lillian S.” -Vs- Caltex Oil (K) Ltd** [1989] KLR 1 acclaims;

“Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

[17] If we find that the respondent's claim was time barred, then we would inevitably have to down our tools and not determine any of the other issues raised in the appeal. Indeed, in the issues listed for determination, the learned Judge, and correctly so, listed the issue of jurisdiction as the first issue for determination. Had he found the claim in contravention of **Section 66** of the Kenya Ports Authority Act, then he would have stopped there. Did he err on this point? When did the cause of action accrue?

[18] We start by looking at **Section 66** of the Act. The same provides as hereunder:-

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any other public duty or Authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect –

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings has been served upon the Managing Director by the plaintiff or his agent;

(b) the action or legal proceeding shall not lie or be instituted, unless it is commenced within 12 months next, after the act complained of or, in the case of continuing injury or damage, 6 months next after the cessation thereof.”

The learned Judge did appreciate that if the claim was filed 12 months after the accrual of the cause of action, then it would have been time barred. The learned Judge however found that there was obscurity in respect of the date of termination and so the appellant could not be availed the defence of time bar under **Section 66** of the Act.

[19] This is the issue we must determine first. If we uphold the learned Judge's decision on the issue of limitation of time, then we shall go to the other issues raised. If however we uphold the appellant's submission on the ground of statutory time bar, then the rest of the issues will come to rest. Was the date of termination of the respondent's employment clear? We find so. We say so because looking from the correspondence in the record of appeal, we see no ambivalence or uncertainty as far as the date of termination is concerned. The letter of termination is clear and we repeat the contents here:

“Ref: PD/7/3/88997/CON

17th August 2007

Mr. Cyrus M. Njoroge

Security Officer (Investigations)

Grade HM 3

C/No. 88997

Thro' The Employee Relations Manager

Mombasa

RE: LIFTING OF SUSPENSION/DISMISSAL

This is further our letter of even reference dated 12th September 2005 by which you were suspended from duty.

You recall that you appeared before a Committee of Inquiry appointed by Management to hear your case following your request to be heard vide your letter dated 15th September 2005.

Management has carefully considered your presentation before the Committee of Inquiry, the findings and the recommendations of the Committee, and it has been decided that you grossly mishandled the operation leading to the loss of container No. PCIU 370149-4 as it was established that;

- *Although you were given sufficient information which enabled you and your team to sight the lorry loaded with the container as it drove down Kipevu Bridge and headed towards yard No. 5, you failed to stop it from exiting the Port.*
- *You trailed the lorry without making adequate arrangement for the mobility of the operation team thus hindering effective operations to arrest the suspects.*
- *When the lorry loaded with the container temporarily stopped at SOT Overhead barrier, you and your team identified it positively but you declined the team's advice to arrest the lorry and the driver.*

*In view of the above findings and your unsatisfactory explanations in regard to your failure to stop theft of container No. PCIU 370149-4, it has been decided that you be **DISMISSED** from the services of the Authority with immediate effect for Gross misconduct.*

By a copy of this letter the Principal Personnel Officer (MS) will arrange for your payments.

You are required to surrender all the Authority's property to the Port Facility Security Officer within 48 hours of receipt of this letter.

Please acknowledge receipt of this letter by signing the duplicate copy provided.

V.M. Wa-Kayanda

HUMAN RESOURCES &

ADMINISTRATION MANAGER

*Copy to **The Financial Controller***

The Chief Internal Auditor

The Chief Medical Officer

The Port Facility Security Officer

The Employee Relations Manager

The Principal Personnel Officer (MS)

The Principal Personnel Officer (SD)

The Personnel Officer (A)

MOMBASA

[20] The contents of the above letter are clear and succinct. It refers to the letter of suspension, adopts it, gives reasons and acknowledges the respondent's presentation before the committee and goes ahead to inform the respondent that he had been "**DISMISSED**" with immediate effect. Following that communication, the respondent appealed vide his letter referred to earlier dated 10th September, 2007. This appeal was considered and declined and the decision communicated vide the letter dated 14th October, 2007. When an appeal is declined, the effective date of the decision appealed against is the date indicated in the decision that is upheld. We do not see any confusion arising out of those letters.

If we had entertained any doubt on the issue, the same would have been settled by a cursory look at paragraph 8 of the respondent's

statement of claim where he has admitted his suspension was lifted on 17th August, 2007, and replaced with dismissal. When the suspension was lifted and the subsequent appeal was dismissed, then clearly the date of termination remained 17th August, 2007.

[21] In the notice served on the appellant's Managing Director pursuant to **Section 66(a)** of the Act, the respondent's advocate stated as follows in part:

“The circumstances giving rise to liability are that on or about 17th August 2007 you did unlawfully without reason and/or colour of right terminate the employment services of the said CYRUS NJOROGE.” (Emphasis added)

From the foregoing, there was no doubt whatsoever in the respondent's mind as to the effective date of his termination. On our part, we find no uncertainty whatsoever on the said date. As to whether the respondent had exhausted his right of appeal, in our view, he lodged his appeal following the letter dated 17th August, 2007; it was dismissed and he had no other right of appeal. Indeed, he appears to have appreciated that fact and that was why he waited until he was acquitted before he could re agitate his matter.

[22] It bears repeating here that the acquittal of the respondent had no impact on his termination. As stated by this Court in a majority decision in **Attorney General and Another v. Andrew Maina Githinji and Another** (2016) eKLR, the cause of action, a criminal trial and disciplinary proceedings taken by an employer against an employee in respect of the same transaction are two different processes. An aggrieved employee can still file suit against an employer notwithstanding pendency of criminal proceedings against him/her over the same subject matter. In this case, nothing stopped the respondent from filing suit within 1 year from 17th August, 2007 pursuant to Section 66 of the Act. We reiterate here that an acquittal in a criminal matter against an employee does not confer on an employee a fresh cause of action against an employer. Nor does it extend time when there is limitation set by statute.

[23] We think we have said enough to demonstrate that the respondent's claim was statutorily time barred under **Section 66** of the Act and the High Court had no jurisdiction to entertain it. It follows therefore that any other orders predicated on the cause of action that was time barred are invalid and cannot be sustained. This inevitably means that we do not need to go into the rest of the grounds raised in this appeal. The appeal has merit and we allow the same but with no orders as to costs given the respondent's pecuniary status *vis a vis* that of his former employer.

Dated and delivered at Mombasa this 5th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR