IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE& P.O. KIAGE, JJA)

CIVIL APPEAL NO. 21 OF 2015

BETWEEN

THE HON. ATTORNEY GENERAL.....1ST APPELLANT

MINISTRY OF STATE FOR IMMIGRATION &

REGISTRAR OF PERSONS.....2ND APPELLANT

AND

ANDREW MAINA GITHINJI..... 1ST RESPONDENT

ZACHARY MUGO KAMUNJIGA.....2ND RESPONDENT

(*Appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nyeri (Ongaya, J.) Dated 6th March, 2015 in* ELRC No. 73 of 2014)

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JUDGMENT OF NAMBUYE J. A.

1. This is a first appeal from the orders issued on the 6th March, 2015 by ***Byram Ongaya J***. in **Nyeri E&LR Court Cause No. 73 of 2015.**
2. The brief background is that the 1st and 2nd respondents **Andrew Maina Githinji** and **Zachary Mugo Kamunjinga** were employed by the second appellant as a finger print officer III and subordinate staff respectively. On the 31st July, 2009 the respondents were arraigned and subsequently unsuccessfully prosecuted in **Kerugoya Principal Magistrate's Court** under **Criminal Case No. 737 of 2009** for various offences related to their employment which included procuring by false pretenses contrary to section 320 of the Penal Code, abuse of office contrary to section 10(2) of the Penal Code among others resulting in the respondents' acquittal on the said charges on the 23rd day of October, 2013.
3. During the pendency of the criminal proceedings, the 2nd appellant dismissed the respondents from their respective employments on grounds of gross misconduct vide letters dated the 2nd and 3rd February 2010 respectively. On 13th June, 2014 the respondents filed **Nyeri E & LR Cause No. 73/2014** against the appellants seeking inter alia reinstatement and general damages for wrongful dismissal. The appellants filed a joint memorandum of response and a Preliminary Objection which was subsequently amended. The gist of the amended Preliminary Objection was

that the respondents had filed their suit out of the requisite time limit stipulated in **section 90** of the Employment Act No. 11 of 2007 hence the respondents' suit was time barred.

4. Upon considering submissions made on behalf of either party, the learned trial Judge **Byram Ongaya, J.** in his ruling dated the 6th March, 2015 dismissed the appellant's amended Preliminary Objection on the grounds that in his view the respondents' cause of action arose after their acquittal of the criminal charges and their suit was properly filed within 12 years of their acquittal as required under section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya. This is the decision that has provoked this appeal. The appellants are now before us having raised three (3) grounds of appeal. These are that;

i. ***The learned Judge erred in law and fact by failing to appreciate and find that the claimant's cause of action against the Respondents was statute barred under section 90 of the Employment Act.***

ii. ***That the learned Judge erred in law and fact in his construction of the evidence adduced and his reliance of (sic)extraneous matters which had him to arrive at an erroneous finding and decision.***

iii. ***That the learned Judge erred in law in applying the general principles in Mathew Kipchumba Koskei V. sBaringo Teachers Sacco [2013] eKLR in determining the notice of Preliminary Objection before him.***

5. In his oral submissions before us, ***Mr. Makori*** urged that the appeal basically raises three major issues for determination namely (i) at what point does a cause of action accrue in a case of unlawful termination? (ii) is an employer bound by an outcome of a criminal process in the exercise of his internal disciplinary process against its employees in instances where these share a common factual base? and (iii) lastly whether the learned Judge was justified in applying the self-formulated principles in the ***Mathew Kipchuma Koskei versus Baringo Teachers Sacco [2013] eKLR*** case to the facts resulting in the appeal herein.
6. Expounding on these issues ***Mr. Makori*** urged us to find that since section 90 of the Employment Act (supra) is couched in mandatory terms and limits the period within which a suit under the Act can be filed against an employer by an employee to three(3) years from the date the cause of action accrues, we should find that the respondents' suit filed on the 13th June, 2014 four (4) years and ten (10) months from the 7th day of August 2009, the date of their dismissal from the 2nd appellant's employment was therefore time barred. In his view, **section 4** of the Limitation of Actions Act (supra) does not enjoy primacy over section 90 of the Employment Act. ***Mr. Makori*** further submitted that had the learned trial Judge addressed his mind properly when construing these two provisions, he could have resolved the inherent conflict in favour of **section 90** of the Employment Act as it is the substantive law that ought to govern resolution of disputes arising from an employer and employee relationship.
7. With regard to the learned trial Judge's application of principles of law to the rival arguments before him, it was ***Mr. Makori's*** arguments that the principle in the ***Mbowa Vs. East Mengo Administration [1972] EA 352*** case ought not to have been applied to the issues in controversy herein as it arose out of a malicious prosecution dispute and thus had no bearing on a dispute arising from a purely employer/employee relationship. Second, the principles arising from the ***Mathew Kipchumba Koskei*** case (supra) were inapplicable because they were nonexistent as at the time the action to dismiss the respondents from the 2nd appellant's employment was taken; the nature of the said principles are inconsistent with the clear provisions of law in **section 87** and **90** of the Employment Act; and the learned trial Judge had no mandate to rewrite a contract of employment between the appellant and the respondents which had clear express and implied terms binding on either side.
8. To buttress his arguments ***Mr. Makori*** cited the case of ***Geoffrey Kiragu Njogu Vs. the Public Service Commission Civil Appeal No. 57 of 2014*** for the proposition that an internal disciplinary process by an employer is distinct from the criminal process and that an acquittal in a criminal proceeding does not bar an employer from instituting disciplinary proceedings against his employee as an acquittal of an employee's criminal charges does not settle issues of misconduct if

any against such an employee. Second that the intention of the legislature when enacting the Employment Act (supra) was to make it the substantive law on matters of dispute resolution between an employer and employee.

9. ***Mr. Makori*** further relied on persuasive decisions in the case of ***James Mugeria Igati Vs. Public Service Commission of Kenya [2014] eKLR, Benjamin Wachira Ndethi Vs. Public Service Commission and Another [2014 eKLR]***, and lastly ***Boniface Inandi Otieno Vs. Mehta Electricals Limited [2014] eKLR*** all for the propositions, inter alia, that a court of law has no jurisdiction to extend the period of limitation provided by statute either in **section 4** of the Limitation of Actions Act (supra) or **section 90** of the Employment Act (supra); that the employer/employee internal disciplinary process is distinct from any possible criminal proceedings against any employee even if these arise from the same set of facts; the institution of the latter is not a bar to the institution of the former and vice versa, even if the latter is resolved in favour of the employee, and lastly that it is risky for a court of law to purport to rewrite a contract of employment based on an employee's acquittal in a criminal prosecution as the employer has no supervisory role or control over the criminal proceedings; and also the standard of proof in criminal proceedings is totally different from that pertaining either in an internal disciplinary proceeding or a civil litigation in a court of law.
10. In response to the appellant's submissions, ***Mr. Gacheru*** learned counsel for the respondents while relying on the case of ***Mbowa versus East Mengo Administration*** (supra) submitted that in an instance where the 2nd appellant did not invoke the internal disciplinary measures against the respondents in the first instance, and instead opted for the criminal prosecution with itself as the complainant and its employees as witnesses, it was only prudent for the learned trial Judge to hold that a cause of action only accrued in favour of the respondents upon their acquittal in the criminal proceedings.
11. In reply to ***Mr. Gacheru's*** submissions ***Mr. Makori*** reiterated his earlier clarification that the ***Mbowa*** case (supra) is distinguishable from the circumstances obtaining herein and lastly that the particulars of the respondents' gross misconduct that led to their dismissals from the 2nd respondent's employment were distinct from the offences they faced in the criminal proceedings.
12. This is a first appeal arising from the learned trial Judge's refusal to uphold the appellant's amended Preliminary Objection to the respondents claim against them. It is my view that although the rival arguments before us have tended to cover both the merits and the demerits of both the amended Preliminary Objection as well as the respective rival pleadings of the parties before the learned trial Judge, it is my opinion that what the learned trial Judge had been invited to rule upon was simply whether the appellants' amended Preliminary Objection had met the threshold for upholding a Preliminary Objection. In other words the issue was whether the competing interests in the rival pleadings before him could be disposed off by way of a Preliminary Objection. My simple task in the circumstances is therefore, to determine as to whether on the basis of the record before him, the learned trial Judge exercised his discretion judiciously when rejecting the appellants amended Preliminary Objection.
13. In doing so, I stand guided by the principles set by the predecessor of this Court in the case of ***Mbogo and another vs. Shah [1968] EA93,*** namely, that I must satisfy myself that the Judge misdirected himself in some matter, and as a result arrived at a wrong decision. Or that it was manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there had been misjustice. I also have to be cautious of the fact that should the appeal herein fail, the parties will have to be required to resubmit themselves to the trial Court for the merit disposal of the issues in controversy as between them. In this regard, I have to steer clear of any temptation to make a merit pronouncement on the undetermined issues in controversy as between the parties.
14. The principles that the learned trial Judge was enjoined to apply in determining the merits or otherwise of the amended Preliminary Objection before him are as were set out by the predecessor of this Court in the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696.***At page 700 Pr. D-F ***Law JA*** as he then was had this to say***:-***

> ***"....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of***

limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Newbold, P.; on the other hand at pg.701 paragraph B-C added the following:

"A Preliminary Objection is in the nature of what used to be a demmurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...."

15. The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what **Sir Charles Newbold** set out above in the **Mukisa** Case (supra). That is **first**, that the Preliminary Objection raises a pure point of law, **second,** that there is demonstration that all the facts pleaded by the other side are correct; and **third,** that there is no fact that needs to be ascertained.
16. When rejecting the appellant's amended Preliminary Objection the learned trial Judge had this to say

*"**The court agrees with the claimant's line of submissions and finds that until the criminal court decided upon the validity of the reasons the claimant's termination the claimants could not properly be said to have all the relevant facts to file a suit questioning the fairness of their termination. Time did not run until the date of acquittal"***.

The court further upholds its opinion in disciplinary cases against employees where in the opinion of the employer there exists a criminal elements as set out in the guiding principles in the case of <u>Mathew Kipchumba Koskei -vs- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013</u> at Nakuru.

The Respondents were entitled but appear not to have taken steps to administratively review the dismissal decision in view of the claimant's acquittal and in the opinion of the court in absence of such administrative review, the claimants were entitled to move to court and the suit was not time barred.

The court further finds that in any event, the suit was properly filed as based on the acquittal order. In the Criminal Case as was within 12 years for suits under section 4 of the Limitation of Actions Act".

17. Applying the ingredients in the above ***Mukisa case*** (supra) to the rival arguments herein, it is my finding that although the appellants' plea of lack of jurisdiction on the part of the trial court is no doubt one of the examples of a pure point of law that **Law JA** gave in the **Mukisa** Case (supra), it is my finding that the threshold for upholding a Preliminary Objection on a point of law was not met fully by the appellants amended preliminary objection. My reasons being that first, the facts pleaded by the respondents are in dispute as the appellants do not agree with the respondent's assertion that they ought to have been reinstated after they were acquitted of the criminal charges they had faced in the criminal case. Second, there is need to ascertain the following facts (i) whether the appellants complied with their obligations under section 87 of the Act by bringing to the notice of the respondents, the rules pertaining to the internal disciplinary mechanisms; (ii) whether, the respondents exhausted the internal disciplinary mechanism before moving to seek redress in the Industrial Court; (iii) whether the respondents suit was premature; (iv) there is need to establish the nature and extend of the prejudice, the appellants stood to suffer if the respondents claim against them was not terminated; (v) there is need to establish when the period of limitation is to be computed i.e is it from the 7th of August, 2009 as back dated by the 2nd appellant in the respondents letters of dismissal dated the 2nd and 3rd February, 2010 respectively; or was the time to start running from the effective date of the respondents dismissal letters.
18. My understanding of the principle set by the **Mukisa** case (supra) is that all the three ingredients, I have identified above must be present before a Preliminary Objection can be sustained. Herein

only one of the three ingredients was satisfied. Non satisfaction of the other two rendered a fatal blow to the appellants' amended Preliminary Objection.

19. The upshot of all the above is that I find the appellant's appeal has no merit. I would dismiss it with costs to the respondents both on appeal and the court below. However, I have had the privilege of reading in draft the lead judgment of P. Waki JA. and that of P. O. Kiage JA. also in draft. I find that they are of the contrary concurrent view. Since theirs is the majority view, orders shall be as proposed by Waki JA in his lead judgment.

Dated and Delivered at Nyeri this 3rd day of February, 2016.

R. N. NAMBUYE

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 21 OF 2015

BETWEEN

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ANDREW MAINA GITHINJI.....1ST RESPONDENT

ZACHARY MUGO KAMUNJIGA.....2ND RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at

Nyeri (Ongaya, J.) dated 6th March, 2015 in E. L. C. No. 73 of 2014)

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JUDGMENT OF WAKI J.A

1. I have had the advantage of perusing in draft the judgment of my Sister Nambuye JA and I need not therefore rehash the salient matters of fact which are well summarized. However, I have the misfortune of differing with the conclusion arrived at on the issue at hand. And the issue, as I see it, is whether the

preliminary objection raised by the Attorney General **(**hereinafter '**the AG')** should be upheld and the suit filed by the respondents herein terminated for being time barred. In answering that issue, it is necessary to determine two offshoots: firstly, whether the Preliminary objection was proper in form, and secondly, if so, whether it was sound in substance.

2. There can be no argument that a preliminary objection to court proceedings must be on a pure point of law. That principle was established, at least in East Africa, as long ago as 1969 in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** which has since been the *locus classicus* in the region. The epochal pronouncements in that case were by **Law JA**, thus:

> ***''So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

And by **Sir Charles Newbold** JA, thus:

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."***

3. The amended "Notice of Preliminary Objection"('**the PO'**) filed in the High Court by the AG was in this form:

> ***"TAKE NOTICE that the respondents shall at the hearing of the claimant's plaint dated 6th June, 2014 raise a preliminary objection of the following grounds:-***
>
> 1. ***That the said claimant's plaint contravenes mandatory provisions of Section 90 of the Employment Act (Cap 226), Laws of Kenya; hence the same is bad in law, misconceived and incompetent before this honourable court.***
> 2. ***That the respondents will suffer prejudice if this industrial cause is heard and determined as filed."***

4. It drew the attention of the Plaintiffs (hereinafter **'the respondents'**) and the court, to **Section 90 of the Employment Act** which governs limitation periods for filing suits under the Act. It was a plea on limitation, which is a pure point of law. As was stated in the case of ***Thuranira Karauri vs Agnes Ncheche – Civil Appeal No. 19 of 196* ,**the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further. The relevant facts relating to that issue were not in dispute. The respondents themselves pleaded that they were dismissed from their employment on 2nd February 2010. The AG pleaded earlier dates on the termination but the date pleaded by the respondents is the relevant one. Their cause of action lay for determination under the **Employment Act, 2007** which came into effect on 2nd June 2008 **(Employment Act)** under which they sought orders for reinstatement and general damages. The Act provides a time limit of three years for instituting suits, but the respondents' suit was filed on13th June 2014. The issue of law was therefore whether the suit was filed in compliance with the Act or was time barred. If it was legally time barred, that would be the end the litigation. There is no room for exercise of judicial discretion. In my view, it was a proper form of PO and the trial court was entitled to consider it as it did.

5. The second offshoot, whether the PO was sound in substance, is the core of the appeal before us. The trial court, in dismissing the PO, was of the view that the cause of action did not arise when the respondents were dismissed from their employment, but on 23rd October 2013 when they were acquitted

of criminal charges relating to their employment. The filing of the suit therefore fell within the statutory provisions as time did not run until the date of acquittal. In this finding, the court followed the reasoning in the case of ***Mbowa vs. East Mengo Administration (1972) EA 352*** where in a case of malicious prosecution, the court held that the cause of action means all facts which the plaintiff would have to prove to succeed. Similarly in this case, the court reasoned, the dismissal was based on facts similar to the facts in the criminal trial and therefore time did not run until they knew they could maintain a successful action against the employer, which time was after their acquittal. The trial court also relied on its own case of ***Mathew Kipchumba Koskei vs. Baringo Teachers Sacco [2013]eKLR*** which was decided after the employer herein had finalized its disciplinary process against the respondents. In that case, the court laid down general principles to be followed where the acts of an employee attract disciplinary censure as well as criminal process; essentially stating that the criminal process takes precedence. Those findings were, of course, supported by the respondents in this appeal, who maintained through learned counsel, **Mr.Gacheru**, that the cause of action arose after the acquittal of the respondents, who had 12 years to file suit as provided under **Section 4** of the **Limitation of Actions Act.**

6. But the AG, through Mr. Makori, argues that **Section 90** of the Employment Act is mandatory and admits of no application of **Section 4** of the **Limitation of Actions Act**; that the cause of action arose upon dismissal of the respondents and not after their acquittal in subsequent criminal proceedings; and that the employer is not bound by the criminal process in exercise of internal disciplinary machinery which arises from the contract of employment. In making these arguments, Mr. Makori followed decisions of the Employment and Labour Relations Court in similar matters including: ***James Mugeria Igati vs. Public Service Commission of Kenya [2014] eKLR; Benjamin Wachira Ndiithi vs. Public Service Commission & another [2014] eKLR***; ***Boniface Inandi Otieno vs. Mehta Electricals Limited [2014] eKLR*** and a decision of this court in ***Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others [2015] eKLR***.

7. The critical question to ask, which I will endeavor to answer, is this: What is a cause of action and when does it arise in a claim for unfair /wrongful termination? In doing so, I must re-emphasize two matters which are clear from the record. Firstly, there is no pretence by the respondents that their claim is based on any other law besides the Employment Act. That is why they went before the Employment and Labour Relations Court (formerly, the Industrial Court) to agitate reinstatement to their employment and to seek general damages for wrongful dismissal. There is no claim for malicious prosecution or general damages for that transgression. It was not a Judicial Review matter either. It is therefore the provisions of ***Part VI*** of the ***Employment Act*** which would fall for consideration to determine whether the termination was lawful. Secondly, there is no traverse to the pleadings by the Attorney General in his *"Memorandum of Response"* that the respondents were given an opportunity to appear before the Human Resource Committee of the employer when the decision to terminate their employment was made and that they appealed against the decision to the Public Service Commission which rejected the appeal, as it did a further Review sought by the respondents. On the respondents' own pleading, their services were terminated on 2nd February 2010 when they were so notified. Parties are bound by their pleadings.

8. ***"A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."***

That definition was given by Pearson J. in the case of ***Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688*** at pg 616. In an earlier case, ***Read vs. Brown (1889), 22 QBD 128***, Lord Esher, M.R. had defined it as:-

> ***"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court".***

Lord Diplock, for his part in ***Letang vs. Cooper [1964] 2 All ER 929 at 934*** rendered the following definition:-

> ***"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."***

I am sufficiently persuaded by those definitions and I adopt them.

9. When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy from their employer through the court? On the one hand, the AG contends that it was on the date of the respondents' dismissal while the respondents insist it was after their criminal trial was exhausted. There does not seem to be a direct authority from this Court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment. I will refer to a few of them by way of illustration.

10. In the ***Benjamin Wachira case*** ***(supra),*** for example, the court, (L. Ndolo J.) expressed itself as follows:-

> ***"On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service.***
>
> ***This Court has however taken a different view on this matter in the case Hilarion Mwabolo –vs- Kenya Commercial Bank [2013 eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.***
>
> ***In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October 2000 as communicated by letter dated 29th September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October 2000 and that is the date when time began to run as against the Claimant's claim."***

11. In other cases where a plea was made that there was an intervening criminal process, it has been held that the institution of criminal proceedings is not a bar to civil proceedings based on similar facts. Such was the case in the ***James Mugeria Igati case*** where Rika J. held as follows:

> ***"The Claim rests on the question whether the Respondent was bound by the outcome of the criminal proceedings in the Nairobi Chief Magistrate's Criminal Case Number 1602 of 2005 R v. James Igati Mugeria. There is nothing in the repealed Employment Act Cap 226 the Laws of Kenya, and the Public Service Commission Regulations 2005 which applied to the dismissal of the Claimant from service, that suggest the disciplinary process, is tied to the criminal process that may arise from the same facts. Section 17 of the repealed Employment Act did not make disciplinary proceedings at the workplace subject to any criminal investigations, trial or convictions. The Claimant appears to confuse the disciplinary process, which is properly a private process between an employer and its employee, whose aim is to ensure the employer's business is not harmed by delinquent employee behaviour, with a criminal trial which is a public process where prosecution is carried out by the state and is purposed on securing the safety of the general population, and on maintenance of a stable social order. This Court has expressed the view in the past that the two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. There is no provision in the old or the new Employment Act, or the Public Service Commission Regulations, which make it necessary for employers to follow police investigations, or findings, or indeed Criminal Court decisions, in resolving employment disputes based on cross-cutting facts.***
>
> ***The Public Service Commission Regulations 2005 are framed in such a way as to leave no doubt that the Respondent intends any criminal processes are not merged with the disciplinary***

processes in the service. Regulation 23 distinguishes between 'proceedings leading to dismissal being taken' and 'criminal proceedings being instituted.' Regulation 24 requires an officer to be suspended where convicted of a serious criminal offence, pending consideration of the case under the Regulations. Conviction like acquittal would not be binding on the employer. The punishments under Regulation 25 are as a result of the disciplinary process, not criminal trial in a court of law. The Claimant misconceived his criminal trial to be the same process as the disciplinary process."

That reasoning was upheld by this court in the ***Geoffrey Kiragu Njogu case (supra)*** decided in May 2015.

12. David O. Owino Vs Kenya Institute of Special Education [2013] eKLR was another Industrial Court decision on similar submissions but the court followed another decision of this Court and held:

"In the case of Kibe Vs Attorney General (Civil Appeal No 164 of 2000) the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair."

13. Finally, I may refer to two decisions where a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. One is the decision of Okwengu, J.A in the case of ***Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR*** where the learned Judge stated as follows:

"The disciplinary process undertaken by the appellant was a quasi-judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertainfacts and make a decision determining the respondent's legal rights in accordance with the Constitution and the Judicial Service Act, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be imposed in the disciplinary proceedings did not include penalties or forfeitures akin to those that could be applied in a criminal trial. Thus the learned Judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned Judge erred in applying the provisions of the Criminal Procedure Code."

14. The other is an English decision which underscored the possibility of a multiplicity of causes of action sprouting from a single act. That is ***R. v. Wigglesworth (1984), 1984 CanLII 2275 (SK CA), 11 C.C.C. (3d) 27, 7 D.L.R. (4th) 361, 38 C.R. (3d) 388 (Sask. C.A.)*** where the court stated:-

"A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example, a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the

State; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly, a policeman who assaults a prisoner is answerable to the State for his crime; to the victim for the damage he caused, and to the police force for discipline.

This has long been the law, and nothing, in my respectful opinion, in s. 11(h) of the Charter has changed matters in this respect. In the light of this I think Constable Wigglesworth's contention must fail since the proceeding before the R.C.M.P. service tribunal was purely disciplinary. It was concerned only with the professional aspect of his conduct: the "offence" of which he was found guilty, a "major service offence", lay in the breach by him of his policeman's duty not to treat his prisoners harshly, cruelly, or with unnecessary violence. He must still answer to society for the criminal aspect of his conduct, or for his "criminal offence."

See also ***Fred Mudave Gogo –vs- G4s Security Services (K) Ltd- Industrial Cause No. 846 of 2013***; ***Victor Owuor Okeyo Vs African Banking Corporation [2014] eKLR; Hezekiah Oira Vs Kenya Broadcasting Corporation and Another [2013] eKLR; Benjamin Wachira Ndiithi vs. Public Service Commission & another [2014] eKLR;***

15. I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not.16.

16. It also leads me to the conclusion that the ***Mbowa case (supra)*** which was followed by the trial court, was distinguishable. The case itself was properly decided on its facts. It was about malicious prosecution and had nothing to do with unfair/wrongful dismissal from employment. Logically, the cause of action in the ***Mbowa case*** would not have arisen until after the plaintiff's acquittal in the criminal trial. The acquittal, as well as malice, were necessary elements of the cause of action. Not in this case.

17. Were the respondents time barred in filing their claim in this case?

Section 90 of the ***Employment Act*** provides:-

> ***"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."***

Such provision did not exist in the repealed **Employment Act**, Cap 229 which did not have elaborate provisions on *'Termination and Dismissal'* as its supplanter does. Time limits in the former Act were subject to the **Limitation of Actions Act** which in some cases could be as long as 12 years and amenable to extension. By expressly inserting **Section 90**, the intention of Parliament , in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'.

18. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold. It follows that I would allow the appeal, set aside the Ruling and order of the Employment and Labour Relations Court made on 6th March 2015 and substitute therefor an order allowing the Preliminary Objection by the Attorney General.

Consequently the respondents' claim filed on 6th June 2014 shall be and is hereby struck out in its entirety. The respondents shall bear the costs of the appeal and of the struck out claim.

As Kiage JA agrees, orders shall follow accordingly.

Dated and delivered at Nyeri this 3rd day of February, 2016

P. N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 21 OF 2015

BETWEEN

THE HON. ATTORNEY GENERAL…….....…….1ST APPELLANT

MINISTRY OF STATE FOR IMMIGRATION & REGISTRAR OF PERSONS…..…….. 2ND RESPONDENT

AND

ANDREW MAINA GITHINJI…….....……..1ST RESPONDENT

ZACHARY MUGO KAMUNJIGA……...….....……2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nyeri (Ongaya, J.) dated 6th March, 2015 **In E. L. C. No. 73 of 2014)**

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JUDGMENT OF KIAGE J.A

I have had the advantage of reading in draft the judgment of my brother **Waki JA** with which I am in full agreement.

The Preliminary Objection that had been raised before the court below was a jurisdictional one. It raised a statutory bar to the bringing of the claim by the respondents herein outside of the three year cut-off imposed by **Section 90** of the **Employment Act**. Such a plea, if upheld, would have been dispositive of the claim and therefore constituted "***a pure point of law***" in the language employed by Sir Charles Newbold P, in the oft-cited case of **MUKISA BISCUIT MANUFACTURING CO. LTD –VS- WEST**

END DISTRIBUTORS LTD [1969] EA 696. It was therefore properly taken.

As to whether it should have been sustained, I, like **Waki JA,** would answer in the affirmative. Of their own showing, the respondents were dismissed from employment on 2nd February 2010. The three year period within which they could lawfully challenge their dismissal expired on or about 1st February 2013. They did not file suit within that period, doing so only on 13th June 2014, which was well out of time. That ought to have led to a striking out of the suit as sought through the Preliminary Objection.

It is quite clear to me that the learned Judge fell into error in holding that time could only run from 23rd October 2013 when the respondents were acquitted of criminal charges that arose from the same facts and circumstances giving rise to the dismissal. I am not persuaded that the acquittal was a prerequisite to the claim for reinstatement and or damages for unlawful termination of employment. The learned Judge proceeded on the basis that it was in much the same way as it is for a claim in malicious prosecution, his reliance on **MBOWA –VS- EAST MENGO ADMINISTRATION** [1972] EA 352. In that he erred since a dismissal is lawful or unlawful and therefore actionable or not on the date it is effected. A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein.

The Preliminary Objection should have been upheld, and I would, in the circumstances, allow this appeal, disposing of it along the terms suggested by **Waki JA.**

Dated and delivered at Nyeri this 3rd day of Eebruary, 2016.

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR