



**Nyamwinga v CMC Motors Group Limited (Appeal E077 of 2022)
[2024] KEELRC 2464 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2464 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E077 OF 2022
AK NZEI, J
OCTOBER 11, 2024**

BETWEEN

PATRICIA KIMANI NYAMWINGA APPELLANT

AND

CMC MOTORS GROUP LIMITED RESPONDENT

JUDGMENT

1. The Appellant herein was the Claimant in Mombasa Chief Magistrate’s Court Employment and Labour Relations Case No. 165 of 2019, whereby she had sued the Respondent herein seeking the following reliefs:-
 - a. A declaration that the Appellant’s summary dismissal from employment was unfair.
 - b. Salaries for the months of May and June 2014 (Kshs.45,360 x 2) Kshs.90,720/=.
 - c. One month salary in lieu of notice Kshs.45,360/=.
 - d. Refund of Kshs.250,000/=.
 - e. 43.5 unpaid leave day Kshs.90,720/=.
 - f. 12 months’ salary as compensation for unfair termination Kshs.544,320/=.
 - g. Certificate of service.
 - h. Costs of the suit and interest from the date of filing suit until payment in full.
 - i. Any other relevant remedies that the Court may deem fit and just to grant.
2. The Appellant had pleaded that at all times material to the suit, she was employed by the Respondent as a branch cashier at the Respondent’s Mombasa branch. That she had been employed on 1st February, 1982 and was earning a monthly salary of Kshs.45,360/= as at 30th June, 2016.



3. It was the Appellant's further pleadings:-
- a. That on 30th June, 2014, the Appellant was issued with a summary dismissal letter (dated 30th June, 2014) on alleged grounds of gross misconduct. That the dismissal was unfair as the same was unprocedural and without a fair reason.
 - b. That the Respondent's management had accused the Appellant of theft of Kshs.850,000/= which she had been given for safe keeping by the Respondent's Credit Controller on 26th April, 2014 awaiting banking on 28th April, 2014.
 - c. That the aforesaid sum of Kshs.850,000/=, given to the Appellant by the Respondent's Credit Controller, Harun Mwenze Muteti, was a deposit from a client towards purchase of a motor vehicle; and that the Appellant placed it in a safe awaiting banking on 28th April, 2014.
 - d. That on 28th April, 2014, the said amount was found missing and the matter was reported to the police.
 - e. That on 12th May, 2014, the Appellant was charged in court with the offence of stealing by servant contrary to Section 281 of the Penal Code vide criminal case No. 915 of 2014, and was eventually acquitted under Section 210 of the Criminal Procedure Code on 13th September, 2018.
 - f. That while on duty on 25th June, 2014, the Appellant had received an email from the Respondent's Regional Manager inviting her for a disciplinary hearing at Nairobi, but which did not disclose the agenda of the hearing.
 - g. That the email informed the Appellant of the right to have a representative at the hearing.
 - h. That the Appellant attended the meeting on 27th June, 2014 without any agenda for the same and without a representative, and was asked about the missing money, which she explained appropriately.
 - i. That the Appellant was told that she would get feedback regarding the outcome of the said hearing, and on 30th June, 2014 received an evenly dated summary dismissal letter. That the Appellant was not paid her salary for the months of May and June 2014, which she was claiming.
 - j. That the Appellant had been forced by the Respondent to admit that she had stolen Kshs.850,000/=, and that a repayment plan was drawn to have the Appellant pay the entire Kshs.850,000/= despite her innocence.
 - k. That the Appellant was forced to pay Kshs.250,000/= to the Respondent Company and the balance of Kshs.600,000/= was to be paid in instalments until payment in full.
 - l. That the Respondent's actions offended Sections 40, 43, 45, 49 and 50 of the [Employment Act](#), Section 48 of the [Labour Institutions Act](#) and Convention 158 of the International Labour Organization Conventions.
4. Documents filed alongside the Appellant's Memorandum of Claim dated 4th March, 2019 and filed in Court on 7th March, 2019 included the Claimant's written witness statement dated 4th March, 2019 and an evenly dated list of documents listing some 6 documents. The listed documents included copies of the Appellant's payslips, invitation letter (send via email) for disciplinary hearing, summary



- dismissal letter dated 30th June, 2014, receipts dated 12th May, 2014 and 20th May, 2014 respectively for Kshs.250,000/= and a certified copy of the (Criminal) Court’s ruling dated 15th February, 2019.
5. The Respondent defended the Appellant’s suit vide an 18 paragraph statement of Response and denied the claim; and called for it to be dismissed in its entirety. The Respondent also filed a witness statement of Ben Sifuna, the Respondent’s Group Human Resource Manager, dated 27th June, 2019 and an evenly dated list of documents, listing 7 documents. On 27th July, 2021, the Respondent filed a witness statement of Julius Anami, the Respondent’s Human Resource Generalist.
 6. Upon full trial, the trial court delivered its Judgment on 19th October, 2022 (dated 18th October, 2022) and dismissed the Appellant’s suit with costs. In dismissing the suit, the trial court stated as follows:-
 - “ 5. The Claimant testified that she was unlawfully and unfairly terminated on 30th June, 2014 which means that the period of limitation lapsed on 30th June, 2017 whereas the present suit was brought on 7th March, 2019, almost two years outside the statutory period of limitation prescribed under Section 90 of the Employment Act, 2007. Section 90 stipulates that:-

“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 cessation thereof.”
 6. Although none of the parties raised the issue of limitation, either in their pleadings or their evidence, this Court takes the view that its hands are tied and it is indeed obligated to raise the issue suo motu.
 7. . . . I have gone through the entire file and there is nothing on record to indicate that such leave was obtained by the Claimant. It follows therefore that the present suit is rendered void and as a result I proceed to dismiss it with costs to the Respondent.”
 7. Aggrieved by the trial Court’s said judgment, the Appellant preferred the present appeal and set forth some 6 grounds of appeal, which I will not consider, in view of what I proceed to state.
 8. The suit filed by the Appellant in the trial court was an employment suit/claim falling within the purview of the Employment Act, 2007. The Appellant pleaded and testified before the trial court that her employment with the Respondent was unfairly terminated by the Respondent on 30th June, 2014. By dint of Section 89 (formerly Section 90) of the Employment Act 2007, statutory limitation period regarding the said termination started running on 30th June, 2014. The primary suit was filed by the Appellant in the trial court on 7th March, 2014, almost five (5) years from the date the cause of action arose, which was 30th June, 2014. The suit was filed outside the mandatory limitation period, and was incompetent and dead on arrival. The trial court had no jurisdiction to handle the dead suit, and ought to have struck it off on the first listing. Any appeal arising from the said incompetent and dead suit is, likewise, incompetent as out of nothing flows nothing.
 9. This Court has no jurisdiction to entertain and to determine an appeal arising from a statute barred suit.



10. For record purposes, it ought to be noted that once the limitation period circumscribed in Section 89 (formerly Section 90) of the *Employment Act* lapses, such limitation period cannot be extended. The said Section clearly states that matters based or arising out of the Act or a contract of service in general are excluded from the application of Section 4(1) of the Limitation of Acts Act (Cap 22 Laws of Kenya). The trial Court fell into error by appearing to state in its aforesaid Judgment that leave to file an employment claim out of time could be sought.
11. The Court of Appeal stated as follows in the case of Beatrice Kahai Adagala v Postal Corporation of Kenya[2015] EKLK:-
- “ . . . Section 90 of the *Employment Act* which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in Devecon Limited v Samani [1995 – 1998] EA – P. 48, a decision relied upon by Radido J. in Josephat Ndirangu v Henkel Chemicals (E.A) Limited (2014) eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the Applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*.”
12. Having said that, I proceed to strike off the Appellant’s appeal herein with no Order as to costs. Each party will bear its own costs of proceedings in the court below.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

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