



REPUBLIC OF KENYA



**Osiemo v Radar Limited (Cause 196 of 2018)
[2023] KEELRC 673 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 673 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 196 OF 2018
K OCHARO, J
MARCH 16, 2023**

BETWEEN

PETER MOKUA OSIEMO CLAIMANT

AND

RADAR LIMITED RESPONDENT

(Formerly CMC 3011 OF 2008)

JUDGMENT

1. The matter herein was commenced by way of a plaint under Nairobi/Milimani Commercial Courts Civil Suit No 3011 of 2008. The Claimant claimed against the Respondent:
 - i. Severance pay [service] at the rate of 15 days for each completed year Kshs 5,993.00
 - ii. Leave days but not taken for 2 years ...Kshs. 11,986.00
 - iii. Payment for Public Holidays [10 per a year] and Sundays [48 days per year] Kshs 72,384.00
..... Kshs 90,263.00
2. Upon being served with summons to enter appearance, the Respondent filed its memorandum of appearance on the June 12, 2008 and a statement of defence on the June 26, 2008.
3. Through Employment and Labour Relations Court, Miscellaneous Application No 81 of 2017, the Claimant sought for transfer of the matter from the Chief Magistrate's Court to this Court for hearing and final disposal, an order which was granted on the 8th day of November 2017.
4. On the September 29, 2022, when this matter came up for hearing before this Court the Claimant was allowed to proceed with his case the absence of the Respondent notwithstanding. Service of Court process for the hearing date had been effected upon them, but they and their counsel were not in attendance of Court, this without any expressed sufficient reason or any reason at all.



A Jurisdictional issue

5. While evaluating the pleadings herein for purposes of preparation of Judgment in this matter, paragraph 4 of the plaint caught the attention of this Court, therein it is averred;

“Pursuant to the said employment aforesaid, the plaintiff diligently and dutifully rendered services as a driver for the defendant until on or about November 11, 2003 when the defendant maliciously terminated the plaintiff’s employment without any lawful cause or excuse through stage-managed resignation procured through duress and undue influence.”

In my view, the paragraph describes the cause of action and when it arose.

6. The parties did not raise the issue in their pleadings, nor canvass it in any matter in the course of the proceedings herein, however, as the same goes to the jurisdiction of this Court, it shall be an abdication of the Court’s duty not to address the same.
7. 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 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 of or in the case of continuing injury or damage within twelve months next after cessation whereof.”

8. In NBI ELRC No 1456 of 2016, Lawrence Gachau Kibu V County Government of Nairobi, this Court expressed itself on the aforestated provision thus:

“ 11. It is worth noting that the coming into effect of the Employment Act, 2007 and therefore the forestated provision, had a twin effect. First, it ousted the applicability of section 4[1] of the Limitation of Actions Act on Civil suits or Employment Act, on Civil suits or proceedings premised on or arising from the Employment Act, or a contract of service in general. Second, unlike for actions of contract, tort, and certain other actions contemplated under section 4 [1] of the Limitations of Actions Act, the provision reduced the Limitation of time from 6 [six] years to 3 [three] years for matters stipulated therein

9. I have no doubt in my mind that the suit herein was filed 4 1/2 years after the cause of action arose. Therefore, by dint of section 90 of the Employment Act, the same is a time barred claim that cannot be allowed to stand. It is hereby dismissed. Each party to bear its own costs.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MARCH 2023.

OCHARO KEBIRA

JUDGE

Ms. Wavinya for the Claimant.

No appearance for the Respondent.

ORDER



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

