



**SGA Guarding Limited v Mwanje (Appeal E024 of 2021)
[2023] KEELRC 911 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 911 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E024 OF 2021
CN BAARI, J
APRIL 20, 2023**

BETWEEN

SGA GUARDING LIMITED APPELLANT

AND

CHRISPINUS AMBANI MWANJE RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. W. K. Onkunya
(SRM) delivered on 18th June, 2021 in Kisumu CMELRC No. 86 of 2019)*

JUDGMENT

1. This appeal arises from a Judgment delivered on 18th June, 2021, where the Trial Court made a finding in favour of the Respondent herein. The court awarded the Respondent Kshs. 688,128 being salary not paid and costs of the suit.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 1st July, 2021.
3. The appeal is premised on the grounds that:
 - i. The Learned Magistrate erred in law and fact in failing to find that the alleged cause of action arose in May, 2013, or thereabouts, and therefore the suit was statute barred, having being instituted on 13th June, 2017, more than 3 years after the alleged cause of action arose.
 - ii. The Learned Magistrate erred in law and in fact that the status of the Claimant's employment was unclear.
 - iii. The Learned Magistrate erred in law and in fact by ignoring the fact that the Claimant expressly admitted that after the robbery incidence at the depot, he neither went back to work nor inquired on the status of his employment.



- iv. The Learned Magistrate erred in both law and fact in failing to find that, by his conduct, the Claimant had terminated the contract.
 - v. The Learned Magistrate erred in both law and fact in ignoring the fact that the Claimant fundamentally breached his obligations arising under the contract of service and as a result, he stood summarily dismissed.
 - vi. The Learned Magistrate erred in both law and fact by ignoring the Respondent's evidence that efforts were made to trace the Claimant including visiting his home in the village, however he could not be found.
 - vii. The Learned Magistrate erred in awarding the Claimant Kshs.688,128 and costs together with interest from May, 2013, yet the Claimant admitted that he did not work from May, 2013.
4. Parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

5. It is the Appellant's submission that the Claimant admitted that he had not received his salary from May, 2013, and this being the act, neglect or default complained of, time in the matter started running from May 2013. It is the Appellant's further submission that the cause of action arose in May, 2013, and the Respondent ought to have commenced this suit sometime before May, 2016, and for reason that this suit was filed in July, 2017, it is time barred. The Appellant sought to rely in *Attorney General & Another vs Andrew Maina Githinji & Another Civil Appeal No. 21 of 2015*, to support this position.
6. The Appellant submits that the Respondent breached the terms of his engagement and impliedly resigned or terminated his employment. It is the Appellant's further submission that the Respondent told court that since the incident on that fateful Sunday, he never returned to work nor made any attempt to inquire on the status of his employment.
7. The Appellant submits that in the circumstance of the case, a reasonable employee, who intends to continue working, would have returned to work. The Appellant further submits that this is a clear case of an employee who resigned, and that although he claims to have gone without salary since May, 2013, he never bothered to report to work or even demand for his salary all those years.
8. It is the Appellant's submission that this case appears to be an afterthought and that Courts should not be used as refuge for indolent parties to cause injustice and hardship to employers.
9. The Appellant submits that that the conduct of the Respondent amounted to gross misconduct and the Appellant acted within the law in issuing the summary dismissal.
10. The Appellant submits that despite the Respondent's testimony that he never returned to work since May, 2013, the Trial Court proceeded to award him 42 months' salary, contrary to Section 49 of the *Employment Act* which provides for a maximum compensation of 12 month's salary.
11. The Appellant invites the court to find that the Trial Court erred in awarding the Claimant Kshs.688,128.

The Respondent's Submissions

12. The Respondent submits that his termination failed the procedural fairness test, as the burden was on the Appellant to show that the reasons given for the termination were valid, fair and justified in accordance with the holding in the case of *Walter Ogal Anuro v Teachers Service Commission*.



13. The Respondent submits that the Appeal herein does not have chances of success as the Appellant's witness admitted not having issued the Respondent with a Notice to Show Cause, and that the form of absence without leave was not sent to the Respondent, but was kept in his personal file held in the Appellant's office.
14. It is the Respondent's submission that the Learned Magistrate was right in finding that his status of employment was unclear for failure to serve termination notice, and that he is entitled to his salary arrears and therefore should dismiss the Appeal with costs to the Respondent.

Analysis and Determination

15. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The seven grounds of appeal are condensed into the following three grounds: -
 - a. The Learned Magistrate erred in law and fact in failing to find that the alleged cause of action arose in May, 2013, or thereabouts, and therefore the suit was statute barred, having being instituted on 13th June, 2017, more than 3 years after the alleged cause of action arose.
 - b. The Learned Magistrate erred in law and in fact that the status of the Claimant's employment was unclear.
 - c. The Learned Magistrate erred in awarding the Claimant Kshs.688,128 and costs together with interest from May, 2013, yet the Claimant admitted that he did not work from May, 2013.
16. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, Madan J.A had this to say on appeals:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
17. This is a first appeal in this matter, and being so, I am under duty to reconsider the evidence, evaluate it and draw my own conclusions. (See *Peters v Sunday Post Ltd* [1985] EA 424)
18. The Appellant contends that the Respondent's claim is statute barred, the cause of action in the matter having accrued in May, 2013. The Respondent in his testimony to the Trial Court, told, the court that the incident leading to the theft of gas cylinders from the Appellant's client's depot took place on a Sunday at about 10 am.
19. The Respondent's oral testimony is that he could not recall the exact date of the robbery. His statement filed in court and adopted as his evidence in chief, indicates that the robbery occurred on 13th May, 2013. The Respondent in the same statement, confirms that he was last paid a salary in April, 2013.
20. The Appellant's witness in the matter before the Trial Court, corroborated this position that the robbery incident occurred on 13th May, 2013, and which is also confirmed by the report of the incident filed at the police station.



21. The Appellant also produced a letter summarily dismissing the Respondent dated 27th May, 2013, and which dismissal is said to take effect on similar date. The Respondent however denied receipt of the dismissal letter.
22. The question for this Court is whether the Respondent's claim is statute barred. Section 90 of the Employment Act, 2007, states:

“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, 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.”
23. To determine validity of this claim, this Court has first to establish when the cause of action in the matter accrued. According to Black's Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.”
24. The record is clear that the robbery incident at the Appellant's client's depot occurred on Sunday, 12th May, 2013, and that the Respondent, from the Appellant's evidence before court did not report to work and from his own admission did not received any salary from the Appellant from May, 2013. It is his evidence that he last received his pay in April, 2013.
25. In my considered view, the Respondent had an actionable claim against the Appellant from May, 2013, when his salary was not paid. I would thus conclude that the cause of action herein accrued in May, 2013. The claim before the trial court was filed on 13th June, 2017.
26. The Court of Appeal in Attorney General & Another vs Andrew Maina Gitbinji & Another Civil Appeal No. 21 of 2015, stated thus: -

“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”.
27. Similarly, the Respondent's claim having been filed on 13th June, 2017, the 3-year limitation period was surpassed by one (1) year. The claim was time barred by May, 2016.
28. I thus find and hold that the Respondent's claim is time barred, and the Trial Court did not have jurisdiction to determine the same.
29. Consequently, I hold that the Trial Court erred in failing to find that the cause of action arose in May, 2013, and therefore, the Respondent/Claimant's suit was statute barred.
30. Having found the claim time barred, and that the Trial Court lacked jurisdiction to determine the matter, the other two grounds fall by the way side. It then follows that a Court without jurisdiction cannot render a valid award.
31. In whole, the award by the Trial Court of Kshs. 688,128 on account of salary not paid and costs of the suit, is set aside in its entirety and the Respondent's claim struck out.
32. I make no orders on costs.
33. Judgment accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 20TH
DAY OF APRIL, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Achieng present for the Appellant

Ms. Wambani present for the Respondent

MS. Christine Omolo - Court Assistant.

