



**Katama v Mombasa Container Terminal Limited (Cause 265 of 2015)  
[2022] KEELRC 12769 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12769 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 265 OF 2015  
AK NZEI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**GEORGE HILTON KATAMA ..... CLAIMANT**

**AND**

**MOMBASA CONTAINER TERMINAL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent *vide* a memorandum of claim dated April 22, 2015 and filed in court on May 15, 2015 and pleaded: -
  - a. that the claimant was employed by the respondent as an empty container deputy clerk from August 12, 1991 to February 14, 2000 when he was promoted to the position of truck/shipping supervisor, a position he held upto June 20, 2009.
  - b. that at the time of termination on June 20, 2009, the claimant was earning ksh 28,691 per month.
  - c. that on July 8, 2008, the claimant applied for 30 days leave which was granted, and he proceeded on leave on August 1, 2008, reporting back on September 5, 2008.
  - d. that while on leave, the claimant was given a show cause letter dated August 15, 2008 to explain the whereabouts of some 12 containers not belonging to the respondent but allegedly loaded on the respondent's tractors to an unknown destination; and why the respondent's tractors transported containers that did not belong to the claimant.
  - e. that despite being on leave, the claimant responded to the show cause letter on August 17, 2008 and explained that the said incident occurred while he was on leave, and was thus unaware of the incident.



- f. that on December 3, 2008, the claimant received an internal memorandum regarding his explanation which had not been accepted, and regarding three missing containers of which his explanation was required by December 4, 2008 at 2.00pm.
  - g. that the claimant gave an explanation.
  - h. that later at a staff meeting, the claimant was asked to give explanation on some 48 containers alleged to have gone missing from the respondents Port-Reitz yard/depot, which accusation was different from the earlier one. That the claimant responded that he was not aware as he was not supervising Port-Reitz, which had its supervisor.
  - i. that on June 22, 2009, the claimant was summarily dismissed from work on account of missing 48 containers.
  - j. that the claimant was dismissed without proof of the alleged 48 missing containers, without proper disciplinary hearing, contrary to rules of natural justice and without payment of terminal benefits. That the dismissal was unlawful and unfair.
2. The claimant claimed:-
    - a. salary for 22 days worked in June 2009 .....ksh 21,040.06
    - b. accrued leave (21 days) .....ksh 20,083.69
    - c. one month salary *in lieu* of notice .....ksh 28,691.00
    - d. 12 months' salary being compensation .....ksh 344,291.00
    - e. a declaration that the claimant's dismissal by the respondent was unlawful and unfair.
  3. On August 11, 2015, the respondent filed a reply to memorandum of claim, dated August 6, 2015, and denied the claimant's claim. The respondent further pleaded:-
    - a. that the explanation given by the claimant on August 17, 2008 was unsatisfactory.
    - b. that the claimant's explanation dated December 4, 2008 was found by the respondent to have been unsatisfactory and evasive.
    - c. that the respondent discovered that 48 containers had been loaded on the respondent's tractors but they never got to their intended destination.
    - d. that the respondent denies this court's jurisdiction, and would raise a preliminary objection on the issue.
  4. The respondent filed a notice of preliminary objection, also on August 18, 2015, *vide* which it gave notice that:
 

“the honorable court lacks jurisdiction to hear and determine the matter by virtue of section 90 of the *Employment Act* 2007 in so far as the same relates to wrongful, unfair or unlawful termination of the claimant.”
  5. On January 22, 2020, the claimant filed his recorded witness statement dated November 20, 2019 and a list of documents dated the same date, listing some 13 documents. The listed documents included a ruling and an extracted order of this court dated March 13, 2015, granting the claimant leave to file suit against the respondent out of time. The court is shown to have granted leave upon hearing both parties on an application in this court's Misc application No 15 of 2012.



6. The court's record shows that on August 6, 2015, the court directed that the suit and the respondent's preliminary objection be heard together.
7. It is clear from the pleadings herein that whereas the cause of action arose on June 22, 2009, this being the date of termination of the claimant's employment, the suit herein was not filed until May 15, 2015. This was clearly outside the limitation period provided in section 90 of the Employment Act which provides as follows:-

“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 after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
8. When the suit came up for hearing on February 24, 2022, the claimant adopted his recorded and filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 5 of this judgment. The respondent closed its case without calling any evidence. Parties filed written submissions pursuant to this court's directions in that regard.
9. The issues that emerge for determination, in my view, are as follows:-
  - a. whether this court has jurisdiction to hear and determine the claim.
  - b. whether the claimant's dismissal was substantively and procedurally unfair.
  - c. whether the claimant is entitled to the reliefs sought.
10. On the first issue, it was submitted on behalf of the claimant that this court has jurisdiction to hear and to determine the claim in view of an order given on March 13, 2015 in Mombasa ELRC Misc application No 15 of 2012 whereby the claimant sought leave to file suit out of time. It was further submitted that the respondent participated in the proceedings in Mombasa ELRC Misc cause No 15 of 2012 through filing of submissions by the respondent's counsel.
11. It was further submitted on behalf of the claimant that his court is bound by the decision in Mombasa ELRC No 15 of 2012 (dated March 13, 2015) and that revisiting the issue of time limitation would be tantamount to sitting on appeal over a decision of a court of concurrent jurisdiction.
12. The respondent, on the other hand, submitted that the foregoing argument flies in the face of the Court of Appeal's decision in Mary Wambui Kabugu v Kenya Bus Service Limited [1997] eKLR where it was held:-

“...the trial judge will not be sitting in appeal on the finding of the judge who granted leave in the first instance. His job would primarily be to decide if the leave was factually and legally and properly obtained.”
13. The court further stated in the Mary Kabugu Case (supra) as follows:-

“...the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think we should allow it to be done at this stage.”
14. In view of the foregoing, the claimant's submission that counsel for the respondent was heard in the application for leave does not, with respect avail much, in view of section 90 of the Employment Act. The respondent further referred the court to the court's decision in the case of Willis Onditi Odhiambo



v Gateway Insurance Co Ltd [2014] eKLR where the Court of Appeal approved its earlier decision and held:-

“accordingly, Osiemo J, had no jurisdiction to extend time as he purported to do on May 28, 1991. That the order was by consent can neither be here nor there; the parties could not confer jurisdiction on the judge by their consent.”

15. Section 90 of the Employment Act caps the limitation period for filing of employment related claims at three years, and has no provision for extension of the three years limitation period once the same lapses. Indeed, the section expressly excludes the applicability of section 4(1) of the Limitation of Actions Act to employment matters. Having said that, I find and hold that the obtaining by the claimant of leave to file the claimant’s suit out of time was done contrary to express mandatory provisions of the statute, and that leave was, therefore, not legally obtained. The suit was filed out of time, about six years from the date the cause of action arose. The suit is statute-barred, and this court has no jurisdiction to determine it. I decline jurisdiction. I must down my tools.
16. The court cannot, without jurisdiction, determine the other two issues. The end result is that the claimant’s suit is hereby dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, 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:

Mr. Rakono for Claimant

N/A for Respondent

