



Mwinzi & another v Factory Guards (Msa) Limited & another (Cause 655 of 2017) [2022] KEELRC 12970 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12970 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 655 OF 2017
B ONGAYA & B ONGAYA, JJ
OCTOBER 28, 2022

BETWEEN

ALEX KIEMA MWINZI 1ST CLAIMANT

ALEX KIEMA MWINZI 2ND CLAIMANT

AND

FACTORY GUARDS (MSA) LIMITED 1ST RESPONDENT

FACTORY GUARDS (MSA) LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on August 7, 2017 through Nguyo Kariuki & Company Advocates. The claimant's case is that the respondent employed him as a security guard from February 22, 2005 and was confirmed on permanent basis on June 22, 2005. He worked for over 12 years being promoted to the position of a senior security guard and eventually to a supervisor. The claimant was paid a basic salary of Kshs 4,795 per month and a housing allowance of Kshs 1,000. The monthly payment was revised to Kshs 18,366. The claimant pleaded that on February 1, 2014 he was issued with a suspension letter; on March 10, 2014 he was issued with summary dismissal letter; on June 4, 2014 he was issued with a letter referenced an appeal against dismissal from the respondent reducing the summary dismissal to termination. The claimant pleads that a decision to terminate him was reached without a chance to be heard. The claimant pleads that the respondent deposited Kshs 102,484.50 into his account without giving him a breakdown by way of a payment statement or pay slip. The claimant claimed as follows:

2.

a. One month's salary in lieu of termination notice Kshs 18,336

3.



- b. Salary for days worked upto January 3, 2014 Kshs 18,336
- 4.
- c. Salary for days on suspension date January 31, 2014 upto July 18, 2017 Kshs 762,353 less Kshs 102,484.50 already deposited into the claimant's account by the respondent Kshs 659,868.50
- 5.
- d. Accumulated leave days for 2.70 days Kshs 1,904.12.
- 6.
- e. Maximum compensation for unlawful termination as per section 49 and 50 of the Employment act that is Kshs 220,032
7. The respondent filed the response to the memorandum of claim on February 11, 2019 through Wandai Matheka & Company Advocates. The respondent's case is that the claimant's primary duty was to supervise security guards at Kaluworks Rolling Mills in Mombasa County. Further, the claimant was found responsible of collusion with Ngunguti to remove a 'gift' from Kaluworks Limited. The claimant attended a disciplinary hearing which led to his dismissal. The claimant was invited for a meeting on April 25, 2014 and the summary dismissal was reduced to termination via a letter dated June 4, 2014 which communicated the same. Further, the respondent pleaded that they paid the claimant his terminal dues of Kshs 102,480, that the claim against it ought to have been filed on or before June 4, 2014 - this being the 3 years' period from June 4, 2014. However, the same was filed on August 7, 2017. The respondent states that the claim is statute barred under section 90 of the [Employment Act, 2007](#).
- The claimant testified to support his case.
8. Final submissions were filed for the parties. The court has considered all the material on record.
9. The 1st main issue for determination is whether the suit is time barred. Under section 90 of the [Employment Act, 2007](#), 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 12 months next after the cessation thereof.
10. The point was urged at the preliminary stage and in the ruling delivered on December 14, 2018 Rika J concluded thus, "15. In this case it is clear that the respondent reduced the claimant's summary dismissal into termination through notice. But notice pay was promissory in nature. Bank Statements show payment of unspecified terminal dues to the claimant after June 4, 2014. This, in the view of the court, cannot therefore have been the effective date of termination. notice pay was not received by the claimant on June 4, 2014. This date cannot be the undisputed date, when the cause of action arose. Parties would have to provide the court with evidence at the trial, to show when the cause of action arose. The claim cannot be rejected based on the grounds stated by the respondent. It is ordered." The court reckons that as a preliminary point, the same failed because it was based on the disputed facts as establishing the date of the cause of action.
11. Now, the case has been heard and the issue is whether by the evidence on record, the date of the cause of action has been established. The claimant testified that he was terminated on June 4, 2014. The court finds that to be the conclusive date of the termination and therefore the date the cause of action accrued. The court returns that the suit was therefore time barred under section 90 of the Act when it was filed on August 7, 2017; the time of limitation of 3-years having lapsed on or about June 4,



2017. As was held by the Court of Appeal in *Attorney General –v- Andrew Maina Gitinji & another* [2016]eKLR, the time of limitation under section 90 of the Act is mandatory and cannot be extended. While pleading that he was terminated on July 18, 2017 because the respondent wrote on that date confirming the termination in June 2017, the claimant has by evidence confirmed termination was on June 4, 2017. There is no established reason for a finding to be made that the termination had been on July 18, 2017. The court therefore considers as misconceived and misleading for the claimant to claim for payment from January 31, 2014 (date of suspension) to July 18, 2017 (date of letter confirming termination was effective June 4, 2014) in circumstances whereby the claimant had not worked for the respondent and had all along known that he was terminated on June 4, 2014.

12. The court has considered the respondent's failure to provide a payment statement as it deposited the claimant's terminal dues in his bank account. Accordingly, each party to bear own costs.
13. In conclusion, the claimant's suit is hereby dismissed as time barred with orders each party to bear own costs of the suit.
14. Signed, dated and delivered by video-link and in court at Mombasa this Friday October 28, 2022.

BYRAM ONGAYA

JUDGE

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