



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAIROBI

CAUSE NO.2398 OF 2017

DAVID KIZITO MAKOKHA.....CLAIMANT

VERSUS

G4S KENYA LIMITEDRESPONDENT

RULING

The ruling herein relates to Notice of Preliminary Objections filed by the respondent and dated 17th August, 2020 and on the grounds that;

1. *The cause of action having accrued on 29th May, 2014 this claim is time barred under section 90 of the Employment Act.*
2. *The court therefore has no jurisdiction to entertain this claim and the same ought to be struck out with costs to the respondent.*

Parties agreed and filed written submissions.

The respondent submitted that section 90 of the Employment Act (the Act) requires a party to file suit within 3 years from the date the cause of action arose. In this case the cause of action arose on 12th June, 2014 when the claimant's employment was terminated. He had until 11th June, 2017 to file suit but instead he filed it on 5th December, 2017.

The claimant in his claim avers that he was arrested on 29th May, 2014 and remained in custody for 21 days and upon release he was issued with letter terminating employment on 20th June, 2014. He did not file suit in time.

The respondent has relied on the case of **Beatrice Kahai Adagala v Postal Cooperation of Kenya [2015] eKLR; Attorney General & another v Andrew Githiji & another [2016] eKLR** and **Joseph Kiria Kinyua v AG [2019] eKLR**. That tabulation of time starts from the date employment terminated.

The claimant submitted that on 29th May, 2014 he reported to work and was assigned work to delivered cheques to a client but was called by the district manager and directed to hand over his duties. He was questioned about a robbery which had occurred on 6th May, 2014, was arrested and kept in custody for 21 days. The claimant was then issued with letter terminating employment on 12th June, 2014. Termination of employment does not abate. This is a continuing injury and once earned cannot be lost as held in **Peter M Kariuki v Attorney General [2014] eKLR**.

The claimant also submitted that article 159 of the Constitution allows the court discretion to address the substantive issue instead of dwelling on technicalities and the objection made should be dismissed and the claimant's case heard on the merits.

Determination

Section 90 of the Act is couched in mandatory terms. A claim arising out of an employment and labour relations and related matters must be addressed within the contest of section 90 of the Act and within 3 years since the cause of action arose.

The claimant's case is that his terminal dues should not be lost in time as these owe and non-payment comprises a continuing injury.

With regard to a continuing injury, such arise where employment is terminated and all accruing dues should be claimed and or lodged with the court within the provisions of section 90 of the Act. in the case of **In G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** the Court of Appeal in addressing the question of continuing injury held as follows;

In the circumstances of this case we find that such ‘unpaid terminal dues’ do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding ‘a continuing injury’, the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant ought dismissal, any claim based on a continuing injury to have been filed within one year failing which it was time barred

The rationale is that all claims with regard to employment and labour relations accrued within 3 years from the date the cause of action arose. In tabulating time, one cannot remove time spent while undertaking criminal proceedings or other dispute resolution mechanisms. In the case of **Attorney General & another v Andrew Maina Githinji and another [2016] eKLR** where in upholding a Preliminary Objection based on Section 90 of the Act, the court held that;

...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. 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.

In this case, employment terminated on 12th June, 2014 and suit filed on 5th December, 2017 way after time lapsed.

Accordingly, the claim herein is time barred and pursuant to section 90 of the Act, the suit is time barred and the court denied jurisdiction to hear and determine the claim. Accordingly, the suit is hereby struck out. Each party shall pay own costs.

Delivered in open court at Nairobi this 4th day of March, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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