



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 530 OF 2016

LUKE OWUOR..... CLAIMANT

- VERSUS -

SILVER HOLDINGS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st May, 2021)

RULING

The claimant filed the memorandum of claim on 05.07.2016 through Oduor Siminyu & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Salary in lieu of notice Kshs.13, 537.80.
- b) 12 months' compensation salary for unlawful termination Kshs.162, 453.60.
- c) Costs of the claim and interest thereon.

The claimant pleaded that he was employed by the respondent with effect from 01.08.1997 at Kshs. 13, 537.80 per month as at the time of dismissal. Further, in June 2010 and without notice the claimant was arrested and arraigned in court to face charges of stealing as per Criminal Case No. 3399 of 2010 but was acquitted of the charges on 20.08.2014. Further, the claimant was summarily dismissed on 14.10.2010. The claimant claimed that the dismissal on the ground of his arrest or prosecution offended provisions of section 44 (4) (f) of the Employment Act, 2007.

The respondent filed the response to the claim on 01.08.2016 through K'Bahati & Company Advocates. The respondent admitted that it employed the claimant effective 12.08.1997 per letter of appointment dated 18.07.1997 and as at dismissal the claimant earned Kshs.13, 357.80 per month. The respondent admitted that the claimant was arrested and charged with the offence of stealing by servant contrary to section 281 of the Penal Code and the arrest and charge were based on reasonable suspicion. Upon that reasonable suspicion of committing an offence, the respondent summarily dismissed the claimant from employment. It was the respondent's case that between January 2010 and June 2010 the claimant issued respondent's stocks out of the stores but which were never received by the user departments. The stocks in issue were valued at Kshs. 301, 443.44. The respondent reported the loss to the police and the claimant admitted that the stocks were neither received nor signed for by the user departments and by the letters dated 13.07.2010 and 10.08.2010 the claimant apologised to the respondent. Further the reasons for termination were stated in the dismissal letter dated 14.10.2010. The respondent pleaded that the dismissal was not therefore unfair as the procedure was fair per the letters of apology showing that the claimant had been given chance to state his case and further the reason for dismissal had been valid and genuine.

The respondent prayed that the claimant's suit be dismissed with costs.

The respondent also filed on 09.11.2017 its list of issues for determination thus:

- a) Is this claim time barred by dint of the provisions of section 90 of the Employment Act, Chapter 226 of the Laws of Kenya?
- b) Shouldn't this case be dismissed with costs?

The suit came up for hearing on 13.05.2021 and Mr. Okoth Odera Advocate for the respondent raised the respondent's issues for determination on preliminary basis. He submitted that the suit was time barred under section 90 of the Employment Act, 2007 because it had been filed after lapsing of the three years of limitation prescribed in section 90 of the Act. He submitted that it was not in dispute that the

claimant had been dismissed on 14.10.2010 and the suit filed on 05.07.2016 after 5 years and, it was therefore time barred so that it should be dismissed with costs.

Learned Counsel for the claimant Mr. Oduor Siminyu submitted that the respondent instigated arrest of the claimant and after release on bond being 14 days from the date of the arrest, he reported on duty and the respondent told him (verbally) that he could only resume duty after full trial of the criminal case. The criminal trial continued until judgment was delivered on 20.08.2014. He reported to the respondent after acquittal and he was given the letter of summary dismissal.

The Court has considered the parties' rival submissions. Section 90 of the Act 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 case of continuing injury or damage within twelve months next after the cessation thereof.”

In the instant case the claimant has pleaded that he was summarily dismissed on 14.10.2010. He has exhibited the letter of summary dismissal dated 14.10.2010. He has not pleaded that he was given the letter after the acquittal and he is bound by his pleading so that his Advocates' submission in that regard was inconsistent with the pleading. Thus the Court returns that the suit was time barred by the three years of limitation of the cause of action prescribed in section 90 of the Act. The Court has considered the submission that the respondent promised resumption of duty upon conclusion of the criminal case. In that case, the acquittal had been on 20.08.2014 and the alleged refusal by the respondent that the claimant resumes duty at conclusion of criminal case would amount to a continuing injury ceasing shortly after the acquittal. In that sense the Court considers that the time of limitation of 12 months from cessation of the continuing injury lapsed on or about 20.08.2015 but the suit was filed belatedly on 05.07.2016. Thus howsoever the issue is considered, the Court returns that the suit was time barred and is liable to dismissal in view of section 90 of the Employment Act, 2007. Section 90 is in mandatory terms and the issue as raised for the respondent will succeed.

In conclusion, the claimant's suit is hereby dismissed with costs on account of being time barred under section 90 of the Employment Act, 2007.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 21st May, 2021.

BYRAM ONGAYA

JUDGE