



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 432 OF 2018

NORAH NDILA NGUTU (SUING AS THE LEGAL

REPRESENTATIVE OF THE ESTATE OF

THE LATE JACKSON WAITA IVULU).....CLAIMANT

- VERSUS -

SOUTHERN CROSS SAFARIS LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

SATAO CAMPS LIMITED.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

RULING

The claimant filed the statement of claim on 21.06.2018 through Munithya, Mutugi, Umara & Muzna Company Advocates. The claimant's case is that Jackson Waita Ivulu (Deceased –and herein after referred to as the employee) was employed by the 1st respondent in the capacity of a Driver Guide in 2006 at Kshs. 5, 715.00 per month. The claimant states that the employee worked diligently until July 2011 when on 19.07.2011 together with another driver they were charged by the 2nd respondent with the offence of stealing by servant. The criminal charge was at the behest of the 1st respondent in Criminal Case No. 2562 of 2011 in the Chief Magistrate's Court at Mombasa. Further the employee received a suspension letter dated 27.07.2011 suspending him from work until investigations were completed. The claimant's alleges that the prosecution was malicious because the complaint was not investigated, the employee was charged without evidence of culpability, the complaint was made without substantive proof, and prosecuting a charge the 2nd respondent's agents had no belief would succeed. The judgment in the criminal case was delivered on 13.09.2016 acquitting the employee under section 215 of the Criminal Procedure Code. The claimant's case is that the prosecution was baseless and the employee was not paid throughout his suspension. The claimant prayed for general damages for malicious prosecution; terminal dues against the 1st respondent particularised and in the sum of Kshs. 2, 252, 771.00; costs plus interest; and a declaration that the claimant's termination was unlawful.

The 1st respondent filed a response to the statement of claim on 30.01.2018 through A.B. Patel & Patel Advocates. The 1st respondent admitted the employment relationship as pleaded by the claimant. The 1st respondent stated that the employee was paid all his final dues. Further, it was stated that the suspension was not malicious but was fair and the report for prosecution was based on reasonable suspicion. The 1st respondent prayed that the suit be dismissed with costs. In the amended response filed on 31.10.2010, the 1st respondent stated that it employed the employee from 15.01.2006 to 15.01.2008 as a Coach Driver and issued a certificate of service as exhibited. After 15.01.2006 the employee was not its worker and the 1st respondent did not issue the suspension letter. The 1st respondent was therefore a stranger to the alleged criminal proceedings.

The 2nd respondent filed the response to the claim on 02.04.2019 through the learned Litigation Counsel Winnie Namahya Waswa, for Attorney General. The 2nd respondent pleaded that there was reasonable cause to believe that the employee had committed an offence and the prosecution was therefore fair as based on reasonable suspicion. The employee's arrest and prosecution was stated to have been lawful and fair as based on relevant statutory provisions. The 2nd respondent pleaded that the suit was incompetent, an abuse of court process and be struck out or dismissed with costs.

The claimant filed amended statement of claim on 17.12.2019 introducing the 3rd respondent, Satao Camps Limited. It was stated that at all material times the 3rd respondent was the holding company and the 3rd respondent is the subsidiary company with the 1st respondent holding 13000 ordinary shares. The claimant stated that the employee was employed by the 1st respondent as a Driver Guide in 2006 at Kshs. 15,

715.00 and thereafter was posted to work for the 3rd respondent. The claimant then made his claims and prayers jointly and severally against the respondents.

The 3rd respondent filed a response to the statement of claim (as amended) on 28.09.2020 and through A.B. Patel & Patel Advocates. The 3rd respondent stated that it employed the employee on 08.02.2011 and terminated him on 29.07.2011. Further, the decision to arrest and to prosecute the employee was by the Police and the Attorney General. The 3rd respondent further pleaded that the cause of action against the 3rd respondent was time barred under section 90 of the Employment Act, 2007. The 3rd respondent prayed the suit be dismissed with costs. In the reply filed on 29.09.2020, the claimant pleaded that the suit against the 3rd respondent had been filed within time of limitation under section 90 of the Act.

This ruling is on the preliminary point by the 3rd respondent that the suit is time barred.

For the 3rd respondent it is submitted that it is not in dispute that the suit against the 3rd respondent was filed on 17.12.2019 by the amended statement of claim. It is also not in dispute that the employee was terminated on 29.07.2011 by the 3rd respondent. It is true that the 3rd respondent has pleaded at paragraph 9 of its response to the claim that it admits that it employed the employee on 08.02.2011 and terminated him on 29.07.2011. The claimant at paragraph 5 of the amended statement of claim has pleaded that the employee worked for the 1st and 3rd respondents up and until July 2011 when he was charged along with another driver on 19.07.2011 with stealing by servant. The claimant claims salary arrears since August 2011 (when he stopped working) to November 2016 (justification for November 2016 not being explained). The Court has considered the pleadings. It is trite law that parties must be bound by their own pleadings. In the instant case, the parties are clear that the employment relationship ended in July 2011. The claimant's case is that after the suspension by the 3rd respondent on 27.07.2011, the employee continued in the employment upon which basis the claimant has made claims for the payment up to November 2016. The Court finds that the claim being for a breach running up to November 2016, the claimant's case as pleaded is that the cause of action exited as at November 2016. Section 90 of the Employment Act, 2007 fixes the time of limitation to 3 years generally and to 12 months for a continuing injury. The Court considers that the salary arrears as claimed was a continuing injury and as against the 3rd respondent the claim ought to have been filed by 01.12.2017 but was filed on 17.12.2019 – and was also outside the 3 years of limitation generally. To that extent the Court returns that the suit as against the 3rd respondent was indeed time barred per section 90 of the Act.

The Court has considered the submission for the claimant that the 1st and 3rd respondents are jointly sued and the 1st respondent had prior to amending its response admitted the fact of employing the employee up to the time of suspension, arrest and prosecution. However, the 1st respondent has since changed its pleading to that it employed the employee from 15.01.2006 to 15.01.2008 and which the Court finds to tally the certificate of service exhibited for the claimant and dated 17.01.2008 showing that the claimant worked for the 1st respondent from 14.08.2006 to 15.01.2008 as a Coach Driver and he left the employment on account of redundancy. The Court finds that looking at the pleadings by the 3rd respondent and all facts of the case as highlighted herein, as already found, the 3rd respondent and the employee separated in July 2011 effective 27.07.2011. The acquittal undisputedly was on 13.09.2016. After acquittal the employee knew the suspension had been by the 3rd respondent but he filed no claim until the amendment of the statement of claim as filed on 17.12.2019, well outside the three years of limitation for general claims in view of section 90 of the Act. It is unexplained by the claimant that the demand letter dated 17.12.2016 was addressed to the 3rd respondent but who was not sued at all when the suit was initially instituted – and the Court finds that it is glaringly obvious that the claimant ought to have sued the 3rd respondent within the time of limitation but that was not done. The Court finds that whichever way it is looked at, the suit against the 3rd respondent was time barred.

The Court has considered that the employee has since passed on and taking all the circumstances of the case into account, each party will bear own costs of the 3rd respondent's preliminary objection and the respective suit.

In conclusion, the 3rd respondent's preliminary objection is hereby upheld that the claimant's suit against the 3rd respondent was time barred per section 90 of the Act and is hereby dismissed with orders each party to bear own costs of the preliminary objection and the suit against the 3rd respondent.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH JULY, 2021.

BYRAM ONGAYA

JUDGE