



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1907 OF 2013

LEONARD MUNYAO MUTUA..... CLAIMANT

VERSUS

SECURITY GUARDS SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit vide a statement of claim dated 28th November, 2013, through the Firm of Mwangi Chege & Co. Advocates.
2. His case is that he was an employee of the Respondent having been employed on the 5th of September, 1997, and shortly thereafter on 1st January, 1998, confirmed to the position of supervisor earning a gross salary of Kshs. 18,000/=.
3. It is the Claimant's further case that the Respondent entrusted him with banking and withdrawals on behalf of the Respondent's company.
4. The Claimant states that on the 6th of March, 2009, the Respondent's accountant one Ms. Virginia Wanjiru Chege gave him a cheque Number 006272 for Kshs. 46,843/- drawn in his name, with instructions to withdraw the said amount and deliver the same to Ms. Chege.
5. It is his case that he withdrew the money and delivered it to Ms. Chege as instructed.
6. The Claimant states that he took his annual leave and which leave was authorized and approved by the Respondent from the 11th to 25th of May, 2009.
7. The Claimant states that he was summoned on the 17th of June, 2009, by a Director of the Respondent, one Edward Mbugua Mudema, who accused him of stealing Kshs. 82,360/- that had been given to him to deposit in the Respondent's account.
8. It is the Claimant's case that he did not receive Kshs. 82,360/- in cash or at all from the Claimant and that the only money he received within the period, was the cheque of Kshs.46,843/- that he cashed and delivered the money to Ms. Chege.
9. The Claimant further states that the Director of the Respondent Mr. Edward Mbugua Mudema, together with the Respondent's security guards took him to Citibank where he was intimidated, coerced and forced to admit liability with the promise that he will be returned to his job without any victimization.
10. The Claimant states that on the 19th June,2009, he was charged with four offences namely; forgery, stealing by servant, making a document without authority and uttering a document with intent to defraud, charges he was later acquitted of.
11. The Claimant has not expressly stated the exact date of his dismissal but states in his claim that his salary was stopped in June of 2009.
12. He seeks orders against the Respondent for:
 - i. Legal expenses of Kshs. 200,000/-
 - ii. Salary for the month of June, 2009, until the determination of the suit
 - iii. Terminal benefits
 - iv. Severance pay

- v. Aggravated damages
- vi. Compensatory or general damages
- vii. Costs and interests at court rate

The Respondent's Case

13. The Respondent filed a statement of response dated 26th March, 2014, and filed in court on 27th March, 2014, through the Firm of P.M Kamaara & Associates Advocates.
14. The Respondent later filed an Amended Statement of Response dated the 10th of December, 2019, and filed on the 17th of December, 2019, through Nchogu, Omwanza & Nyasimi Advocates.
15. The Respondent admits that the Claimant was their employee whose job was that of a rider, but deny that he was a diligent and faithful worker.
16. It is the Respondent's response, that the Claimant was so negligent in his duties that he occasioned massive financial losses to its business, including loss of a motorcycle assigned to him under unclear circumstances.
17. It is the Respondent's assertion that the Claimant was sent to bank a sum of Kshs. 82,368/- in form of cash of Kshs. 46,843/- and a cheque of Kshs.35.525/-, an amount the Claimant failed to deposit as instructed.
18. The Respondent states that it was notified by its auditors that the amount the Claimant was instructed to deposit had not been reflected in its account as a deposit or at all, prompting an investigation on the anomaly.
19. The Respondent's further case is that their bankers denied receiving any deposit of the amount in issue and on the date the Claimant was sent to deposit the money, and further confirmed that a deposit slip provided by the Claimant as proof of having banked the money had a stamp that did not belong to it.
20. The Respondent states that it begun investigations on what transpired in partnership with Citibank who was its banker, and that while the investigation was on going, the Claimant asked to take his annual leave which was approved to commence on the 11th of May, 2009, and terminate on the 24th of May, 2009.
21. It is the Respondent's case that it issued a show cause letter and later an invitation to the Claimant to attend a disciplinary hearing, which hearing was to be held on the 17th of June, 2009.
22. It is the Respondent's further response, that the Claimant attended the disciplinary hearing together with a representative of his choice, who was a colleague named Mr. Haroun Njuguna.
23. On the date of the disciplinary hearing the Claimant together with the discipline panel of the Respondent visited the bank, where he was asked to identify the teller who received the money when he made the deposit, but that he failed to recognize the teller and thereafter, he was handed over to the police at Kilimani police station.
24. The Respondent states that the Claimant is responsible for loss of money subject of this case and that it had no control over the handling of the criminal case against the Claimant and his subsequent acquittal.
25. The Respondent further states that the Claimant had already been lawfully dismissed and the dismissal communicated to him in accordance with Section 44 of the Employment Act, 2007, and hence his demand for reinstatement could not be honoured.
26. The Respondent states that it issued the Claimant with a letter of summary dismissal on the 17th of June, 2009.
27. The Respondent further states that it paid the Claimant for all the days worked in June, 2009, and thus, does not owe the Claimant any money.
28. The Respondent further states that this court lacks jurisdiction as the suit is time barred having been filed outside the 3 years statutory period provided for under Section 90 of the Employment Act, 2007.
29. The Respondent denies that the Claimant is entitled to the reliefs sought.
30. The Claimant testified in support of his case and the Respondent presented one Virginia Wanjiru Chege, its Accounts Manager to testify on its behalf.
31. Both parties filed submissions in the matter.

Claimant Submissions

32. It is submitted for the Claimant that the evidence presented before court showing that the Claimant was taken through a discipline process is a fabrication by the Respondent while in truth, no discipline process took place.

33. It is further submitted for the Claimant that upon being cleared of the criminal charges, the Claimant wrote to the Respondent seeking to be reinstated to his job, which letter did not elicit a response and which the Claimant submit is for reason that the Respondent did not take the Claimant through a disciplinary process.

34. It is submitted for the Claimant that though he was out on bond, he did not attempt to go back to work so as not to discuss a matter that was before court.

35. It is further submitted that the Claimant is deserving of the reliefs sought as tabulated in the claim and further reiterated in the submissions filed before court.

The Respondent Submissions

36. It is submitted for the Respondent that the Claimant was terminated fairly and lawfully as he was formally informed of the accusations against him, given time to respond and heard before the decision to terminate was arrived at. The Respondent sought to rely on the decision in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd (2013) eKLR* to support the procedure adopted in the termination of the Claimant.

37. It is further submitted for the Respondent that the Claimant was given a cheque and cash to bank on behalf of the Respondent, which monies he did not bank and instead, he presented a deposit slip that was later discovered to be fake and thus the Respondent had valid reasons to terminate the Claimant.

38. It is submitted that the Respondent adhered to both substantive and procedural fairness in dismissing the Claimant.

39. It is submitted that the Respondent did not have to await the conclusion of the criminal proceedings for it to carry out an internal disciplinary procedure and on this they sought to rely on the holding of *Rika J in the Case of Clement Mutiso Muinde v British American Insurance Company limited (2013) eKLR*.

40. It is further submitted for the Respondent that the suit is Statute-barred as the same was filed four years after the Claimant was terminated contrary to Section 90 of the Employment Act, 2007. The Respondent sought to rely on the cases of *George Hiram Ndirangu v Equity Bank Limited (2015) eKLR and Dominciano Kinyua Magambo & 5 others v Invesco Insurance Company Limited (2016) eKLR* where the court held that salaries and accrued benefits fall within the definition of continuing injury which ought to be brought within 12 months.

Issues for Determination

41. The court identified the following as issues for determination in the matter:

- i. Whether the suit is time barred
- ii. Whether the dismissal of the Claimant was wrongful
- iii. Whether the Claimant is entitled to the remedies sought

Whether the suit is time barred

42. The Claimant's claim is dated 28th November, 2013, and filed in court on the same day.

43. The evidence before court indicate that the Claimant was summarily dismissed on the 17th of June, 2009.

44. The Claimant's evidence is that he was taken into police custody on the same 17th of June, 2009, and that he never returned to the service of the Respondent until after he was acquitted of the criminal charges on 30th May, 2013, when he went to ask the Respondent to reinstate him, which request the Respondent declined, hence this claim.

45. The Claimant denies receiving his letter of dismissal but admits receiving his pension from the Respondent's Staff Provident Fund and signing for the same on the 7th October, 2009.

46. It is the Claimant's further evidence that he did not work for the Respondent from the day he was arrested, which arrest happened on the 17th of June, 2009.

47. The Claimant states that he asked to be paid his terminal dues because he knew that he had lost his employment with the Respondent.

48. It is indeed clear from the evidence before this court that the Claimant was aware that he had been dismissed from the service of the Respondent effective 17th June, 2009, as he never returned nor attempted to return to work even after being released on bond. Further, evidence is that his salary was also stopped effective the 17th June, 2009.

49. Further, the fact that the Claimant received and signed for his pension on the 9th of October, 2009, goes to confirm his separation from the Respondent, which separation he was fully aware of.

50. It is clear that the cause of action in this suit, arose on 17th June, 2009 upon the Claimant's arrest and dismissal from the service of the Respondent. Section 90 of the Employment Act, provides as follows in regard to filing of employment related suits;

“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 the case of continuing injury or damage within twelve months next after the cessation thereof.”

51. Whether this suit is looked at from the point of view of an action arising out of a contract of service or as a continuing injury, either way, the claim herein is Statute-barred in terms of Section 90 of the Employment Act, 2007.

52. The suit before court was filed on the 28th November, 2013, and the cause of action arose on the 17th of June, 2009, 4 years and 5 months after the accrual of the cause of action. For this reason, the Claimant's right to sue has lapsed and he lacks capacity to agitate any cause of action against the Respondent. (See *G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR.*)

53. A cause of action arose the moment the Claimant knew that he had been dismissed and did not have to wait for the criminal proceedings to be concluded. *Waki JA in upholding a Preliminary Objection based on Section 90 of the Employment Act in the case of Attorney General & another v Andrew Maina Githinji and another [2016] eKLR held as follows:*

“...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.”

54. A criminal case is a separate proceeding and is not in any way tied to the administrative or civil action and this suit is in no way tied to the criminal action that the Claimant faced before filing the current suit, and ought to have brought this action at the time when he was dismissed as opposed to waiting for the conclusion of the criminal case.

55. The court determines that this suit was filed outside the Statutory 3-year time limit. It is Statute-barred by dint of Section 90 of the Employment Act, 2007.

56. For the foregoing reasons, the Court lacks jurisdiction and as was held in the case of *Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd (1989) eKLR*, the Court has no option but to down its tools.

57. The other issues herein, fall by the way side and are not worthy of determination

58. The suit is dismissed.

59. Parties shall bear their own costs of the suit.

60. The Deputy Registrar is ordered to transmit this file to Nairobi upon delivery of this judgment.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform.

CHRISTINE N. BAARI

JUDGE

Appearance:

No appearance for the Claimant

Mr. Odhiambo for the Respondent

