



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 328 OF 2018**

**LAWRENCE NJUGUNA GULLAM.....CLAIMANT**

**VERSUS**

**FIVE FORTY AVIATION LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The respondent/objector raised a Preliminary Objection to the suit vide a statement of claim dated 10/3/2018 and filed on 16/3/2018.
2. The objection raised in paragraph 3 of the Statement of defence is that the suit is time barred and offends the express provisions of Section 90 of the Employment Act, 2007. The Objector also filed written submissions in support of the objection dated 3/4/2018 and the claimant filed submissions dated 20/4/2021.
3. As was held in **Mukisa Biscuits Manufacturing Co. Ltd. -vs- West End Distributors Limited (1969) E.A. 696**,  
  
**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**
4. The cause of action as disclosed in the Statement of Claim is that on or about 1<sup>st</sup> December, 2014, while engaged in his lawful duties as the 1<sup>st</sup> Respondent’s employee, the claimant was a victim of a crime where he was robbed. The claimant was later arrested as a result of the 1<sup>st</sup> Respondent’s complaint lodged at a police station regarding the robbery.
5. Following the arrest, the 1<sup>st</sup> Respondent told the claimant not to report to work until the criminal case was determined.
6. The claimant was acquitted 3 years later on 28<sup>th</sup> August, 2017 and when the claimant reported back to work he was told that his employment had been terminated.
7. The claimant prays for a determination that the termination of his employment was wrongful and unfair and that he be paid terminal benefits in the sum of Kshs 1,232,000; compensation for wrongful termination and for defamation and malicious prosecution.
8. In the Statement of defence, the defendant states that upon arrest of the claimant by the police, the claimant never returned to work and the 1<sup>st</sup> respondent never told him not to report to work as alleged or at all. That the claimant has not reported to work to date.
9. It is apparent from these facts that the manner and time of termination of employment of the claimant is in dispute.
10. The suit was filed on 16<sup>th</sup> March, 2018. Three (3) years period lapsed on or about the 1<sup>st</sup> December, 2017, from the date the claimant stopped working. In terms of Section 90 of the Employment Act, 2007, a suit founded on a contract of employment must be filed within 3 years from the date the cause of action arose.
11. This suit however is multifaceted and has a tortious claim for malicious prosecution. This cause of action crystalised on 28<sup>th</sup> August, 2017, when the claimant was acquitted of all charges laid against him upon a complaint by the 1<sup>st</sup> respondent.

12. This particular claim including that of defamation on account of alleged false charges were filed within five (5) months from the date of acquittal.

13. To win a suit for malicious prosecution, the plaintiff must prove four elements: -

(i) that the original case was terminated in favour of the plaintiff;

(ii) that the defendant played an active role in the original case;

(iii) that the defendant did not have probable cause or reasonable grounds to support the original case; and

(iv) That the plaintiff suffered harm and/or injury as a result thereof.

14. The Preliminary Objection with regard to the entire suit is dismissed with costs in the cause.

**DATED AND DELIVERED AT NAIROBI(VIRTUALLY) THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mungu, Kimetto & Company Advocates for the 1<sup>st</sup> respondent

Odukenya for 2<sup>nd</sup> respondent (Attorney General)

Nyereru & Associates Advocates for the claimant