



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC APPEAL NO. E002 OF 2020.

TEACHERS SERVICE COMMISSION.....APPELLANT

VERSUS

PAUL OLWENY NGOWE.....RESPONDENT

(Being an Appeal against the Ruling of Hon. W. Onkunya

in Kisumu CMELRC No. 22 of 2020 delivered on 18th November, 2020)

JUDGMENT

1. This judgment arises from an Appeal lodged by the Appellant herein against the ruling of the Chief Magistrate's Employment and Labour Relations Court at Kisumu. The Respondent had filled a claim on 10th February, 2020, wherein he sought orders for a declaration that his termination was unlawful, payment of terminal dues and reinstatement to the service of the Appellant.

2. The Appellant filled a Preliminary Objection that the claim was time barred having been filled outside the three-year Statutory period provided for causes of action based on a contract of service under *Section 90 of the Employment Act, 2007*. The Court rendered its ruling dismissing the Preliminary Objection, hence the instant appeal.

3. The appeal is premised on the following grounds:

i. The Learned Magistrate erred in finding that the Respondent's claim was not barred under *Section 90 of the Employment Act, 2007*.

ii. The Learned Magistrate erred in law and fact by holding that the cause of action for the claim arose and started running on 28th February, 2018 and not 16th February, 2012.

iii. The Learned Magistrate erred in law and fact in failing/declining to consider the Appellant's submissions and authorities on the Preliminary Objection which raised substantial issues of law.

4. Parties canvassed the appeal by way of written submissions. Both parties filled their submissions.

The Appellant's Submissions

5. The Appellant submitted that the suit before the Learned Magistrate is time barred by virtues of the provisions of *Section 90 of the Employment Act*. Accordingly, the Magistrate has no jurisdiction to preside over the suit.

6. It is submitted for the Appellant, that the Respondent's service was terminated with effect from 8th February, 2012, and the decision communicated vide a letter issued on 16th February, 2012. The Appellant submitted that the cause of action in the matter arose on 16th February, 2012, when the Appellant informed the Respondent of his dismissal and removal from the register of teachers.

7. The Appellant submitted that the Respondent ought to have challenged the decision to terminate his services within three years from 16th February, 2012. It is submitted that this period lapsed on 16th February, 2015, and that the claim was filled on 10th February, 2020, five years late, hence the suit is time barred. The Appellant sought to rely on the holding in the cases of **Msa Industrial Petition No. 1 of 2013 Josephat Ndirangu v Henkel Chemicals (EA) Ltd (2013) eKLR** and **Nrb Industrial Court cause No. 846 of 2013 Fred Gogo v G4s Security Services (K) Ltd (2014) eKLR**, to buttress their position.

8. It is further submitted for the Appellant that the accrual date of the cause of action, has a direct bearing on the running of time. The Appellant submits that the cause of action accrued on 16th February, 2012 when the letter of dismissal was issued to the Respondent and not 28th February, 2018 when the Commission conveyed the Appeal/Review decision. The Appellant sought to rely on the decision of the Court of Appeal in **Attorney General v Andrew Maina Githinji & Another (2016) eKLR**, where the Court of Appeal held that once the employee received the termination letter, the termination took effect and the cause of action accrued and that was the date time began to run.

9. The Appellant submitted that the Respondent's appeal to the Appeals Tribunal did not amount to a stay of the statutory limitation as imposed by law and neither did it stop the running of time for purposes of starting proceedings under the Employment Act. They rely on **Nrb Industrial Cause No. 953 of 2010 Benjamin Wachira Ndiithi v Public Service Commission & Another (2014) eKLR**, where this court held that the fact that an employee whose employment has been terminated seeks review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.

10. It is submitted for the Appellant that the Learned Magistrate did not consider its submissions on the Preliminary Objection, which included authorities from the High Court and the Court of Appeal on accrual of time, and which authorities were binding on the Magistrate and would have aided her in making her ruling.

11. It is submitted that the Respondent had a right to approach the court to either quash or challenge the decision of the Appellant within the time provided under statute, but did not and hence the suit filed on 10th February, 2020, is time barred.

The Respondent's Submissions

12. It is submitted for the Respondent that he was dismissed from the service of the Appellant vide a letter dated 28th February, 2012, where after, he lodged an appeal against the decision to dismiss him, to the Teachers Service Appeal Tribunal for a review of the decision.

13. The Respondent submitted that it was not until 28th February, 2018, when the Tribunal made a decision upholding the dismissal, leading to the filing of the suit subject of this appeal on 10th February, 2020.

14. The Respondent submitted that the cause of action did not accrue until 28th February, 2018, when his termination was upheld by the Tribunal. He submits that the delay in filing his claim, was occasioned by slow action of the tribunal which failed to hear and determine his appeal within 90 days. He sought to rely on the case of **Tom Ochako v Teachers Service Commission (2017) eKLR and Tom Joseph Orina v Kenya Bureau of Standards & Another**, on the running of time.

15. It is submitted for the Respondent that the Learned Magistrate was right in finding that from 28th February, 2018, the limitation period of three years began to run and ends on 28th February, 2021.

Determination

16. The grounds upon which this appeal is premised, are that the Learned Magistrate erred in finding that the Respondent's claim was not barred under *Section 90 of the Employment Act* and for the holding that the cause of action for the claim arose and started running on 28th February, 2018 and not 16th February, 2012.

17. In determining this appeal, the issue for this court, is when the cause of action in the suit before the trial court accrued? According to **Black's Law Dictionary (10th Edition)** the word "accrue" means "**to come into existence as an enforceable claim or right.**"

18. This court would then ask, when the dismissal of the Respondent became a claim capable of enforcement; was it at the time of dismissal or upon the decision of the appeals tribunal?

19. It is not disputed that the Respondent was dismissed vide a letter dated 16th February, 2012. The Respondent has submitted that he filed an appeal against his dismissal before the Teachers Service Appeal Tribunal, which upheld the Appellant's decision to dismiss the him on 28th of February, 2018. The questions then become, when between these two dates, did the cause of action accrue. **Ongaya J** in the case of **Peris Maina v Nairobi City Water & Sewerage Company Limited (2018) eKLR**, stated as follows in respect of when time starts to run in employment related disputes:

"As submitted for the Respondent, the administrative appeal proceedings did not postpone or adjourn the running of the time of limitation after the dismissal...". This position was affirmed in the case of **Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR**, where the court stated that:

"... termination kicks in from the date stated in the termination letter..."

20. The date when time begins to run, was further buttressed by the holding of the Court of Appeal in the case of **David Ngugi Waweru v Attorney General & Another (2017) eKLR**, where the court stated that the time of dismissal or termination is the time contained in the letter of termination/dismissal and not the time of conclusion of internal disciplinary mechanisms. It then follows that the cause of action in this matter, accrued on 16th February, 2012, when the Respondent was dismissed and not 28th of February, 2018 when the Appeals Tribunal rendered its decision.

21. The upshot is that the Appellant's appeal is upheld and the Respondent's claim, filed on 10th February, 2020, is declared time barred and

is struck out with costs.

22. The Respondent shall bear the costs of this appeal.

23. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Manyasa present for the Appellant

Mr. M. C. Ouma for the Respondent

MS. Christine Omollo - Court Assistant.