



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.749 OF 2014

JONES ONGAGA MONYONCHO.....CLAIMANT

CONSOLIDATED WITH

CAUSE NO. 748 OF 2014

FRED NYAKUNDI MORIGORI..... CLAIMANT

VERSUS

RILEY FALCON SECURITY SERVICE LIMITED..... RESPONDENT

RULING

The suits herein are consolidated for the ruling herein as both relates to the same questions of law; the cause of action arose under similar circumstances and relates to the same respondent.

The respondent, Riley Falcon Security Services Limited filed Notice of Preliminary Objections dated 26th November, 2019 and on the grounds that;

The matter(s) is time barred by virtue of section 90 of the Employment Act, 2007.

On 5th December, 2019 the court directed parties to address the court on the objections filed by way of oral submissions on 21st January, 2020. On the due date only the respondent attended.

As the date had been allocated by consent, the respondent made oral submissions that the claims by the claimants are time barred by operation of section 90 of the Employment Act, 2007 (the Act). The claims for underpayment are for an undefined period and section 90 of the Act requires all claims be filed within 3 years or 12 months where there is a continuing injury.

The respondent kept work records in accordance with section 74 of the Act and employment ceased in the year 2010 and not 2014 as claimed. Suit is filed on 17th December, 2014 out of time. The last date at work was 28th August, 2010.

A background herein is that the claimants filed the Memorandum of Claim on 17th December, 2014 and then filed Amended Memorandum of Claim on 14th November, 2018.

The claim is that the claimants were employed by the respondent as security guards from the year 2009 to July, 2014 and March, 2010 to July, 2014 respectively when employment terminated unfairly.

The respondent filed defence and also Amended Statement of Response and deny the claims made and without prejudice avers that the claimants were employed on 3 months renewable contracts on 26th December, 2009 to 28th August, 2010 and there followed renewals but on 28th August, 2010 there was a robbery at the site the claimants were securing which led to their arrest and placed in police custody until number, 2010 when they were released on bond and then acquitted on 7th July, 2014.

There is no response to the Amended claim.

The respondent filed work records. The claimants last day at work was 28th August, 2010.

In the main Memorandum of Claim filed on 17th December, 2014 the claimants have attached proceedings in Nakuru Chief Magistrates Criminal Case No.4461 of 2010 – Republic versus Josiah Awaro Nyamweya, Nyakundi Fred Morigori & Jones Ongaga Monyoncho charged with the offence of breaking and committing a felony on the night of 28/29th August, 2010 the property of Maili Saba Camp while guarding the property under the respondent.

The claimants were held in custody until release on bond. There was judgement on 7th July, 2014 with an acquittal.

I take it the claimant then proceeded on the basis of the acquittal and filed suits against the respondents on 17th December, 2014 with regard to their employment.

Section 90 of the Act is premised on mandatory terms. All claims with regard to employment and labour relations must be addressed with the court within 3 years and any continuing injury with 12 months from the date the cause of action arose. See **Michael Akoko Mbero versus Kenya Revenue Authority [2018] eKLR**.

In **Regent Management Limited versus Wilberforce Ojiambo Oundo [2018] eKLR** the Court of Appeal held that;

*It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this Court's decision in **Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others [2015] eKLR**. With the foregoing in mind we concur with the majority decision of this Court in **Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR** that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal. Consequently, we find that the learned Judge did not err in entertaining and determining the respondent's suit during the pendency of the criminal proceedings.*

Whether there are on-going criminal proceedings against an employee or not, upon termination of employment for what is considered unfair, unlawful or as the case may be, such matter must be addressed with the court within the limitation period set out under section 90 of the Act.

In **Iyego Farmers' Co-operative Sacco versus Kenya Union of Commercial Food and Allied Workers [2015] eKLR**, whenever an issue of wrongful or unfair dismissal arises the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

Accordingly, where the claimants were last at work on 28th August, 2010 and filed suit on 17th December, 2014 following acquittal in Criminal Case No.4461 of 2010, such is a time beyond the 3 years limitation. Time lapsed to file suit on 27th August, 2013.

Accordingly, the objections filed are found with merit. The suits herein filed by the claimant are time barred and are hereby struck out. Each party shall bear own costs.

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of:

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