



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 438 OF 2018

SAMWEL JEFWA CHARO.....CLAIMANT

VS

FREIGHT IN TIME LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Samwel Jefwa Charo against his former employer, Freight in Time Limited.
2. The claim is by way of Memorandum of Claim dated 20th June 2018 and filed in court on 25th June 2018. The Respondent filed a Statement of Reply on 3rd December 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Mombasa Branch Manager, Rozmin Bux. The parties also filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Port Clerk on 1st December 2010. He was deployed at the Respondent's Mombasa Branch.
5. The Claimant worked for the Respondent until 29th July 2011, when he was implicated in the theft of a Toyota Land Cruiser. He was charged in *Criminal Case Number 2328 of 2011*.
6. The Claimant claims that the Respondent had promised to re-employ him upon completion of the criminal case and clearance of any wrongdoing. *Criminal Case Number 2328 of 2011* was finalised and the Claimant was acquitted.
7. The Claimant lays a claim for unlawful and unfair termination of employment on the following grounds:
 - a. The reasons cited for termination were not plausible;
 - b. The Claimant was never afforded an opportunity to defend himself nor was he given concise information on the charges levelled against him.
8. The Claimant now seeks the following:

- a. 12 months' salary in compensation.....Kshs. 189,600
- b. Salary for 33 months.....521,400
- c. Notice pay.....15,800
- d. Accrued leave for 1 year and 7 months.....23,700

- e. Gratuity
- f. Certificate of service
- g. Costs plus interest

The Respondent's Case

9. In its Statement of Reply dated 29th November 2018 and filed in court on 3rd December 2018, the Respondent admits having employed the Claimant as a Port Clerk from 1st December 2010 until 29th July 2011, when his employment was terminated on account of alleged theft of a Toyota Land Cruiser.
10. The Respondent states that on 21st July 2011, a Toyota Land Cruiser that had been cleared at the Port on behalf of a client, one Manik Choda was stolen from the Respondent's premises. The Respondent made a complaint at the Divisional CID Headquarters in Mombasa on 23rd June 2011.
11. The Respondent avers that it decided to terminate the Claimant's employment alongside his colleague, Solomon Atuti Ombwori upon finding that they had breached trust. This was after the Claimant and Ombwori were charged at the Chief Magistrate's Court, Mombasa in ***Criminal Case Number 2328 of 2011***.
12. The Respondent maintains that the termination of the Claimant's employment was lawful and fair as the Respondent genuinely felt that the Claimant had breached trust.
13. The Respondent contends that due procedure was followed in effecting the termination and denies the Claimant's allegation that he was never availed any opportunity to defend himself as required by law.
14. The Respondent further contends that the Claimant had a right to file a claim in the then Industrial Court immediately after termination and he had no justifiable reason to wait for the outcome of the criminal case which was different and distinct.
15. The Respondent concludes that the Claimant's claim is time barred and should be dismissed with costs.

Findings and Determination

16. From the pleadings and submissions filed by the parties, the first issue that emerges for determination is whether the Claimant's claim is statute barred.
17. At paragraph 16 of its Statement of Reply, the Respondent states that the Claimant's claim is time barred.
18. In his final submissions filed in court on 11th October 2019, the Claimant complains that the Respondent has not particularised the points of law relied upon in the objection which is preliminary in nature.
19. A preliminary objection was defined in the well known case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited (1969)E.A. 696** as one which:
- “consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**
20. To my mind, the issue of limitation of actions is a self-explanatory pure point of law that does not need any further illumination from the party raising it.
21. There is nothing to suggest that the Claimant had no notice of the exact nature of the objection raised by the Respondent in its Statement of Reply. Further, a determination of this issue could well dispose of the case in its entirety. I therefore find and hold that the Respondent's objection is properly before the Court.
22. The Claimant further submits that the time taken in ***Criminal Case Number 2328 of 2011*** and the typing and certifying of the criminal proceedings should not be counted in computing the limitation period of three years provided under Section 90 of the Employment Act.
23. The Claimant states that the litigation process in ***Criminal Case Number 2328 of 2011*** was beyond his control and the question of limitation did not therefore arise.
24. The Claimant adds that upon the termination of his employment by letter dated 29th July 2011, the criminal case operated as a continuing injury as the termination letter had promised that the Claimant would be reinstated if he was acquitted.
25. The Claimant thus maintains that time started to run after the criminal case was finalised.

26. With tremendous respect, I find no legal basis for the Claimant's proposition that the criminal proceedings against him halted the running of time with regard to his employment claim.

27. As held by this Court in *David Owino v Kenya Institute of Special Education [2013] eKLR* a criminal trial and internal disciplinary proceedings are two distinct processes with different procedural and standard of proof requirements.

28. There is therefore no necessary nexus between criminal proceedings and an employment claim based on the same set of facts. An employee cannot therefore escape the vagaries of limitation of time simply because they were facing criminal proceedings. Just like an employer will not be allowed to delay disciplinary proceedings on the basis of pendency of criminal proceedings, an employee will not be excused for coming to court late on the same ground.

29. As to the question whether limitation is a matter of procedural technicality as submitted by the Claimant, such a notion was debunked by the Court of Appeal many years ago in *Thuranira Karauri v Agnes Ncheche [1997] eKLR* where it was held that limitation goes to the core of the jurisdiction of the Court to entertain a matter served before it.

30. That said, the only finding to make is that the cause of action herein arose on 29th July 2011, when the Claimant's employment was terminated. Within the confines of Section 90 of the Employment Act, 2007 the claim ought to have been filed by 28th July 2014.

31. The corollary finding is that the current claim filed on 25th June 2018 is way out of time and the Court has no jurisdiction to entertain it. This marks the end of the road for this case and I will consequently not address the rest of the issues listed for determination.

32. In the end, the Claimant's claim brought by way of Memorandum of Claim dated 25th June 2018 and filed in court on even date is struck out.

33. Each party will bear their own costs.

34. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY FEBRUARY 2020

LINNET NDOLO

JUDGE

Appearance:

Ms. Masinde for the Claimant

Mr. Arum for the Respondent