



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 154 OF 2017

SOLOMON ATUTI OMBWORI.....CLAIMANT

VERSUS

FREIGHT IN TIME LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Solomon Atuti Ombwori and Freight In Time Limited. The Claimant has documented his case by a Statement of Claim dated 13th February 2017 and filed in court 1st March 2017. The Respondent's response is by way of a Statement of Reply dated 30th March 2017 and filed in court on 11th April 2017.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Branch Manager (Mombasa) Rozmin Bux. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Freight Clerk on 1st June 2004. The Claimant initially earned a monthly gross salary of Kshs. 13,000 which was progressively reviewed to Kshs. 20,000.
4. The Claimant worked for the Respondent until 29th July 2011 when his employment was terminated on the ground that there was an ongoing investigation regarding theft of a motor vehicle, Toyota Land Cruiser from the Respondent's office parking area.
5. The Claimant was charged in ***Criminal Case No 2328 of 2011*** but was acquitted under Section 215 of the Criminal Procedure Code.
6. The Claimant claims that the termination of his employment was unlawful and unfair for the following reasons:
 - a) The Respondent failed and neglected to consider and appreciate that the Claimant had not been involved in any misconduct while carrying out his duties; a fact which the Claimant brought out clearly in his defence to the Managing Director;
 - b) The Respondent proceeded to dismiss the Claimant without having conducted full and proper investigations to establish whether there was misconduct on the part of the Claimant;
 - c) The Respondent dismissed the Claimant yet investigation into the alleged loss of motor vehicle had not been completed;
 - d) The Respondent dismissed the Claimant without any justifiable or valid reason.
7. The Claimant avers that he was not able to file this claim in time because he had a pending criminal case and he had to wait for its outcome.
8. The Claimant's claim is as follows:
 - a) One month's salary in lieu of notice.....Kshs. 20,000

b) Salary for 33 months.....	676,500
c) Accrued leave.....	123,000
d) Gratuity.....	70,962
e) Compensation for unfair termination.....	246,000
f) Certificate of service	
g) Costs plus interest	

The Respondent’s Case

9. In its Statement of Reply dated 30th March 2017 and filed in court on 11th April 2017, the Respondent admits having employed the Claimant as a Clerk from 1st June 2004 until 29th July 2011.

10. The Respondent states that the Claimant’s employment was terminated on account of alleged theft of a client’s motor vehicle, Toyota Land Cruiser.

11. The Respondent goes on to state 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. A complaint was lodged at the Divisional CID Headquarters in Mombasa on 23rd June 2011.

12. The Respondent, upon finding that the Claimant had breached the Respondent’s trust, decided to terminate the Claimant’s employment alongside a Port Clerk, one Jefwa Charo, since the Police after completing investigations, decided to charge the two employees in **Criminal Case No.2328 of 2011**.

13. The Respondent contends that the termination of the Claimant’s employment was lawful and fair as the Claimant had breached the Respondent’s trust. The Respondent adds that due procedure was followed in effecting the termination.

14. The Respondent further contends that the Claimant had a right to file a claim immediately after dismissal and had no justifiable reason to wait for the outcome of the criminal case.

Findings and Determination

15. At paragraph 12 of his Statement of Claim, the Claimant admits having filed his claim late, ostensibly because he was waiting for the outcome of the criminal case against him and his colleague, Jefwa Charo.

16. In response, the Respondent states that the Claimant did not have to wait for the outcome of the criminal case before filing his employment claim.

17. What is disclosed here is that the Claimant’s claim could well be statute barred and this is the first question I must deal with. The Claimant himself pleads that his employment was terminated on 29th July 2011. His claim which was filed on 1st March 2017, was therefore way out of the three-year period prescribed under Section 90 of the Employment Act.

18. The Claimant appears to have been aware that his claim was filed out of time but states that he was late because he was facing criminal charges.

19. The question whether the pendency of criminal proceedings can halt the running of time within which to file an employment claim was settled by the Court of Appeal in **Attorney General & another v Andrew Maina Githinji & another [2016] eKLR** where it was held that a claimant in an employment matter has all the material required to display a cause of action without having to wait for the outcome of criminal proceedings on the same set of facts.

20. It follows therefore that the pendency of criminal proceedings cannot cure an otherwise time barred claim.

21. Consequently, I find and hold that the Claimant’s claim was filed out of time and the Court has no jurisdiction to entertain it.

22. The claim is therefore struck out with no order for costs.

23. It is so ordered.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the

COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Omwenga for the Claimant

Mr. Arum for the Respondent