



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1655 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

NICHOLAS MUSYOKA KIMUYU.....CLAIMANT

VERSUS

NEW KIMUTWA BUTCHERY LIMITED.....RESPONDENT

JUDGMENT

The Claimant instituted this suit on 21st September 2015, to challenge the termination of his employment. He seeks the following reliefs-

- a. *A declaration that the termination and/or dismissal of the Claimant by the Respondent was unfair and unlawful.*
- b. *An order compelling the Respondent to pay the Claimant his terminal benefits and compensation for unfair termination amounting to Kshs.1,616,710.30, tabulated as follows-*
 - i. *One months' notice of Kshs.10,777.97.*
 - ii. *Severance pay for 7 years amounting to Kshs.29,423.85.*
 - iii. *Annual leave arrears for 10 years amounting to Kshs.75,445.79.*
 - iv. *Underpayment for 10 years totalling to Kshs.617,269.41.*
 - v. *Overtime (5 hours per day) totalling to Kshs.754,437.85.*
 - vi. *Maximum compensation for unfair termination of Kshs.129,335.64.*
- c. *Costs and interests of this claim.*

On 30th November 2015, the Respondent filed its Statement of Defence denying the allegations set out in the claim and urged this Court to dismiss the same with costs to the Respondent.

Claimant's Case

The Claimant avers that he was employed by the Respondent on 5th November 2003, as a cook earning a monthly salary of Kshs.1,800.00. The salary was increased over time from Kshs.2,100.00 in October 2004, Kshs.2,600.00 in January 2006 and Kshs. 3,500.00 in June 2010. He avers that he was underpaid.

Sometime in February 2014, the Claimant was sent on unpaid leave until such a time that the Respondent's business picked up.

However, he was not called back despite his numerous follow ups.

It is his case that on 13th August 2014, he mistakenly caused a letter to be written to the Respondent and copied to the Machakos District

Labour Officer, which letter indicated that his employment had been terminated on 5th February 2012.

In his witness statement dated 30th July 2015, the Claimant avers that there was no response from both parties prompting the Claimant to write a demand letter to the Respondent on 9th March 2015. The Respondent responded on 18th March 2015 stating that the matter was before the labour office. The parties then appeared before the labour officer who prepared a report thereafter in which he found that the claim was time barred as it was reported 3 years after termination. It is the claimant's position that this was a misdirection.

It is the Claimant's further position that the termination of his employment was unfair as it was without notice or hearing.

Respondent's Case

The Respondent denies that Joseph Mutuku was its Director or that he sent the Claimant home on the promise that he would be called back once the business improved. The Respondent contends that the Claimant deserted his duties and that they only heard from him after 2 years, when he wrote to them seeking his terminal dues.

The Respondent avers that the claim is time barred as it was instituted 2 years after the Claimant's alleged termination.

On 2nd April 2019, parties agreed to dispense with the oral hearing and dispose of the suit by way of written submissions. The Claimant filed his submissions on 8th May 2019 and the Respondent filed theirs on 7th November 2019.

Claimant's Submissions

The Claimant submits that the Respondent has given contradictory statements. On the one hand, it denies employing the Claimant and on the other hand, it contends that the Claimant absconded duty. It is his submission that for him to have absconded work, he must first have been employed.

He submits that the Respondent has not discharged the burden of proof set out in Section 10(7) of the Employment Act which requires an employer to prove or disprove a term of employment where it fails to produce a written contract. He relies on the case of **Charles Wanjala Watima v Nyali Golf & Country Club Limited [2013] eKLR** which discussed the contents of the said provision.

The Claimant submits that the Respondent's decision to send him on unpaid leave until business picked up amounted to declaring him redundant. As such, it is his position that the Respondent ought to have followed the procedure set out in section 40 of the Employment Act. By failing to do so, the Respondent breached due process and procedure thus rendering the termination of his employment unfair.

He cites the case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa – Kenya (Anidan K) [2013] eKLR** where the Court held that at the time of redundancy, an employer ought to factor in seniority, skills, ability and reliability and the process ought to adhere to substantive fairness.

The Claimant submits that the Respondent has not proved a case of desertion as no evidence was adduced to controvert his assertion that he had been sent on unpaid leave. Further, he submits that the Respondent did not try to contact him to know why he had not reported back, before he was allegedly dismissed. This was the opinion of the Court in **David Nyanjui Mburu v Sunmatt Limited [2017] eKLR**.

The Claimant submits that the provision under section 47 requiring an employee to make a complaint to the labour officer within 3 months is not mandatory by dint of subsection (3). The Claimant further submits that the claim was instituted on 21st September 2015, whereas the cause of action arose in 2014, hence the claim is not time barred.

The Claimant submits that he is entitled to the reliefs sought due to the Respondent's failure to comply with the provisions of section 40(1) (d) to (g) of the Employment Act. It is his submission that he is entitled to notice pay as he was never issued with a notice. That he is also entitled to severance pay by dint of Section 40(g) of the Employment Act.

The Claimant submits that he is entitled to annual leave arrears pursuant to Section 28(1) and 40(e) of the Employment Act. He further submits that he is entitled to the claim for underpayments having been underpaid for 10 years. It is his submission that the Respondent ought to bear the costs of the suit and interest on the same from the date of judgment.

Respondent's Submissions

The Respondent submits that the Claimant has not adduced any evidence to prove that his employment was orally terminated or that he was declared redundant. As such, he has failed to prove his claim.

The Respondent submits that the Claimant's claim is exaggerated since he is claiming service pay for 7 years and annual leave, underpayment and overtime for 10 years without any evidence. It is the respondent's submission that the demand letter only claimed Kshs.169,541.60.

Analysis and Determination

I have carefully considered the pleadings filed by the parties, the evidence adduced as well as the submissions. The issues for determination are –

- a. Whether the suit against the Respondent is time barred.
- b. Whether the Claimant was employed by the Respondent.
- c. Whether the Claimant absconded work or was declared redundant.
- d. Whether the Claimant is entitled to the reliefs sought.

Limitation Period

The issue of limitation touches on the jurisdiction of this Court because if the suit is time barred, this Court has no option but to down its tools. The Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** held so when it stated:

"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Section 90 of the Employment Act makes the following provisions regarding time limitation –

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The Respondent has asserted that the claim is time barred as it was instituted 2 years after the Claimant's alleged termination. On the other hand, the Claimant contends that the letter of 13th August 2014 to the Respondent which indicated that his employment had been terminated on 5th February 2012, was a mistake.

In an effort to prove his case, the Claimant relied on the labour officer's report, which reads-

"My reason for accepting these cases was that I wanted the complainants to prove (sic) any of the following-

- a. Whether the reasons for the delays in reporting was as a result of lawful confinement.*
- b. Sickness for a long time or*
- c. They were out of the country.*

The conciliator tried to enquire whether the above reasons were applicable but no complainant had any reasons for not reporting their cases within 3 months as provided by law.

The employer submitted that the two complainants disappeared from their proper place of work without permission. Paul Muua Mang'eng'e left employment in August 2009 and Nicholas Musyoka Kimuyu left employment in February 2014. The employer stated that these complainants had no genuine claims for they would have reported their cases to the Labour officer immediately they left employment...

It is quite unbelievable that somebody can be told by an employer to go home and wait for 2 – 3 years waiting to be called back and not engaged in any employment.

The conciliator gave the parties to negotiate for any payment based on mutual agreement but NOT the law. They were not able to agree on anything...

The conciliator declares that these cases are time barred and there is no legitimate claim to be demanded by the complainants from their employer."

From the report, it is clear that the Claimant had left employment more than two years before the time he reported his case to the Labour Officer. In the report he stated that the Claimant's employment was terminated on 5th February 2012. This is corroborated by the NSSF statement which shows that the last remittance by the respondent to NSSF was in March 2012. It also corroborates the claimant's letter of demand where he states that his employment was terminated on 5th November 2012.

In light of the foregoing, I find that the Claimant has failed to prove that the cause of action arose in 2014 and not 2012. As such, the suit is time barred by dint of Section 90 of the Employment Act having been filed after the limitation period of three years. This Court therefore lacks the jurisdiction to hear and determine the same. For this reason, the claim is struck out.

Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE