



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2243 OF 2015**

**DEIRDRE NASERIAN** **1<sup>st</sup> CLAIMANT**

**FELIX OPILEH MGAWANI** **2<sup>nd</sup> CLAIMANT**

**EVERLINE S.N. KHAMONI** **3<sup>rd</sup> CLAIMANT**

**LUCAS MANGESA** **4<sup>th</sup> CLAIMANT**

**v**

**JUDICIAL SERVICE COMMISSION** **RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Claimant was dismissed through a letter dated 26 October 2006 and which letter was served upon her in February 2007. By then, the window for disciplinary appeal had expired but she still lodged an appeal which was dismissed on 3 February 2014. She was also charged in Court but was acquitted on 28 December 2012.

2. The 2<sup>nd</sup> Claimant was interdicted on 9 May 2006 and this was followed with dismissal from service in July 2006.

3. On 6 October 2006, this Claimant was charged with stealing by a person employed in the public service but he was acquitted on 28 December 2012. A disciplinary appeal against the dismissal was declined by the Respondent on 26 June 2013. A second disciplinary appeal was also dismissed.

4. The 3<sup>rd</sup> Claimant was interdicted through a letter dated 8 May 2006 before dismissal through a letter dated 27 October 2006. This Claimant was also acquitted of criminal charges on 28 December 2012 and a disciplinary appeal against dismissal was also unsuccessful.

5. The 4<sup>th</sup> Claimant was interdicted on 8 May 2006 and was dismissed on through letter dated 27 October 2006. His disciplinary appeal against the dismissal after acquittal by the Magistrates Court on 28 December 2012 was rejected by the Respondent.

6. On 15 December 2015, the Claimants jointly sued the Respondent alleging violation(s) of their right to fair administrative action, breach of contract and wrongful termination of employment.

7. The primary reliefs sought by the Claimants were *outstanding leave, leave allowances, accrued salaries* during interdiction and up to the determination of appeals, *salary in lieu of notice, compensation* and *a declaration that the dismissals were wrongful/unconstitutional*.

8. On 6 November 2019, the Respondent filed a Notice of Preliminary Objection and List of Authorities contending

1. That the Claim herein founded on dismissal is statute-barred as the cause of action arose on 27<sup>th</sup> October 2006 and 5<sup>th</sup> March 2007 and therefore the claim against the Respondent should have been filed in the first instance on or before 27<sup>th</sup> October 2009 and on or before 5<sup>th</sup> March 2010.

2. The suit is statute-barred and offends the mandatory provisions of section 90 of the Employment Act 2007 and section 4(1) of the Limitation of Actions Act.

3. That in view of the foregoing, this Honourable Court has no jurisdiction to hear and determine the claim as the same is statute-barred by dint of section 4(1) of the Limitation of Actions Act, section 3 of the Public Authorities Limitations Act and section 90 of the Employment Act 2007.

4. The suit is an abuse of the court process.

5. The suit is incompetent and ought to be struck out with costs.

9. The Respondent filed its submissions in support of the Objection on 11 December 2019 while the Claimants filed their Submissions and List of Authorities in opposition to the Preliminary Objection on 30 January 2020. The Court took arguments on 19 February 2020.

10. The Court has considered the Preliminary Objection, the submissions and the authorities.

11. The primary legal issue raised is whether the cause(s) of action presented by the Claimants accrued upon dismissal, upon acquittal by the Magistrates Court, or upon determination and communication of the decision(s) on the disciplinary appeals.

12. It is not in dispute that the Claimants were dismissed in 2006 (all the Claimants were dismissed when the governing law was section 4(1) of the Limitation of Actions Act and not section 90 of the Employment Act, 2007).

13. It is also not in dispute that the Claimants were arraigned before the Magistrates Court and charged with offences based on the same facts that lead to the dismissal(s) and that they were acquitted on 28 December 2012.

14. Upon acquittal, all the Claimants appealed to the Respondent against the dismissals without success.

15. Further, it cannot be disputed that the Claimants instituted these proceedings some 8 years after their dismissals.

16. The Claimants cited two decisions to advance an argument that their respective causes of action accrued upon the rejection of their disciplinary appeals and/or comprised *continuing injury* within the context of section 90 of the Employment Act, 2007.

17. In the first decision, *George Hiram Ndirangu v Equity Bank Ltd* (2015) eKLR, the Court held that a cause of action for unfair termination of employment accrued on dismissal.

18. In the second decision, *Stephen Muange Mutua v Kenya Revenue Authority* (2017) eKLR, the Court made a proposition that failure to pay accrued dues amounted to a *continuing injury*.

19. The date of accrual of a cause of action in unfair termination of employment disputes/breach of contracts was examined by the Court of Appeal in ***Attorney General & Ar v Andrew Maina Githinji and Ar* (2016) eKLR.**

## 20. The Court held

*The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time-barred as at 1st February 2013, and I so hold.*

21. This authority from the Court of Appeal sets out the law as of now, and it is that a cause of action for unfair termination of employment/breach of contract accrues at the date of termination of employment.

22. The Claimants causes of action, therefore, arose upon dismissal by the Respondent in February 2007 for the 1<sup>st</sup> Claimant, July 2006 for the 2<sup>nd</sup> Claimant and October 2006 for the 3<sup>rd</sup> and 4<sup>th</sup> Claimants.

23. The Claimants also advanced an argument that their employment relationships or status with the Respondent were sustained or preserved pending the determination of their disciplinary appeals. The same argument was raised with respect to the determination of the criminal charges and the effect of the acquittals.

24. However, the Claimants did not draw the Court's attention to any legal or contractual provision preserving the employment contracts pending the determination of their disciplinary appeals.

25. This Court is therefore of the view that unless there are express contractual or legal provisions preserving an employment relationship after separation or up to the determination of criminal charges, the contract stands determined upon dismissal.

26. The Court would also wish to note the concurring holding in the *Githinji case* (supra) 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. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein.

27. On the submissions concerning *continuing injury*, the Court finds the position taken by the Claimants self-defeating.

28. For, if indeed the proposition by the Claimants is correct, they were under an obligation to present their claims within 12 months of the

cessation of the *continuing injury(ies)* and that could only be within 12 months of dismissal or stoppage of allowances, payment of salaries and/or breach of contract. The breaches of contract arose at the date of dismissal and not acquittal(s) or dismissal of disciplinary appeals.

29. Whether under section 4(1) of the Limitation of Actions Act or section 90 of the Employment Act, 2007, the Claimants moved the Court outside the prescribed limitation period.

30. The Court will uphold the Preliminary Objection and strike out the Memorandum of Claim filed in Court on 15 December 2015. No order on costs.

**Dated, signed and delivered through video/email in Nairobi on this 8<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants Mr. Chigiti instructed by Chigiti & Chigiti Advocates

For Respondent Mr. Wakwaya instructed by Rachier & Amollo Advocates LLP

Court Assistant Judy Maina