



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 274 OF 2017

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

NAMUKIKA SACCO LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued seeking relief for the 3 Grievants – Bernard Irungu, Josphat Ndungu and Paul Mwangi. It was averred that the 3 were employees of the Respondent as stage attendant, matatu driver and matatu conductor. They were dismissed on diverse dates in 2013 and 2014 the latest being in the month of February 2014 they sought payment of their terminal dues comprising of salary in lieu of notice, service pay, underpaid basic minimum wages, overtime, payment for overtime worked on public holidays. They also sought costs of the suit and a certificate of service.

2. The Respondent denied that Bernard Irungu, Josphat Ndung'u and Paul Mwangi were ever employees of the Respondent. The Respondent thus sought the dismissal of the Claimant's suit.

3. In the reply to the memorandum of response by the Respondent, the Claimant filed the identification badges of the 3 Grievants issued by the Respondent.

4. The parties prayed for hearing through submissions which was acceded to. The crux of the matter was the alleged dismissal of the Grievants. Whereas there was an assertion they were dismissed without cause, the Claimant took too long to file the suits. Under Section 90 of the Employment Act, there is provision as follows:-

90. Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (Cap. 22) no civil action or proceedings based on 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

5. The decision of the Court of Appeal in **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** has settled the law as far as limitation goes. The learned Judges of Appeal (Waki, Nambuye, Kiage JJA) held that the cause of action accrues upon termination. Per Waki JA -

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy from their employer through the court? On the one hand, the AG contends that it was on the date of the respondents' dismissal while the respondents insist it was after their criminal trial was exhausted. There does not seem to be a direct authority from this Court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment.

And later in the judgment:-

By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'. (underline mine)

6. The Claimant filed this suit outside the limits prescribed in law as the 1st Grievant was dismissed on 5th April 2013. He had to file suit before 5th April 2016. The 2nd Grievant was dismissed in May 2014 and had to file suit by May 2017. The 3rd Grievant was dismissed in

February 2014 and had to file suit by February 2017. This claim was filed on 24th July 2017 which is beyond the 3 years set in law. It matters not that there was conciliation processes ongoing for purposes of limitation. In any event the certificate of referral was issued on 11th December 2015 which was within the period they could seek relief by filing suit. The suit is dismissed for being filed out of time but I make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 19th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar