



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1584 OF 2013

ALLOYCE OBAMA

CLAIMANT

v

KENYA RAILWAYS CORPORATION

RESPONDENT

JUDGMENT

1. Alloyce Obama (Claimant) was employed by Kenya Railways Corporation (Respondent) on 2 September 2002 as a Trainee Sub Permanent Way Inspector.
2. On 21 August 2006, the Respondent interdicted the Claimant.
3. On 27 September 2006, while still on interdiction, the Claimant was promoted to Sub-Permanent Way Inspector Grade RB Exec. II.
4. A month later, on 23 October 2006, the Respondent informed the Claimant that it had been decided that he be reinstated back to work and that the interdiction was being lifted. The reinstatement was without prejudice to any appropriate disciplinary action.
5. Within 2 months of the reinstatement, on 20 December 2006, the Respondent wrote to the Claimant informing him that he was being suspended, and the reason given was that he had been arrested by the Police and charged with theft.
6. The suspension, it was explained was anchored on Personnel Regulation G.9 (e) and would await the outcome of the criminal case in Court.
7. The charges against the Claimant were withdrawn under section 87(a) of the Criminal Procedure Code on 18 December 2008, and on 2 February 2009, the Respondent wrote to the Claimant to advise him that following the acquittal, it had been decided to lift the suspension, and further that he it had been decided that he be retrenched with effect from 31 December 2006 (backdated) in line with Phase IV of the Early Retirement Programme.
8. The retrenchment letter also advised the Claimant of the benefits he was entitled to.
9. The Claimant was aggrieved, and on 2 October 2011 he instituted legal proceedings against the Respondent alleging breach of contract and seeking payment of terminal benefits being salary withheld during suspension, house allowance, commuter allowance, retrenchment package and gratuity (totalling Kshs 4,312,189/-).
10. The Respondent raised a *Preliminary Objection* to the Cause founded on section 87(b) of the Kenya Railways Act and section 90 of the Employment Act, 2007 (paragraph 15 of the Response also raised plea of limitation).
11. The *Preliminary Objection* was not prosecuted for over 4 years, and on 20 March 2018 the Court directed that the parties file submissions ahead of hearing of the *Objection* on 16 May 2018.
12. When the *Preliminary Objection* came up for hearing on 16 May 2018, the Claimant indicated he was not ready to proceed and the Court, to save time, directed that the *Preliminary Objection* be taken as part of the main hearing on 31 October 2018.
13. On 20 August 2018, the Claimant applied to amend the Statement of Claim, an application which the Court allowed on 24 August 2018.
14. An *Amended Statement of Claim* was filed on 25 October 2018 ahead of the hearing on 31 October 2018.

15. The Claimant and his witness testified on 31 October 2018 while the Respondent's Human Resources Officer testified on 15 November 2018.

16. The Claimant filed his submissions on 24 December 2018 while the Respondent filed its submissions on 23 January 2019.

17. The Court has given due consideration to the pleadings, evidence and submissions.

Limitation

18. The Claimant was informed of the termination of his employment on account of retrenchment through a letter dated 2 February 2009 (effective date of termination was backdated to 31 December 2006).

19. The determination of the effective date of separation therefore becomes a legal question.

20. In terms of common sense and logic, an employee cannot be assumed to know that his employment has been terminated until he receives unambiguous communication to that effect.

21. This Court will therefore endorse and adopt the approach taken in *McMaster v Manchester Airport plc* (1998) IRLR 112 EAT that the effective date of termination of a contract of employment cannot be earlier than the date on which an employee receives knowledge that he is being dismissed. The doctrine of constructive or presumed knowledge has no place in questions as to whether a dismissal has been communicated or not, save only in the evidential sense that an employment tribunal will be likely to assume that letters usually arrive in the normal course of post...

22. The English Court of Appeal reached a similar conclusion in *GISDA Cyf v Barratt* (2009) IRLR 933.

23. Arising from the aforesaid legal principle, the effective date, and which date the cause of action accrued is 2 February 2009.

Section 16A of the Pensions Act and accrual of cause of action

24. In his submissions, the Claimant contended that time for purposes of limitation did not arise because pursuant to section 16A of the Pensions Act, he was still *deemed* as an employee because his *gratuity* had not been paid in full.

25. According to the Claimant, the contract of employment would continue to subsist until payment of full *gratuity*.

26. The Claimant further submitted that the Respondent had through a Memo dated 16 October 2006 assured retrenched employees that their contracts would continue until full settlement of *gratuity*.

27. The Claimant drew the attention of the Court to the cases of *Charles M. Shitavi v City Council of Nairobi* (2012) eKLR and *Ronald Kampa Lugaba v Kenol Kobil Ltd* (2016) eKLR.

Does the Pensions Act apply?

28. The Pensions Act does not define *gratuity* as used in section 16A. What is defined is *pensionable emoluments*.

29. Despite the lack of definition, section 16A is express that the *gratuity* referred to should be payable under the Pensions Act.

30. The Claimant herein is not claiming *gratuity/pension* under the Pensions Act. The Respondent had (has) its own Kenya Railways Corporation Act which has Regulations on Pensions and Gratuities.

31. The Claimant's cause therefore can only be validly anchored on the Respondent's parent statute and any contractual agreements, such as collective bargaining agreements in place at the material time (payment of *gratuity* though based on the parent statute was also pursuant to negotiations with the relevant Union).

32. Although the parties did not address the question, this Court would hazard to opine that section 16A of the Pensions Act applies only to those entitled to pension thereunder.

Accrual of cause of action and the deeming provision

33. The Court will now return to issue whether the *deeming* provision stops time from running for purposes of limitation.

34. Pursuant to section 90 of the Employment Act, 2007, the Claimant had 3 years within which to commence legal proceedings challenging the termination of employment on account of redundancy.

35. The 3 years, in the view of the Court lapsed on or around 1 February 2012.

36. The Claimant herein moved the Court on 2 October 2013, over 1 year after the limitation period. He now wants to find umbrage in the *deeming* provision in the Pensions Act.

37. In the view of the Court, whether the contract of employment was (is) *deemed* to continue until full settlement of *gratuity* in terms of the Pensions Act, the *deeming* provision does not stop time from running for purposes of limitation.

38. The Court is of that view because despite the *deeming* provision, the Claimant, as indeed any other affected employee, was aware that by its letter of retrenchment, the Respondent had taken action which in his view amounted to breach the contract.

39. The cause of action on the lawfulness or fairness of retrenchment accrued on receipt of the letter and the continued existence of the contract did not alter the alleged breach of contract.

40. The alleged breach occurred at an identifiable point in time.

41. In light of the above and in consideration of the settled principle that limitation is jurisdictional question, the Court has come to the conclusion that the cause of action presented by the Claimant is statute barred, with the consequence that the Court downs its pen and orders the Cause dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 1st day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Owino instructed S.O Owino & Co. Advocates

For Respondent Mr. Ochieng instructed by Prof Albert Mumma & Co. Advocates

Court Assistant Lindsey