



**REPUBLIC OF KENYA**

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

**CAUSE NO 258 OF 2018**

**DAVID MUTHUI MUSYIMI.....CLAIMANT**

**VS**

**MASAI BARS & RESTAURANTS LIMITED.....RESPONDENT**

**RULING**

1. This ruling flows from a Preliminary Objection raised by the Respondent by notice dated 18<sup>th</sup> June 2018. The objection is based on the ground that the Claimant's claim as contained in the Memorandum of Claim dated 12<sup>th</sup> April 2018 is time barred and offends Section 90 of the Employment Act.

2. The objection was urged by way of written submissions. In the submissions filed on behalf of the Respondent on 23<sup>rd</sup> January 2019, it is submitted that the cause of action herein arose on 5<sup>th</sup> March 2015 and the claim filed on 19<sup>th</sup> April 2018 was out of time. The Respondent therefore submits that the Court has no jurisdiction to entertain the claim.

3. On his part, the Claimant submits that in tabulating time under Section 90 of the Employment Act, Sundays and public holidays ought to be excluded. The Claimant also submits that the dominant cause of action being breach of contract, is governed by Section 4(1) of the Limitation of Actions Act.

4. Section 90 of the Employment Act provides as follows:

***90. 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.***

5. The Court finds nothing in this provision that excludes Sundays and

public holidays in tabulating time for purposes of limitation. Further, Section 90 expressly covers all civil actions arising out of contracts of service; that would include breach of contract.

6. In its decision in *Attorney General & another v Andrew Maina Githinji & another [2016] eKLR* the Court of Appeal defined a cause of action as:

***“an act on the part of the defendant which gives the plaintiff his cause of complaint.”***

7. In paragraph 5 of his Memorandum of Claim the Claimant states that the Respondent verbally terminated his employment on 5<sup>th</sup> March 2015. This is when the cause of action arose and the claim filed on 19<sup>th</sup> April 2018 is statute barred. As held by my brother **Ongaya J** in *Nicodemus Marani v Timsales Limited [2014] eKLR*, Section 90 of the Employment Act leaves no room for the Court to extend time beyond the three year limitation period.

8. That said, the only thing to do is to strike out the Claimant's claim, which I hereby do.

9. Each party will bear their own costs.

10. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF MARCH 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mulei for the Claimant

Miss Wamithi for the Respondent