



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 96 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOHN OKULO ANYIKO.....CLAIMANT

VERSUS

KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant seeks compensation for unlawful termination of employment and payment of terminal benefits to wit:

- (a) Notice pay
- (b) Overtime
- (c) Underpayments
- (d) Night shift allowance arrears.
- (e) 30 unpaid public holidays
- (f) Costs and interest.

2. Claimant testified and told the court that he worked for the respondent as a senior electrical motor rewinder from 2009 to 2011. He earned a gross pay of Kshs. 17,508.50 as per the pay slip exhibit '1' at the time he left employment.

3. On 21st February 2011 workers were locked out at the gate and they held a meeting with the Human Resource Officer and the Director.

4. The employees presented their grievances. Union representatives were prevented from delivering a letter to the Director. Police were called. Teargas was lobbed at the workers and they were dispersed. Some workers including the claimant were arrested by the police as they ran in different directions. The claimant was arrested, charged with incitement to violence and released on bond. The following morning he reported to work but was told to go home and come back for a meeting on 4th February 2011.

5. The claimant and five others were suspended and no meeting took place on 9th February as promised.

6. The claimant denied that the workers were on strike. The claimants were told to await further communication but none came to date of filing suit.

7. The claimant was acquitted of the charges. Claimant was not a union official and denied having incited the workers as alleged or at all.

8. The claimant was not given a show cause letter nor was he called to a disciplinary hearing. Claimant states that the termination of his employment was unlawful and unfair. Claimant did not get a letter of termination and thus got no reason for the termination.

9. Claimant denied that he was employed on 5th March 2010. He insisted that he had served the respondent for two years from 2009. Claimant insisted that the meeting held on 21st February 2011 was called by management. It was to take place at 8.00 a.m as communicated by a supervisor.

10. The claimant denied that the workers had planned to go on strike the night before. He denied that property was destroyed by stones thrown by workers. The claimant denied that the meeting held on 4th February 2011 was a disciplinary hearing. Claimant stated that the disciplinary hearing did not proceed on 9th February 2011 either.

11. The claimant conceded that the suit was filed six (6) years from the date of termination. The claimant stated that he awaited the outcome of the criminal case.

12. The claimant further conceded that the case was filed more than one year after the criminal trial concluded.

Response

13. The respondent did not raise a preliminary objection in its response to the claim filed on 22nd August 2017 on the question of time limit. However, the issue was raised in cross examination of the claimant by counsel for the respondent. The court is therefore bound to deal with it.

14. RW1 Moli David Odoyo testified on behalf of the respondent. RW1 stated that he was the Human Resource Manager of the respondent. He adopted a witness statement he recorded on 20th April 2018 as his evidence in chief. RW1 testified that the claimant was absent from work without justification and was given a show cause letter dated 14th February 2011. The notice was served on the union and a copy sent to the claimant's last known address. The claimant was invited to attend a disciplinary hearing on 21st February 2011.

15. The claimant failed to attend the disciplinary hearing. RW1 wrote a letter of termination dated 18th March 2011 to the claimant. The union received the letter on behalf of the claimant and acknowledged receipt of it with an official stamp.

16. The notice to show cause; hearing notice and letter of termination were produced as exhibits before court.

17. Under cross examination, RW1 admitted that the notice to attend hearing was not served on the union. RW1 also admitted that the claimant was entitled to salary for the days worked but he did not clear from work hence he was not paid.

18. RW1 stated that the claimant did not attend the scheduled meeting for 9th February 2011. The claimant was however dismissed for absenteeism but not for going on strike. RW1 stated that he was not aware of the outcome of the criminal charges and that he only saw the claimant again in court. RW1 stated that the claimant had worked for only one year.

19. RW1 prays the suit be dismissed for lack of merit.

Determination

20. The issues for determination are as follows:

- (a) Whether the suit is time barred.
- (b) Whether the termination of the claimant was for a valid reason and done in terms of a fair procedure.
- (c) Whether the claimant is entitled to the reliefs sought.

Issue A

21. The testimony by the claimant is that he stopped working for the respondent on 2nd February 2011 the day the claimant states that he and other workers were locked out of the respondent's premises in the morning. That a meeting was held between the workers and management. That the meeting was dispersed by police and the claimant was arrested and charged before a magistrate court with the offence of incitement to violence. That he was released on bond and attended a meeting at the respondent's place on 4th February 2011. That he was suspended from work pending investigations and was to report back on 9th February 2011. That the meeting did not take place on 9th February 2011 and the claimant did not receive any further communication from the respondent until he filed the suit.

22. The suit was filed on 14th March 2017 more than six (6) years from the date the claimant stopped working for the respondent. The claimant testified that he had to await conclusion of the criminal case before he filed the suit.

23. The claimant was acquitted by Hon. B. Kasavuli in a judgment delivered on 26th April 2016.

24. Following the decision of the court of Appeal in *G4S Security Services (K) Limited vs Joseph Kamau and 468 others NRB Civil Appeal NO. 158 of 2015 [2018] eKLR*, the suit by the claimant is time barred and the court lacks jurisdiction to entertain it.

25. The Court of Appeal stated:

“Pursuant to Section 90 of the Employment Act, the claims should have been filed within three years of termination of employment.....Regarding ‘a continuing injury’ the provision to Section 90 of the Employment Act requires that the claim be

made within 12 months next after the cessation thereof. The learned judge did not determine when the continuing injury ceased for purposes of computing the twelve month period.....

Upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."

26. The Court of Appeal further held following its decision in Rift Valley Railways (Kenya) Limited vs Hawkins Wagonza Musonye and another (2016) eKLR that time does not stop running on commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the constitution or any other law.

27. This court has similarly continuously held that time does not stop running because there is a pending criminal trial arising from the facts that led to the termination or dismissal of the claimant. For purposes of time limit, where the claimant alleges, as in the case that he did not receive the letter of termination, time starts running from the last date the claimant stopped working for the respondent and these facts clearly demonstrate a constructive severance of an employee and employer relationship. This maybe not a clear point of law in terms of the Mukisa Biscuits Case, but the legal point is capable of determination upon hearing of the facts of the case.

28. The court is satisfied that the claimant last worked for the respondent on 2nd February 2011 and was not taken back until he filed the suit. The separation crystalized in the month of February 2011. Three years lapsed by the end of the month of February 2014 in the latest if the court were to take into account the version by the respondent that the letter of termination was issued on 18th February 2011. Whichever version the court looks at, the cause of action had crystalized by end of February 2011 and the claimant was statutorily bound to file suit before the expiry of three (3) years and from 1st March 2011.

29. This suit is therefore statute barred by *dint of Section 90 of the Employment Act, 2007*. The court lacks jurisdiction to determine the same on the merits.

30. In any event, and with regard to issues (b) and (c) above, the court is satisfied that the claimant participated in unlawful strike and did not subsequently return to work when called upon to show cause in writing and to attend a disciplinary hearing for absenteeism.

31. Accordingly, the suit lacks merit and stands dismissed.

32. In the final analysis, the suit is time barred and is struck off for want of justification to determine it.

33. Respondent ought to have raised the Preliminary Objection at the outset and therefore each party to bear their own costs of the suit.

Judgment Dated, Signed and delivered this 7th day of May, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Ojwango for the Claimant

Mr. Onyango for Respondent

Chrispo – Court Clerk