



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 205 OF 2018

AGGREY OUTA ONG'ANG'O.....CLAIMANT

VERSUS

NAIROBI COUNTY GOVERNMENT.....RESPONDENT

RULING

Introduction

1. The Claimant was employed by the Respondent and by the letter dated 2.3.2011, he was suspended from work for alleged gross misconduct, namely forging academic certificate. On 11.11.2011, the respondent's staff committee discussed his conduct in his absence and recommended for his dismissal from employment. The same recommendation was made by the respondent's Finance Committee on 17.2.2012 without hearing the claimant and the decision was conveyed to him by the letter dated 5.7.2012 giving him the right of appeal to the PSC within 42 days. He appealed by the letter dated 24.7.2012 asking for lifting of the termination pending the determination of the criminal case he was facing in relation to the alleged forgery.

2. The appeal was however dismissed by the letter dated 31.3.2015 which was communicated to him by the letter dated 27.4.2015. While the appeal was still pending, the claimant was acquitted for the forgery case he was facing before the criminal court. He therefore sought review of the decision by the PSC and requested for a personal hearing even naming some of the government officials who were his classmates when he did the exam from which he attained the certificate in question. The said letter of review was never responded to and the claimant brought this suit on 21.2.2018 seeking declaration that his dismissal was unfair and prayed for compensatory damages, certificate of service and costs of the suit.

3. In response, the respondent filed Notice of Preliminary Objection (P.O) seeking for the suit to be dismissed with costs for the reason that the suit is time barred and the court is divested of jurisdiction to entertain it by dint of section 90 of the Employment Act. The P.O was disposed of by written submissions.

Respondent's Submissions

4. The respondent submitted that the claimant was informed of termination of his employment on 5.7.2012 and as such, he ought to have filed his claim on or before 4.7.2015. Consequently, in the respondent's view, filing the suit on 21.2.2018 was out of time by over 5 years and as such the suit is time barred. He relied on *Maria Machocho V Total (K) [2013]eKLR*, *Joyce Wanjiku Muchiko & Another V Telkom (K) Limited [2012]eKLR* and *Rift Valley Railways (Kenya) Ltd V Hawkins Wanguza Musonye and Another [2016]eKLR* to support his submissions that a claim founded on the employment Act becomes time barred after the lapse of 3 years from the time the cause of action accrues and the court lacks jurisdiction to extend that limitation period.

5. He further relied on *Attorney General & Another Vs Andrew Maina Githinji & Another [2016]eKLR* where the Court of Appeal held that the employees' cause of action for unfair termination accrued on the date when they received their termination letters and they did not wait for the Criminal case against them to be concluded.

6. Finally she relied on *Samuel Thuku Mwangi V County Government of Laikipia & 3 others [2016]eKLR* where among other things Ongaya J held that the contractual or statutory right of an employee to appeal against a termination or to apply for review of the termination decision does not stay or stop running of the time of limitation as prescribed in the statute and that contractual or statutory provision that the employee has a right of appeal does not defer or adjourn or oust the right of the employee to impugn the dismissal in court.

Claimant's Submission

7. The claimant submitted that his appeal was disallowed on 31.3.2015 by the PSC and that is the date when the 3 years limitation period

started running. That from 31.3.2015 to 21.2.2018 when the suit was filed is 2 years 11 months and as such, the suit was filed before the lapse of the 3 years limitation period.

8. He further submitted that the facts of the instant suit are distinguishable from the *Rift Valley Railways (Kenya) Ltd V Hawkins Wangunza Musonye & Another [2016]eKLR* because the claimant herein was not engaged in alternative dispute resolution or negotiations but was appealing against the decision of the respondent as was procedurally required of him. He therefore prayed for the P.O to be dismissed with costs for lack of merits.

Analysis and determination

9. There is no dispute from the pleadings that the claimant was dismissed from employment by the letter dated 5.7.2012 by which he was accorded the right to appeal within 42 days. There is further no dispute that he appealed against the dismissal within the prescribed period but the appeal was not determined until 31.3.2015 when it was dismissed. Finally, there is no dispute that the claimant filed this suit on 21.2.2018. The issue for determination is whether the suit is time barred by dint of section 90 of the Employment Act.

10. Section 90 of Act provides that

“Notwithstanding the provisions of section 4 of the limitation of Action 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.”

11. The question that begs for answer is what is a cause of action and when does it occur in relation to termination of employment. Waki JA dealt with the issue in the *Rift Valley Railways Case aforesaid*. With regard to the meaning of a cause of action, the Judge was persuaded by the definition given by several English precedents including *Drummond Jackson Vs Britam Medical Association [1970] 2 WLR 688* where Pearson J. held that:-

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

12. Waki JA further adopted the definition of cause of action given by Lord Diplock in *Letang Vs Cooper [1964]2 AII ER 929 at 934* thus:

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

13. As regard the time when a cause of action in termination claim arises, Waki J held that the cause of action accrues from the time when the claimant receives the letter of dismissal. The Judge stated as follows:-

“... the cause of action in this cause did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letter of dismissal on 2.10.2010.”

14. The foregoing precedent is binding on this court and it sets fundamental principles of law that for purposes of suits for unfair or unlawful termination of employment contract, the limitation period starts running from the time when the employee receives information of the termination or if the contract allows right of appeal from the date when the appeal is determined. In the instant case, the claimant received information about his dismissal on or about 5.7.2012 and he exercised the option of appealing before coming to court. By appealing, in my view, he extended the disciplinary hearing so that the cause of action was postponed to the end of the appeal.

15. The reason for the foregoing view being that disciplinary hearing must be deemed to include the appeal proceedings. To that extent I respectively disagree with Ongaya J in his decision in *Samuel Thuku Mwangi Vs County Government of Laikipia & 3 others [2016]eKLR* in so far as he held that the contractual or statutory right for the employee to appeal or seek review of the decision to terminate employment does not affect the running of limitation period once the initial termination is communicated by letter to the employee.

16. In my considered view, an appeal by the employee can yield to either confirmation of the dismissal or setting aside of the dismissal and as such the employee has every right not to come to court until his appeal has been heard and dismissed by the employer. That is the time when his hope of regaining his job back is dashed. This view is fortified by the definition of cause of action in the aforesaid English cause of *Letang Vs Cooper [1964] 2 AII ER 929 at 934*.

17. In view of the foregoing analysis, I return that the cause of action herein arose on both 5.7.2012 and 31.3.2015 when the claimant received the information that his services had been terminated, and his appeal against the termination respectively was dismissed. It is further my opinion that the claimant had the right to sue either before lodging the internal appeal or after the dismissal of his appeal. In this case, he opted to wait for the outcome of the appeal before suing. The suit was filed within 2 years 11 months from 31.3.2015 when the appeal was dismissed. Consequently, I return that the suit is not time barred and the P.O is dismissed with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE