



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1486 OF 2018

(Formerly Nairobi HCCC 50 of 2017)

Before Hon. Lady Justice Maureen Onyango

PATRICK SAIDI MUSYOKA.....CLAIMANT

VERSUS

KENYA ROADS BOARD.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

The Claimant originally instituted this claim in the High Court on 2nd February 2017. The case was transferred to this Court on grounds of jurisdiction. On 10th August 2018, the 1st Respondent filed a Chamber Summons Application seeking the following orders-

- a. The Court be pleased to strike out the 1st Defendant/Applicant from the Plaintiff dated 30th January 2017.
- b. The suit against the 1st Defendant be dismissed for want of jurisdiction and for being time barred.
- c. The costs of this Application and the suit be awarded to the 5th Defendant/Applicant.

The Application is supported by the grounds on the face of the application and the Supporting Affidavit of Eng. Jacob Ruwa. It is the applicant's case that the Claimant instituted this suit against the 1st and 2nd Respondents vide the Plaintiff dated 30th January 2017 while the Claimant's employment was terminated on 18th January 2009 hence this Court lacks jurisdiction in the matter.

The Applicant avers that the suit as filed is contrary to section 90 of the Employment Act for having been filed out of time. That the suit is incompetent, bad in law and an abuse of the Court process as it discloses no cause of action against the 1st Respondent hence should be dismissed. It is the Applicant's case that it has no role to play in determining whether or not a person will be charged for committing a criminal offence.

The Claimant opposed the Application vide his Replying Affidavit filed on 4th October 2018. He avers that after a complaint was made by the 1st Respondent, the 2nd Respondent instituted criminal proceedings in Chief Magistrates' Criminal Case 1894 of 2008 which was heard and he was found guilty. He appealed the decision in High Court Criminal Appeal No. 58 of 2015 and vide a judgment delivered on 14th December 2016, he was acquitted and the conviction and sentence set aside. Consequently, he instituted proceedings for compensation for unlawful termination of his employment.

He contends that this Court has jurisdiction to hear the matter and further contends that the claim is not time barred. He urged this Court to dismiss the Application.

The Application was dispensed with by way of written submissions. The Respondent submits that since the Claimant's employment was terminated on 18th February 2009, the Claimant was supposed to have filed his claim within 3 years from that date. Filing the claim almost 8 years after his employment was terminated amounted to filing out of time hence the claim was statutorily barred by section 90 of the Employment Act.

It is submitted that the Claimant's acquittal did not revive the claim for wrongful employment. It is the Respondent's submission that upon the termination of his employment, the claimant was entitled to seek compensation for wrongful termination, notwithstanding the pendency of the criminal proceedings.

The respondent also submitted that there was no cause of action against it as it was merely a complainant. That the 2nd Respondent was tasked with the duty of investigating. That prosecuting was vested in the police.

In his submissions, the Claimant admitted that his employment was terminated on 18th February 2009. However, he submitted that the institution of criminal proceedings was a continuing injury which ceased when his conviction was set aside and he was acquitted. As such, his claim was not time barred. It is the Claimant's submissions that this Court has the jurisdiction to hear the matter.

Determination

Section 90 of the Employment Act 2007 provides as follows-

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.

The Claimant admitted that his employment was terminated on 18th February 2009. His explanation for filing the claim almost 8 years after his employment was terminated was that the suit against him was a continuing injury, which ought to have been addressed before he filed a claim for unfair termination of his employment. This court and the Court of Appeal have pronounced the legal position that the subsistence of criminal proceedings was not a bar to civil proceedings as was held in the case of ***The Attorney General and Another vs. Andrew Maina Githinji & Another [2016] eKLR***. As such, the Claimant was legally obliged to file his claim for compensation within 3 years of his termination. The claim for malicious prosecution is the one that is dependent upon the acquittal of the accused.

By failing to do so, his claim became time barred by virtue of section 90 of the Employment Act.

Reasonable Cause of Action

The Applicant has submitted that it is non-suited because it did not publish the defamatory matter and neither did it institute the criminal proceedings.

This is not the correct position because it is trite law that suits for malicious prosecution are brought against those in charge of instituting and prosecuting the criminal matters as well as the complainant where there is reason to believe that the complaint was driven by malice. It is the Claimant's case that the Applicant made the complaint so that the Claimant could be found culpable yet the Applicant knew that the Claimant was not the custodian of the cheque book and had no role to play in the fraud that he was charged with.

Under the Limitation of Actions Act, claims for malicious prosecution must also be instituted within 3 years, the same being a tort.

On the issue of libel, one of the ingredients is that the Defendant must have published the libellous matter. This was not the case according to the pleadings, the alleged defamatory statement was published by Taifa Leo. As such, the Claimant ought to have joined the Newspaper as party to these proceedings as opposed to the Applicant.

From the foregoing the entire claim is statute barred and thus unsustainable against either of the respondents. The same is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE