



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 2304 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**SHADRACK CHARO MWANGO.....CLAIMANT**

**VERSUS**

**BATA SHOE COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant herein filed a Statement of Claim on 23<sup>rd</sup> December 2015 in which avers that the Respondent suspended him from service on 30<sup>th</sup> April 2011 and that he was charged with stealing by servant in Criminal case No. 305 of 2011. He further avers that upon his acquittal on 31<sup>st</sup> March 2015 the Respondent refused to allow him back to work and withheld his salary arrears. He therefore seeks the following reliefs:

1. A declaration that the Claimant's termination from his employment was unlawful and unfair.
2. The Claimant be paid his terminal benefits totalling to Kshs.1,624,229.70.
3. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months' gross salary.
4. The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
5. The respondent to pay the costs of this claim.
6. Interest on the above at Court rates.

The Respondent filed its Memorandum of Response and Counter-Claim on 4<sup>th</sup> October 2016. It avers that on 3<sup>rd</sup> May 2011 the Claimant absented himself from work without authority or justification for 10 consecutive days until 12<sup>th</sup> May 2011. It therefore avers that the Claimant's termination is attributable to his own fault for absconding duty and failing to give notice or payment in lieu of notice. It has filed a counterclaim in which it seeks Kshs.24,278 being one month's salary in lieu of notice from the claimant. The Claimant in its Reply to the Memorandum of Response denied absconding duty and urged Court to dismiss the counter-claim with costs.

On 16<sup>th</sup> May 2018, the Respondent filed a notice of preliminary objection on grounds that the claim is statute barred by virtue of section 90 of the Employment Act. Each party filed its respective submissions to the preliminary objection and on 15<sup>th</sup> November 2018, the Claimant's counsel applied that the preliminary objection be decided in the main suit. This was allowed by the court. This judgment is therefore in respect to both the claim and the preliminary objection.

**Claimant's Case**

The Claimant, testified that he was employed in 1982 as general worker and thereafter as a driver. He testified that on 30<sup>th</sup> April 2011 he was called and accused of stealing. He was thereafter arrested and charged with stealing at Limuru Law Courts. He testified that he was released on bond and then went back to work but was advised to wait until the case was concluded. He testified that the case was concluded on 31<sup>st</sup> March 2015 when he was acquitted. He testified that he went back to work but was informed that he no longer had a job.

He testified that he was neither issued with a letter of termination nor informed of any offence that he had committed. That he was not given

an opportunity to defend himself. It was his case that he did not abscond duty on 30<sup>th</sup> April 2011. He testified that he was not informed of removal of his name from the payroll.

In cross-examination he testified that he reported daily for work, to see the Human Resource Manager. He testified that he never wrote to the company seeking to be paid his salary and that he never asked for his Certificate of Service. He testified that he was arrested together with his colleagues Kimeu and Kuria and that Kimeu continued to earn his salary.

### **Respondent's case**

PETER GIATHI, RW1, testified that he is the Human Resource Manager of the Respondent since 1993. He testified that from the records the Claimant was employed in 1993.

He testified that the Claimant and his workmates were involved in an incident of theft and were charged in court. It was his testimony that after he was arrested, the claimant never met him and he did not see the claimant's name in the records. He testified that the respondent was not able to contact the Claimant as it did not have the claimant's address and he did not show up at work. He testified that the Claimant was never disciplined, as he never went back to work. He further testified that the case of Kuria Ngechu who left employment under the same circumstances as the claimant was dismissed after the court found that it was time barred.

In cross-examination, RW1 testified that the Claimant was already working for the Respondent when he joined the employment of the respondent. He testified that the Claimant was issued with a letter of appointment which he signed. He testified that he did not know whether the Claimant was released as he was not involved in the criminal case. He testified that the respondent did not write to the Claimant when he absconded duty for reason that he was not available and the respondent expected him to report back for duty. Further, the respondent did not wish to interfere with the criminal proceedings. He testified that they did not initiate disciplinary proceedings against the Claimant since he was not available. He testified that the respondent did not inform the Claimant of his removal from the payroll on 13<sup>th</sup> May 2011 and that the claimant was not issued with a termination letter.

He testified that the Claimant was not suspended and he has never been paid any money for reason that he never went back to Respondent's premises to determine if he had any terminal benefits. He testified that the CBA provides for the payment of service pay upon termination only if it is not based on disciplinary grounds. It was his case that in the instant case the Claimant absconded duty which is a disciplinary case. He further testified that because the Claimant absconded duty his leave entitlement was not calculated. He further testified that the Claimant was not issued with a show cause letter because he did not show up at work. In re-examination, he testified that when the Claimant was arrested he never reported back to work.

### **Claimant's submissions**

In respect of whether the claim is time barred the Claimant relied on his submissions filed on 9<sup>th</sup> October 2018.

It was submitted for the Claimant that he was unfairly terminated, as the Respondent did not give any reason for his termination. He further submitted that the Claimant was not given any notice to show cause as to why his services could not be terminated contrary to section 41 of the Employment Act. He further submitted that Section 47(5) of the Employment Act places the burden of proving a valid reason for termination on an employer and that the Respondent had failed to prove by evidence any valid reason.

It was further submitted that the Respondent did not adhere to the mandatory statutory procedure in terminating the Claimant's employment. He submitted that the provisions of Section 45(4)(b) of the Employment Act were not complied with. Further, the Respondent did not provide minutes of any disciplinary hearing held in the presence of the Claimant prior to his termination.

It was submitted that the Claimant is entitled to 2 months' salary in lieu of notice since the Respondent did not issue the notice or pay in lieu of notice as required by the provisions of Section 35 of the Employment Act.

It was submitted that the claimant was never paid his prorated leave

of Kshs.486,866 for the 33 years he served the Respondent. It was further submitted that the Claimant is entitled to salary arrears from 1<sup>st</sup> April 2011 to 30<sup>th</sup> March 2015 for the period he was on suspension and that the claimant is also entitled to unpaid annual leave for 4 years when he was on suspension. It was further submitted that the Claimant is entitled to 12 months' salary as compensation for unfair termination as provided under Section 49(1)(c) of the Employment Act and to a Certificate of Service under the provisions of section 51 of the Employment Act. He further submitted that the claimant had proved his case on a balance of probabilities and is therefore entitled to costs of the suit.

### **Respondent's Submissions**

On whether the suit is time barred, the Respondent relied on its submissions filed on 23<sup>rd</sup> August 2018.

It submitted that the Claimant failed to meet the threshold set out under Section 47(5) of the Employment Act as he had failed to prove that he had been terminated. Further, the Claimant's admission to having been released in July 2015 together with lack of evidence of any attempt to communicate the reason for his absence even if he was in lawful custody proves that there was no termination. It relied on the case of **George Ogweno -V- Autolitho Limited [2018] eKLR** where the Court dismissed the claim for reason that the claimant failed to prove that he returned to work to explain the reason for his absence and so had not discharged the burden of proof as set out under Section 47(5) of the Employment Act.

It submitted that the Claimant is not entitled to 2 months' salary in lieu of notice as he absconded duty. It submitted that leave is a continuous injury that ought to have been claimed within 12 months. It is further submitted that the Claimant's salary arrears for the period between 1<sup>st</sup> April 2011 to 30<sup>th</sup> March 2015 is time barred. The respondent urged the Court to dismiss the claim with costs.

## **Determination**

The main issues for determination as discussed by the parties are:

- a. Whether the claim is time barred.

Depending on the finding in (a) above:

- b. Whether the Claimant was unfairly terminated.
- c. Whether the Claimant is entitled to the reliefs sought.

### **a. Whether the claim is time barred**

The Respondent in its preliminary objection filed on 16<sup>th</sup> May 2018 contends that the claim is time barred by virtue of section 90 of the Employment Act. It submitted that the cause of action accrued between 30<sup>th</sup> April 2011 and 3<sup>rd</sup> May 2011, when the Claimant alleges to have been suspended and when he absconded duty. Thus in accordance with section 90 of the Employment Act, the claim ought to have been filed on 30<sup>th</sup> April 2014 yet it was filed on 22<sup>nd</sup> December 2015. It submitted that the pendency of a criminal trial does not stop time from running as held by Radido J., in *John Kuria Ngechu v Bata Shoe Company [2018] eKLR* whose facts as similar to the present case.

The Claimant submitted that the Criminal Case No. 305 of 2011 was concluded on 31<sup>st</sup> March 2015 and the Claimant was acquitted under section 215 of the Criminal Procedure Code. That it is after the acquittal that the Claimant reported to work. It was his submission that at the time of conclusion of the criminal case, the claimant was on suspension. Further, that the Respondent had not released a termination or dismissal letter at the time of filing the suit. He submitted that this is a unique situation when the Court is being beseeched not to make a positive decision in favour of the preliminary objection. He urged the Court to consider the decision in *Kenya council of employment Migration Agencies v Nyamira County Government & 10 Others [2015] eKLR*.

At paragraphs 4 of this Statement of Claim, the claimant alleges that he was suspended on 30<sup>th</sup> April 2011 and charged with the offence of stealing by servant. He further avers that he was acquitted of the charges of on 31<sup>st</sup> March 2015. That upon reporting to work, the Respondent refused to take him back. The Claimant submitted that time started running after his acquittal in the criminal case in which the Respondent was the complainant. The Respondent disputes the suspension and avers that the Claimant absconded duty and was thereafter removed from the payroll on 13<sup>th</sup> May 2011.

Section 90 of the Employment Act provides:

**“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 did not prove that he was indeed suspended on 30<sup>th</sup> April 2011. It is however undisputed that he was arrested on that day. In the absence of proof of suspension, the claimant's cause of action against the Respondent arose on 30<sup>th</sup> April 2011 as it is the date he claims to have stopped working for the Respondent. He never received any salary from 1<sup>st</sup> April 2011, which he now claims up to the date of his acquittal.

I find that the Claimant's acquittal had no relation to the commencement of the cause of action. I agree with the finding of Radido J. in *John Kuria Ngechu v Bata Shoe Company [2018] eKLR* that the acquittal could not revive the cause of action. Further, in *Attorney General & another v Andrew Maina Githinji and Another [2016] eKLR* Waki JA held:

*“I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case 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 letters of dismissal on 2<sup>nd</sup> October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not... By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word ‘shall’.”*

Having found that the claim is time barred, the other two issues for determination are redundant and need not be considered. Consequently, the claim is dismissed on grounds that it is time barred under Section 90 of the Employment Act.

There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**