



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 168 OF 2016**  
**ROBERT MASIKA SIMIYU .....CLAIMANT**  
**VERSUS**  
**CIVICON COMPANY LIMITED .....RESPONDENT**  
**JUDGMENT**

**Introduction**

1. The Claimant brought this suit on 29.2.2016 alleging that he had been falsely imprisoned, maliciously prosecuted and his employment contract breached and wrongfully terminated by the Respondent. He therefore sought to recover Special as well as General damages for the said tort and unfair termination of his employment.
2. The Respondent never entered appearance and as such, the suit was undefended. It proceeded by formal proof on 20.7.2017 where the Claimant testified as CW1, thereafter he filed written submissions which I have carefully considered herein.

**Claimant's Case**

3. CW1 testified that he was employed by the respondent on 10.10.2010 as Turn boy for motor vehicle KAH 590B Lorry. His salary was Kshs.9,200 per month.
4. On 10.10.2011, he was destined to deliver 33 iron bars to Naivasha and a trader to Kampala using the said Truck. While exiting the Respondent's premises, the truck was stopped by security guards and arrested on allegation that he had stolen the said iron bars but the driver of the truck was let to go on with the journey. Thereafter, the Claimant was charged in Court with Criminal Case No. 3195 of 2007 but on 27.3.2013 he was found innocent and acquitted.
5. When he reported to work after the acquittal he was told to go away and wait until he was called. The employer never called him as promised nor was he told that he had been dismissed. He therefore sued after serving a demand letter through his lawyer.
6. He further stated that he never went for any annual leave during his employment period and prayed for his salary for November 2011, salary in lieu of notice, compensation plus costs.

**Analysis and Determination**

7. After careful consideration of the evidence and the submissions presented to the Court, it is not in dispute that the Claimant was employed by the Respondent as he alleges the foregoing finding is fortified by the payslips produced as exhibits by the Claimant herein. There is also no dispute that the Claimant was arrested on 11.10.2011 an allegation of theft and thereafter charged in Court in proceeding, which ended with his acquittal on 27.3.2013. Finally, it is without dispute that after the acquittal, the Claimant reported back to work with a copy of the Judgment but the HR Manager, Mr. Julius Ochieng instructed to go away and wait to be called back but he was never called back until 18.6.2013 when he served a demand letter and thereafter brought this suit. The issues for determination are:

- (a) Whether the Respondent falsely imprisoned and maliciously prosecuted the Claimant;
- (b) Whether the Respondent wrongfully and unfairly terminated the Claimant's contract of service;
- (c) Whether the Claimant is entitled to the reliefs sought.

### **False Imprisonment and Malicious Prosecution**

8. After careful consideration of the evidence and submissions by the Claimant, nothing was said to prosecute the tort of false imprisonment and malicious prosecution. Even if anything was said on the tort, I would still find and hold that the Claimant did prove that it is the Claimant who made the decision to arrest and charge the Claimant, and thereafter carried on the prosecution of the Claimant. Such decision to arrest and charge and prosecute most likely was done by person who are not parties to this suit including the police and the office of the Director of Public Prosecution.

### **Unfair termination**

9. The Claimant has contended that he was never served with notice to terminate his employment or told that his services were terminated on 11.10.2011 when he was arrested or any other day thereafter. However, the foregoing contention by the Claimant is not true in view of what he stated in his demand letter dated 18.6.2013. The letter stated in paragraph 3 as follows:

***“During this period i.e. from 11th October 2011, not only did you unlawfully terminate our client from gainful employment but also for unilaterally terminate his services without paying him a penny of his dues which has caused him untold suffering and harm and he now seeks damages.”***

10. After careful consideration of the foregoing excerpt from the demand letter, it is clear that the Claimant was terminated from 11.10.2011 and he knew that fact. From 11.10.2011 to 29.2.2016 when this suit was filed is a span of over 5 years. Under section, 90 of the Employment Act, no civil action or proceeding founded on the Act or contract of employment generally can be commenced after expiry of 3 years next after the time when the cause of action arose. Consequently, I find that the claim for damages for unfair termination of employment is time barred, having been filed after the statutory limitation period of 3 years. Consequently, the Court must now down its tools for lack of jurisdiction.

### **Disposition**

11. For the reasons stated above the suit is dismissed with no order as to costs.

**Dated and signed at Nairobi this 23rd day of February, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 2nd day of March, 2018**

**LINNET NDOLO**

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**JUDGE**