



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 813 OF 2016**

**BETWEEN**

**JOHN MUSAMBI MUTISYA ..... CLAIMANT**

**VERSUS**

**MASH BUS SERVICES LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant filed his Statement of Claim on 13<sup>th</sup> October 2016. He states he was employed by the Respondent around December 2005 as a Bus Conductor. His last salary was Kshs. 7,500. His contract was terminated by the Respondent in December 2012. He complains this was done without notice and just cause. He prays the Court to grant him against the Respondent, compensation for unfair termination and terminal dues.

2. The Respondent filed its Statement of Response on 28<sup>th</sup> November 2016. Its position is that the Claimant deserted duty in December 2012. Termination in any event occurred in December 2012. It is not until 13<sup>th</sup> October 2016, that the Claimant filed Claim. The Claim is time-barred under Section 90 of the Employment Act 2007.

3. Parties agreed to have Preliminary Objection considered and decided on the strength of the record. They confirmed the filing of their Submissions on 1<sup>st</sup> November 2017.

4. The Parties agree on the date of termination, and on the date of filing of the Claim. They agree there is a 3 year-limitation imposed by Section 90 of the Employment Act, on the filing of Claims such as the one filed by the Claimant herein.

5. The Claimant submits however that all Sundays, and Public Holidays, are excluded from the 3 year period. In his estimation, 84 days every year, translating to 222 days in 3 years, ought to be excluded in computing the time within which he presented his Claim. He cites Order 50 of the Civil Procedure Rules.

**The Court Finds:-**

6. The Claim was filed way beyond 3 year- limitation period, imposed under Section 90 of the Employment Act 2007. The proceedings of the Employment & Labour Relations Court are not regulated by the Civil Procedure Rules.

7. Even were they so regulated, there is nothing in Order 50 of the Civil Procedure Rules, to suggest the Court can interfere with Section 90 of the Employment Act, by stretching the period of 3 years, to accommodate late filings. This limitation law is a jurisdictional law, which cannot be interfered with, by procedural rules. The immutable nature of time limits is stated in the ***Kenya Court of Appeal Decision, Divecon v. Samani [1995-1998] EA 48***. The Claimant in any event, did not make any application under Order 50, for extension of time, to enable the Respondent answer to such a plea for extension, and enable the Court, to explore in depth, the legal validity of the Claimant's proposition on applicability of Order 50.

8. The submission that 222 ought to be excluded in computation of time is flawed. Section 90 of the Employment Act 2007 makes reference to 3 years, without qualification. It does not refer to days that should be excluded in counting the years.

9. The term 'year' is not defined in the Employment Act 2007. Section 3 of the Interpretation and General Provisions Act Cap 2 the Laws of Kenya, defines the term 'year' to mean a year reckoned according to the British Calendar.

10. This is the 365 –day Calendar in use in Kenya. 3 years' limitation under Section 90 of the Employment Act 2007, in the understanding of the Court, is based on the Calendar year. In computation of time under the Interpretation and General Provisions Act, there are excluded days. These include Sundays, Public Holidays or all Official Non-Working Days. Section 57 [d] states where an act or proceeding is directed, or allowed to be done or taken within any time not exceeding 6 days, excluded days shall not be reckoned in the computation of time. Exclusion applies over a limited period, not exceeding 6 days. Excluded days cannot fail to be reckoned in computation of the 3 year –limitation period, under Section 90 of the Employment Act 2007.

11. The Claimant is therefore incorrect in his deduction of certain days from the Calendar year, to justify his late filing of the Claim.

IT IS ORDERED:-

***a. The Claim is dismissed preliminarily for want of jurisdiction under Section 90 of the Employment Act 2007.***

***b. No order on the cost.***

Dated and delivered at Mombasa this 15<sup>th</sup> day of February 2018.

James Rika

Judge