



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 188 OF 2017

JUSTINE NGUMA KITONYO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

Introduction

1. The Claimant was employed as a teacher at [particulars withheld] Primary School, Kilifi having been posted there vide letter dated 13.12.2007. Thereafter he was arrested on allegation that he had carnal knowledge of his pupil A K C on the night of 19.4.2010 at her mother's kitchen. However after investigations, he was released without charges after the Doctor who examined the public confirmed that she had not been defiled.
2. Thereafter, the pupil was found dead and her body dumped in a bush and the Claimant was arrested and charged with murder on 27.9.2010 before Malindi High Court. After the trial, he was found guilty, convicted and sentenced to death on 3.4.2013. He was aggrieved and filed an appeal at the Court of Appeal at Malindi. After the hearing he was acquitted on 11.11.2016. Throughout the time of the trial and appeal, he was kept in custody.
3. After the acquittal, the Claimant went to the Respondents office in February 2017 to check on his employment only to be told that he had been dismissed on 30.8.2011 and a copy of the dismissal letter was in his file at the Respondent's office. He therefore brought this suit on 7.3.2017 alleging that he had been unfairly dismissed and not served with the dismissal letter dated 30.8.2011. He sought to recover terminal dues plus compensation for unfair termination totaling to Kshs.6,746,402 costs and interest.
4. The Respondent never filed any defence but the Notice of Preliminary objection (P.O) dated 15.5.2012 objecting to the suit on ground that it was time barred by dint of section 90 of the Employment Act. The Preliminary Objection was disposed by written submissions.

Respondent's Case

5. The Respondent submitted that the suit is statute barred and offends the mandatory provisions of section 90 of the Employment Act. She relied on the dismissal letter dated 30.8.2011 filed by the Claimant to fortify her submissions that the suit is statute barred. She cited a total of 6 judiciary precedents to support her case and demonstrate that limitation period in employment contracts cannot be extended. She concluded by urging that by virtue of the expiry of the limitation period, the Court's jurisdiction is extinguished.

Claimant's Case

6. The Claimant opposed the Preliminary Objection and prayed for the same to be dismissed with costs. He submitted that the Preliminary Objection was not competent because it is not founded on the Respondents pleading's. In his view, the Respondent having not pleaded limitation in a defence he was not entitled to raise a Preliminary Objection on that ground. He relied on *Fredrick Idiama Emojong Vs Seferio Mangeni Manyuru & 2 others [2017] eKLR* where Kaniaru J. cited the Court of Appeal decision in *Achola & Another Vs Hongo & Another [2004] eKLR 462* where it was held that failure to plead limitation in the defence disentitles the defendant from using Preliminary Objection on that issue.
7. He further submitted that limitation period did not start running until the day when he was notified of the dismissal in February 2017 after when he visited the Respondent's office. He maintained that the Respondent never served him with any letter or other documents while in the lawful custody. He relied on *Ezekiel Nyangoya Okemwa Vs Kenya Marine & Fisheries Research Institute [2016] eKLR* where Rika J. held that time started running from the time when the employee learned of the unfair or unlawful termination of his employment. He therefore urged the Court to find that his suit is not statute barred because it was filed shortly after learning of his dismissal.

Analysis and determination

8. The issue for determination never is whether the suit herein is statute barred by duit of section 90 of the Employment Act. The said ection provides that;

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or contract of service in general shall he or be instituted unless it commenced within three years next after the act, neglect or default complained in the case of continuing injury or damage within twelve months next after the cessation thereof.”

9. In this case, the Claimant was dismissed by the letter dated 30.8.2011 while under lawful custody facing murder charges in Court. He has pleaded in the statement of claim that he was never served with the dismissal letter dated 30.8.2011 while in prison and that he only came to learn of the same in February 2017 when he visited the Respondent’s office after acquittal by the Court of Appeal. He avers in his pleadings that the termination only took effect from the time it was communicated to him in February 2017. He therefore submits that the suit is not statute barred because it was filed a few weeks after the notification of the dismissal.

10. The Respondent, however contends that the dismissal was done on 30.8.2011 and therefore the suit having been filed on 6.3.2017 is statute barred because it was filed outside the 3 years window provided under section 90 of the Employment Act. She further contends that the issue of limitation is not a mere procedural issue but a substantive question that goes to the jurisdiction of the Court.

11. After careful consideration of the pleadings and the submissions filed by the parties, the following questions arise;

- (a) whether the Claimant was served with the dismissal letter dated 30.8.2011;
- (b) if the answer to the foregoing question is no, when was he notified of his dismissal;
- (c) depending on the answer to the above questions, when did the termination of the employment contract take effect;
- (d) whether filing the suit on 6.3.2017 was a violation of section 90 of the Employment Act.

12. The Respondent has not filed any defence to deny the Claimant’s averment that he was never served with the dismissal letter dated 30.8.2011 and that he only learned about it in February 2017 when he visited the Respondent’s office after his acquittal from the murder charges by the Court of Appeal. In my view, where an employer choses to terminate the contract of employment by a letter, the said termination is not effective until the letter is effectively served on the employee. Any other view would be wrong and unfair to the employee if the employers were to be allowed to be writing dismissal letter and keep them until the limitation period lapses and plead the defence of limitation. It would also open a window for the mischief of backdating termination letters.

13. The foregoing view is fortified by the persuasive decision of Rika J. in **Dr. Ezekiel Nyngoya Okemwa Vs Kenya Marine & Fisheries Research Institute [2016] eKLR** where it was held that;

“40. The upshot is that there was no evidence that Claimant received the termination letter in the year 2002, either from the Law firm or from the Respondent itself.

41. The evidence of Dr. Okemwa on the circumstances revolving around the discovery of the termination letter is persuasive. He was advised by the Permanent Secretary that a termination letter was in his employment record, when the Claimant sought the intervention of the Permanent Secretary in having suspension lifted, in September 2012.

42. It is therefore fair to assume that the Claimant learnt of the termination of his contract of employment on 22nd September 2012. This is the point at which time any action for unfair or unlawful termination should be deemed to have started running.”

14. The facts of the foregoing case and the facts of this case are on all fours. The Judge was only able to reach the cited conclusion after the hearing of evidence from the witnesses. In this case also, it is necessary to take evidence from witnesses on the issued of service of the dismissal letter dated 30.8.2011. The proof of service of the said letter is the pillar, which supports the defence of limitation, and if not established the said defence will crumble down.

15. The foregoing view leads to the question whether the Preliminary Objection meets the threshold of a Preliminary Objection as it was enunciated by **Mukisa Biscuits Manufacturing Limited Vs West End Distributors Limited [1969] EA. 696** where it was held that a Preliminary Objection should be on a pure point of law that should not require production of evidence and which has the ability to dispose the entire suit. As observed above, the Preliminary Objection on limitation herein is anchored on the proof of service of the dismissal letter dated 30.8.2011. The said service is a question of fact that requires evidence to prove it. Consequently, I find and hold that the Preliminary Objection by the Respondent herein does not meet the threshold of a Preliminary Objection as described by **Mukisa Biscuits Limited Case**.

16. As a parting short, I wish to state that, in this case the defence of limitation should have been pleaded in a response to the claim before being raised as a Preliminary Objection vide a Notice of Preliminary Objection. Kaniaru J. was faced with a similar Preliminary Objection in **Fredrick Idiama Emojong Vs Seferio Mageni Manyuru & 2 others [2017] eKLR** and found answer in the Court of Appeal decision in **Achola & Another Vs Hongo & Another [2004] eKLR 462** where it was held that the second Respondent having failed to plead limitation in his defence, was not entitled base Preliminary Objection on that issue Kaniaru J. held:

“10. As pointed out earlier, a defence opens the eyes of the court to see the contested, uncontested and/or admitted facts. When the

Preliminary Objection is raised. Later, it is then easy to see what facts it is premised on and whether those facts are contested or not. The defendants were wrong in plunging headlong into the Preliminary Objection without first filing the defence.”

17. Having found herein above that the Preliminary Objection herein raises matters which requires taking of evidence, it is my further finds that the facts of this case are distinguishable from the facts in the judicial precedents relied upon by the Respondent in prosecuting her Preliminary Objection.

Disposition

18. For the reasons that the Preliminary Objection dated 15.5.2017 is not well founded in pleadings and that it raises matters which require taking of evidence to prove, the Preliminary Objection is dismissed with costs. The Respondent is put at liberty to file and serve defence within 21 days from the date hereof after which the matter shall be go to full hearing.

Dated and signed at Nairobi this 12th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

LINNET NDOLO

JUDGE