



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 417 OF 2014

CYRUS WAIHAKA WACHIRA CLAIMANT

v

EQUITY BANK LIMITED RESPONDENT

JUDGMENT

1. Cyrus Waithaka Wachira (Claimant) was offered employment as an Accounts Assistant by Equity Bank Ltd (Respondent) through letter dated 5 July 2007.
2. On 22 February 2010, the Respondent wrote to the Claimant to inform him that he had been summarily dismissed with immediate effect because of involvement in fraud, which was the subject of a criminal case before the Magistrate's Court.
3. On 18 March 2014, the Claimant instituted legal proceedings against the Respondent and he stated the Issues in Dispute as
 - (a) Unfair termination/dismissal
 - (b) Non-payment of part salary due
 - (c) Non-payment of terminal dues and compensatory damages.
4. The Respondent filed a Response on 11 April 2014 contending that the dismissal was fair because the Claimant had been suspected of and was charged with committing a criminal offence.
5. The Respondent also contended that the Cause was statute barred in terms of section 90 of the Employment Act, 2007.
6. On 18 November 2015, the Respondent filed an application to have the Cause struck out for being statute barred.
7. The application was canvassed and in a ruling rendered on 18 March 2016, Ndolo J reached a conclusion that by dint of section 23(3) of the Limitation of Actions Act, the cause of action accrued on 1 April 2014, because the Respondent had written to the Claimant on that date to acknowledge owing him Kshs 59,044/- as final dues.
8. The Cause was heard on 10 May 2018, when the Claimant and Respondent's Assistant Human Resources Manager testified.
9. The Claimant filed his submissions on 28 May 2018 while the Respondent filed its submissions on 14 June 2018.
10. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as
 - (i) *whether the Cause is statute barred and if not,*
 - (ii) *whether the summary dismissal of the Claimant was unfair and*
 - (iii) *appropriate remedies/orders.*

Limitation

11. Despite the Court having dealt with the limitation question as a preliminary point, the Respondent's witness raised it afresh in her witness

statement and the Claimant was cross examined on it, thus it requires the Court's examination.

12. The Court of Appeal in *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR addressed the question of when a cause of action accrues in employment contracts and held that the cause accrues on receipt of the letter of dismissal.

13. The Claimant was dismissed from employment through a letter dated 22 February 2010. The Cause was filed on 18 March 2014.

14. In attempting to demonstrate that the cause of action was not statute barred, the Claimant drew the attention of the Court to a letter written to him by the Respondent on 1 April 2014 advising him of his final dues, and to the fact that the criminal case was concluded on 30 December 2012.

15. In terms of section 90 of the Employment Act, 2007, the Claimant ought to have instituted legal proceedings anchored on that injury or wrong within 3 years, that is, on or before 21 February 2013. He did not.

16. As far as criminal proceedings are concerned, the Court of Appeal has rendered itself in *Andrew Maina Githinji* (supra) that even in such cases an employee ought to bring a claim for unfair termination of contract within the prescribed time.

17. On the question of acknowledgment of debt, the Court is of the view that although intractably linked to the question of fairness of a termination of employment, the issue of final or terminal dues is more a question of breach of contract, and therefore can be severed from the cause of action for unfair termination.

18. The Court is of that view because the remedies for unfair termination of employment are primarily *reinstatement, re-engagement and or compensation*.

19. The compensation cannot be a debt or a liquidated pecuniary claim. It is discretionary and falls for the Court to assess.

20. In this particular case, the Court observes that the letter of 1 April 2014 related to salary for days worked and pending leave days. These 2 heads of claim can be severed from the claim for unfair termination of employment.

21. Consequently, the Court reaches the conclusion that the cause of action relating to unfair termination of employment was caught up by limitation law, and therefore the remedies of compensation and pay in lieu of notice would be legally untenable.

22. The Claimant must have been alert to the distinction for he identified the issues in dispute separately and clearly.

Acknowledged final dues

23. The Respondent acknowledged owing the Claimant Kshs 59,044/- being salary for days worked and pending leave on 1 April 2014.

24. The Court finds that the Claimant is entitled to the same.

Conclusion and Orders

25. The Court finds and holds that the cause of action for unfair termination of contract and any remedies applicable thereunder are caught up by section 90 of the Employment Act, 2007.

26. However, the Claimant is entitled to and is awarded Kshs 59,044/- as set out in paragraph 22 herein above.

27. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 29th day of June 2018.

Radido Stephen

Judge

Appearances

Mr. Ongicho instructed by Ongicho-Ongicho & Co. Advocates for Claimant

Ms. Mburu Instructed by Kimondo Gachoka & Co. Advocates for Respondent

Court Assistant Lindsey