



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAKURU

CAUSE NO.440 OF 2016

JOSEPH NYABWARI.....CLAIMANT

VERSUS

SPIN KNIT COMPANY.....RESPONDENT

RULING

The ruling herein relates to Notice of Preliminary Objections filed by the respondent, Spin Knit Company on 19th April, 2017 together and under paragraph 5 of the Memorandum of Defence and on the grounds that;

- i. The suit offends the provisions of section 90 of the Employment Act, 2007.*
- ii. The claimant has come to court too late in that the claim was filed on 25th October, 2016, which is more than 4 years after his dismissal on 19th June 2016.*
- iii. The claimant's case is misconceived, incompetent and bad in law and needs to be dismissed on the fore mentioned reasons.*

The claimant filed written submissions on 4th June, 2018 and the respondent made oral submissions on 5th June, 2018.

The respondent submits that the claimant was dismissed from employment with the respondent on 19th June, 2012 and filed the claim herein on 25th October, 2016 which is a period beyond 3 years allowed under section 90 of the Employment Act. The claim is statute barred and should be dismissed.

The claimant in the filed submissions case is that he was employed by the respondent in the year 2005 and on 19th June, 2012 he was arrested while at work and then charged in Criminal Case No.2109 of 2012, Nakuru on allegations that he had stolen 13 pieces of sweater. While the criminal proceedings were pending the claimant was summarily dismissed from his employment by the respondent. On 5th September, 2016 the claimant was acquitted of the charges and on 26th October, 2016 filed the claim herein.

The claimant also submits that the claim is not statute barred as it was filed within 12 years period provided for under section 4 of the Limitation of Actions Act. The cause of action only arose after the action of the respondent of causing the arrest of the claimant on 19th June, 2012 and 12 years have since not lapsed. With the acquittal of the claimant in the criminal case, the matters alleged by the respondent and leading to the summary dismissal are discharged and not true to justify the dismissal.

In the case of **Mathew Kipchumba Koskei versus Baringo Teachers Sacco [2013] eKLR** the court held that guidelines applicable in disciplinary cases in the employment relationship and there exists a criminal element and where the employee is exculpated or found innocent, the employee is entitled to setting aside of the punitive decision.

Determination

Section 90 of the Employment Act, 2007 provides that;

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based on 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 provisions of Limitations of Actions Act Cap 22 Laws of Kenya do not apply to claims made and or based on the provisions of the Employment Act, 2007. The rationale is that section 90 of the Employment Act, 2007 has repealed all provisions in terms of time limitations in employment and labour relations claims which must be filed with the court within 3 years since when the cause of action arose unless there is continuing injury or damage within 12 months next after the cessation thereof.

In addressing a matter similar as herein, the Court of Appeal in the case of **Thuranira Karauri Versus Agnes Ncheche [1997] eKLR** held that the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further. To my mind, even in the current constitutional dispensation, parties come to court in time. Time starts running as of the date employment terminates. Any other process undertaken upon such action must be viewed in terms of section 90 of the Employment Act, 2007 and the time allowed moving the court within 3 years.

The claimant in submissions has relied on the case of **Mathew Kipchumba Koskei versus Baringo Teachers Sacco [2013] eKLR** but the Court of Appeal in addressing the question of whether criminal proceedings and an acquittal of an employee should apply to stop time running held in the case of **Attorney General & Another versus Andrew Maina Githinji & another [2016] eKLR** that even where there are on-going criminal proceedings, in a claim arising out of employment contract, the cause of action arise from the date employment is terminated.

In this case, it is not in dispute that the claimant was arrested while at work on 19th June, 2012 and was charged with a criminal case and was acquitted whereupon he filed the claim herein on 26th October, 2016. Such was time outside the limitation period set out in law in mandatory terms under section 90 of the Employment Act, 2007.

The Court of Appeal in **Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR** held as follows;

Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited -vs- Samani [1995-1998] 1 EA P.48, ...in Josephat Ndirangu vs – Henkel Chemicals (EA) Limited, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.

The objections by the respondent are therefore with merit. The same are hereby allowed. The claim filed on 26th October, 2016 is time barred and is hereby struck out. Each party to bear own costs.

Delivered in open court at Nakuru this 14th day of June, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:

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