



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 852 OF 2016

JOSEPH SIMIYU WEKESA.....CLAIMANT

VS

PWANI ARMOUR LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 3rd November 2016 and filed in court on even date, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Response on 24th January 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Director, Samuel Mudaki Mugaro. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a night security guard, from September 2012 until May 2015, when his employment was terminated.

4. The Claimant’s case is that the termination of his employment was without any justifiable cause and in violation of due procedure. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 7,000.00
- b) Annual leave allowance for 2 years.....14,000.00
- c) Service pay for 2 years & 9 months.....133,303.50
- d) Public holidays.....15,080.80
- e) Off days @ 4 days per month.....35,547.60
- f) Underpayment.....99,101.10
- g) House allowance.....54,014.00
- h) Compensation for unfair termination.....84,000.00

The Respondent’s Case

5. In its Response dated 24th January 2017 and filed in court on even date, the Respondent admits having employed the Claimant as a night security guard but denies the effective date of September 2012, pleaded by the Claimant. In this regard, the Respondent states that the Claimant was employed from 1st July 2013 until 30th October 2013.

6. On 31st October 2013, the Claimant was arrested on allegations of theft. He was subsequently charged in Criminal Case No 2647 of 2013. The Respondent states that the Claimant remained in custody for over a year and could not therefore continue with his employment. Upon

release from custody, he did not report on duty and therefore abandoned his work.

7. The Respondent denies terminating the Claimant's employment. The Claimant's entire claim is thus denied.

Findings and Determination

8. From the pleadings, evidence and submissions on record, the following issues emerge for determination before the Court:

- a) Whether the Claimant's claim is statute barred;
- b) Whether the Claimant has made out a case for unfair termination of employment'
- c) Whether the Claimant is entitled to the remedies sought.

Claim Statute Barred?

9. It is common cause that the Claimant was arrested on 31st October 2013 and was subsequently charged in Mombasa Criminal Case No 2647 of 2013. He was detained in custody for over one year and did not therefore report to work after the date of his arrest.

10. The Respondent contends that the Claimant's claim was filed more than three (3) years after accrual of the cause of action and the claim is therefore statute barred by dint of Section 90 of the Employment Act, 2007.

11. In his final submissions filed on 4th April 2018, the Claimant states that his incarceration prevented him from accessing legal advice and filing his claim in time. He asks the Court to hold that time did not run against him until he was released from custody.

12. Section 90 of the Employment Act provides as follows:

“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 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.”

13. The Court of Appeal in ***Beatrice Kahai Adagala v The Postal Corporation of Kenya [2015] eKLR*** and ***Attorney General v Andrew Maina Githinji & another [2016] eKLR*** confirmed that Section 90 of the Employment Act strips the Court of any discretion to extend time in employment matters.

14. As to the question whether the Claimant's incarceration could halt the running of time, I am guided by the finding in the ***Andrew Maina Githinji Case*** (supra) that an employee cannot rely on pendency of criminal proceedings to avoid limitation of time.

15. The short of it is that the Claimant's entire claim is time barred by virtue of Section 90 of the Employment Act and this Court lacks jurisdiction to entertain it. The claim is therefore struck out with no order for costs.

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr.Tolo for the Claimant

Mr. Odera for the Respondent