



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 893 OF 2017

BETWEEN

ZAIB WANGA MAKOKHA.....CLAIMANT

VERSUS

BOMU HOSPITAL.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wabuyabo Lukoba & Company Advocates for the Claimant

Mwakireti Ndumia & Company Advocates for the Respondent

RULING

1. The principal facts in this Cause are undisputed: the Claimant was employed by the Respondent Company as a Pharmaceutical Technologist on 7th April 2011; he was charged with the offence of stealing Respondent's medicines vide Mombasa Chief Magistrate's Criminal Case Number 1809 of 2013, on 29th July 2013; he was summarily dismissed by the Respondent on 12th August 2013, based on the allegation that he stole Respondent's medicines; and the criminal trial ended in Claimant's acquittal on 3rd July 2017.
2. The Claimant filed this Claim on 30th November 2017. He alleges termination was unfair under the Employment Act 2007, and seeks the Court to order the Respondent to pay unpaid salaries from July 2013 to July 2017; and the equivalent of 12 months' salary in compensation for unfair termination- total Kshs. 2,160,000. He seeks also costs, interest and any other suitable remedy.
3. At paragraph 22 of its Statement of Response filed on 12th January 2018, the Respondent raises objection on the jurisdiction of the Court, based on Section 90 of the Employment Act 2007. The Respondent filed also, an Application dated 12th January 2018, asking the Court to dismiss the Claim under Section 90 of the Employment Act 2007. This law stipulates that employment claims brought under the Act, shall be made within 3 years from the date the cause of action arises. Termination took place on 12th August 2013. The Claim was filed on 30th November 2017, about 4 years and 3 months after termination.
4. The Claimant filed his Replying Affidavit sworn on 7th February 2018, on 7th February 2018. His position is that he could not initiate the Claim herein, while the criminal proceedings were underway. The decision to dismiss the Claimant was a matter of continuing injury, which under Section 90 of the Employment Act 2007, could be litigated within 12 months after cessation of continuing injury.
5. Parties agreed to have the Court consider and determine Objection, on the basis of their Pleadings, Affidavits, Documents, and Submissions on record. They confirmed filing of Submissions on 20th March 2018.

The Court Finds:-

6. The issues raised by Respondent's Objection have adequately and determinatively, been dealt with in a catena of decisions of the Employment and Labour Relations Court, and Appeals at the Court of Appeal of Kenya. The Parties have highlighted these decisions in their Submissions. Among these decisions are *[CA] Attorney General & Another v. Andrew Maina Githinji & Another [2016] e-KLR* and *[E&LRC] James Mugeria Igati v. Public Service Commission of Kenya [2014] e-KLR*.

7. Based on this succession of judicial opinions, it is fair to hold that: the criminal trial was unrelated to disciplinary proceedings at the workplace; the Claimant was not prevented from initiating this Cause by his criminal trial; the Respondent was not barred from disciplining the Claimant by the criminal proceedings; the two processes are different, in their procedures, evidential threshold and objectives; the disciplinary process relates to a private business, and is based on the Employer's right to manage its business, and in particular its labour-force; the criminal trial is a public affair, involving the State, aimed at protecting the general public and maintaining of law and order; and, the outcomes in the respective processes, have no relation to each other, in the absence of the Parties expressly stating in their contracts, collective agreements, human resource manuals or letters of suspension, that disciplinary sanction should abide the outcome of criminal proceedings.

8. The Claimant did not have any reason to join in his mind, his criminal trial, to the disciplinary process. He misapprehended the effect of the criminal trial, on the disciplinary process. The Court, in which he was tried for stealing, was not mandated to enquire into the Claimant's guilt or innocence for an employment offence under the Employment Act 2007; it was discharging a public obligation under the Criminal Procedure Code. The Respondent did not surrender or in any way limit its prerogative of managing its workplace to public authorities.

9. Termination took place on a specific date known to the Parties. There was no continuing injury. There was only a contract of employment, terminated on a specific date known to the Parties, a date when the cause of action arose. There was no continuous injury, and if there was, when does the Claimant consider it to have ceased, so that he justifies filing of the Claim within 1 year of cessation thereof? The criminal trial cannot by any stretch of argument, have amounted to continuing injury, so that its cessation, would grant the Claimant 1 year within which to commence his Claim for unfair termination. The Court of Appeal in *Rift Valley Railways [Kenya] Limited v. Hawkins Wagunza Musonye & Another [2016] e-KLR*, held that there are no exceptions to the 3 –year limitation period under Section 90 of the Employment Act 2007, save for cases of continuing injury or damage. Termination of the contract subject matter of the dispute herein, was a single act of termination, which happened on a specific date- 12th August 2013.

10. The Court is satisfied that it is not seized of temporal jurisdiction under Section 90 of the Employment Act 2007, to hear and determine this Claim. ***The Application dated 12th January 2018 filed by the Respondent is allowed, the Claim dismissed, with no order on the costs.***

Dated and delivered at Mombasa this 6th day of July 2018.

JAMES RIKA

JUDGE