



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1005 OF 2017**

**CATHERINE WANJERI WAMAITHA.....CLAIMANT**

**VERSUS**

**PETROLEUM LIMITED.....1ST RESPONDENT**

**THE ATTORNEY GENERAL.....2ND RESPONDENT**

**RULING**

**Introduction**

1. The claimant brought this suit on 30.5.2017 claiming damages for unfair termination of his employment contract by the first respondent plus a further claim against the two respondents for malicious prosecution in Criminal Case No. 1297 of 2011 at Makandara Law Courts Nairobi. The respondents both denied liability to pay the said damages and further raised Preliminary Objection(P.O) to this suit on ground that the suit is incompetent and statute barred by dint of section 90 of the Employment Act. The P.O. was disposed of by written submissions.

**1st Respondent Case**

2. The first respondent contended that she employed the claimant in 2003 and rose to the rank of a Supervisor. On 21.3.2011 she was arrested by police and charged with Criminal Case No 1297 of 2011 for theft of Kshs.1,932,412 following a complaint made by the Director of the first Respondent. Thereafter the claimant never reported back to work again until 30.5.2017 when she filed this suit.

3. It was therefore urged that the claim for damages under the Employment Act is statute barred because under section 90 of the Act, and that she ought to have filed it within 3 years from 21.3.2011 when she was arrested and stopped working. As regards the claim for Malicious Prosecution, it was urged that this Court lacks jurisdiction to entertain it because that claim is not related to unlawful dismissal.

**Second Respondent's Case**

4. The second respondent's submissions on the claim under the Employment Act are in agreement with those made by the first respondent above. It was therefore urged that the P.O. should succeed because the claimant ought to have filed his employment claim within the statutory time and not to wait until criminal case was concluded. He cited the Court of Appeal decision in *Attorney General & Another Vs Andrew Maina Githinji [2016]eKLR* where it was held that:

***“A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary process that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein.”***

5. The second respondent did not however object to the tortious claim of malicious prosecution.

**Claimant's Case**

6. The claimant contended that after being charged in court she was granted bail and reported back to work but the company's Director Mr. Sood told her to go home and await for conclusion of the said criminal case. After the case was withdrawn on 31.1.2017, she reported back to work but she was not allowed to resume work. She therefore contended that the issue of when the cause of action arose is a triable issue that warrants full trial to determine whether termination accrued when she was arrested or when she was barred from resuming work after acquittal on 31.1.2017.

7. As regards the claim for Malicious Prosecution she submitted that this court has jurisdiction to entertain the same and cited *Nagvi Syed Qmar Vs Paramount Bank Ltd & Another [2015]eKLR*.

### **Analysis and Determination**

8. The issues for determination are:

(a) Whether the claim under the Employment Act is statute barred by dint of section 90 of the Act.

(b) Whether this court has jurisdiction to continue entertaining the claim founded on the tort of Malicious Prosecution if the claim under the Employment Act collapses.

### **Statute barred suit**

9. There is no dispute that the claimant was arrested and charged with criminal case and did not work again until the case was withdrawn on 31.1.2017. The claimant alleges that she was suspended by the Director until the conclusion of the criminal proceedings. The first respondent has denied the alleged suspension. The claimant has not pleaded the date when the suspension was given and whether the suspension was in writing. Consequently, the court finds on the basis of the pleadings herein that the alleged verbal suspension by the claimant does not constitute a reasonable basis for trial. In this court's view, that allegation will be impossible to prove in the absence of any written evidence or admission from the first respondent.

10. In view of the foregoing finding, I proceed to determine the P.O. on the basis that the cause of action arose from 14 days after the arrest of the claimant when the employer became entitled to terminate her under section 44(4) (f) of the Act. From 21.3.2011, 14 days lapsed on 4.4.2011.

Under section 90 of the Act, the claimant ought to have commenced the proceedings related to the termination of her contract of employment within 3 years from 4.4.2011 the latest being 4.4.2014. It follows therefore that filing the suit on 30.5.2017 was outside the limitation period and I strike out the claim under the Employment Act for being statute barred by dint of section 90 of the Act. In making the foregoing finding, I am guided by the decision of the Court of Appeal in *Attorney General and Another Vs Andrew Maina Githinji*, aforesaid, which is binding on me.

### **Claim under tort of Malicious Prosecution**

11. There is no dispute that the claim for malicious prosecution was filed within the limitation period and it should proceed to trial. However considering the fact that the claim for termination of contract of employment, which principally invoked the jurisdiction of this court under section 12 of the Employment and Labour Relations Court Act has collapsed, I find that the court is no longer seized with the jurisdiction to continue entertaining the suit any more.

12. The claimant cited the persuasive decision by Rika J. in *Nagvi Syed Qmar Vs Paramount Bank Ltd and Another [2015]eKLR*, where the court held that the jurisdiction of this court is not limited only to contractual disputes between employers and employees but it also extends to tortious claims between the said parties. I wish however to hold that such tortious claim should only be brought before this court only where the courses of actions arise from the same event or are conjoined at the hip by the facts and circumstances under which they arose, and that the purpose of joinder of the causes of action under one suit is to avoid duplicity of suits. It follows therefore that except in torts founded on the labour law, all other tortious claims ought to be filed in other courts which are clothed with the necessary jurisdiction. Consequently, I decline to continue entertaining the outstanding claim for damages which is based on pure law of tort.

### **Conclusion and Determination**

13. For the reason that the claim under the Employer Act is statute barred, I strike it out with no order as to costs. The residue claim being purely tortious in nature and not founded on Labour law, I direct that it be and is hereby transferred to the Chief Magistrate's Court Milimani for hearing and determination.

**Dated, Signed and Delivered in Open Court at Nairobi this 17th day of August, 2018**

**ONESMUS N. MAKAU**

**JUDGE**