



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 850 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**RASHID DUANE IBRAHIM.....CLAIMANT**

**-VERSUS-**

**KENYA WILDLIFE SERVICE.....RESPONDENT**

**RULING**

This suit was filed by the claimant on 22<sup>nd</sup> May 2014. The issue in dispute is that the claimant's sustained injury on 11<sup>th</sup> March 2009 while in the course of employment and was as a consequence retired on medical grounds. He prayed for remedies as follows –

- a. A declaration that the act of sending the Claimant on early retirement by the Respondent on the basis of his disability amounted to an act of discrimination against the Claimant and that it offends Article 27(4) of the Constitution.
- b. A declaration that the Respondent has violated and continues to violate Section 15 of the Persons with Disabilities Act.
- c. A declaration that the Respondent has violated and continues to violate Section 5(3) (a) of The Employment Act.
- d. A declaration that the right fair labour practices and to reasonable working conditions under Article 41 (1) and (2) (b) have been violated and remain violated by the Respondent
- e. A declaration that the right to be treated with dignity as provided for tender Article 54(1) has and remains violated by the Respondent.
- f. An order for calculation and award of the Claimant's retirement benefits and pension on the basis of a retirement age of 60 years as provided for under Section 15(6) of the Persons with Disabilities Act.
- g. An order for a refund of Kshs.500,000.00/ — deducted by the Respondent from the Group Personal Accident injury claim.
- h. A declaration that the Petitioner is entitled to payment of Kshs.4,071,600.00 tabulated at Kshs.26,100.00 per month being the amount in arrears he would have otherwise earned had his lights not been violated for thirteen (13) years until the retirement age of sixty (60).
- i. Compensation.
- j. Special damages as prayed in paragraph 18 of the statement of claim.
- k. Any other order and or directions that this court may deem fit to grant

In the memorandum of reply, the respondent states that at the time of the claimant's accident, it had in place the KWS Superannuation Scheme and the claimant was a member. That it further secured an insurance cover with Kenindia Assurance Company to cover injury while at work. That following the claimant's injury the respondent paid the claimant's hospital bills amounting to Kshs.500,000 at Karen Hospital. That thereafter the claimant applied for retirement on medical grounds by his letter dated 26th February 2010 and he was retired on 21<sup>st</sup> May 2010. That upon retirement the claimant was paid his benefits under National Social Security Fund (NSSF) and the respondent's superannuation scheme.

At paragraph 16 and 17 of the memorandum of reply the respondent pleads as follows –

*“16. That the Claimant's Claim for damages/compensation for injuries sustained while at work including inflicted disabilities, reduced and/or lost earning capacity are misplaced, untenable and improperly before this Court as the Court lacks jurisdiction to determine issues of compensation in relation to injury at places of work as provided under the Work Injury Benefits Act 2007, which vests such jurisdiction in the Magistrates' Courts.*

*17. That the respondent shall before the hearing of this case raise Preliminary Objections:-*

*(a) That this Court lacks jurisdiction to make declarations that the Claimant's various constitutional rights have been infringed upon and/or breached as such powers rest with the High Court of Kenya more particularly the Constitutional Division.*

*(b) That this Court lacks jurisdiction to deal with matters of Compensation and accordingly paragraphs 17, 18, 19 and 20 of the statement of Claim ought to be struck out.”*

The case came up for hearing on 20<sup>th</sup> December 2017 before Mbaru J. During cross-examination, the court adjourned the case and directed the parties to address the court on Section 90 of the Employment Act. The parties did so by way of written submissions.

#### **Claimant's Submissions**

In the submissions of the claimant dated 15<sup>th</sup> January and filed on 17<sup>th</sup> January 2018, it is stated that the delay in filing the claim was caused by physical challenges to the claimant who lost a limb due to injuries he sustained on 11<sup>th</sup> March 2009, that he was fitted with a prosthesis and had to learn to walk, and that he was suffering from psychological trauma. It is further submitted that the delay was not unreasonable.

The claimant relies on the case of **LYDIA PAMELA NYAGALA -V- ROYAL MEDIA SERVICES LIMITED [2016]** in which the court stated–

*“The provisions of section 90 of the Employment Act, 2007 are premised on sound legal foundations. Such is set to regulate employment and labour relations disputes and to ensure that an employee whose rights have been violated is able to get appropriate redress within 3 years of termination. Equally an employer is protected against indolent claimants who unreasonably delay filing their suits. This is aptly captured by the Court of Appeal decision in the case of **GATHONI VERSUS KENYA CO-OPERATIVE CREAMERIES LIMITED, CIVIL APPLICATION NO. 122 OF 1981** that;*

*The law on limitation is intended to protect the defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”*

#### **Respondent's Submissions**

The respondent submitted that the claim was filed on 22<sup>nd</sup> May 2014 outside the limitation period of 3 years without leave. The respondent relied on the case of **MARIA MACHOCO -V- TOTAL KENYA LIMITED** in which the court declined to extend the limitation period citing the decision in **DIVECON LIMITED -V- SAMANI**. The respondent further referred the court to its pleadings at paragraph 16 of the memorandum of reply to the effect that this court has no jurisdiction to hear personal work injury matters, which are reserved for Magistrates' courts.

#### **Determination**

I have considered the submissions of parties. The claimant does not deny filing this suit out time and has given his reasons for filing out of time. He however did not seek leave before filing the suit out of time.

I will not comment on the averments by the respondent to the effect that this court has no jurisdiction to determine claims for work injury not only because the same is not correct but because the directions of the court were specifically that the parties address it on Section 90 of the Employment Act only.

As the claimant does not deny filing suit outside the three year limitation period provided for under Section 90 of the Employment Act, this court has no jurisdiction to hear the same with the result that the claim is struck out for being statute barred.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**