



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

CAUSE NO. 195 OF 2013

ALFRED MWANGI KANINU.....CLAIMANT

v

DELMONTE KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Alfred Mwangi Kaninu (Claimant) sued Delmonte Kenya Ltd (Respondent) alleging unfair termination of employment and breach of contract. For the breaches, the Claimant sought a total of Kshs 26,962,444/-.
2. In its Response, the Respondent contended that the causes of action advanced by the Claimant were statute barred (limitation).
3. On the merits, the Respondent maintained that the dismissal of the Claimant was justified on grounds of gross misconduct and that the Claimant was not entitled to any relief.
4. The preliminary point on limitation was taken before a hearing on the merits, and in a ruling delivered on 5 February 2015, the Court overruled the objection by holding that the causes of action were presented by the Claimant not time barred because the injuries/wrongs complained of were of a *continuous nature*.
5. The Cause was heard on 17 April 2018 and 27 June 2018 when the Claimant testified and closed his case. The Respondent opted not to lead any evidence.
6. After close of hearing and pending delivery of judgment, the Respondent filed a motion on 15 October 2018 under certificate of urgency seeking a review of the order dismissing the preliminary objection on limitation.
7. The Court reserved determination of the application in this judgment.
8. The Court has considered the pleadings, evidence, submissions and the record and come to the view that the Issues for determination are, *whether the Cause was time barred and if not, whether the dismissal of the Claimant was unfair, whether there was breach of contract and appropriate remedies/orders*.

Limitation

9. Limitation goes to jurisdiction and is therefore not purely a procedural/technical matter.
10. It is not in dispute that the Claimant was dismissed through a letter dated 12 November 2009.
11. The Claimant admitted in cross examination having received the letter on the same day. The Memorandum of Claim was lodged with the Court on 11 February 2013 (3 years and 4 months later).
12. It is also common that the Claimant was charged before the Magistrate's Court on 9 November 2009 and that he was acquitted on 24 February 2011.
13. When the Claimant moved Court, he stated the issue in dispute as

unlawful termination of account of unlawful/wrongful dismissal.

14. In paragraph 6 of the Memorandum of Claim, the gravamen of the Claimant's case was outlined thus

6. On or about 9th November, 2009 the Respondent suspended the Claimant from employment and subsequently on 12th November 2009 unlawfully and or wrongfully dismissed the Claimant's employment without notice or any reason contrary to the provisions of Sections 32, 33 & 34 of Labour Relations Act 2007, Section 12, 8, 15(c) of the Labour Institutions Act 2007 and Rule No. 16 of the Industrial Court Rules.

15. In terms of remedies, the Claimant outlined the same in paragraph 12 as

- a. One month salary in lieu of notice
- b. Salary for the days the Claimant was out of employment from 2009 to 2022
- c. Accrued leave on pro-rate 14 years
- d. Commuter allowance
- e. Medical, school and paternity leave allowance
- f. Severance pay for 17 years
- g. House allowance
- h. Full compensation.

16. It does not require much discernment that the reliefs sought by the Claimant flowed directly from the alleged injury of unfair/unlawful dismissal on 12 November 2009.

17. When addressing the objection on limitation raised by the Respondent, the Court was of the view that

5. The injury or damage complained of are of a continuous nature and had not abated by the time the claim was filed.

18. That position, in this Court's view, and on the basis of binding authority from the Court of Appeal was erroneous. An unfair termination of employment cannot be a *continuing injury*.

19. A dismissal is effective from the time it is communicated to the employee and that is the point at which the legal injury or wrongful action is suffered.

20. It would be illogical to treat such a once off action/injury as continuous in nature.

21. The Court of Appeal (majority) in *Attorney General v Andrew Maina Githinji* (2016) eKLR discussed at some length when a cause of action accrues within an employment relationship and came to the conclusion that it accrues when the employee is informed of a dismissal. It is not necessary for this Court to repeat what Waki JA stated for the majority.

22. In *G4S Security Services (K) Limited v Joseph Kamau & 468 others* (2018) eKLR, the Court of Appeal was clear in its mind (paragraph 20) that **unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act.**

23. However, does this Court have the power to do what the Respondent is seeking (review the order of a concurrent Court?).

24. In *Eastern and Southern African Development Bank v African Green Fields Ltd & Ors* (2002) 2 EA 397, the Court held that **An order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Further it could not be reviewed on the ground that another other judge of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue.**

The proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.

25. Regrettably, this Court is of the view that it cannot revisit the limitation question under its review jurisdiction, and it will go ahead to address the substantive issues raised on the merits.

Unfair termination of employment

Procedural fairness

26. The Claimant was issued with a suspension letter dated 9 November 2009 which outlined the allegations against him and instructing him to stay from work until further notice.

27. On 12 November 2009, the Respondent wrote to the Claimant to inform him that he had been dismissed from employment and the Claimant moved the Court on 11 February 2013.

28. The Claimant contended that the dismissal was unfair because there was no notice of termination. The Respondent did not call any witness or lead evidence to show whether a notice of termination was given, or a hearing as required by section 41 of the Employment Act, 2007 was held.

29. Section 35(1) of the Employment Act, 2007 contemplates written notice of termination and because none was issued to the Claimant, the Court finds that the termination was procedurally unfair.

Substantive fairness

30. With the conclusion on procedural fairness, it is not necessary for the Court to examine whether the Respondent discharged the burden expected of it by dint of sections 43 and 45 of the Employment Act, 2007.

Breach of contract

Lost income

31. The Claimant alleged breach of contract in that he was entitled to Kshs 15,399,384/- being the remuneration he would have earned until retirement in 2022.

32. In the view of the Court, the Claimant did not provide any contractual, evidential or legal foundation to this head of claim.

33. The Court would also endorse the principle expressed by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Accrued leave

34. An employee is entitled to at least 21 days annual leave with full pay every year. The Claimant sought for leave accrued over 14 years.

35. In consideration of section 28(4) of the Employment Act, 2007, the Claimant could only validly make a claim for leave for the last one and a half years of employment (18 months). However, he did not lay an evidential foundation as to the periods or years he sought for and/or did not go on leave and this head of claim is declined.

Commuter allowance

36. A commuter allowance is a facilitative allowance and the Court finds no legal justification for paying an employee such an allowance for the period he would have worked but for the unfair termination of employment.

Medical, school and paternity leave

37. In the view of the Court, these 3 items also fall in the same category as commuter allowance and lost income.

38. In any case the Claimant did not disclose details of any of his children who were going to school or when he had a child to be entitled to paternity leave. The contract also provided that school fees was a reimbursable item.

Severance pay

39. The Claimant's case was not one of redundancy and therefore severance pay for 17 years does not arise.

Compensation

40. Compensation is discretionary, and in the view of the Court, and after considering the circumstances of separation and the limitation question, this is not a fit case to award compensation despite the finding that the termination of employment was procedurally unfair.

Conclusion and Orders

41. The Court finds and holds that though the Claimant established that there was unfair termination of employment, this is not a fit case to award compensation.

42. On the claims for breach of contract, the Court finds and holds that the same were not proved to the required standard.

Delivered, dated and signed in Nairobi on this 30th day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mageto instructed by M’Njau & Mageto Advocates

For Respondent Ms. Kikanu instructed by Simba & Simba Advocates

Court Assistant Stella