



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 655 OF 2017

BETWEEN

ALEX KIEMA MWINZI.....CLAIMANT

VERSUS

FACTORY GUARDS MOMBASA LIMITED.....RESPONDENT

RULING

1. The Claimant filed his Statement of Claim on 7th August 2017. He states he was employed by the Respondent as a Security Guard on 22nd February 2005. He rose to the position of Senior Guard. He was suspended by the Respondent on or about 1st February 2014. He was alleged to have been involved in theft of Christmas gifts. He was dismissed on 24th February 2014. He was asked to appeal the decision if he so wished. He appealed. On 4th June 2014, the Respondent gave a decision on appeal, reducing summary dismissal to termination. The Claimant was offered terminal benefits, to be paid upon clearance. The Claimant holds termination was unfair and prays for Judgment against the Respondent for terminal benefits, compensation, and certificate of service. He prays for costs and interest.

2. The Respondent filed a Notice of Preliminary Objection on 24th August 2017. It is argued that the Claim was filed out of time, under Section 90 of the Employment Act.

3. The Objection was heard on 4th October 2018.

4. The Respondent submits that the Claim offends Section 90 of the Employment Act 2007. Termination was on 10th March 2014. After the Claimant made an Appeal against termination decision, a decision was taken on 4th June 2014, reducing summary dismissal to normal termination. Termination was effective on 4th June 2014.

5. The Claim was filed on 7th August 2017. It was filed out of the 3 year period prescribed under Section 90 of the Employment Act. The Respondent's position is supported by the letter of termination, Claimant's letter on appeal, and Respondent's letter commuting summary dismissal into normal termination. The Claim is time-barred.

6. The Respondent counters that facts have to be ascertained through evidence. The effective date of termination is important. Termination letter states the Claimant was summarily dismissed effective 24th February 2014. The other letter communicating appeal decision is dated 4th June 2014. It reduced summary dismissal to regular termination with notice and other terminal dues. There are terminal dues, shown to have been paid through Claimant's Bank Account by the Respondent, on 23rd July 2014. The Respondent relies on *Societe Generale, London Branch [Respondent] v Geys [Appellant] [2012] UKSC 63*, in its proposition that both Parties need to know when termination took place, in clear and unambiguous terms. The Court held:

- It is necessary, therefore, that the Employee not only receive his payment in lieu of notice, but that he receive notification from the Employer in clear and unambiguous terms, that payment has been made, and that it is made in the exercise of the contractual right to terminate the employment with immediate effect. He should not be required to check his bank account regularly, in order to discover whether he is still employed. If he does learn of a payment, he should not be left to guess what it is for, and what it is meant to do.
- Given that such a notice is a necessary incident of the relationship, a wise Employer would take to give it in writing...if payment is made direct to the Employee's bank account, the Employee's bank is his agent for receipt of payment, but it is not without more his agent for the receipt of notification of what the payment is for. The notification has to be given to the Employee.

7. The Claimant suspended on 31st January 2014.
8. He was summarily dismissed on 24th February 2014.
9. He lodged appeal internally against the decision.
10. The Respondent made a decision to reduce summary dismissal decision into regular, or what is commonly referred to as normal termination. This involved payment of 1 month salary in lieu of notice, among other terminal benefits.
11. Section 36 of the Employment Act 2007 governs payment in lieu of notice. It is worded as follows:

“ Either of the Parties to a contract of service to which Section 35 [5] applies, may terminate the contract without notice, upon payment to the other Party of the remuneration which would have been earned by that other Party, or paid by him as the case may be, in respect of the period of notice to be given under the corresponding provision of that section.”

12. The understanding of the Court is that termination becomes effective, only upon receipt of notice pay. Notice pay is not meant to be received at a future date, after the date alleged in the letter of termination, to be the date of termination. The mutuality of obligations comes to an end, when notice pay has been received.

13. This intention of the law can be read likewise, under the law on redundancy. **Section 40 [1] [g] of the Employment Act**, states that an Employer shall not terminate a contract of service, unless the Employer has paid the Employee not less than 1 month's salary in lieu of notice. It is payment of notice, which effectuates termination.

14. It is clear from the Supreme Court of the United Kingdom decision, cited by the Respondent above, and from the provisions of the Employment Act 2007, that termination becomes effective, on payment and receipt of notice pay. Termination cannot take effect where notice pay is deferred. Contractual obligations and rights come to an end, when that which the law requires to be done, is done. The practice where Employers write termination letters, with given effective dates, but without actual payment of notice, has no support in law, with regard to the effective date of termination.

15. In this case it is clear that the Respondent reduced the Claimant's summary dismissal into termination through notice. But notice pay was promissory in nature. Bank Statements show payment of unspecified terminal dues to the Claimant after 4th June 2014. This, in the view of the Court, cannot therefore have been the effective date of termination. Notice pay was not received by the Claimant on 4th June 2014. This date cannot be the undisputed date, when the cause of action arose. Parties would have to provide the Court with evidence at the trial, to show when the cause of action arose. The Claim cannot be rejected based on the grounds stated by the Respondent.

IT IS ORDERED:-

a) The preliminary objection is declined.

b) Parties shall endeavour to set down the substantive Claim for hearing

Dated and delivered at Mombasa this 14th day of December 2018.

James Rika

Judge