



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO. 986 OF 2013**

**PAUL MAYANDA OTWERE.....CLAIMANT**

**VERSUS**

**WELLS FARGO LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 28.6.2013 alleging that his services were unfairly terminated by the respondent on 28.6.2010. He therefore prayed for reinstatement to his job or in the alternative he be paid his terminal dues plus compensatory damages for the unfair termination.
2. The respondent admitted in her defence that she summarily dismissed the claimant by the letter dated 4.5.2010 which was served upon him on 24.5.2010. She further averred that the termination was grounded on valid reason and that he was paid his terminal dues and issued with a certificate of service. In addition, the respondent averred that the suit was filed out of time and is therefore statute barred.
3. The suit was head on 18.10.2018 what the claimant testified as Cw1 and the respondent's HR Manager Mr. Stephen Kangethe testified as Rw1. Thereafter both parties filed written submissions.

**Claimant's Case**

4. Cw1 stated that he was employed by the respondent in October 2003 as a driver and worked diligently until 28.6.2010 when he was suspended indefinitely. That the reasons cited for the suspension was that he caused many accidents through negligence. He however produced a bundle of Police Abstracts to prove that he was not blamed for any accident he was involved in and that he was never charged with any traffic offence.
5. He produced payslip for July 2010 to prove that he was still in employment as that time. He contended that after the suspension letter dated 28.6.2010, he was never served with any termination letter. He therefore denied that his suit was filed out of time and prayed for the reliefs sought.
6. On cross examination Cw1 denied ever being served with a dismissal letter and a cheque for Kshs.7,200. He also denied ever writing the letter dated 2.6.2010 contending that the signature thereon was not his. He however admitted that after the suspension he instructed Sangwe Advocate to serve the demand letter dated 17.6.2010. He maintained that in July 2010, he was still in Employment and he received his last salary. He admitted that he never reported to the police that the letter dated 2.6.2010 was forged. He also admitted that he was dismissed for being involved in 4 accidents within a short duration, but contended that the police abstracts produced do not show that he was charged with any offence. He further contended that all his payments from the respondent were done through the bank.

**Defence Case**

7. Rw1 admitted that the claimant was employed by the respondent as a driver until he was dismissed by the letter dated 4.5.2010. That the letter, certificate of service plus the cheque for terminal dues were dispatched to Kisii Branch and it was received by the claimant on 24.5.2010. That the reason for the summary dismissal was involvement of the claimant in numerous accidents the last one being 25.4.2010.
8. Rw1 further testified that on 2.6.2010, the claimant wrote to him a letter referring to his previous letter sent on 14.5.2010 about his suspension and complained that instead of the matter being resolved he received dismissal letter, cheque for Kshs.7,21 and certificate of

service, on 24.5.2010. Rw1 further stated that the claimant notified him by the said letter that he had rejected the said documents because he was not paid all his service.

9. Rw1 denied that the letter dated 2.6.2010 contained a forged signature. He contended that the reason for dismissing the claimant was valid because other employee were refusing vehicles assigned to the claimant due to his negligence.

10. On cross examination Rw1 stated that he suspension letter dated to the claimant was signed by the Branch Manager, Kisii on 28.4.2010. He therefore explained that the date of 28.6.2010 on the letter must be a typing error. He referred to the certificate of service to maintain that the claimant was employed from 22.12.2003 to 27.4.2010 when he stopped working before the dismissal letter was written on 4.5.2010. he therefore contended that the continued payment of salary up to July 2010 was an error caused by delay and clearance and notice to the Payroll Department and stated that the pay will be recovered from his terminal dues.

### **Analysis and determination**

11. There is no dispute that the claimant was employed by the respondent until he was dismissed for misconduct. The issues for determination herein are

- a) Which date was the dismissal done. b) Whether the suit is statute barred. c) Whether the dismissal was unfair.
- d) Whether the reliefs should be granted.

### **Termination date**

12. The claimant contended that he was never served with any termination letter but only suspension letter dated 28.6.2010. The respondent has contended that the suspension letter was signed on 28.4.2010 but erroneously dated 28.6.2010. She further contended that the termination was vide letter dated 4.5.2010 which was received by the claimant on 24.5.2010 and he responded to it on 2.6.2010 declining the cheque for terminal dues. The claimant has however denied authoring the said letter and contended that the signature is not his but a forgery.

13. I have carefully considered the rival contentious from Rw1 and Cw1.

There is no doubt that the employer herein invoked his power to dismiss the claimant under section 44 of the Employment Act on 4.5.2010 by writing a dismissal letter, cheque for terminal dues and certificate of service. However the claimant alleges that he was never served with that letter and as such, the termination never crystallized.

14. After careful consideration, the signature on the claimant's letter dated 2.6.2010 and the other signature in his verifying affidavit and witness statement dated 28.6.2013, I find that they resemble each other. The claimant was therefore served with the dismissal letter and responded to it on 2.6.2010. He did give any evidence as to why the employer would want to forge his signature. He has also confirmed that he never complained to the police that his signature was forged by the respondent.

15. The claimant contended that he was paid his salary for July 2010 and for that reason he was still in employment. That contradicts with his pleading in paragraph 9 where he stated that he was dismissed on 28.6.2010. I find the explanation by Rw1 reasonable and believable that, the continued payment of salary after dismissal was an error caused by the delay in clearance by the claimant and also delay in notifying the pay roll section. Consequently I return that the termination of the claimant's contract of service took effect on 24.5.2010 when he was served with the dismissal letter dated 4.5.2010 and not 28.6.2010 as alleged by the claimant.

### **Statute barred suit**

16. Under section 90 of the Employment Act, a claim founded on the said act or contract of service in general must be commenced within 3 years after the date when the cause of action arose or 12 months after a continuing injury ceases. In this case, the cause of action arose on 24.5.2010 and expired on 24.5.2013. Consequently filing the suit on 28.6.2013 was outside the limitation period and I return that it is statute barred. The corollary to the foregoing is that the court lacks jurisdiction to determine the suit on merits. I will therefore not deal with the other issues because I must down my tools.

### **Conclusion and Disposition**

17. I have found that the claimant was dismissed effective 24.5.2010 when he received the dismissal letter. I have further found that the suit was filed after the limitation period of 3 years from that date. Consequently, I strike out the suit with no costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018**

**ONESMUS**

**N.**

**MAKAU**

**JUDGE**