



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 570 OF 2015

LUCAS WAMALWA WAMBATICLAIMANT

VERSUS

KENYA RAILWAYS CORPORATIONRESPONDENT

RULING

INTRODUCTION

1. The claimant was employed by the respondent from 2006 as Financial Accountant and later became the General Manager Finance. On 19/10/2009 he was charged with the offence of theft in Criminal Case No. 3395 of 2009 and in the meanwhile he was subjected to disciplinary process by the employer which culminated to his dismissal on 5/11/2009. He appealed against the dismissal on 8/12/2009 but the appeal was disregarded and/or ignored.

2. After 6 years trial, the claimant was acquitted of the Criminal charge on 3/7/2015 and thereafter brought this suit on 10/8/2015. The suit prays for:

(a) Declaration that the claimant's dismissal contravened the Rules of Public Service Commission Regulation and is therefore null and void.

(b) An order for payment of half (1/2) salary and house allowance from 28th October 2009 to 3rd July 2015.

(c) An order for the Respondent to reinstate the Claimant's employment with accrued promotions and salary increments and payment of suspended salary until the conclusion of the Criminal case No. 3395 of 2009 on 3rd July 2015.

(d) Interest on the award in (b) and (c) above at commercial rates till payment in full.

(e) Costs of this claim

3 The respondent has denied liability and pleaded the defence of statute bar. It is the defence case that the cause of action having arisen on 5/11/2009, the claimant was barred by Section 90 of the Employment Act from filing the suit after the lapse of 3 years from 5/11/2009. He therefore filed Notice of Preliminary Objection (PO) dated 8/1/2016 which was disposed of by written submission. The only issue for determination herein is whether the suit herein is statute barred.

ANALYSIS AND DETERMINATION

4 There is no dispute that the claimant was employed by the respondent from 2006 until 5/11/2009 when he was dismissed for gross misconduct. There is no dispute that this suit was filed on 10/8/2015 almost six years after the said dismissal. Considering the provisions of Section 90 of the Act and the Court of Appeal precedents cited, the suit was filed outside the statutory period.

5 Section 90 of the Act provides that:

“Notwithstanding the provisions of Section 4 of the Limitation of Action Act, No civil action or proceedings based on or arising out of this Act or a contract of service in general shall be or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of a continuing injury or damage within twelve months next after the cessation thereof”.

6. In RIFTVALLEY RAILWAYS (KENYA) LTD V HAWKINS WAGUNZA MUSONYE & ANOTHER [2016] e. KLR the Court of Appeal held that:

“For us it is clear from our reading of Section 90 aforesaid that there are no exceptions to the three years limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of continuing injury or damage but one of a single act of termination”.

7. I entirely agree with the appellate court that the three years period cannot be extended in a case involving a single act of termination like in this case. The claimant was dismissed on 5/11/2009 and all his rights under his contract of employment were known to him. He also had the ability to claim them before he was caught by the statute bar on 4/11/2012. Consequently I find and hold that suit herein is statute barred and the court has no jurisdiction by dint of Section 90 of the Act to continue entertaining it. I must therefore down my tools now.

DISPOSITION

8. For the reason that the suit was filed after 3 years permitted by Section 90 of the Act, I allow the Preliminary Objection and strike out the suit with no costs.

Dated, Signed and Delivered this 31st March 2017

O.N. Makau

Judge