



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT**

**AT MOMBASA**

**CAUSE 354 OF 2016**

**JOSEPH SEIF DECHE.....CLAIMANT**

**VERSUS**

**MISTRY V.N. MULJI & COMPANY..... RESPONDENT**

**JUDGMENT**

**Introduction**

- 1) This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment by the respondent on 30.5.2013. It is the claimant's case that the reason cited for the termination of his contract was not true and he was never accorded a fair hearing before the dismissal.
- 2) The respondent has denied ever dismissing the claimant and averred that the claimant was never her employee. In the alternative, she averred that the claimant ceased to work for her on 29.4.2013 and as such the suit was statute barred and ought to be struck out.
- 3) The suit was disposed of by written submissions on the strength of the pleadings, written witness statements and documentary evidence.

**Claimant's Case**

- 4) The claimant stated that he was employed verbally by the respondent on 3.5.2011 as an electrician earning Kshs. 12,350 per month. He used to sign salary voucher which were retained by the respondent. He used to work from 7.30am – 5.00 pm every Monday to Friday and 7.30am – 1pm every Saturday.
- 5) On 27.4.2013, Mr. Garama Ruwa Nzai passed at the claimant's work place and saw electric wires there and escorted the claimant to the Kiembeni police station. The claimant was thereafter charged in court on 29.4.2013 and was released on bond the following day. When he reported to work on 1.5.2013, he was stopped at the gate by the security guards who told him that Mr. Garama would not let him in until he met Mr. Katan. He kept on checking on Mr. Ketan until 30.5.2013 when he was told by Mr. Harun that he had been dismissed and would not be paid any salary. He was also not paid any terminal dues. He therefore continued attending court until he was acquitted on 24.7.2015. Thereafter he served a demand letter on 26.10.2015 through his advocate. He submitted that his suit is not statute barred, that he worked from 2011-2013, and that the reliefs sought should be granted.

**Defence Case**

6) Mr. Yunnus Harun filed written statement for the defence. He stated that he has worked for the respondent for 20 years as the manager Kiembeni workshop. He explained that the respondent's core business is to build homes in which she employs various artisans and technicians as and when work is available. He filed payment vouchers for casual workers for the period between August 2011 and April 2013. He pointed that as at 18.4.2013, the claimant worked for one day at the rate of Kshs 475. He maintained that the claimant was a casual labourer who was paid a daily rate when there was work for him.

7) It was submitted for the respondent that the last day for the claimant to work was before 18.4.2013 and not 29.4.2013. She also submitted that the claimant's employment never converted to regular term contract under section 37 of the Employment Act because he never worked for a complete month. She further submitted that the claimant has failed to prove that he was unfairly dismissed within the meaning of section 43, 44, 45 and 46 of the Act.

### **Analysis and Determination**

8) There is no dispute that the claimant worked for the respondent between 2011 and 2013. There is also no dispute that the claimant was arrested and charged with theft on 29.4.2013, released on bond and finally acquitted on 24.7.2015. The issues, for determination are:-

- a) Whether the claimant was employed as a casual employee or employed as regular terms employee.
- b) Whether the suit is statute barred.
- c) Whether the claimant was dismissed unfairly.
- d) Whether the reliefs sought should issue.

### **Casual vs. Regular Term Employment**

9) Mr. Yunus Harun, witness for the defence has contended that the claimant was a casual employee and his last day of work was before 18.4.2013 and as at that date he had worked for only one day in April 2013. He produced payment voucher for casual workers for the period 30.8.2011 to 18.4.2013 to support his alleged casual employment of the claimant. He further contended that the claimant was paid on daily basis and only for the day worked. He also contended that the claimant being an electrician his services were not needed throughout but only when the buildings they were contracted to build required such services.

10) I have carefully considered the evidence and submissions presented to the court by both parties. It is clear that no written contract of employment was produced as evidence by either party. Under section 9(2) of the Employment Act, the obligation of writing the contract of employment lies with the employer. However, under section 9(1) of the Act the said obligation accrues only if the employment it is for a number of working days amounting in the aggregation to the three months or more, or if it provides for the performance of any specified work which could not reasonably be expected to be completed within a period of working days amounting to three months.

11) The burden of proving that he was employed for an aggregate of three months or more, or that he was contracted to do a specified work which could not reasonably be completed within three months lies with the employee who alleges that he was so employed. In this case, the claimant never called any witness or produced any form of evidence to prove that he worked for an aggregate of three months or that he was given a task which could not reasonably and in three months.

12) In addition he has not produced any evidence to rebut the evidence by the defence witness that he was a casual employee hired only on need basis and paid a daily wage for the days worked. He has not for example disproved the payment vouchers produced as exhibits by the defence and which clearly indicate

that he was working intermittently for either 1,2,3 or 4 days in a week. Consequently, I find and hold that the claimant was at all material times employed by the respondent on casual basis and on diverse dates between 2011 and 2014.

### **Time barred Suit**

13) The objection to the Suit on ground of time bar was pleaded in the defence but it was never prosecuted in time. According to the claimant the last day he was on duty was 27.4.2013 when he was arrested and thereafter arraigned in court to face charges of theft. That after securing release on bond on 30.4.2013, he reported back to work but he was not allowed until 30.5.2013 when Mr. Harun told him that he had been dismissed. Mr. Harun has however denied the alleged termination and maintained that the claimant was a casual employee who last worked for the respondent on 17.4.2013.

14) I have carefully considered the evidence by both sides regarding the claimants last day at work. Although Mr. Garama Ruwa Nzai has not testified in his case to deny that the claimant was at work on 27.4.2013, I find on a balance of probability that the last day the claimant worked for the respondent was 17.4.2013. The reason for foregoing view is that the statement recorded by Mr. Garama at the police station indicated that Mr. Garama witnessed the theft of wires by the claimant on 17.4.2013 and reported the matter to the police on that day, and not 27.4.2013 as alleged by the claimant in his comprehensive statement filed in court on 9.9.2016. The said statement by Mr. Garama was filed in court by the claimant on 9.9.2016. The claimant's evidence is in sharp conflict with respect to the date Mr. Garama witnessed the theft and reported to the police. Indeed it corroborates the respondent's payment voucher for casuals dated 18.4.2013 which shows that the claimant worked for only one day in April 2013, which must be 17.4.2013 when Mr. Garama witnessed the theft by the claimant and reported to the police.

15) In view of the foregoing observations, it is clear that the claimant being a casual employee, his employment ended on 17.4.2013. He never worked for the respondent thereafter. He has not adduced any evidence to prove that he reported to work from 17.4.2013. He also did not produce any evidence to prove that he was released by the police after arrest nor did he produce any evidence to prove that he was released on bond on 30.4.2013 and reported back to work.

16) Without any evidence to rebut the defence evidence that the claimant was not employed by the respondent after 18.4.2013, I agree with the defence that this suit was filed out of time and it is therefore statute barred. Under section 90 of the Act, any claim under the Act, or founded on employment contract must be commenced in court within 3 years next after the date the cause of action arose. As already found herein above, the Cause of action herein however arose on 17.4.2013. Three years from 17.4.2013 lapsed on 17.4.2016 but the suit was commenced on 17.5.2016. That was clearly outside the statutory period of 3 years. Consequently, I find and hold that the suit is incompetent for being time barred.

### **Unfair Termination**

17) For the reason that the suit is statute barred, the court's jurisdiction is extinguished and must not continue entertaining this suit any further.

### **Disposition**

18) The Suit is struck out with no order as to costs.

Signed, Dated and Delivered at Mombasa this 5<sup>th</sup> day of May 2017.

**ONESMUS MAKAU**

**JUDGE**