

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 377 OF 2017

BENJAMIN MUTISYA MUTUA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. This ruling is in respect to a preliminary objection raised by the Respondent by notice dated 15th March 2017, to the effect that the Court lacks jurisdiction to entertain the Claimant's claim, which is time barred.

2. In response, the Claimant filed a replying affidavit sworn on 25th April 2017, in which he states that he was arrested in August 2011 and charged with the offence of attempted defilement contrary to Section 9 of the Sexual Offences Act. He adds that while the criminal case was pending, he was dismissed from employment, on allegations that he was of immoral behavior in that he had defiled a pupil.

3. The Claimant further depones that he was advised by officials of the Kenya National Union of Teachers that he could not challenge the dismissal until the criminal case was concluded. He lodged an appeal against the dismissal while awaiting the outcome of the criminal case. The Claimant was cleared of the criminal charges on 21st November 2013, upon which he began pursuing his reinstatement to the Register of Teachers.

4. The Claimant claims that the cause of action herein arose on 7th September 2015, when the Respondent declined his request for reinstatement.

5. The Respondent's objection is based on Section 90 of the Employment Act, 2007 which provides as follows:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years after the act, neglect or default complained of or in the case of a continuing injury or damage within twelve months next after the cessation thereof.”

6. The Claimant's reply is hinged on the argument that during the pendency of the criminal case against him time did not run. In ***Wilberforce Ojiambo Oundo v Regent Management Limited [2013] eKLR*** and ***Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR***, this Court held that there is no necessary nexus between internal disciplinary proceedings facing an employee at the work place and a criminal trial against the same employee.

7. The pendency of a criminal trial cannot therefore be used as a defence against an objection on limitation of time. The Claimant's dismissal took effect on 5th October 2012 and that is when time began to run. His claim filed on 22nd February 2017 is therefore statute barred and this Court lacks jurisdiction to entertain it.

8. The result is that the Claimant's claim dated 7th February 2017 is struck out with no order for costs.

9. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF OCTOBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwalimu for the Claimant

Mr. Oyucho for the Respondent