



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1643 OF 2015

ALFRED OMWOYO.....CLAIMANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

RULING

1. This ruling proceeds from a preliminary objection raised by the Respondent by notice dated 14th January 2016, to the effect that the Claimant's claim is statute barred by dint of Section 90 of the Employment Act, 2007. By consent of the parties, the objection was urged by way of written submissions.

2. Section 90 of the Employment Act, on which this objection is grounded provides as follows:

90. 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 next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

3. In response to the objection, the Claimant submits as follows:

a) That he became aware of the letter of dismissal one year after its issuance upon which he lodged an appeal. The appeal was not determined until 24th June 2014, which the Claimant reckons as the accrual date;

b) That since the dismissal was predicated upon the Claimant's conviction of a criminal offence, time did not begin to run until determination of his appeal against the conviction on 14th March 2013.

4. The Claimant's submissions beg the question as to what is meant by a cause of action. This matter was laid to rest by the Court of Appeal in *Attorney General v Andrew Maina Githinji and another [2016] eKLR* where **Waki J.A.**, writing the lead decision for the majority, posed the question "***What is meant by a cause of action and when does it arise in a claim for unlawful/unfair termination?***"

5. In answer to this question the learned Judge of Appeal quoted the following definition offered by **Pearson J** in *Drummond Jackson v Britain Medical Association (1970) 2 WLR 688 at 616*:

"A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of

complaint.”

6. Looking at the Statement of Claim filed in court on 18th September 2015, the Claimant’s complaint is that he was dismissed by letter dated 22nd August 2011. To my mind, the dismissal is the indisputable cause of action and the effective date is as stated in the letter communicating the dismissal. In the submissions filed on behalf of the Claimant, there was an allusion that the Claimant became aware of the dismissal letter, one year down the line. There was however no evidence to support this allegation and the Court did not consider it.

7. The other argument pushed by the Claimant is that because his dismissal was predicated on conviction of a criminal offence, then time did not begin to run until the criminal matter was concluded. This question was also addressed in the ***Andrew Maina Githinji Case*** (supra) where the Court of Appeal cited with approval the decision **Rika J** in ***James Mugeria Igati v Public Service Commission of Kenya [2014] eKLR*** where my brother Judge held that the pendency of criminal proceedings is not a bar to civil proceedings, on the same facts. In reaching his decision, the learned Judge drew a distinction between a disciplinary process which is purely private between an employer and an employee and a criminal trial which is a public process.

8. Further, in an earlier decision by the Court of Appeal in ***Kibe v Attorney General (Civil Appeal No 164 of 2000)***, it was held that acquittal in a criminal trial does not automatically render an employee immune to disciplinary action. It seems to me therefore that the law on the impact of criminal proceedings on the employment relationship is well settled and it is this: that there is in fact no necessary nexus between the two and an employee who comes to court late cannot be excused on the basis that there have been criminal proceedings against them.

9. The effect of the foregoing is that the Claimant’s claim filed on 18th September 2015 is statute barred and as held by different judges of this Court, the Employment Act, 2007 does not avail any discretion to extend time (see ***Maria Machocho v Total Kenya Limited [2013] eKLR*** and ***Rama Krishnarao v Saj Ceramics Limited [2013] eKLR***).

10. In the end, the Court finds the Claimant’s claim incompetent and proceeds to strike it out with no order for costs.

11. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 3RD DAY OF NOVEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochieng for the Applicant

Miss Mboya for the Respondent