



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO.253 OF 2014

ALEX OLUCHILI MILOKO

CLAIMANT

v

NAKUMATT HOLDINGS LIMITED

RESPONDENT

JUDGMENT

1. Alex Oluchili Miloko (Claimant) was employed by Nakumatt Holdings Ltd (Respondent) on 28 March 1995 as a shop Assistant. He rose to position of Deputy Branch Manager.
2. On 27 June 2014, the Claimant commenced legal proceedings against the Respondent alleging unprocedural, wrongful and unlawful dismissal, and he quantified his total claim as Kshs 11,176,681/-.
3. The Respondent was served and it raised a preliminary objection contending that the cause of action was statute barred, but the Court declined to uphold the objection.
4. The Respondent consequently filed a Response on 4 December 2014, and on 5 December 2014, the Cause was fixed for hearing on 3 November 2015.
5. The hearing date was fixed in the presence of Mr. Wahome holding brief for Mr. Kirwa for the Claimant while Mr. Aim held brief for Mr. Nyaberi for the Respondent.
6. When the Cause was called out for hearing on 3 November 2015, there was no representation for the Respondent, and the Court allowed the hearing to proceed as the date had been taken in the presence of the Respondent's legal representative.
7. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether cause of action is statute barred, whether the dismissal of the Claimant was unfair and appropriate remedies/orders including contractual/statutory entitlements sought by the Claimant such as overtime and leave.*
8. The Court notes that the Claimant attempted to sneak in evidence of his wages from 1995 to 2006 through the submissions in what he called *Affidavit in Support of the Claimant's Claim.*
9. The said evidence is rejected.

Whether cause of action is statute barred

10. Although the Court rejected the preliminary objection on limitation, a few words are merited.
11. The evidence on record is that the Claimant became aware of his dismissal on 31 January 2013, when the Respondent advised his advocate after they sought to know his employment status.
12. The request to know the status could not have been made if the Claimant was aware that he had been dismissed in March 2010, and therefore this cause of action is not caught up by section 90 of the Employment Act, 2007.
13. The Court takes comfort in reaching that conclusion after considering the jurisprudence from

comparative jurisdictions, and which general legal principles the Court endorses as being applicable even in our jurisdiction.

14. In *McMaster v Manchester Airport plc* (1998) IRLR 112 EAT, the Employment Appeal Tribunal, England was of the view that the effective date of termination of a contract of employment could not be earlier than the date on which an employee received the knowledge that he had been dismissed with reference to the circumstances of the case.
15. In *Hindle Gears Ltd v McGinty & Ors* (1984), IRLR 477, the Court of Appeal, England held that an uncommunicated decision to dismiss an employee was not sufficient to effect a dismissal. Of course there would be exceptions.

Whether dismissal was unfair

Procedural fairness

16. Section 41 of the Employment Act, 2007 provides for due process before an employee's services is terminated on the grounds of *misconduct, poor performance and or physical incapacity*.
17. In paragraph 14 of the Response, it was contended that the Claimant was dismissed from employment because he fundamentally breached his contract of service through fraud and gross misconduct.
18. A hearing was therefore mandatory. The question therefore is whether a hearing as contemplated by section 41 of the Employment Act, 2007 was held.
19. The Claimant challenged the process of dismissal during testimony, and stated that he was not given notice.
20. He called the Branch Secretary of the Kenya Union of Commercial, Food & Allied Workers who testified that the union was not called to a hearing prior to dismissal.
21. In his testimony, the Claimant stated that he got information of his dismissal on 31 January 2013, through his advocates, L.M. Ombete.
22. The Respondent had in a letter of that date and in response to the advocate's letter advised the advocate that the Claimant had been dismissed with effect from 1 March 2010, and that the dismissal letter had been posted to the Claimant.
23. The Claimant stated that on 16 February 2010, he had been called to the Respondent's head office in Nairobi and he was questioned by the Operations Manager about a cheque and purchases made by Baraton University.
24. The Operations Manager then referred him to the Personnel Manager who told him the issue was under investigations and he went home but got no feedback, and therefore on 26 June 2010 he went back and was told he would be redeployed.
25. The Claimant denied that the address used to post the dismissal letter, P.O. Box 79 was used by him. He stated his address was P.O. Box 8337 Eldoret.
26. The Respondent dealt with the process followed prior to dismissal in paragraphs 6, 7 and 17 of the Response.
27. Without any explanations to substantiate the pleadings, the Court is not able to determine whether what happened was an inquiry/investigative process to unearth the facts upon which to charge the Claimant, or a hearing as contemplated by section 41 of the Employment Act, 2007.
28. The Court can therefore only conclude that the Respondent did not comply with the preemptory requirements of section 41 of the Employment Act, 2007, and therefore the dismissal was procedurally unfair.

Overtime

29. The Claimant stated that he used to work from 6.00am to about 10.00pm (16 hours every day).
30. The Claimant was in management and by practice in this country, managers do not earn overtime but get compensated in other ways such as through responsibility allowance.
31. With the material placed before Court, the Court declines to find that the Claimant is entitled to overtime.

Rest days

c. Accrued leave 2010	Kshs 82,500/-
d. Gratuity	Kshs 825,000/-
e. Unpaid wages to January 2013	Kshs 2,887,500/-
TOTAL	Kshs 4,850,000/-

51.Claimant to have costs.

Delivered, dated and signed in Nakuru on this 26th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kirwa instructed by Mwakio, Kirwa & Co. Advocates

For Respondent Nyaberi & Co. Advocates

Court Assistant Nixon