



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.135 OF 2015

(Originally Nakuru CMCC No. 530 of 2012)

NEWTON MULI MBATHA.....CLAIMANT

v

CMC MOTORS GROUP LIMITED..... RESPONDENT

JUDGMENT

1. Newton Muli Mbatha (Claimant) commenced legal action against CMC Motors Group Ltd (Respondent) before the Chief Magistrates Court on 10 May 2012 alleging that the termination of his employment was unlawful in light of his acquittal during a criminal trial in Criminal Case No. 29 of 1998.
2. The Respondent did not file a Defence in time, and after formal proof, the Subordinate Court delivered judgment in favour of the Claimant on 1 March 2013.
3. The judgment was later set aside and the Respondent given leave to defend on 12 September 2013
4. The Respondent had filed a Defence on 13 February 2013, out of time.
5. The Cause was thereafter transferred to this Court and it proceeded to hearing on 12 November 2015.
6. Although the parties were directed to file and serve submissions within set timelines, the Claimant's submissions were only filed on 29 January 2016 (instead of before 12 December 2015) while the Respondent's submissions were filed on 1 March 2016 (instead of before 31 January 2016).
7. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the cause of action herein is statute barred, whether the Claimant deserted work, whether the termination of the Claimant's employment was unlawful, effect of acquittal in criminal proceedings and appropriate remedies including entitlements accruing out of the employment relationship.*

Whether cause of action is statute barred

8. A determination of this issue one way or the other will unravel whether the Court needs to determine the other issues identified.
9. This issue was identified as Claimant's issue 4 and Respondent's issue 1 in their respective submissions.
10. The Claimant did not set out the date when he was allegedly dismissed in the Statement of Claim. However, he filed a letter dated 25 November 1997 informing him that his employment was being stopped because of desertion from duty.

11. In examination in chief, he stated that he served until 27 October 1997 and that he received the letter dated 25 November 1997. He also admitted receiving a letter dated 22 December 1997 setting out his final dues.
12. During cross examination, he confirmed that he received the dismissal letter while in police custody and that the cause of action arose on 25 November 1997 while the claim was lodged in Court on 10 May 2010.
13. The explanation he gave was that he was still undergoing a criminal trial.
14. In disputes of unfair termination of employment or wrongful dismissal, the legal injury or actionable wrong is sustained at the point of dismissal.
15. The Claimant appeared to be suggesting that where criminal proceedings on the same facts have been instituted, then either time stops running or the cause of action could be sustained until conclusion of the criminal process.
16. The Respondent, in advancing its case that the cause of action was statute barred in terms of section 4(1) of the Limitation of Actions Act cited the decision of *Rosebellah Jepkoech Ronoh v Telkom Kenya Ltd* (2013) eKLR which cited the authority of *Abdulla Ramadhan & Ar v Suleiman Haji & Ar* for the dicta that *time stopped running because of the criminal case is wrong interpretation of the law*.
17. I would endorse the above as the correct legal position.
18. The Claimant did not draw the attention of the Court to any express provision of law to support the attractive contention that pendency of criminal proceedings can sustain a cause of action based on contract (employment) beyond the prescribed limitation period either under the Limitation of Actions Act or the applicable Employment Act.
19. In my view, the Claimant cannot invoke the aid of equity on the basis that the Respondent had not suffered any prejudice to address the jurisdictional question of limitation.
20. The instant Cause was commenced about 10 years after the legal injury/actionable wrong and therefore legally unsustainable.
21. With that conclusion, in my considered view it would be meaningless to examine the other issues except to make a few observations regarding relationship between an acquittal in a criminal charge and validity and fairness of a termination of employment.

Acquittal in criminal proceedings

22. The Claimant in his pleadings made much of his acquittal in the criminal case.
23. Criminal law and trials have their own objectives and purposes and an acquittal by itself could not fetter the hands of an employer from bringing an employment relationship to an end.
24. The practices and procedures in criminal trials also require proof beyond reasonable doubt while an employer may terminate the employment of an employee where the employer has reasonable and sufficient reasons to suspect the employee of having committed a criminal offence to the detriment of the employer.
25. In unfair termination of employment disputes, the standard of proof is lower than proof beyond reasonable doubt, and therefore an Employment Court should be cautious in arriving on a decision of unfairness merely on the basis of an acquittal in the criminal Court.

Conclusion and Orders

26. The Court finds and holds that the cause of action herein is statute barred in terms of section 4(1) of the Limitation of Actions Act and orders that it be struck out.
27. No order as to costs parties having failed to adhere to timelines for filing submissions.

Delivered, dated and signed in Nakuru on this 11th day of March 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Biko instructed by Odhiambo & Odhiambo

For Respondent Mr. Ombati instructed by Kefa Ombati Advocate

Court Assistant Nixon