



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 209 OF 2016**

**BETWEEN**

**1. PETER OTIENO ODHIAMBO**

**2. MUTINDA SINGI**

**3. JUSTINE MWANDEZI MWATUKU**

**4. NEBART AKIDIVA MENGESA**

**5. DAVID MUREITHI MWANGI.....CLAIMANTS**

**VERSUS**

**TOTAL SECURITY SURVEILLANCE LIMITED.....RESPONDENT**

**RULING**

1. The Claimants filed their Joint Statement of Claim, on 22<sup>nd</sup> February 2016. This is the date which appears on the Court Receipt issued to the Claimants on filing of the Claim.
2. They state they were employed by the Respondent as Security Guards, on diverse dates.
3. They were arrested and charged at the instigation of the Respondent, on the allegation of theft, or failure to prevent theft of copper cables at the workplace. They were arrested on 19<sup>th</sup> September 2011. The trial ended in their acquittal, on 29<sup>th</sup> April 2015.
4. They state the Respondent did not allow them back to work during the criminal trial, or even after the trial ended. They were never issued with letters of termination.
5. Believing they were constructively dismissed, they filed this Claim seeking terminal dues, and compensation for unfair termination.
6. The Respondent raises a point of preliminary objection, based on section 90 of the Employment Act 2007. It is submitted the Claim is time-barred. The Respondent explains it is not in contention the Claimants last worked for the Respondent on 19<sup>th</sup> September 2011. 3 year limitation period ended before the Claim was filed. The Respondent relies on *Industrial Court Cause No. 399 of 2014 between Stephen Kamau Karanja & Anor. v. Family Bank Limited*, where it was held time does not stop running

because an Employee has been charged with a criminal offence. Respondent prays the Claim be dismissed preliminarily.

7. The Claimants submit they were not given any letter of termination by the Respondent. They state they were constructively dismissed. No date is given when termination took place. The date of termination is a matter to be determined on full hearing. The Claimants rely on ***Employment and Labour Relations Court Cause No. 949 of 2013 between Paul Dedan Ochieng' & 2 others v. Harambee Co-operative Savings & Credit Society***, which concluded that where there is no clear date of termination, the date when the cause of action arises, cannot be presumed. The Claimants urge the Court to reject preliminary objection.

***The Court Finds:-***

8. The Respondent denies terminating the Claimants' contracts of employment. This is captured in paragraph 8 of the Statement of Response. There is an implied agreement, that Respondent did not issue the Claimants a letter of termination.

9. The Claimants were arrested on 19<sup>th</sup> September 2011. There is nothing to indicate the date of arrest, is the date the cause of action arose. The date when the cause of action arose, would be the date of termination.

10. The Claimants state they were not allowed to resume work. They were not given notice of termination or called upon to defend allegations of theft at the workplace. They allege they were constructively dismissed.

11. The Court agrees with the Claimants that the date when termination happened can only be understood by the Court on full hearing. It is not clear at this preliminary point: if the Claimants were advised their continuity in service, depended on the outcome of the criminal case; whether they reported back to work on being bailed out in the criminal trial, and locked out; whether same thing happened on acquittal; and/or whether they deserted. It is not known when termination, be it through constructive dismissal, summary dismissal or desertion, took place. There is no specific and clear date which can be adopted incontrovertibly, as the date the cause of action arose.

12. In the circumstances, the Court finds the preliminary objection is misplaced. Parties need to be heard, before the Court can make a full determination on limitation of time.

IT IS ORDERED:-

***a. The point of preliminary objection is joined to the substantive dispute.***

***b. Parties to agree on a date for hearing of the full dispute.***

***c. Costs in the cause.***

***d. Dated and delivered at Mombasa this 9<sup>th</sup> day of December, 2016.***

**James Rika**

**Judge**