



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.73 OF 2014

ANDREW MAINA GITHINJI.....1ST CLAIMANT

ZACHARY MUGO KAMUNJIGA.....2ND CLAIMANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

**MINISTRY OF STATE FOR IMMIGRATION & REGISTRAR OF
PERSONS.....2ND RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2015)

RULING

The respondents filed a preliminary objection on 25.09.2014 on the following grounds:

- a) That the claimant's plaint contravenes mandatory provisions of section 90 of the Employment Act (CAP 226) ; hence the same is bad in law, misconceived and incompetent before the honourable court.
- b) The respondents will suffer prejudice if the suit is heard and determined as filed.

It was submitted for the respondent that the claimants were dismissed on 7.08.2009 for gross misconduct and the plaint was filed on 13.06.2014. Thus, it was submitted that as at 8.08.2012 the suit became time barred under section 90 of the Employment Act, 2007 which prescribes 3 years for filing suits based on the employment contract.

It was not disputed that the claimants had been charged in criminal case No. 737 of 2009 at the Principal Magistrate's court at Kerugoya and acquitted on 23.10.2013 under section 215 of the Criminal Procedure Code. The criminal proceedings were about facts substantially similar to the reasons leading to the claimants' dismissal. It was submitted by the respondents that the acquittal was inconsequential to the claimants' earlier dismissal. It was urged for the respondents that the suit be struck out as time barred. The respondents relied on **Fred Mudave Gogo versus G4S Security Services (K) Limited [2014]eKLR** where Mbaru J. dismissed a suit based on the contract of employment and filed after lapsing of the three years prescribed under section 90 of the Act. It is notable that in that case, the criminal element and criminal proceedings in issue in the present case did not exist and the case is therefore distinguishable.

The claimants relied upon the holding of the East African Court of Appeal in **Mbowa –versus- East Mengo Administration (1972)E.A. 352** where in a suit for damages for malicious prosecution, it was held that cause of action means all facts which the plaintiff would have to prove to succeed. It was

submitted for the claimants that following the holding in the cited case, the reason for dismissal being substantially similar to the facts of the case in the criminal case, time did not begin to run and could only begin to run from the date when the plaintiffs could first successfully maintain an action, and that was the time the claimants were acquitted. The court agrees with the claimants' line of submission and finds that until the criminal court decided upon the validity of the reasons for the claimants' termination, the claimants could not properly be said to have all the relevant facts to file a suit questioning the fairness of their termination. Time did not run until the date of acquittal.

The court further upholds its opinion in disciplinary cases against employees where in the opinion of the employer there exist a criminal element as set out in the guiding applicable principles in the case of Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru. At page 13 to 14 of the judgment, the court stated as follows:

“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

- a) **Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant criminal justice agency.**
- b) **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
- c) **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer’s administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**
- d) **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.”**

The respondents were entitled but appear not to have taken steps to administratively review the dismissal decisions in view of the claimants' acquittal and in the opinion of the court, in absence of such administrative review, the claimants were entitled to move to court and the suit was not time barred.

The court further finds that in any event, the suit was properly filed as based on the acquittal order in the criminal case as was within 12 years for suits based on judgment or court decision under section 4 of the Limitation of Actions Act. Thus, the court upholds its decision in Kenya Petroleum Workers Union – Versus- Kenya Pipeline Company Limited [2014]eKLR, thus, **“Nevertheless, the court has considered the acquittal order of 14.07.2006 and finds that the grievants’ and claimant’s cause of action was properly grounded upon that acquittal order. Section 4(4) of the Limitation of Actions Act provides 12 years as the limitation period for actions based on a court judgment or order and the court finds that the claimant’s suit was not time barred as based on the acquittal order.”**

In conclusion, the preliminary objection is dismissed with costs and parties are now invited to take directions on the hearing of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 6th March, 2015.**

BYRAM ONGAYA

JUDGE