



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 668 OF 2014
ADAM ISILU MUTINDA APPLICANT
VERSUS
THE HON. ATTORNEY GENERAL..... RESPONDENT

M/s Mumo for the Hon. Attorney General

Mr. Agina for the Claimant

RULING

1. The Claimant brought this suit by way of a Memorandum of Claim on 22nd April, 2014.
2. The issues in dispute are false imprisonment; wrongful dismissal; torture and failure to pay terminal dues.
3. The cause of action arose on 1st August, 1982 the day of the attempted coup d'etat in Kenya.
4. The claim is based on Section 70, 71(1), 72(3), 75(5), 74(1), 77(2), 79(1) and 84(2) of the erstwhile Constitution of Kenya 1969, the provisions of The Armed Forces Act, and The Kenya Defence Forces Act, No. 60 of 1968.
5. The remedy sought includes;
 - a. a declaration that the Claimant's rights under the Armed Forces Act, The Kenya Defence Forces Act No. 60 of 1968 were violated from the month of August, 1982 till the date of conviction and sentencing by the court martial,
 - b. a declaration that the claimant's fundamental rights and individual freedoms under Sections 70, 71, 72, 74(1) and 79 of the Constitution of Kenya, 1969 were violated by Army and Prisons Officers of the Government of Kenya from 1st August, 1982 till 2nd September, 1985,
 - c. a declaration that the Claimant is entitled to payment of compensation for the violation of his fundamental rights and individual freedoms under the Constitution of Kenya, 1969,
 - d. Grant of general, exemplary and aggravated damages under Section 84(2) of the Constitution of Kenya 1969 *inter alia*.
6. The Respondent via state counsel M/s Mumo has raised Preliminary Objection to the claim to wit, that the claim is statute barred the cause of action having arisen in 1982 more than 32 years

ago. That the Claimant is guilty of indolence and has sat on his right to file a suit for such an inordinate period of time, and therefore this court lacks jurisdiction to entertain the suit in that;

1. the suit offends the mandatory provisions of **Section 90** of the **Employment Act, 2007 Laws of Kenya**
2. that the suit is an abuse of the court process, is incompetent and ought to be struck out with costs.

7. The Preliminary Objection was opposed by Mr. Agina, Advocate for the Claimant on the grounds that the statutory provisions on limitation, be it in terms of **S.4(1) of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya or under Section 90 of the Employment Act No. 11 of 2011** are inapplicable in matters of violation of human rights and fundamental freedoms in terms of **Section 84(2) of the erstwhile Constitution of Kenya 1969** which provided the Claimant ought to seek redress to the High Court.

8. That any statutory provision which offends the constitutional provisions is void to the extent of inconsistency and this is the case with respect to **S.4(1) of Cap. 22.**

9. That **Section 90 of the Employment Act, 2007** is inapplicable to this case since it cannot apply retrospectively to a matter that arose in 1982. For this reason, the provisions of the Constitution of Kenya 2010 are similarly not applicable to this case.

10. Upon a careful consideration of the facts of the case, the court is guided by the finding of **A. Hayanga J. as he then was in HCC at Nairobi Misc. Application No. 494 of 2003, Dominic Arony Amolo V. The Hon. Attorney General** where after reviewing various local and foreign authorities found,

“I therefore, think and also hold that Section 3 of the Constitution excludes the operation of Cap. 22 with regard to claims under Fundamental Rights and further that Fundamental Rights Provisions cannot be interpreted to be subject to the legal wrongs or causes of action enunciated under the limitation Act Cap. 22.”

11. The learned Judge cited an Article entitled **“The Bill of Rights in the Modern State”** Edited by Geoffrey R. Stone & Others as follows;

“Everyone agrees in the abstract that there are Human Rights that no society should abridge.”

12. The Judge further said,

“Our Constitution is still young but it is born behind older international siblings from whose steps she can align her movements. Therefore, we can subject our constitution to progressive mode of interpretation like in United States of America to enable our constitution also guide destiny of a people and to do this, it must be made to change with time through its judicial constitutional courts which are the vessels that bring it in her new attire to the shores of changed circumstances.

I feel statute cannot bar adjudication on fundamental rights.”

13. These are profound words which easily resonate with me and find that the violation of human Rights and Fundamental Freedoms that have occurred in our young Republic cannot be shielded from judicial adjudication, merely by passage of time.

14. Consequently the Preliminary Objection is not upheld and the suit will take its normal course.

Dated at Nairobi this 23rd day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered by Hon. Hellen Wasilwa on 24th day of April, 2015.

In the presence of