



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 287 OF 2014

BETWEEN

NOEL NJEGHE

MWALAMBA.....CLAIMANT

T

VERSUS

LOUIS DREYFUS KENYA LTD.....

..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Owino holding brief for Mr. Alando Advocate instructed by Alando & Company Advocates for the Claimant

Mr. Njenga holding brief for Mr. Asige Advocate instructed by Asige Keverenget & Anyanzwa Advocates for the Respondent

RULING

1. The Claimant filed his Statement of Claim on 23rd June 2014. He states he was employed by the Respondent Company on 23rd March 2004, as an Operations Officer, earning an initial gross monthly salary of Kshs. 50,000.

2. He was summarily dismissed on 21st November 2008. The Respondent had earlier on 12th November 2008, caused the Claimant to be arrested, alleging the Claimant had attempted to steal from the Respondent. The Claimant was charged in

Mombasa Chief Magistrate's Court Criminal Case Number 3396 of 2008, with the offence of attempted theft. He was tried for 5 years, culminating in his acquittal on 30th May 2013. His salary on termination had risen to Kshs. 84,285.70.

3. He faults the Respondent for summarily dismissing him, alleging the Respondent ought to have waited for the Criminal Court to determine his guilt or innocence, before taking the summary dismissal decision.

4. He seeks against the Respondent, the following Orders:-

- a. 1 month salary in lieu of notice at Kshs. 84,285.70.
- b. Unpaid salary for November 2008 at Kshs.84,285.70.
- c. Loss of salary for the period of the Criminal Case (54 months) at Kshs. 84,285.70X54=Kshs.4,551,427.80.
- d. Special damages for wrongful termination of employment the equivalent of 24 months' salary at Kshs. 2,022,856.80.
- e. Loss of employment up to retirement age at Kshs. 24,274,281.60. (The Claimant was 36 years on the date of dismissal, and expected he would retire at the age of 60 years).
- f. Damages for malicious prosecution and attendant legal fees of Kshs. 700,000.
- g. Punitive or exemplary damages for the illegal, unlawful and unconstitutional termination of employment.
- h. Damages of loss of salary to retirement age at the rate of Kshs. 84,285.70

Sub-total.....Kshs. 31,969,994.70

5. Other prayers include: a declaration that the Claimant was wrongfully, unlawfully and unfairly dismissed; certificate of service to issue; interest; costs; and any other suitable relief.

6. The Respondent filed its Statement of Response on 24th July 2014. Filed at the same time, is a Notice of Preliminary Objection. The Respondent holds the Claim is time barred, under Section 90 of the Employment Act 2007. The Respondent counter-claims Kshs. 1,741,680.63, alleged to be an outstanding loan from the Claimant.

7. Paragraph 9 of the Statement of Response states that the mere fact, that the Claimant was acquitted in the Criminal Case, did not render summary dismissal unfair. The Criminal process was a separate process from the summary dismissal process.

8. Parties agreed on 1st December 2014, to have the Preliminary Objection considered and determined by the Court, on the basis of Written Submissions. These were confirmed to be filed, on 13th May 2015. Today's ruling is with respect to this Preliminary Objection.

9. The Respondent submits the Claim is time-barred. The Claimant's Criminal Trial had no bearing to the Employment Dispute. The Respondent anchors its submissions on the following Decisions:-

- a. ***Industrial Court at Mombasa Cause No. 85 of 2012 between Sila Mauga & 4 Others v. Kaluworks.***
- b. ***Industrial Court at Nakuru Cause No. 334 of 2013 between Francis Somoni Kamesh v. Uniliver Tea Kenya Limited [2014] e-KLR.***
- c. ***Elinathan Kitiro Mwamburi v. Telkom [Kenya] Limited [2014].***

In these Decisions the Court was emphatic that expiry of time limit bars the Cause and the Remedy. The Respondent urges the Court to dismiss the Claim, and allow the Counter-Claim.

10. The Claimant submits his Criminal Trial took almost 5 years. His Claim is not time-barred. Summary dismissal occurred in the pendency of the Criminal Trial. The only way the Claimant would be proved guilty or innocent was through the Criminal Trial. The cause of action arose on 30th May 2013, when the Criminal Trial ended in acquittal. He cites the Authority of the High Court at Nairobi ***Kenya Bus Service Limited & another v. Minister for Transport & 2 Others [2012] e-KLR.***

The Court Finds:-

11. There is a catena of Judicial Authorities, upholding the view that Section 90 of the Employment Act 2007, is a jurisdictional law. Among these, are:-

- a. *The Decisions cited by the Respondent at paragraph 9 of this ruling.*
- b. *Industrial Court at Mombasa Cause Number 183 of 2011 between Mutinda Antony Nzioka v. the TSC [2014] e-KLR.*
- c. *Industrial Court at Nairobi Case Number 1232 of 2011 between Irene Yambo v. Kenya Airways (unreported).*
- d. *Industrial Court at Nairobi Misc. Civil Application Number 9 of 2013 between Joseph Kimele v. the TSC [2014] e-KLR.*
- e. *Industrial Court at Nairobi Cause Number 953 of 2010 between Benjamin Wachira Ndithi v. the PSC Kenya & Another [2014] e-KLR.*

All these decisions of the Industrial Court propound the jurisdiction theory developed in *Kenya Court of Appeal Decision in Divecon v. Samani [1995 – 1998] E.A. 48.*

12. The Claimant does not dispute that he was summarily dismissed on 21st November 2008, or that he filed this claim on 23rd June 2014. It is not contested that a period of 3 years had passed, from the date of dismissal to the time of filing. The cause of action arose, the Claimant submits, not on the date of dismissal, but on the date of his acquittal by the Criminal court.

13. This argument is flawed. In the *Industrial Court at Nairobi, Cause Number 1944 of 2012 between Banking, Insurance and Finance Union (Kenya) v. Consolidated Bank of Kenya Limited [2014] e-KLR; Cause Number 981 of 2011 between James Mugera Igati v. the PSC [2014] e-KLR; and Cause Number 875 of 2010 between Peter Omachi Nyakio v. Nairobi Java House Limited*, the Court concluded that the disciplinary process at the employment place is not subject to the Criminal process.

14. The disciplinary process can only be affected by the outcome of criminal proceedings where the Employer has communicated to the Employee that the Employee's fate at the employment place depends on the outcome of the Employee's Criminal Case. The individual contract of employment, collective agreement, human resource policy and procedure document, or the law to which the employment relationship is subject, may join the criminal process to the disciplinary one.

15. Otherwise, and as submitted by the Respondent, the processes are entirely different. The criminal process is a public process, undertaken by public authorities to safeguard public order. The disciplinary process is private in nature, carried out by an organization to protect its own private interest. The standards of proof applicable in criminal offences and employment offences, where such offences are founded on the same facts, are entirely different. The acquittal of the Employee by the Criminal Court does not absolve him of the employment offence.

16. The Claimant's contract of employment allowed the Respondent, under Clause 20, to summarily dismiss the Claimant for acts of gross misconduct. It is not stated in the contract that such acts would be tried by the Criminal Court. Secondly, the Respondent suspended the Claimant through the letter dated 10th November 2008, on the ground that the Claimant was suspected of fraud. The Respondent made it clear suspension was made pending investigation to be carried out. The Claimant was not advised suspension would be pending investigations made by the Police. Lastly, he was summarily dismissed on 21st November 2008. The Respondent indicates in the letter of summary dismissal, that the decision was made, following internal investigations carried out by the Respondent. Nowhere does the Respondent make hint of a public process.

17. From the holding in the various Decisions of the Court, it is safe to conclude that the Preliminary Objection by the Respondent is well-founded. The Claim is time-barred; the Claimant did not have to wait for Judgment in the Criminal Case to initiate the Claim; and there is no effect in his being acquitted, on the finding of guilt by the Employer. The Counter-Claim is similarly time-barred.

IT IS ORDERED:-

1. *The Claim and the Counter-Claim are both time-barred and struck out.*
2. *No order on the costs.*

Dated and delivered at Mombasa this 19th day of June 2015

James Rika

Judge