



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO 1766 OF 2013**

**WILLIAM MOGENI MOMANYI ..... CLAIMANT**

**VERSUS**

**AGA KHAN UNIVERSITY HOSPITAL..... RESPONDENT**

**RULING**

1. The respondent, Aga Khan university Hospital filed their preliminary objection dated 11<sup>th</sup> May 2015 on the grounds that the suit herein is statute barred by section 90 of the Employment Act having been brought three years after the alleged act; and that the claim has no basis and should be dismissed with costs. Both parties filed their written submissions.

2. The Claimant submitted that the Memorandum of Claim was filed on 31<sup>st</sup> October 2013 for alleged wrongful and unfair termination of the claimant. The basis of the claim is that the Respondent breached the terms of the employment contract of the claim on 11<sup>th</sup> May 2010. The claim is thus filed beyond the time contemplated under section 90 of the Employment Act, a time three (3) year over and above the limited time. The claim being based on a contract of service, the provisions of the law require that any alleged breach be addressed within the provisions of section 90 of the Employment Act as held in **Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eKLR**. The Respondent further submitted that the issue of limitation is not a mere technicality but a substantive ground of law that a Court must address. Cited was the case of **Kenya Scientific Research international and Allied Workers union versus T.N.S. Research International, Industrial Cause No. 27 of 2010** noting that the Court has no mandate to entertain claims brought outside the limitation period.

3. The Claimant in response submitted that where a matter is referred to conciliation, time does not run until the conciliation process is concluded. In this case the Claimant received a letter of dismissal dated 11<sup>th</sup> May 2010. The Claimant appealed vide letter dated 30<sup>th</sup> September 2011 and a response was given noting the appeal had been rejected. By allowing for the appeal, the case was kept alive. The appeal was allowed under the collective agreement. Where internal procedures were still available, time cannot be said to have lapsed until the outcome of the appeal that was rejected on 30<sup>th</sup> September 2011 as held in **David Otunga Kenani versus Office of the Controller and Auditor General & Another [2015] eKLR**. The claim is therefore filed within the time limits and the objections herein should be dismissed and the Claimant heard on merit.

4. Limitation of actions is a matter that when raised, a Court should stop at everything else and address it as this goes to the jurisdiction of the Court to hear such a claim as held in the case of **Owners of Motor Vessel 'Lillian S' versus Caltex Oil (Kenya) Limited [1989] KLR 1**. This goes to the jurisdiction of the Court to entertain such a matter that is filed out of time. With regard to matters filed before this Court Section 90 of the Employment Act regulate time as follows;

*90. Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

5. The law is couched in mandatory terms. Any claim that has its basis under the Employment Act *shall lie or be instituted* within 3 years next after the act, neglect or default complained of. The law also ousts the operation of section 4(1) of the Limitation of Actions Act. I find this to be a deliberate effort to remove any doubt with regard to the limitation period of claim filed before this Court with regard to rights under the Employment Act. No claim shall lie after 3 years since the time the cause of action arose.

6. Section 62 of the Labour Relations Act now allows parties in a dispute to report the same to the Minister. Upon such report, the Minister is allowed to appoint a Conciliator and upon hearing the parties, the Conciliator has to file a certificate of settlement or disagreement upon which any dissatisfied party can move the Court by citing such report to the Minister and the certificate issued by the Conciliator. Time in such a case is based on the time of report to the Minister and the resultant outcome from the Conciliator. This is a legal process that this Court has to take into account with regard to the limitation period set out under section 90 of the Employment Act. But this is not an open door, once the Certificate is issued by the Conciliator, time starts running as under section 90 of the Employment Act as this cannot be left in eternity.

7. To enjoy the protections of section 62 of the Labour Relations Act and avoid a challenge on limitations outlined under section 90 of the Employment Act, a party must outline such grounds in the Memorandum of Claim to enable the Respondent in response and defence to a claim to appreciate such facts. Where a party complies with the requirements set out under Rule 4 of the Industrial Court (Procedure) Rules and especially Rule 4(e), a party in response is able to adequately give an appropriate defence with the knowledge of what law, policy or international regulations and protections the Claimant is basing the claim upon. Without such compliance, the Respondent is left to their own devices and groping in the darkness not knowing the basis of a claim and how far to offer a defence. Such is not the purpose of litigation before this Court as each party should table their claim in good faith to enable the other party to effectively respond.

8. It is now an accepted best practice for employers to set up international policies to regulate affairs as between themselves and employees as required in the sector the employer operates. Such policies also are to regulate the human resource, disputes resolution and disciplinary mechanisms. This is what is contemplated under section 26 of the Employment Act thus;

*26. (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.*

*(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply. [emphasis added]*

9. Therefore, where there is a policy, regulations and internal mechanisms that allow an employee to utilise before filing a claim in Court or reporting a dispute to the Minister, this Court is bound to take into account such a policy regulation. Administrative action in most entities take into account time for appeal and or review of a decision made against an employee. In the exercise of such a right, an employee has to await the outcome and the last communication with regard to such a process on the rejection or conditions set for allowing the appeal is equally important as this is the time the employee can move and challenge such a decision.

10. The issue in dispute herein is stated by the Claimant to be his wrongful/unfair/unlawful termination of

employment and he is seeking awards on this basis. At paragraph III (d) of the Memorandum of Claim, the Claimant states;

*The Respondent wrongfully and / or unfairly terminated the claimant's contract of employment on 11<sup>th</sup> May 2010 on allegations of theft whereby the Claimant was accused in conjunction with another employee of theft of company property.*

11. Further at paragraph III (h) the Claimant avers;

*The Claimant was never afforded an appeal on the decision to terminate his employment so as to afford him a chance to ventilate his case against the allegations against him, if at all. **(Attached herewith and marked as appendix 4(a) and 4(b) is a copy of claimant's letter appealing against the decision to dismiss him from employment and a response from the Respondent dismissing the appeal without any hearing).** [emphasis added].*

12. On the basis of these averments well-articulated in the Memorandum of Claim, the time the appeal took to be administratively addressed by the Respondent is crucial. The outcome of it was not issued to the Claimant until 30<sup>th</sup> September 2011. Whether this was allowed internally by the Respondent policy or not is a matter of evidence that the Court can only address by call of evidence. But the facts outlined in the Memorandum of Claim and for the Court to address the preliminary objections herein raised, this becomes a very fundamental aspect to consider. The appeal was only addressed on 30<sup>th</sup> September 2011. This is when the Claimant can be said to have exhausted all available remedies with regard to his dismissal by the rejection of his appeal. This is what is contemplated under section 26 of the Employment Act. The existence of the policy to lodge an appeal and the same to be given a chance hence becomes part of the contract of employment and the contractual obligations the Respondent had to meet before being extricated of the Claimant as their employee. Had the appeal been allowed, the claim would not have arisen and with the rejection of the appeal, recourse was to report to the Minister of file a claim as herein.

13. The time herein started running as of 30<sup>th</sup> September 2011. As regards the provisions of section 90 of the Employment Act, the claim was filed on 31<sup>st</sup> October 2013 a period of 2 years and 2 months after the cause of action arose. I find no departure from the provisions of the law with regard to time.

**The preliminary objections are hereby dismissed. Costs shall be in the cause.**

**Delivered in open Court , dated and signed in Nairobi on this 10<sup>th</sup> day of June 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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