



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.98 OF 2015

DANIEL INGUNA NDATHOCLAIMANT

VERSUS

TEXAS ALARMS (K)RESPONDENT

J U D G M E N T

Introduction

1 The claimant brought this suit on 5.3.2015 claiming terminal dues plus compensation for unfair termination of his employment by the respondent in October 2011. It is the claimant's case that he was not accorded any hearing before the termination of his employment.

2 The respondent has denied liability for unfair dismissal of the claimant and averred that it is the claimant who deserted work from 1.10.2011. That after one month follows up, the claimant told the respondent that he was no longer interested in the job. That the claimant only re-appeared on 18.4.2012 to return his uniform in the company of union officials. In addition the respondent raised a preliminary objection (P.O) to the suit on ground that it is time barred.

3 The suit was heard on 8.7.2015 when the claimant testified as Cw1 and the respondent called Mr Benard Odhiambo Aduda as Rw1. Thereafter both parties filed written submissions.

Analysis or Determination

4 There is no dispute that the claimant was employed by the respondent as a security guard from 4.1.2006 until 1.10.2011 when he failed to resume duty from his annual leave as required. The issues for determination are;

- a) whether the suit is time barred.
- b) whether the claimant deserted work or he was unfairly dismissed by the respondent
- c) whether the reliefs sought should issue.

Time Barred Suit

5 The P.O on time bar was pleaded in the defence and it is therefore a tribal issue herein. The evidence by the Rw1 is that Cw1 deserted work from 1.10.2011 the day he was to report back to work from his annual leave. That he followed up the claimant for a whole month and stopped after he told him that he was no longer interested in the respondent's employment. Consequently according to him the claimant

terminated his employment contract through desertion on 1.10.2011. In addition the defence counsel has submitted that section 90 of the EA provides in mandatory terms that a suit founded under the Act must be filed within 3 years. He relied on **ICC No. 1189 of 2012 Machuka Anyona Julius and 5 Others vs Omera Pharmaceuticals Ltd (2014) eKLR** in which the court struck out a suit filed outside the 3 years' time bar.

6 Cw1, on the other hand told the court that he failed to report back to work on 1.10.2011 because the bus in which he was travelling on 29.10.2011, broke down and he only reached Mombasa on Sunday 2.10.2011, That he reported to work on Monday 3.10.2011 but he was barred from resuming work by Rw1 because he had absented himself from work. That after several visits to the office to plead with Rw1 to reinstate him without success, Cw1 reported the matter to his trade union who raised the issue with the Director of the respondent on 10.11.2011 and he agreed to pay Cw1's dues. That on 23.3.2012, Rw1 wrote a letter to Cw1 asking him to return the company uniform. That after some disagreements Cw1 in the company of 2 union officials returned the uniform to Rw1. That on 24.4.2012 the respondent paid Ksh 5000 through Cw1's bank account as his terminal dues. Cw1 was dissatisfied and brought this suit on 5.3.2015.

7 There is no doubt that the cause of action herein arose on 1.10.2011 when Cw1 failed to report to work after his annual leave and Rw1 decided that Cw1 was not going to continue working for the respondent. The claimant had the right to sue the respondent and claim compensation and terminal dues subject to the statute time bar. Under section 90 of the EA, a claim founded on employment contract must be filed in court within 3 years next after the day when the cause of action arose and in case of a continuing breach, damage or injury, the suit must be filed in court within 12 months from the time the injury, damages or breach ceased.

8 After careful consideration of the material placed before the court, it obvious that whichever way one looks at the case, the suit has no life. It has expired and the court lacks jurisdiction to entertain it. First, the claim for compensation for unfair termination of employment arose on 1.10.2011 and is obviously time barred because it expired on 30.9.2014 before the suit was filed on 5.3.2015. Second, the claim for employment terminal dues in respect of annual leave days earned between 2004 and 2009 and the claim for off days worked between January 2004 and September 2011 is also time barred. The said claims are based on continuing breach, injury, damage or default which ceased in 2009 and September 2011 respectively. Under section 90 of the EA, Supra, the said claims expired 12 months from the time the injury, damage, breach and default ceased. In that regard, the claim for accrued leave expired in December 2010 while the claim for off days worked expired in September 2012. Consequently, the court must down its tools after having satisfied itself that it lacks jurisdiction to determine the suit herein for being time barred under section 90 of the EA.

Disposition

10 For the reasons stated above, the suit herein is struck out. Each party shall bear his or her own costs.

Signed, Dated and Delivered at Mombasa this 13th day of November 2015.

ONESMUS MAKAU

JUDGE