



**REPUBLIC OF KENYA**

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

**CAUSE NO.136 OF 2014**

DAVID NYAMAI.....1<sup>ST</sup> CLAIMANT  
FREDRICK CHIBOLE MUSA.....2<sup>ND</sup> CLAIMANT  
HARRISON IRUNGU MAINA.....3<sup>RD</sup> CLAIMANT  
JAMES NJOROGE KIURA.....4<sup>TH</sup> CLAIMANT  
JAMES KENNETH KIARIE NGANGA.....5<sup>TH</sup> CLAIMANT  
JOSEPH OJWANG OWINO.....6<sup>TH</sup> CLAIMANT  
JOSEPHAT MUSYOKI MUTUA.....7<sup>TH</sup> CLAIMANT  
PETER MWANIKI NJOGU.....8<sup>TH</sup> CLAIMANT

**VERSUS**

**DEL MONTE KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 4<sup>th</sup> December, 2015)

**RULING**

The claimants filed the memorandum of claim on 24.10.2014 through Shem Kebongo & Company Advocates. The claimants were employed by the respondent in diverse capacities and on various dates. Their employment was terminated on diverse dates. They prayed for judgment against the respondent for orders including unlawful and unfair termination; compensation for unfair termination; unpaid salary up to the date of termination; salary in lieu of termination notice; leave allowance; holidays; long term service pay; certificate of service; gratuity; overtime; costs of the suit; interest; and any other relief the honourable court deems fit to grant.

The respondent filed the response to the claims on 14.08.2015 through Simba & Simba Advocates. The respondent prayed that the claimant's claim be dismissed or struck out with costs. At paragraphs 4, 5, and 6 of the response, the respondent pleaded a preliminary objection that the suit was time barred.

The preliminary objection was heard on 25.11.2015. It was submitted for the respondent that the claim for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, and 7<sup>th</sup> claimants was time barred because it was filed after the 3 years of limitation prescribed in section 90 of the Employment Act, 2007. It was submitted that the said claimants pleaded

that they were each terminated on 04.10.2011 and the suit was filed on 24.10.2014 being 20 days after the lapsing of the prescribed 3 years for suits based on the contract of employment. It was further submitted that there was a criminal case relating to the circumstances of the termination of employment and judgment was delivered in the criminal case on 04.04.2014 and the claimants had failed to plead that there had been a criminal case. The criminal case, it was submitted, was not continuous process as part of the termination and the date of the judgment in the criminal case was not the date of the cause of action. The claimants had failed to plead the judgment in the criminal case and it was submitted that they could not rely on the same to urge their cause of action.

It was submitted for the respondent that the said claimants had not applied for extension of time and even if such application was made extension would not have been allowed because the claim was not in tort but founded in contract. The respondent cited **Beatrice Kahai Adagala- Versus- Postal Corporation of Kenya [2015]eKLR** where it was held that section 90 of the Employment Act, 2007 was in mandatory terms that a claim based on the contract of employment must be filed in 3 years and that the period of limitation could only be extended in claims founded on tort and only when the applicant satisfies the requirements of section 27 and 28 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.

For the claimants it was submitted that they filed the list and copies of documents on 06.11.2015 and served on 10.11.2015 exhibiting the judgment in criminal case No. 3435 of 2007 at Thika. The claimants were acquitted in the criminal case on 1.04.2014 and reported to the company to seek reinstatement prompting their demand letter of 04.04.2014 delivered to the respondent on 07.05.2014. It was submitted for the claimants that the cause of action was therefore a continuous cause of action, it was not time barred and due to the criminal case the suit would not be filed in 3 years. The cause of action therefore never accrued until the determination of the criminal action. The claimants had pleaded, claimed and prayed that the termination was unfair. Thus the claimants were clearly in time as the cause of action was continuous and the Article 159 (d) of the claim aided the claimant's case that justice be administered by the court without undue regard for procedural technicalities. The injury was a continuous injury under section 90 of the Employment Act, 2007 and the suit had been filed within 12 months after the date of the judgment in the criminal case. The judgment was on 01.04.2014 and the suit was filed on 24.10.2014 within 12 months for a continuing injury under section 90 of the Employment Act, 2007.

The **1<sup>st</sup> issue** for determination is whether said claimants have adequately pleaded so as to rely on the judgment in the criminal case. The memorandum of claim has repeatedly referred to the said claimants being handed a memo by the respondent sometimes in September 2011 stating that the claimants were caught colluding and stealing 21 bags of company urea fertilizer. The memorandum of claim further states that thereafter the said claimants were wrongfully and unlawfully terminated due to alleged sufficient proof of participation complicit or otherwise of the offence of stealing company property. The claimants then prayed for a declaration that the termination was illegal and unlawful. The claimants further pleaded that their respective termination was founded upon irrelevant and malicious considerations as it was unilateral, without legal justification and without due notice. The court has carefully considered the pleadings. It is pleaded that the considerations or reason for termination and which is about alleged stealing of some fertilizer is one of the grounds for the claimant's unfair and unlawful termination. Under section 43 of the Employment Act, 2007 the reason for termination when it is not valid or genuine as at time of termination would constitute unfair termination. The court finds that the claimants have sufficiently pleaded the reason for termination as being unfair and have filed in court the judgment in the criminal case as part of their documents to be relied upon in urging their respective cases. The respondent has failed to show that the criminal case which has a bearing on the reason for termination would be outside the pleadings and thus, the court finds that the claimants have sufficiently pleaded their case as they are within their pleadings to rely on the judgment in the criminal case.

The **2<sup>nd</sup> issue** for determination is whether the cause of action accrued on 01.04.2014 on the basis of continuing injury under section 90 of the Employment Act or on 04.10.2011 when they are said to have been terminated. The claimants, Fredrick Chibole Musa; Josphat Musyoki; Joseph Ojwang; David Nyamai; and Harrison Irungu were dismissed by the letter dated 04.10.2011 for colluding and stealing 21 bags of company urea fertilizer. The issue before the court is whether the allegation of colluding and stealing was a continuing injury so that the claimants were entitled to file the suit within 12 months from

the date of the judgment in the criminal case.

The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under sections 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee. Firstly, and on that ground alone, the court finds that the claimants' cause of action was not time barred.

Secondly, the court 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.”**

Thirdly, the court further considers 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. It would therefore be contrary to substantive justice to dismiss the present suit as the parties have the entitlement to move the court in a suit based on the judgment in the criminal case. 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.”**

Fourthly, the court upholds its opinion in the ruling of 06.03.2015 in **Andrew Maina Githinji and Another –Versus- The Hon. Attorney General and Another [2015]eKLR** thus, **“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 claimants have shown that immediately after the acquittal, they reported to the respondent to administratively review the termination decision. A demand letter was shown to have been delivered to the respondent. The respondent failed to take up the case in exercise of its administrative authority. In the circumstances, the court finds that the claimants were entitled to move the court and their suit was not time barred.

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

**Signed, dated and delivered in court at Nyeri this Friday, 4<sup>th</sup> December, 2015.**

**BYRAM ONGAYA**

**JUDGE**