

reconstitution of the court the case was allocated to me I mentioned the case on 13th November 2012 and 23rd January 2013 but on both occasions though the case was fixed for hearing it did not take off. When the parties appeared before me for hearing on 19th June 2013 Mr. Peter Kiilu representing the Respondent informed the court that the witness the Respondent intended to call as the 2nd Respondent's witness could not be traced. He asked that the court closes the Respondent's case and proceeds to prepare judgment. The parties thereafter filed written submissions.

The Claimant was represented by Mr. Jaoko while the Respondent was represented by Mr. Mutiso.

The Claimant testified that he was employed by the Respondent as a matatu driver in June 2001 and worked until 18th January 2007. He was driving motor vehicle registration No. KAS 571W known as Mystic. The matatu was plying Machakos – Emali – Nairobi Route. His salary was Shs. 6000 per month and he was also paid Shs 200 daily for breakfast and lunch. He was never issued an employment contract. He denied absconding work as alleged in the statement of Reply. He was not given notice prior to termination. He was not paid terminal benefits. He was given 4 days off and when he reported back he was told there was no job. This was at the Respondent's place of business at the drycleaners.

He seeks payment of outstanding salary arrears of Shs 17,299/- rest days Shs. 22,432.80/- public holidays Shs. 3,882.60/- , gratuity Shs. 18,604.10/- and annual leave Shs. 22,648.50 all totaling Shs. 92,309.45 as claimed in the memorandum of claim. His terminal dues were complied by the Labour Officer.

For the Respondent Peter Muema Kiilu RW1 testified that he was the manager of Mystic Company. He knew Daniel K. Mativo the Respondent who was a director of Mystic. His duties were to collect and bank collections and to manage the vehicles. The Claimant was a driver of Motor Vehicle KAS 571W. He was engaged in the year 2001 at a Salary of Shs 200 per day. This was increased to Shs 300 a day in 2006. He paid himself from daily collection and was never given any additional Salary at the end of the month. He worked from 8.00am to 7.00 pm. He was in charge of the vehicle both during the day and night. The Claimant worked even during holidays. The Claimant took off days and rest days at his own convenience. He stopped work on 2nd January 2007. He was not terminated. He just parked the car and left. In November 2006 the Claimant had informed RW'1 that he would quit.

At the time he left service he had been paid his salary. RW.1 signed a voucher for Claimant's Salary for December 2006 on 28th December 2006 for Shs .9000 (produced as Respondent's Exhibit 1). The Claimant was not entitled to notice as he is the one who left employment. RW 1 denied refusing to pay the Claimant's terminal benefits, breaching any term of employment or denying the Claimant a hearing. He also denied that the Claimant was dismissed. He prayed that the Claimant's case be dismissed with costs.

Both parties filed written submissions.

The Claimant also filed further submissions in reply to the Respondent's submissions.

The issues for determination are as follows:-

1. Whether the claim was time barred.
2. Whether the Claimant was dismissed from employment or absconded duty.
3. Whether the Claimant is entitled to his prayers.

I will consider the issues below.

1. Was the time barred? In the Answer to statement of claim the Respondent pleaded at paragraph 9 (which was the last paragraph thereof) as follows:-

“The Respondent state(s) that the Claimant's claim is misconceived bad in law and without any

substance otherwise the claim is an abuse of the court process.”

In the written submissions of the Respondent it is submitted that the claim is time barred as the cause of action arose according to the Claimant on 18th January 2007 and according to the Respondent on 16th December 2010, that the claim offends Section 90 of the Employment Act which provides that no civil action or proceedings based on the Act or a contract of Service in general shall lie or be instituted unless it is commenced within three years after the act / neglect or default complained of or in the case of a continuing injury or damage within twelve months. That the claim having been instituted on 16th December 2010 was time barred as it should have been instituted on or before 17th January 2010. The Respondent relied on the ruling of Justice Onyaya in MESHACK ANGENGO OMONDI V ELDORET MUNICIPAL COUNCIL & ANOTHER [2012]Eklr in which the court held that the suit was time barred by virtue of Section 90 of the Employment Act having been brought after the lapse of three years from the date the cause of action arose.

In the supplementary written submissions it is submitted for the claimant that the claim is not time barred because having been dismissed on 18th January 2007 he approached the labour Officer on 27th August 2007 and 28th October 2009, that between 2007 and 2009 the dispute was being addressed by the labour Officer and time did not start running until 30th August 2010 when the Claimant realized that efforts by the labour Officer to resolve the dispute had failed.

The Claimant relies on the following cases, Cause No. 91 of 2012 ; KENYA PLANTATION AND AGRICULTURAL WORKER UNION V MUNUNGA LEAF BASE [2013] EKLr, KENYA LOCAL GOVERNMENT WORKERS UNION V KANGUNDO TOWN COUNCIL CAUSE NO. 71 OF 2009; CAUSE 821(N) OF 2010; KENYA UNION OF JOURNALISTS AND ALLIED WORKERS V NATION MEDIA GROUP.

I find the positions taken by both counsel to be wrong . To start with the Respondent, limitation is a matter that must be specifically pleaded so that it can be dealt with as a preliminary issue as it is a matter of jurisdiction and goes to the core of the case by determining whether or not the court has jurisdiction to try the case. This was not pleaded by the Respondent and he is estopped from raising it at the end of the case through the written submissions.

On the part of the Claimant, the fact that a Claimant reports a dispute to the ministry of Labour does not affect the limitation period. Time starts running on the date the cause of action arose. The cases relied upon by the Claimant all involved trade Unions whose procedure for filing disputes was originally provided for in the Trade disputes Act (repealed) and now in the Labour Relations Act. The disputes are commenced through reporting a dispute to the Minister for Labour (now Cabinet Secretary for Labour).

Individuals cannot be protected by these provisions. This notwithstanding, the labour Relations Act does not have the effect of extending the limitation period.

It is not provided anywhere in the Act or in its predecessor the Trade Disputes Act that a claim that has been reported to the Minister has the effect of stopping the running of time. The labour Relations Act gives the Minister only 30 days within which to resolve a dispute following which it must be presumed that the dispute has not been resolved unless the parties by consent agree to extend the 30 days. If the dispute is reported to the Cabinet Secretary just before the lapse of the 30 days , it will not provide insulation to the claimant from the provisions of limitation.

The cause of action herein commenced on 18th January 2007 when the claimant alleges to have been dismissed by the Respondent.

On that date the Employment Act 2007 had not been enacted. The dispute therefore falls under the limitation of Actions Act. Whose Limitation period for contracts is six years.

This dispute having been commenced just under 4 years from the date the cause of action arose is therefore not statute barred.

2. Was the Claimant dismissed by the Respondent .

The Claimant alleges he went on 4 days leave with permission from the Respondent but when he reported back was told there was no work for him. RW1 on the other had testified that the Claimant stopped work on 2nd January 2007 and that in November 2006 the Claimant had orally informed him of his intention to quit employment.

in cross examination RW 1 stated that the Claimant used to take leave in January and that on 2nd January 2007 the Claimant was went to rest as he always did. In re-examination, RW1 stated that when the Claimant took the vehicle he indicated he would be away for a few days.

RW1 did not state when the Claimant absconded duty or deny that the Claimant was not allowed to go back to work on 18th January 2007. Indeed he admitted the Claimant informed him he was going to be away for a few days and that the claimant always took leave in January.

I find that the claimant was terminated by the Respondent by not being allowed to resume duty after leave.

3. Is the Claimant entitled to the prayers sought?

The claimant prayed for notice , unpaid wages, rest days worked, public holidays worked, gratuity and earned leave.

i. Notice

The Respondent's position was that the claimant was a casual paid Shs 300 per day amounting to Shs. 9000/- per month.

The Respondent however produced a salary voucher showing that the claimant was paid a monthly salary of Shs 9000/- on 28th December 2006 and received Shs 6000/- after deduction of an advance of Shs. 3000/-.

The is confirmation of the claimants position that he was paid Shs. 200 daily for breakfast, lunch, and Shs 6000/- at the end of the month.

I find that the claimant is entitled to one month's salary in lieu of notice and award him Shs. 9000/- based on Respondent's admission through the salary voucher.

ii. Unpaid wages Shs. 17,299.80 . The Claimant did not explain how he tabulated the unpaid wages or what period. The wages related to. I did that this claim has not been proved and dismiss the same.

iii. Rest days worked Shs. 822,432.80

iv. Public Holidays worked – Shs. 3,882.60.

RW.1 stated in his testimony that the claimant worked from 8.00 am to 7.00 pm and was in charge of the car even at night. He further testified that the claimant worked even during the holidays.

This is an admission that the claimant worked on both rest days and public holidays and indeed worked overtime as he worked eleven hours a day making 77 hours a week as opposed to the statutory maximum hours of work of 52 hours per week.

The number of hours worked during public holidays and rest days at double rate for only one year

at 52 rest days and eleven public holidays for one year alone paid at double the hourly rate would amount to Shs 37,800/- as against the amount claimed of Shs 26,315.40 for the two heads of claim.

I therefore award him the amount claimed of Shs. 26,315.40/-.

v. Gratuity.

vi. Earned leave Shs. 22,648.50 .

The Claimant has claimed that he never took annual leave for the entire period he was in employment.

The Respondent who has a statutory obligation to keep leave records did not prove that the claimant took any annual leave.

Indeed RW.1 confirmed the claimant worked even during rest days and public holidays. He was terminated when he took leave on 2nd January 2006.

The law provides for 21 working days annual leave for every year worked on 1.75 days for each month worked. The claimant worked from June 2001 to 18th January 2007, a period of 5 years and 7 months. He is therefore entitled to annual leave of 127.25 days . At Shs 300 per day this would amount to Shs. 47,215.00 . Having claimed only Shs. 22,648.50 without explaining how the amount was arrived at, I award him the amount claimed in the sum of Shs 22,648.50.

Costs and interest

Having been substantially successful in his claim I award the claimant costs.

He shall also be paid interest at court rates from date of judgment.

Orders accordingly.

DATED DELIVERED AND SIGNED IN OPEN COURT ON 31st MARCH 2014.

MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent