



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 332 OF 2014

KEVIN OMONDI ODERA

CLAIMANT

v

FLAMCO LTD

RESPONDENT

RULING

1. Kevin Omondi Odera (Claimant) instituted legal proceedings against Flamco Ltd (Respondent) on 28 July 2014, stating the issues in dispute as

1. *Unfair termination and or wrongful dismissal*
2. *Notice*
3. *Normal overtime*
4. *Off duties*
5. *Public holidays*
6. *Leave*
7. *Gratuity.*

2. The Respondent filed a Response on 18 August 2014, and therein it pleaded that

2. Without prejudice to anything contained herein, the Respondent states that the Cause filed herein is bad in law, inept, ambiguous and does not or does not sufficiently disclose particulars of the claim and/or the cause of action and may be struck out with costs. The same is equally statutorily time-barred having been lodged more than 3 years after the date of the alleged cause of action accrued and therefore outside the time-limit prescribed by the Employment Act, 2007. The termination of the Claimants services was first communicated through the District Labour Officer on the 23.5.2011. The Respondent reserves the right to raise a preliminary objection to the proceedings on this ground, inter alia.

3. In a Reply to the Response filed on 22 August 2014, the Claimant denied that the suit was statute barred, because the Claimant was awaiting the outcome of Nakuru Criminal Case No. 1894 of 2012.
4. When the Cause was called up on 21 October 2014, both parties indicated that they were ready to

argue on the preliminary objection.

Respondent's submissions

5. The Respondent stated that according to the Memorandum of Claim, the Claimant pleaded that his services were *terminated on May 2011* and that the Memorandum of Claim was filed on 28 July 2014.
6. This, the Respondent submitted, meant the Claim should have been instituted by May 2014 pursuant to section 90 of the Employment Act, 2007 which has provided for 3 year limit to commence legal proceedings, but the action was commenced two months outside the prescribed period.
7. The Respondent cited Nakuru Cause No. 334 of 2013, *Francis Somoni Kamasia v Unilever Tea Kenya Ltd* in support of its submissions.

Claimant's response

8. The Claimant's position was that the preliminary objection was misconceived.
9. The Claimant admitted that the employment relationship was terminated on allegations of theft in May 2011, after which criminal proceedings were brought against him in Nakuru Principal Magistrate's Court Criminal Case No. 1894 of 2013.
10. It was submitted that the Claimant was acquitted and this determined the issue of culpability and therefore there was a continuing injury.

Respondent's reply

11. In reply to the Claimant's submissions, the Respondent contended that criminal charges could not stop time from running and that the Claimant was not continuously terminated, therefore there was no continuing injury.
12. According to the Respondent, the cause of action arose at time of termination and not acquittal.

Evaluation

13. The authority cited by the Respondent is distinguishable from the instant case. The issue of pendency of criminal proceedings was not raised.
14. In the present case, if I understand the Claimant's case, is that the cause of action arose only after the acquittal of the Claimant in the criminal case. The reason being that the Claimant's services were terminated on allegations of theft and those allegations were the subject of a criminal trial, in which the Claimant was not found culpable. Time therefore started running on the acquittal.
15. Section 90 of the Employment Act provides that

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.

16. The section does not make any reference to criminal proceedings as an exception to the 3 year cap on commencement of legal proceedings. The only exception is in the case of *continuing injury or damage*, where the time limit has been fixed at 12 months of the cessation of the injury or damage.
17. The question therefore is whether the charging of an employee in a criminal case would constitute a *continuing injury or damage* for purposes of the section.
18. I dealt with this question as recently as last week in *Stephen Kamau Karanja v Family Bank Ltd* (2014) eKLR and without seeking to reinvent the wheel, I beg indulgence to set out my reasoning and holding in that decision.

17. My understanding of the submission by the Claimants is that two authorities have held that where criminal proceedings have been preferred against an employee whose services have been terminated or dismissed, time does not run until the conclusion of the criminal charges and therefore, like in the instant case, I should disallow the preliminary objection.
18. But I am unable to accede to the invitation by the Claimant. And with utmost respect, I do not subscribe to the position taken by my brother the Principal Judge and sister judge.
19. For one, there is no controversy as to what an injury is. It is the violation of another person's legal right for which a remedy is available or has been provided by law.
20. Sections 41 and 45 of the Employment Act, 2007 provide all employees with the primary rights as far as termination or dismissal is concerned. These are the right to a hearing or procedural fairness before decision to terminate is taken and the right not to be dismissed without fair and valid reasons.
21. The Claimants have pleaded that their dismissals were *wrongful, unprocedural* and *unfair*. The Claimants as indeed all ordinary employees have a legal right not to be *wrongfully dismissed, unprocedurally dismissed* or *unfairly terminated*. The injuries the Claimants suffered can generally be said to be *wrongful dismissal, or unprocedural dismissal or unfair termination*.
22. Two, the two decisions have not attempted to define or put contours to what a *continuing injury or damage* is. The Employment Act, 2007 has not defined what a *continuing injury or damage* is.
23. It would be appropriate for me therefore to make reference to other reputable sources. Black's Law Dictionary, ninth edition defines *continuing injury* as

An injury that is still in the process of being committed - An example is the constant smoke or noise of a factory.

24. Once the services of an employee have been *wrongfully, unprocedurally or unfairly terminated* or he has been dismissed, he suffers a violation of the rights above mentioned and the injury becomes a *fait accompli*.
25. The employee can either challenge the termination or accept it. The *wrongful, unprocedural or unfair termination/dismissal* cannot be deemed to be continuing because of criminal charges. The criminal process cannot and does not restore the employment relationship which has been ended in breach of the law or contract.
26. When the criminal process is engaged, it cannot divest from the fact that the employee has suffered an injury because of the impugned termination. The injury cannot continue in motion because of the pendency of the criminal process. The criminal process has its own momentum, objectives and purposes.
27. Different legal principles apply to the criminal process. An employer cannot without more be stopped from proceeding with disciplinary processes as an employer because of pendency of criminal trial unless there is an express intention to await the outcome of the criminal process.
28. In the same vein, it cannot be that time for purposes of limitation would stop running because an employee has been charged with a criminal offence. If this were the intention, it would have been expressly provided for either in the Limitation of Actions Act or the Employment Act, 2007.
19. I do not think any erudition of words or display of verbosity will add to the recital, except to find and hold that the Memorandum of Claim herein was time barred having been filed outside the period allowed by section 90 of the Employment Act, 2007.

Conclusion and Orders

20. The upshot of the above discussion is that the Respondent's preliminary objection is upheld and the Court orders that the Memorandum of Claim filed in Court on 28 July 2014 be struck out. Each party to bear its own costs.

Delivered, dated and signed in open Court in Nakuru on this 14th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kairu instructed by Nancy W. Njoroge & Co. Advocates

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates