



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO.1627 OF 2012**

**CHARLES MANONO ONCHIRI ..... CLAIMANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL..... 1ST RESPONDENT**

**THE BOARD OF MANAGEMENT**

**KENYATTA NATIONAL HOSPITAL ..... 2ND RESPONDENT**

**THE DIRECTOR, KENYATTA**

**NATIONAL HOSPITAL.....3RD RESPONDENT**

**RULING**

This is a ruling in relation to preliminary objection dated 1st February 2013 by the respondents on the grounds that the entire suit was filed is statute barred by virtue of section 4(1) of the Limitation of Actions Act. Parties made their oral submissions and exchanged list of authorities.

The claim herein dated 11th September and amended on 25th March 2013 is based on unlawful termination of the claimant by the respondent on the 30th November 2005 which is alleged to have been unprocedural and an unreasonable decision after the claimant had been charged in a criminal case at the instance of the respondents, which criminal charges he was cleared of. That following the criminal trial, the claimant was found innocent on 11th April 2012 when he started organizing this claim against the respondents. That the respondent termination of the claimants employment while criminal proceedings were ongoing was *sub judice* and double jeopardy and a violation of his constitutional rights as under the Bill of Rights and against the labour laws and his terms of service with the respondent.

The claimant further avers that he did not expect to be terminated summarily while the criminal cases against him were ongoing and awaiting determination. He therefore seeks the court to direct the respondents to pay all his salary arrears and future earnings until he turns sixty years, a declaration that the respondents breached the law in dismissing him without notice and before the criminal charges were over, a declaration that his summary dismissal was unlawful and or reinstatement and general damages together with costs for the suit.

In the defence, the respondents filed their response dated 21st October 2012 and amended the same dated 18th March 2013 and admit that the claimant was their former employee but he was terminated following his arrest and being charged in court in Criminal Case Number 2351 of 2003 where due procedure was followed before the claimant was dismissed. That in their dismissal of the claimant, the respondents followed the Employment Act and in the respondent's guideline issued to their employees. That based on the claim, the respondents assert that the same is time barred pursuant to section 4 of the Limitation of Actions Act as the claimant was dismissed from employment on 30th November 2005 and the claim was filed on 11th September 2012 and the same should be dismissed.

In submissions, the respondents advocate stated that the claim as filed is time barred based on section 4 of the Limitation of Actions Act as suits based on contract should be filed in court within six years and based on the notice of preliminary objection filed by the respondents the claimant was made aware of this fact. That the claim therefore offends the provisions of the law and the claimant cannot rely on the Employment Act, 2007 as the cause of action arose before it came into operation. That based on the provisions of the Limitation of Actions Act, section 4(1), the cause of action arose as of 30th November 2005 and the same lapsed on 30th November 2011 and by filing it on 11th September 2012, the claimant was already out of the limitation period.

That in the claim the claimant states that time started running after the criminal charges he was facing were cleared by the Magistrates Court and the High Court whereas he faced criminal charges while he still in employment and had no legal incapacity stopping him from filing his claim as under the Limitation of Actions Act. That the claim is based on procedures applied in his dismissal but not on the reasons for the termination.

The respondents cited the *Halsbury Laws of England, Vol. 16*, noting that the effective date of termination of a contract for an employee is by notice on the date this notice expires and where there is no notice, the date the termination takes effect or where the contract is for a fixed period, the date on which the term expires without being renewed under the same contract. Also cited is *Halsbury Laws of England, vol. 18*, noting that time runs from when the cause of action accrues and in computing this period, the day on which the cause of action arose is excluded.

That as a court of equity and based on the claim before court, the court should apply the maxim that equity aids the vigilant and not the indolent. Follow the law and allow the preliminary objection, dismiss the claim and give costs to the respondents.

On the other hand the claimant through their advocate submitted that the claimant was an employee of the respondent when he was charged with 4 criminal counts in 2003. That while these cases were pending, he was terminated from his employment by the respondents the reasons being the criminal charges. That he was convicted in one case in 2008 while he was acquitted in the others and thus lodged an appeal to the High Court which appeals succeeded and he was cleared of all the charges on the 11th of April 2012. That while these criminal cases were ongoing, on 30th November 2005 he was dismissed.

The claimant further submitted that he was dismissed and the reasons were that he had criminal charges in court and hence time stopped running until these matters came to a conclusion. That noting his dismissal was on 30th November 2005 and conviction in 2008, only 3 years had lapsed after the dismissal date and by use of this logic, time stopped running when he was convicted and started running again upon acquittal. That immediately after acquittal he filed this claim within 5 months. That pursuant to section 90 of the Employment Act, 2007 the claimant was still within the 3 years period to file this claim.

That notwithstanding the provisions of section 4 of the Limitation of Actions act, no civil action can arise if there is a continuous action and a claim shall be after 12 months from the 3 years. In this case, time started running from the date of acquittal. The claim was based on the criminal cases as the ground for dismissal and the acquittal from these criminal charges is the basis for the claimant's case as from April 2012.

That the preliminary objection should be dismissed and the case heard on merit.

In employment contracts time is not of the essence unless the parties expressly stipulate that conditions as to time must be respected or complied with. Also based on the nature of the subject matter of the contract or the surrounding circumstances that show time should have been considered to be of the essence and where a party who has been subjected to an unreasonable delay gives notice to the party in default making time of the essence.

The claimant herein was terminated on the 30<sup>th</sup> of November 2005 after the commencement of the criminal charges that were pending in court. These criminal charges though reported by the respondents, were not running parallel to any civil claim that had been filed in court noting that his position with the respondents was subject of these criminal charges. It was therefore the duty of the claimant to seek and protect his rights when the criminal charges commenced or immediately when he was terminated from his position with the respondents. Nothing prevented him from commencing his civil claim at any stage within the permissible time. Nothing was done by the respondent in admission of the claim or part of it to extend the legal time under which the claim fell, that is within the meaning of the Employment Act, 226 (now repealed). Equally where the Trade Disputes Act, cap 234 (repealed) became applicable, the claimant failed to utilize its provisions.

Looking at the issues raised in the preliminary objection I note The law applicable at the time of the termination of the Claimant's services as of 30<sup>th</sup> November 2005, was the Employment Act; Cap 226. This law was repealed by the Employment Act, 2007. A pertinent question to the determination of the preliminary objection is therefore whether the limitation provisions in section 90 of the Employment Act, 2007 is applicable to contracts of service terminated before its commencement, in other words if the Employment Act, 2007 extinguished the Claimants right to bring the Claim. My reading of the Employment Act 2007 has not found any provision in the Act which states that it shall have retrospective application. The only respect in which the Employment Act, 2007 applies to contracts of service entered into before its commencement in 2008 is its amendment of the terms of such contracts which were still subsisting to be construed as if they were made in accordance with it.

The claimant contested that the time stopped running when he was convicted and time started running against when the Court of Appeal acquitted him. However my reading of the law is the other way round. A civil claim should give way to a criminal case as any acquittal from the criminal case is not a bar to civil proceedings. In the old case of *Abdulla Ramadhan and Another versus Suleiman Haji and Another*, the court held that it is not necessary that criminal proceedings should have been instituted first even if available. Hence, the criminal charges for which the claimant was attending before the magistrate's Court and the high Court were not a bar to him to commence his claim for unfair termination by the respondents. Whatever claim that he had against his employer in 2005 was governed by the applicable law and to say that time stopped running because of the criminal cases is a wrong interpretation of the law. In any event these criminal charges commenced before the termination. Time started running in his employment claim from the date of his termination being the 30<sup>th</sup> of November 2005.

On the other hand, Section 93 of the Employment Act, 2007 sets out the transitional provisions relating to continuance of valid contracts of service and foreign contracts of service entered into before its commencement. At the time the contract of service in contention was terminated, the Employment Act, 2007 was not in place. the employment/contractual relationship had ended on 30<sup>th</sup> November 2005 with

the termination of the Claimant, a date before the commencement of the Employment Act, 2007. In this regard the continuance, application and interpretation of the contract in accordance to the provisions of the Employment Act, 2007 does not arise. Any disputes on limitation from such contract must be determined on the basis of the repealed Employment Act, Cap. 226 and the Limitation of Actions Act, Cap 22 Laws of Kenya.

A consideration of the Limitation of Actions Act and section 4 thereof is relevant. The section provides:

*4(1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued-*

- a. *Actions founded on contract;*
- b. ...

It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 30<sup>th</sup> November 2005, seven years from the date of filing this claim in the Industrial Court on the 11<sup>th</sup> September 2012 and therefore by operation of the law, the claim lapsed on 30<sup>th</sup> November 2011.

This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the Court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time. This was not the case here.

This claim does not fall under the ambit of the Employment Act, 2007 as the cause of action arose as of 1st June 2006 and based on the provisions of section 84 of the Labour Relations Act and section 93 of the Employment Act on transitional provisions, this dispute should have been resolved as under Trade Disputes Act, cap 234 Laws of Kenya (no repealed). The claim therefore does not conform to the mandatory time limitations. It must fail.

**The preliminary objection is upheld. With that I strike out the claim filed on 11<sup>th</sup> September 2012. Each party to bear their own costs.**

Dated and delivered in open court this 24<sup>th</sup> day of May 2013

**Mbaru M.**

**Judge**

In the presence of:

Court clerk: Jacob Kipkirui

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