



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 680 OF 2010

BETWEEN

COMMUNICATION WORKERS UNION

[KENYA]..... CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....

RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Mutuli instructed by Mutuli and Associates, Advocates for the Claimant

Ms. Mate instructed by Iseme, Kamau & Maema Advocates for the Respondent

RULING

1. The Respondent raised a preliminary challenge to the validity of the Claim filed herein, based on the time limit on filing of employment claims, set at three years from the date of accrual of the cause of action, under Section 90 of the Employment Act 2007.
2. It is not disputed that the Grievant Beatrice Mukholwe on whose behalf this Claim is brought by her Claimant Union, was employed by the Respondent as a Senior Clerical Officer. She was suspended by her employer on 20th January 2005, pending investigation into allegations made against her by her employer that she had engaged in fraudulent preparations of credit adjustments. She was subsequently dismissed from employment on 31st March 2006.
3. The Parties agreed on 21st May 2013 to have this preliminary challenge disposed of by way of written submissions. The Respondent submits that the Memorandum of Claim was filed on 6th August 2009, more than three years after the dismissal. This was contrary to Section 90 of the Employment Act 2007, which states such action must be commenced within three years next, after the act, neglect or act complained of. The Respondent relies on two decisions of the Industrial Court in support of its submission, namely: *Cause Number 687 of 2011 between Nelson Ochieng’ Nyoturu v. Telkom Kenya Limited and Cause Number 1162 of 2011 between Kilo Kimilu and 2 Others v. Rolmil Kenya Limited.*

4. The Claimant concedes dismissal took place on 31st March 2006. The Grievant filed an appeal against the dismissal to the Respondent, which appeal was rejected on 23rd November 2006. The Grievant took up the matter with her Trade Union the Claimant herein, who reported the existence of a trade dispute with the Minister for Labour on 28th June 2007. This according to the Claimant was done in accordance with Section 47 [1] of the Employment Act 2007. The Minister carried out investigations which culminated in recommendation dated 18th March 2009, for reinstatement of the Grievant, in accordance with Section 47 [2] and Section 49[3] of the Employment Act 2007. The Respondent subsequently declined to implement the recommendation, in a letter to the Ministry dated 3rd April 2009. The Claimant filed the Claim one month and a half after the refusal. The Claim cannot therefore be time-barred.

The Court Finds and Orders:-

5. The Grievant was summarily dismissed on 31st March 2006. At the time, the Employment Act 2007 was not in place, and would not be the substantive law applicable to the Claim; the substantive law would be the Employment Act in place at the time, being Cap 226 the Laws of Kenya, as read together with Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya. The Grievant has no reason to look for remedies from a law that was not in place when the infringement took place. Doing so as she has done clearly brings Section 90 of the new Act into play, and her Claim would be time barred. Section 90 does not take into account the non-adjudicatory dispute resolution mechanisms relied upon by the Claimant to explain delay.

6. The correct procedure would have been for the Claimant to refer the dispute under the provisions of the repealed Trade Disputes Act, as provided for in the transitional provisions contained in Section 84 of the Labour Relations Act Number 14 of 2007. Schedule 5 of this law states that, disputes relating to summary dismissal claims which arose before the enactment of the Labour Relations Act, are to be filed in accordance with the provisions of Trade Disputes Act. The procedural law in going to the Minister, and subsequently in coming before the Court, ought to have been the Trade Disputes Act. The substantive law, which would allow the Grievant to claim for reinstatement, compensation or terminal benefits, would be Section 15 of the Trade Disputes Act, the Employment Act Cap 226 the Laws of Kenya or the Regulation of Wages and Conditions of Employment Act Cap 229 the Laws of Kenya. Under these laws, it would not have been necessary to consider Section 90 of the Employment Act, a law that found the Grievant already out of employment. The Employment Act 2007 is wholly without application to the Grievant, dismissal having taken place before the coming into force of this law. In light of these views, the Court Orders:-

[a] The Claim is improperly before the Court and is hereby struck out;

[b] The Claimant is at liberty to bring fresh proceedings under Section 84 of the Labour Relations Act; and

[c] No order on the costs.

Dated and delivered at Nairobi this 9th day of December 2013

James Rika

Judge