



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 230 OF 2013

AGNES NGENDO WANYOIKECLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent on 16.2.2004 as supplies officer 1 and worked until 2.12.2004 when she was summarily dismissed for misconduct. She appealed against the dismissal but the appeal was dismissed on 31.3.2005.
2. On 20.2.2013, the claimant brought this suit contending that her dismissal was unjust, unfair and unlawful and prayed for the following reliefs:
 - (a) Salary she could have earned during the 24 years before age of retirement at the rate of her last salary of Kshs.162,360 per month equaling to Ksh.46,759,680.
 - (b) Loss of lucrative employment.
 - (c) General damages
 - (d) Costs of the suit.
3. The respondent filed defence on 27.3.2013 denying the alleged unjust and unfair dismissal and averred that the dismissal was justified and a fair procedure was followed by granting the claimant a hearing before the dismissal and upon her appeal. She further denied the reliefs sought by the suit and averred that they are not tenable. Finally, the respondent contended that the suit is statute barred and prayed for the same to be dismissed with costs.
4. The suit was heard on 23.10.2018 and 24.10.2018 when the claimant testified as Cw1 and the respondent called Mr. Ezekiel Cheptumo as Rw1. Thereafter both parties failed to file written submissions as directed by the court.

Claimant's Case

5. Cw1 stated that she joined the respondent on 16.2.2004 as a Supplies Officer Job Group 5. That her salary was Kshs.162,360 per month in addition to other allowances. That her services were terminable by 3 months' notice or salary in lieu of notice.
6. Cw1, further contended that after she served the respondent faithfully, diligently and honestly until 2.12.2004 when she was served with dismissal letter without any justifiable cause. She appealed on 8.12.2004 but the appeal was dismissed vide the letter dated 31.3.2005.
7. Cw1 further contended that upon her appointment she and 2 other colleagues were secluded to a room to sort out documents from old procurement files. That, thereafter she was relocated to the local purchasing under 2 bosses but she was not a signatory. That after serving for one and half (1 ½) months, she was suspended on alleged corruption. That after hearing by committee, she was found innocent and reinstatement was recommended but the Board overruled the committee and dismissed her and evicted her from the Staff Quarters. She maintained that the alleged procurement irregularities upon which she was dismissed were never explained to her.

Defence Case

8. Rw1 is the respondent's Senior Foundation Officer who formerly served as the Senior HR Officer Industrial Relations. He confirmed that the claimant was employed by the respondent from 16.2.2004 to 2.12.2004 as a Supplies Officer 1, that during her tenure of office a procurement scam was reported which led to the loss of a colossal sum of money to the respondent.

9. As a result of the said information, a management committee was constituted to conduct an audit of the Supplies Department. That the Audit was done in August 2004 and it verified that there were indeed gross insufficiencies in the procurement department and a Report of the Audit was given to the Respondent's Board of Directors.

10. Rw1 further testified that on 25.10.2004 the claimant and some other officers implicated by the Audit Report were suspended on half salary to pave the way for an in-depth investigation of the scam. That after the investigations, the claimant was invited to a hearing on 17.11.2004 before the management Verification Committee after which it made its recommendation to the Board of Directors. That the Board deliberated on the said recommendations and decided to dismiss the claimant for her apparent involvement in the procurement irregularities. That the claimant appealed against the dismissal and Management Panel heard the appeal on 7.2.2005 and made its recommendation but the appeal was dismissed and she was paid all her terminal benefits.

11. Rw1 admitted that he was not there when the investigations were done but contended that he learned the matters from office records that 9 Queries had been raised under Exh.D.3(a) which involved loss of millions of shillings. He contended that the claimant's appeal was dismissed because she admitted that there were malpractices in the department and that she was acting on instructions from his seniors in the department. That she had also approved a list of supplier who had not been prequalified.

12. On cross examination Rw1 admitted that he had no documentary evidence to prove that the claimant had signed approval of a list of prequalified suppliers. He further admitted that Appeal Panel allowed the claimant's appeal and gave her the benefit of doubt because the officer who instructed her accepted responsibility.

13. Rw1 however admitted that the Board of Directors overruled the decision of the Appeals Panel and upheld the summary dismissal on ground that the claimant had participated in the procurement irregularities. He maintained that the decision of the Appeals Committee is not binding on the Board.

Analysis and Determination

14. There is no dispute that the claimant was employed by the respondent as Supplies Officer 1 from 16.2.2004 to 2.12.2004 when she was summarily dismissed. The issues for determination herein are:-

- (a) Whether the suit is statute barred;
- (b) Whether the summary dismissal was unjust, unfair and unlawful;
- (c) Whether reliefs sought are tenable and should be granted.

Statute barred suit

15. The defence of limitation was pleaded in the defence and prosecuted vide the respondent's. Notice of motion dated 22.4.2013. During the hearing of the motion on 20.5.2013 before Marete J, Mr. Nyagito, Counsel for the claimant admitted that the suit was filed out of time but contended that the delay was occasioned by the claimant's depression after the summary dismissal.

16. After the hearing of the motion, Marete J. struck out the suit on 4.6.2013 for being statute barred and the file was closed. Thereafter the claimant filed Exparte Miscellaneous Application No. 56 of 2013 seeking for leave to file suit out of time citing ill health as the reason for the delay in filing her suit. By his ruling dated 26.2.2013, Marete J. allowed the Miscellaneous Application No. 56 of 2013 whose effect was to set aside the earlier order of dismissal of the suit herein and paved the way for hearing on the merits.

17. The respondent filed Notice of Motion dated 23.1.2015 seeking review and setting aside of the exparte ruling dated 26.2.2014 but on 10.12.2015, she withdrew the application with intention to appeal but that is the last time the court was informed about the intended appeal. It is presumed that no appeal was lodged because thereafter the respondent participated in the hearing of the suit.

18. The defence of limitation was not prosecute during the hearing or canvassed by submissions. However, the issue of limitation goes to the jurisdiction of the court to determine a dispute it must be determined first. It is also trite law that jurisdiction cannot be conferred by consent or acquiescence of the litigants.

19. In this case, the claimant never gave any evidence to prove that the failure to file suit within statutory period can be excused. The filing of the suit was done 2 years out of time. Without any evidence to prove that the delay was excusable is fatal to the suit because the grant of leave to file suit out of time does not absolve the claimant from the obligation to justify the late filing. In my view, the leave to file suit out of time, which is obviously exparte order, remains a triable issue and the claimant is legally bound by the rules of evidence to prove that the leave was justified. Consequently I find that the suit herein is statute barred by dint of section 4(1) of the limitation of actions Act under which the claim expired 6 years after the claimant's dismissal on 2.12.2004 being 2.12.2010.

Unfair dismissal

20. In view of the fact that the suit herein is statute barred, I decline to determine the suit and proceed to down my tools.

Conclusion and Disposition

21. I have found that the suit hereon is statute barred and the court lacks jurisdiction to determine it. Consequently I strike it out with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE