



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 333 OF 2014

PAUL TOWETT.....APPELLANT

- V E R S U S -

COMMANDING OFFICER 3KR LANET BARRACKS.....1ST RESPONDENT

**BRIGADE COMMANDER OF THE 2ND BRIGADE LANET BARRACKS.....2ND
RESPONDENT**

CHIEF OF GENERAL STAFF.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

*(Being an appeal from the judgement and decree delivered by Hon. C. Obulutsa (Mr) Ag Chief
Magistrate on 1st July 2014 in Nairobi CMCC No. 10449 of 2007)*

JUDGEMENT

1. Paul Towett, the appellant herein, filed an action before the Chief Magistrate's Court, Nairobi vide the plaint dated 29.11.2007, in which he sought for compensation for wrongful and unlawful termination of his employment from the Kenya Army as follows:

- a) General damages for wrongful and unlawful termination.***
- b) General damages for false imprisonment.***
- c) Reinstatement to serve in the Armed Forces.***
- d) Salary, allowances and benefits from September 2003 to the date of judgment.***

2. The respondent filed a defence and contended that the action was statute barred. The suit was heard and in the end, Hon. Obulutsa learned Ag Chief Magistrate upheld the respondent's objection and proceeded to strike out the suit. Being aggrieved, the appellant filed this appeal.

3. On appeal the appellant put forward the following grounds

- 1. THAT the learned magistrate made errors of law and in fact in finding that the suit was time barred.***
- 2. THAT the learned magistrate in reaching the finding that the suit was time barred relied on***

evidence that was not before him.

3. THAT the learned magistrate in reaching his finding that the suit was time barred ignored evidence and matters of law that were placed before him.

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the case that was before the trial court. I have also considered the rival oral and written submissions. I think it is important to set out the brief background of this appeal. The appellant joined the Kenya Army on 27.12.1980 as a driver and obtained the rank of a corporal stationed in Lanet Barracks, Nakuru. On 31.7.2003, a kitchen belonging to 3KR caught fire. On 11.08.2003, the appellant was summoned by Military Intelligence Officers for interrogation over the burning of the aforesaid kitchen. The appellant denied playing any role in the arson and set up the defence of alibi claiming that he was in Eldoret Barracks when the kitchen caught fire. It is in evidence that the commanding officer 3KR Lanet Barracks, the 1st respondent charged the appellant for various offences touching on indiscipline and was subsequently demoted to senior private and discharged from the Armed Forces. The discharge punishment was later mitigated and replaced with the deduction of 10 days' pay. However, the Brigade Commander of the 2nd Brigade Lanet Barracks, the 2nd respondent herein, summoned the appellant and accused him of taking part in causing the fire incident and proceeded to summarily dismiss the appellant from the Armed Forces. This action prompted the appellant to file the compensatory suit before the Chief Magistrate's Court which action in the end was dismissed.

6. On appeal, the prominent ground which commended itself for consideration is whether or not the suit was time-barred. According to the appellant, the learned Ag, Chief Magistrate erred when he found that the action was time-barred pursuant to Section 3(2) of the Public Authorities Limitations Act, yet the ground was never pleaded by the respondents. The appellant further argued that the trial court ought to have considered that he first followed the available Internal Dispute Resolution Mechanism under the Armed Forces Act, thus delaying to file the action within the period fixed by the statute.

7. The respondents on the other hand are of the view that the trial magistrate arrived at the correct decision in law. The respondents argued that the appellant should have sought for leave to file an action out of time before filing the suit. It is not in dispute that the appellant was dismissed from the Armed Forces on 2nd September 2003. It is also not disputed that the suit before the trial court was filed on 29.11.2007. Under Section 3(2) of the Public Authorities Limitation Act no action founded on contract shall be brought against the Government or a local authority after the lapse of 3 years from the date when the cause of action arose. It is apparent from the recorded evidence that the appellant filed the suit before the trial court four years after the date of his dismissal.

8. It is clear to me that the suit was simply statute barred. There was no leave sought to extend time to file an action out of time. The learned Ag. Chief Magistrate was therefore right to strike out the suit.

9. In the end, I find the appeal to be without merit. It is dismissed in its entirety. In the circumstances of this case, I am convinced that a fair order on costs is to direct which I hereby do that each party meets its own costs on appeal.

Dated, Signed and Delivered in open court this 24th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent