Obaigwa v Ministry of State for Defence & another (Civil Appeal 106 of 2018) [2023] KECA 173 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 173 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 106 OF 2018

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

FEBRUARY 17, 2023

BETWEEN

HENRY OSIEMO OBAIGWA ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTRY OF STATE FOR DEFENCE ..... 2ND RESPONDENT

(Appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Nzioki wa Makau, J.) dated 30th November 2017 in ELRCC No. 1603 of 2014)

JUDGMENT

1. The appellant, Henry Osiemo Obaigwa is aggrieved by the judgment and decree of the Employment & Labour Relations Court at Nairobi (Nzioki wa Makau, J.) dated 30th November 2017. By the said judgment, the learned judge dismissed the appellant's claim against the respondents for wrongful and unlawful termination of employment. He found that the claim had no merit and, in any event, was time-barred. The short background to the appeal is as follows.

2. On 4th October 2013, the appellant lodge a claim in the Employment & Land Court at Nairobi against the Ministry of State for Defence (the 1st respondent) and the Attorney General (the 2nd respondent) for wrongful and unlawful termination of service. He pleaded that in April 1984 the 1st respondent employed him through an oral contract as a senior sergeant in the Kenya Army tailoring unit, earning a gross salary of Kshs 54,000 per month and annual travelling allowance of Kshs. 30,000. The appellant further averred that, in June 2007, the 1st respondent wrongfully and unlawfully terminated his employment following allegations and prosecution for alleged theft. It is common ground that the appellant was convicted by a Court Martial and, subsequently, by the Chief Magistrates Court at Nairobi and sentenced to two years' imprisonment.

3. The Appellant successfully appealed to the High Court against the conviction and sentence by the Chief Magistrates Court vide a judgment dated 27th November 2012. However, the 1st respondent refused to reinstate him after the acquittal. Accordingly, the appellant prayed in his claim for a declaration that the termination of his employment was unlawful, an order for payment of all his monies, allowances and benefits due from the date on interdiction, general, aggravated, exemplary and or special damages, interest and costs.

4. In their joint memorandum of reply, which was subsequently amended, the respondents denied the appellant's claim and averred that he was not entitled to the remedies he had sought because he was the author of his own misfortune. They further pleaded that the appellant was taken through lawful disciplinary proceedings for conduct prejudicial to good order and service discipline under section 68 of the repealed Armed Forces Act, where he admitted stealing from his colleague and offered to repay the money. As a consequence, he was lawfully discharged from service. As regards his acquittal, the respondents contended that it was not a valid ground for overturning the disciplinary proceedings.

5. The trial court heard and dismissed the claim in the impugned judgment on the ground that the appellant had admitted the theft and signed a written confession to that effect and that, in any event the suit was time-barred under the repealed *Employment Act* (cap 226) and section 4(1) of the *Limitation of Actions Act*. Each party was ordered to bear its own costs. The appellant was aggrieved and lodged the present appeal.

6. Although the appellant's memorandum of appeal raises eight grounds of appeal, as he himself readily admits in his written submissions, it raises only two issues, namely whether the learned judge erred by holding that his termination was not unlawful and unfair, and by declining to award the remedies that he had prayed for. The appellant contended that there were no valid reasons for his termination under sections 43 and 45 of the *Employment Act*, 2007 because the only reason for his termination was the alleged theft from his colleague. He further submitted that, under section 68 of the repealed Armed Forces Act, upon conviction for conduct prejudicial to good order and service discipline the prescribed sentence was a term of imprisonment not exceeding two years or any less punishment prescribed by the Act, but not termination.

7. It was the appellant's further contention that his statement and confession before the disciplinary tribunal (the court martial) was not authentic. In any case, he submitted that he successfully appealed to the High Court against his conviction and sentence by the Chief Magistrates Court and was accordingly exonerated. He relied on the decision of this Court in *Kenfreight (E.A.) Ltd v. Benson K. Nguti* [2016] eKLR and *Judicial Service Commission v. Mbalu Mutava & Another* [2015] eKLR and urged us to find that his termination was wrongful and unlawful.

8. Lastly, the appellant submitted that having demonstrated that his termination was wrongful and unfair, he was entitled to the remedies that he had prayed for. Accordingly, he urged us to allow the appeal and award him the remedies he had sought, together with costs both in this Court and in the trial court.

9. Though duly served with a hearing notice, the respondents neither filed their written submissions nor appeared at the online hearing of the appeal.

10. We have carefully considered the record of appeal, the judgment of the trial court, the appellant's submissions and authorities, and the law. In a first appeal like this, we are required to revisit the evidence that was before the trial court afresh, analyse it, evaluate it and come to our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses,

hearing them and observing their demeanour and giving allowance for that. Indeed, in *Musera v. Mwechelesi & Another* [2007] 2 KLR 159, the Court warned:

> " As an appellate court, the Court has to be very slow to interfere with the trial judge's findings unless it was satisfied that either there was absolutely no evidence to support the findings or that the trial judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupported conclusion."

11. The record shows that, before he was charged in the Chief Magistrates Court and convicted and sentenced for stealing contrary to section 275 of the *Penal Code*, the appellant was taken through a court martial which found him guilty of conduct prejudicial to good order and service discipline, contrary to section 68 of the repealed Armed Forces Act. The record of the proceedings before the Court Martial indicates that the charge was read to the appellant. The framed charge was:

> Conduct to the prejudice of good order and service discipline contrary to section 68 of the Armed Forces Act, 1968

12. The particulars of the offence were equally explained to him, being:

> At Kahawa Garrison Warrant Officers'/Senior Sergeants' Mess Single Quarters, on diverse dates and times between 13th May 2007 and 28th May 2007, the accused (the appellant) used ATM card in respect of 56228 SGT Yuvinus Makanga of KACT to withdraw Kshs 643,200 (six Hundred Forty Three Thousand Two Hundred) from his (SGT Making's) account without the SNCO's consent, an act he knew or was expected to know to be an offence."

13. The record also shows that the appellant admitted the charge after which he was convicted and dismissed from the Armed Forces, now Defence Forces. There is nothing on record to suggest that the appellant did not admit the offence or that the record is not authentic. The appellant was subsequently charged in the Chief Magistrates Court, but was ultimately acquitted by the High Court. It is only after the 1st respondent refused to review the appellant's case upon being acquitted in the High Court, that the appellant alleged that his plea of guilty before the Court martial was not genuine.

14. In our view, the disciplinary process and the criminal proceedings were two separate processes and independent of each other. The appellant was not dismissed from the defence forces because of his conviction by the Chief Magistrates Court. On the contrary, he was dismissed before he was prosecuted in the civilian courts after he admitted before the Court Martial commission of the offence of conduct prejudicial to good order and service discipline. Acquittal by the High Court did not have any effect on the disciplinary proceedings where he freely admitted the disciplinary offence.

15. That would have been enough to dismiss this appeal, but there are three additional reasons which we must advert to. First, the appellant was employed and dismissed during the tenure of the repealed *Employment Act*, 1976. His employment was terminated in June 2007. The current *Employment Act*, 2007 commenced on 2nd June 2008 and, by section 92, it repealed the previous *Employment Act*. The current Act has no retrospective application and, therefore, the appellant's claim could not be brought under it because he was employed and his employment terminated before the current Act came into force. (See *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR).

16. Secondly, by dint of Section 1(2) (a) of the repealed *Employment Act*, that Act did not apply to the armed forces as defined in the Armed Forces Act, cap. 199 (repealed). Hence the Applicant could not validly bring his claim under the repealed *Employment Act*. Lastly, even under the current *Employment*

Act, the appellant's claim was time barred. Section 90 requires the appellant to lodge his claim within three years from the date of the alleged unlawful termination. That would have been by June 2010, but the appellants claim was lodged on 4th October 2013. But as we have already noted, his claim could not, in any case, have been brought under the current *Employment Act*. Whether the claim was time-barred was a jurisdictional issue that the trial court was entitled to raise, even suo moto. (See *Attorney General & 2 Others v. Okiya Omtata & 14 Others* [2020] eKLR).

17. For all the foregoing reasons, we find no merit in this appeal and dismiss it in its entirety. As the respondents did not defend the same, we direct each party to bear its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIARB, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR