Maina v Kenya Revenue Authority (Petition E220 of 2023)
[2025] KEELRC 235 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 235 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E220 OF 2023

MN NDUMA, J

JANUARY 30, 2025

BETWEEN

CYRUS MACHARIA MAINA ..... PETITIONER

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

JUDGMENT

1. The Petition before Court was filed by the Petitioner on the 28/11/ 2023. It is seeking the following remedies;
    1. A declaration that the Petitioner's Fundamental Rights and Freedoms have been violated by the Respondent.
    2. A declaration that the Respondent terminated the Petitioner's employment unfairly.
    3. A declaration that the Respondent discriminated against the Petitioner
    4. An Order for compensation by way of general, aggravated, special and exemplary damages as may be assessed and found suitable.
    5. General Damages for constitutional breaches and violations.
    6. Costs of, and incidentals to, these proceedings be borne by the Respondent.
    7. Any other relief that this honourable court may deem just to grant.

Facts of the Petition

2. The Petitioner says that he joined the Respondent body in what was then Customs and Excise Department as a Clerical staff in the Ministry of Finance in November, 1986 and diligently performed his duties in various places and custom offices in Kenya up until his termination from employment

vide a dismissal letter dated 27th March, 2009 as the Assistant Revenue Officer on account of gross misconduct.

3. The Petitioner was reporting to the Isebania Station Manager. That it was alleged that a number of consignments loaded on trucks numbers T 641ANQ/T614AGQ, T634AEC/T652AEC, T237ALV/T888ANH and declared on Entry No's 2007/KSM/55931, 2007/KSM/55927, 2007/KSM 56784, 2007/KSM/57179, 2007/KSM/57109, 2007/KSM/57112 did not reach their intended destination in Tanzania. The Petitioner was accused of abetting in the commission of dumping of the said consignment goods into the Kenyan local market. He was invited to a disciplinary hearing on the 10/12/2008 and attended on the 9/2/2009. The employment of the petitioner was terminated thereafter.

4. The Petitioner says that he informed the Committee that the Respondent was already in receipt of the landing certificates that were issued by the Tanzanian authorities upon importation of the goods. That he was discriminated against by being targeted for dismissal despite the evidence he had provided and pleas to have the matter investigated afresh.

5. The Petitioner deposes that he requested for a review of his disciplinary case against the decision to terminate vide several letters dated 26th October 2015, 5th December 2015, 18th December 2017 and 18th May 2023 in vain.

Affidavit

6. The Respondent through its officer Jackson Kimeu Kyalo deposes that the Petitioner was employed as an assistant revenue officer by the respondent.

7. The decision to discipline the Petitioner was informed by an investigation on the dumping into the local market of petroleum products, cigarettes and garments meant for export.

8. Through a letter dated 21/07/2008 the Petitioner was required to show cause why disciplinary action should not be taken against him based on the finding of the investigations report. The petitioner responded to the notice to show cause. He was invited by the Respondent to appear before a disciplinary tribunal on the 22/01/2009 vide a letter dated 15/01/2009. That explanation by the petitioner was found to be unsatisfactory and was dismissed from employment vide letter dated 27th March 2009.

9. That the Petitioner vide letter dated 30/01/2009 exercised his right of appeal against the decision of the Respondent to terminate his employment.

10. That upon being heard the Petitioner was found culpable and was dismissed vide a letter dated 27th March 2009 in line with the provisions of section 7.9 of the KRA Code of Conduct which provided for lawful grounds of separation.

11. The Petitioner lodged a second appeal through letter dated 21st April 2009 and the Respondent upheld the decision vide letter dated 14th October 2009 on the ground that no new evidence was adduced to warrant a review of the earlier decision.

12. In the replying affidavit of Julius Chege Macharia, the respondent deposes that the consignments in question are 2007/KSM/5591, 2007/K5SM 55927, 2007/KSM/56787, 2007/KSM/57179 and 2007/KSM/57112.

13. That the Petitioner was interrogated with regard to his role having purportedly physically examined the consignment when no such exports took place. That this action facilitated the dumping of the said

petroleum products in Kenya. The petitioner in turn presented as evidence certificates belonging to Mozzy Zakaria as evidence of goods leaving the Country.

14. The witness deposed that in the customs best practice and Kenya Revenue Authority' s customs procedure, the importer of a particular consignment cannot change at point of entry into another country. Salama Investment and Mossy Zakaria are separate entities and the Petitioner's argument fails as it is not only dishonest but lacks legal basis.

15. That the suit by the respondent lack merit and it be dismissed with costs.

Determination

16. The parties filed written submissions which the court has carefully considered together with the authorities furnished by counsels thereof. The court has also considered the evidence as contained in the respective depositions and have delineated the following issues for determination: -

    a. Whether there were fair and valid reasons for termination of the claimant's employment

    b. Whether the Petitioner is entitled to the remedies sought.

17. Section 43 of the *Employment Act* 2007, provides as follows:

> "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of the section.

18. Section 45 (1) and (2) of the *Employment Act* 2007 provides that–

> "(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer is unfair if the employer fails to prove—
>
> (a) that the reason for the termination is valid;
>
> (b) that the reason for the termination is a fair reason—
>
> (i) related to the employee's conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure."

19. The Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR the court said that

> ''The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test.''

20. The Court went further and observed that

> " ...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

21. Lord Denning MR in Leyland UK Ltd versus Swift 1981 IRLR; said that the test is

> 'Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases, there is a band of reasonableness, within which an employer might reasonably take one view; and another quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.

22. The Respondent's reason for the dismissal of the Petitioner as stated in the letter dated 21/07/2009 labelled as the annexure JKK is that the Petitioner purportedly physically verified the consignments relating to the entries number 2007/KSM/55931, 2007/KSM/55927,2007/KSM/56784,2007/KSM/56787,2007/KSM/57179, 2007/KSM/57109, 2007/KSM/57112.

23. The Respondent's stand is that the said consignment did not leave the country and the Company listed in the Simba system as the consignee, Salama Investments, was not registered in Tanzania. The Respondent says that it is the information given by the Petitioner in his report as the verification officer that was used to come up with the entry in the system. This, says the Respondent, facilitated dumping of the said goods in Kenya. The Respondent adds that the Petitioner in answer to the whether the goods left the country instead provided a landing certificate belonging to one Mossy Zakaria which is separate and distinct from Salama Investment. The Respondent also maintains that the importer of a particular consignment cannot change at point of entry into another country

24. The Petitioner does not dispute at all that it was the report he gave that led to the entry of Salama Investment as the Consignee of the goods. Rather, his argument is that the entries Mossy Zakaria had used to clear the goods in Tanzania were not genuine entries processed through the Respondent's system. There is no evidence for that on the record. There were in the view of the Court ample basis for taking the decision to dismiss.

25. This Court accordingly finds that the Respondent did have a reason to terminate the Petitioner's employment.

26. The Respondent gave the Petitioner the opportunity to appear before the disciplinary Committee vide the letter dated 18/11/2008 for the hearing. This was after being served with the show cause letter dated the 21/7/2008. The subsequent appeals were also duly responded to through the Authority's letters dated 14/10/2009 and 26/7/2011 in respect of the second appeal. The Petitioner was only allowed two

Appeals, and so there was no obligation to respond to the other Appeals lodged by the Petitioner. The Respondent therefore complied with section 41 of the *Employment Act* 2007 as regards procedural fairness.

Doctrine of avoidance

27. The cause of action in this matter arose on 27th March 2009 when the claimant was dismissed from employment. This suit as set out in the petition is a mundane employment dispute that should have been filed in terms of the provisions of the *Employment act* 2007. The claimant had 3 years in which to file the suit otherwise the suit was time barred in terms of section 90 of the Act which provides that all suits based on contract of employment must be filed within 3 years from the date the cause of action arose.

28. In Petition E 5629 of 2020 Anderson Nganga Maina and 2 others versus National Cereals and Produce Board the court had the following to say;

> 'Section 90 of the *Employment Act* provides as follows:- Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof. From a plain reading of the law, the claim is, as asserted by the Respondent, quite stale, barred by limitation and worse still vexatious and an abuse of the Court process. The Claimants were required to move the Court by 4th October 2013 as the *Employment Act* places a limitation of 3 years on their claim since there is no scope for enlargement of time nor does time stop running'.

29. The court finds that the attempt to invoke the provisions of *the Constitution* of Kenya 2010 which were not in place at the time the cause of action arose is an after-thought on the part of the petitioner.

    The petitioner has not established violation of any human rights or fundamental freedoms that would warrant this court to elevate this dispute to a constitutional matter and extend the limitation time within which the suit should have been filled.

30. No application for extension of time was sought by the petitioner and the petition itself does not on the face of it disclose any justification to elevate this matter accordingly.

31. In conclusion, the Petition before Court has no merit and is dismissed with no order as to costs.

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2025

Mathews Nduma

Judge

Appearance;

Guserwa for the Petitioner

Okondo for the Respondent

Kemboi Court Assistant