



REPUBLIC OF KENYA



KENYA LAW
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**Ekhuya v Agricultural Development Corporation & 2 others (Appeal
11 of 2019) [2023] KEELRC 772 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 772 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 11 OF 2019
B ONGAYA, J
MARCH 28, 2023

BETWEEN

ABRAHAM MARK EKHUYA APPELLANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION 1ST RESPONDENT

**MANAGING DIRECTOR, AGRICULTURAL DEVELOPMENT
CORPORATION 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

*(An appeal from the judgment of Hon. T. C. Wamae, Chief Magistrate, Milimani
Commercial Courts, Nairobi, delivered on 24.02.2012 in CMCC No. 14102 of 2006)*

JUDGMENT

1. The appellant filed the memorandum of appeal on March 23, 2012 through Naikuni, Ngaah & Miencha Company Advocates. The appellant raises 11 grounds of appeal which in the appellant's written submissions are reduced to three issues for determination namely:
 - a. Whether the question of appellant's suspension was rightfully and justifiably dispensed with.
 - b. Whether the appeal should be allowed.
 - c. Who should bear the cost?
2. The appellant prayed for orders:
 - a. The appeal be allowed and the judgment made on February 24, 2021 be set aside.
 - b. The respondents be made to pay the plaintiff for general damage of the indefinite and illegal suspension from employment, costs of the suit and interest thereof.



- c. The respondent be ordered to pay the costs of the appeal.
3. The appellant filed the plaint before the trial Court on December 19, 2006 through Naikuni, Ngaah & Company Advocates. The amended plaint was filed on August 24, 2007. The appellant pleaded as follows. His contract of service with the respondent was dated February 12, 1990. He was employed to the position of Accounts Clerk at an annual salary of £822.00. The appellant served until 1990 when it was alleged that the corporation had made huge losses for that particular financial year 1989-1990 and with the appellant's assistance the matter was subjected to investigation by the Provincial Criminal Investigation Officer (PCIO) Rift Valley Province and all managers in Nakuru Division were implicated. Following the investigations, the 1st and 2nd respondent became uncomfortable with the appellant who was transferred to Nyota Farm as an assistant Farm Clerk where he worked for 8 months when he was again transferred to Molo as a Farm Clerk. While at Molo, the office was broken into and a sum of Kshs 18,000.00 was stolen from the safe. The 1st and 2nd respondents suspended the appellant. It was alleged that the appellant had been involved in the office breaking on 30th and August 31, 1991.
4. The appellant further alleged that the 1st and 2nd respondents maliciously caused the appellant to be arrested by the police who preferred two charges of office breaking and stealing contrary to section 306(a) of the Penal Code and failing to prevent the commission of a felony contrary to section 392 of the Penal Code. He was arraigned in court in criminal case No 1643 of 1991 at Resident Magistrate's Court in Molo but on November 30, 1993 the case was dismissed for lack of evidence and non-appearance by the complainant in court. Particulars of malice were pleaded against the 1st and 2nd respondents including giving police false report that the appellant was involved in breaking the office; failure to investigate the allegation of breaking into the office and preparation to commit a felony; causing unfair arrest of the appellant and his confinement in police cells; injuring the claimant's reputation through the arrest, confinement and prosecution; and causing the wrongful arrest. The particulars of alleged malice against the 3rd respondent included charging the appellant without supporting evidence; arresting the appellant prior to investigating the complaint; causing the appellant to be prosecuted without any reasonable cause whatsoever; conspiracy with the 1st and 2nd respondent to subject the plaintiff to humiliation, mental torture, and intimidation.
5. The appellant's claim against the 1st and 2nd respondents was for the indefinite, unlawful, illegal and wrongful suspension from employment. The appellant prayed for judgment against the 1st, 2nd and 3rd respondents jointly and severally for:
 - a. The general damages for the indefinite and illegal suspension from employment.
 - b. Costs of the suit.
 - c. Interest at court rates from the date of filing the suit till full payment.
 - d. Such further relief as the Honourable Court deem fit and just to grant.
6. The 1st and 2nd respondents filed on February 5, 2006 the 1st and 2nd defendants' defence through Nyaencha Waichari & Company Advocates. They pleaded as follows. They denied the appellant's allegations and that the termination, if any, was in accordance with the appellant's terms of the contract of service. They denied maliciously causing the appellant's arrest but that he was arrested by the police and prosecuted by the 3rd respondent. Further, the claim was unknown in law and it was vexatious and an abuse of court process. They denied subjecting the appellant to humiliation, harassment and mental torture as alleged. They prayed the claim be dismissed with costs. The reply thereto was filed for the appellant reiterating the plaint.



7. The 1st and 2nd respondents filed a preliminary objection on May 4, 2009 that the suit was time barred because the suspension was in 1991 due to criminal proceedings and acquittal was on 30.11.1993. It was urged that section 4(1) of the Limitation of Actions Act provided that the suit be filed within 6 years as it was based on contract so that the suit ought to have been filed in 1997 but was filed in 2006, 15 years belatedly. On June 16, 2010, the trial Court ruled that the issue be canvassed during the main hearing.
8. It appears the 3rd respondent did not enter appearance, file a defence or participate in the proceedings.
9. This being a first appeal, the role of the Court is to re-evaluate the evidence and arrive at own conclusions bearing into account that the Court did not take the testimonies by itself as was done by the trial Court.
10. The appellant testified that the 1st respondent employed him by letter dated February 12, 1990. He was suspended by the letter dated September 2, 1991 stating that he was being suspended from duty with immediate effect following his arrest implicating him in the break in on the night of 30th-August 31, 1991. He confirmed in his testimony that on the material night the Molo office he was working at was broken into and he was subsequently arrested and charged in criminal case 1543 of 1991 with the offence of office breaking and stealing. He testified that he was acquitted on November 30, 1993 for lack of evidence, he had never been dismissed and he had never been asked to show cause. He stated that the suspension was malicious because the incident happened at night whereas he used to work during the day. Further, by letter dated November 20, 1993 his advocates requested for proceedings of the criminal case but the same had not been provided and when he went to court to get them, he was told that the files got burned and the proceedings were therefore not available. That was in 1995. He earned Kshs 1665 as at suspension. He stated that he was acquitted on October 4, 1991(in a contradictory manner, having earlier stated that the acquittal was on November 30, 1993) and he filed suit on December 19, 2006. The appellant blamed the 1st and 2nd respondent because they failed to reinstate him after the acquittal.
11. In the judgment delivered on February 24, 2012 the trial Court found that had the appellant provided the proceedings in the criminal case, then the Court would have been able to come up with the decision as to whether or not the plaintiff was unlawfully suspended and, his claim for general damages for indefinite and illegal suspension from employment failed. Further, even if he had established the unlawful suspension, his claim would not fall in the category of general damages but, he would have been entitled to salary for the period he was under suspension which was quantifiable as falling in category of special damages. He had not sought any special damages and his claim failed for the reason that a party is only entitled to what is pleaded and proved. Even if he had filed suit for unlawful dismissal, he would not be entitled to general damages. The trial Court did order the suit dismissed with costs.
12. It is submitted for the appellant that the trial court made a finding on a matter not pleaded. But the Court returns that the appellant by his own pleading stated that he had been arrested, charged and acquitted so that it is the Court's finding that it was the appellant's burden to produce the record of the proceedings in the criminal case - and the trial Court cannot be faulted for its findings that respect, especially with the contradictory appellant's testimony on the date of acquittal. Be it as it may, the trial Court found that on a balance of probability, the appellant had not established the unlawful suspension as alleged. The Court finds that indeed the appellant confirmed that the theft leading to his arrest took place and his only concern was that he was not culpable as implicated. As submitted for the 1st and 2nd respondents, once the report was made to the police, the matter left the employer's control of the next steps. To the extent that the appellant was arrested and admitted by him as much,



the reason for suspension is found to have been valid. He was suspended because he had been picked by the police and locked up. The Court finds that by inference, the suspension was to persist until the lock up by the police lapsed. There was no evidence that after the police or court released the appellant on bond, he ever went back to the employer on account the reason for the suspension had lapsed. It appears the appellant was misconceived that the suspension was until after the end of the prosecution and he was to be recalled. But the Court finds such not to have been the terms of the suspension. The trial Court did not err in finding that the appellant had failed to show on a balance of probability that the suspension was unlawful.

13. The Court further finds that the trial Court did not err in finding that the claim being based on a contract of service and in the circumstances of the prevailing law, only special damages based on the terms and conditions of service would be available and not general damages in the manner the claim and prayer had been made.
14. The 1st respondent's letter dated April 14, 2004 confirmed that the claimant was dismissed following the arrest. In view of that letter the trial Court found that the suit had been filed on December 19, 2006 which was 2 years from the date that the cause of action arose and therefore not time barred. The Court has considered that finding and returns that as submitted for the 1st and 2nd respondents, the appellant had failed to inform the employer after the release on bond and then after the acquittal. It is further submitted for the 1st and 2nd respondents that the inordinate delay was trapped by the limitation time under section 4(1) of the Limitation of Actions Act because the appellant knew of the purported indefinite suspension and had no reason to belatedly file the suit 15 years later. The Court agrees that the trial Court erred in that respect. The letter of April 14, 2004 by the 1st respondent was not an acknowledgement of liability or debt as to revive the action from that date. It was a mere explanation that by the suspension letter, the dismissal had taken effect. The Court finds that once the appellant received the letter of suspension, he ought to have inferred that he ought to report back once he was released from the confinement. Even if he did not do so, then interpreted as an indefinite suspension, it appears to the Court that it would then have amounted to a fundamental breach of the contract of service by the 1st respondent thereby entitling the appellant to alleged unfair constructive dismissal but which appears not to have been the case. It is indeed absurd for the appellant to take the view that for 15 years or until the letter of April 14, 2004 he was on suspension despite such otherwise serious purported breach of the contract by the 1st respondent. The Court finds that the appellant must be deemed to have been dismissed by reason of the suspension letter and the suit was belated as seriously time barred when it was filed.
15. The Court has considered all circumstances of the case including the wording of the suspension letter which may not have been precise on the next steps on the contract of service and in view of the ensuing criminal proceedings against the appellant. The 1st respondent was by that suspension letter ambiguous on the effect and scope of the suspension. The Court returns that in the circumstances, the appeal will fail with orders each party to bear own costs of the appeal and the Court below. The Court considers that if the issue of the suit being time barred had been tackled appropriately, the parties would have as well mitigated on costs of the proceedings.

In conclusion, judgment is hereby entered for the 1st and 2nd respondents and the appeal determined with orders:

- a. The appeal is dismissed with orders each party to bear own costs of the appeal and the suit before the trial Court.
- b. The appellant's suit was time barred.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
TUESDAY 28TH MARCH, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

