



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 234 OF 2015

SALIM MALAKWEN KOMEN.....CLAIMANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

O.C.P.D ELDORET.....3RD RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 3rd July, 2015, the Claimant sought that this court awards him General and Special damages on account of wrongful dismissal, arrest and confinement in custody, a declaration of un-procedural dismissal, and in the alternative reinstatement, payment of salaries due to him from the date of dismissal, costs of the suit and interest.
2. The Respondent entered appearance through the Attorney General on 3rd September, 2015 and filed a reply to the statement of claim on similar date.
3. The Claimant testified in support of his case. He adopted his witness statement and produced his bundle of document as evidence in the matter.
4. The Respondent did not present any witnesses in the matter and chose to rely on the reply to the statement of claim filed in the matter.
5. The Claimant filed submissions. The Respondent did not.

The Claimant's Case

6. It is the Claimant's case that he was charged with the offence of aiding prisoners escape from court cells in Criminal Case No. 530 of 2004, while he was in-charge on 11th November, 2003. It is his further case that he was acquitted of the charges on 15th February, 2005.
7. The Claimant states that he was dismissed from the service of the Respondents effective 25th November, 2003. He further states that although charges had been preferred against him administratively, the hearing had not been concluded at the time the decision to dismiss him was reached.
8. It is the Claimant's case that his dismissal was devoid of due process and the reasons attached to the dismissal are untrue as he was acquitted of the criminal charges that gave rise to the dismissal.
9. The Claimant avers that he submitted an appeal against the dismissal, but which did not receive a favourable consideration. He states that arising from the dismissal, he faced financial challenges that made it difficult for him to institute a claim against the dismissal.
10. It is the Claimant's case that he was dismissed without terminal benefits.

The Respondent's Case

11. The Respondents states that the Claimant was dismissed as there was reasonable apprehension of a crime committed by him.

12. The Respondents further stated that they complied with all the laid down laws and administrative procedures that guide disciplinary proceeding. It is their case that the Claimant was aware of the reasons that informed his dismissal, and that he was given opportunity to make representation.

13. It is the Respondents case that the claimant was accorded fair administrative action and the laws related thereto were complied with.

Analysis and Determination

14. I have considered the pleadings herein, the Claimant's oral testimony and the submissions filed in the matter. The issues for determination are:

- i. Whether the suit is Statute barred
- ii. Whether the Claimant was wrongfully dismissed
- iii. Whether the Claimant is entitled to the reliefs sought.

Whether the Suit is Statute Barred

15. The Claimant's case is that he was dismissed on 25th November, 2003. He further stated that he did not have the requisite finances to institute a claim against his dismissal at the time. The instant suit was filed on 2nd July, 2015.

16. The question for this court is when the cause of action in the matter accrued. It has been severally held that the date of a Claimant's termination or dismissal, is the date the cause of action accrues, as the Claimant will, immediately he is dismissed/terminated have clear facts under which he can claim. Waki J in *Attorney General & another v Andrew Maina Githinji and another [2016] eKLR* held as follows: -

"...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold."

17. Persuaded that the cause of action herein arose on the 25th November, 2003, being the Claimant's date of dismissal, it follows that the instant suit was filed 12 years after the accrual of the cause of action.

18. The Claimant having been dismissed in 2003, the law on limitation applicable then was the Limitation of Actions Act. Section 4 (1) of the Limitation of Actions Act provides as follows:

"The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

a. actions founded on contract."

19. Justice Radido In *Maria Machocho -v- Total (K) Industrial Cause No. 2 of 2012*, opined:

"Before the coming into operation of section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in Section 4(1) of the Limitation of Actions Act, and it was 6 years."

20. The Claimant has produced in evidence his letter of appointment which in effect is a contract of service. The time he had to file suit upon dismissal by dint of the law applicable then, was 6 years. He filed it 12 years later, hence 6 years late. In *Gathoni vs. Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981*, Potter, J. observed in obiter in regard to limitation that;

"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest"

21. The Court of Appeal in *Divecon Ltd v Samani [1995-1998] 1 EA 48 at pg. 54*, held that section 4(1) of the Limitation of Actions Act was clear beyond any doubt and meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, such as an action founded on contract.

22. Jurisdiction as they, is everything. Without which, a court must down its tools. The Supreme Court of Kenya in the cases of In *Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional Application No. 2 of 2011; [2011] eKLR* and in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR*, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and Judicial precedent.

23. I find and hold that this court lacks jurisdiction to entertain this matter, on account of Section 4(1) of the Limitation of actions Act. The suit herein, is Statute barred and to proceed to determine the issues in the suit will amount to the court arrogating itself jurisdiction through

the craft of interpretation. For this reason, the other issues for determination in this claim fall by the wayside.

24. The upshot is that the Claimant's claim filed on 2nd July, 2015, is struck out for being Statute barred.

25. Parties shall bear their own costs of the suit.

26. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

APPEARANCE:

MR. ISIJI PRESENT FOR THE CLAIMANT

N/A FOR THE RESPONDENTS

CHRISTINE OMOLLO- C/A