



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1998 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DAVID MWANGALA.....CLAIMANT

VERSUS

DODHIA PACKAGING LIMITED.....RESPONDENT

JUDGMENT

The claimant filed his claim vide a Memorandum of claim dated 10th November, 2015 in which the claimant claims for his salary since June 2011 to 10th April, 2015 and reinstatement.

The Claimant seeks for the following remedies; -

1. Reinstatement without loss of benefits
2. Alternatively, the claimant seeks 12 months' gross salary compensation for the wrongful dismissal and loss of employment as follows: -
 - a. Full salary for the period between the time of the salary suspension (June 2011 to the time the claimant was discharged from the criminal case and sought reinstatement by the respondent amounting to Kshs.1,411,200.
 - b. 12 months' salary compensation for wrongful termination the sum of Kshs.382,800.
 - c. Service pay at 15 days for every year worked amounting to Kshs.4,851,000.
 - d. A certificate of service as provided in Section 51 of the Employment Act 2007
 - e. Costs of the suit
 - f. Interest in (a) to (e) above.

The respondent did not file a response to the claim herein. The facts as pleaded in the Memorandum of claim are thus uncontested.

At the hearing the claimant testified and adopted his statement dated 10th November, 2015 as his evidence in chief and produced the documents as listed in his list of documents dated 10th November, 2015.

In his testimony the claimant stated that he was employed by the respondent in May 2001 as a dispatch clerk with a salary of Kshs.5,000 which salary has been increased over the years to Kshs.29,389.

He further stated that in June 2011 he was charged with the offence of stealing by servant but he was discharged from the same for lack of evidence.

He stated that after the discharge he tried to get back to work but was not allowed and instead he was issued with a letter of termination from employment. The claimant stated that he was not paid his salary during the period of the criminal case.

On cross examination the claimant stated that his basic pay was Kshs.29,000 inclusive of overtime. He also confirmed that his last day of

work was 6th June, 2011. The claimant stated he did not have a letter showing he sought to be reinstated but stated that he went to the work place. He also stated that he did not have a letter increasing his pay from Kshs.10,523 to Kshs.13,450.

On re-examination the claimant stated that his basic pay was Kshs.29,000 which had been increased over time. He also stated that he visited the Respondent's office 4 to 5 times for over a period of 1 month and each time he would be told the CEO is not in.

The Respondent closed its case without calling any witness.

Claimants Submissions

The claimant submitted that he was employed by the Respondent

in May 2001 as a dispatch clerk with a salary of Kshs.5,000 but his salary changed over time to Kshs.29,389.46. He further submitted that he was charged with a criminal case "*Stealing by servant*" which charges were discharged on 10th April 2015. During the period of the case he was neither paid his salary nor received any termination letter. The claimant submits that he made several attempts to be reinstated to his position to no success.

He submits that since the respondent did not respond to the claim, his evidence is uncontroverted.

He relied in the case of **Kenya Hotels and Allied Workers Union v Taratibu Bar Restaurant (2019) eKLR** where the case was undefended and the court held that the claimant had proved his case and decided in favour of the claimant.

The claimant submits that in the instant case the Respondents failed to reply to the claim. Its advocate attended court but did not call any witnesses. He urges the court to enter judgment in his favour.

The claimant submits he worked for the respondent for 10 years prior to the institution of the criminal case during which period he was never suspended or terminated. After the discharge in the criminal case, the respondent declined to reinstate the claimant to his position in employment.

The claimant submits that he was entitled to half salary during the period of the criminal case which he was never paid, and after the acquittal he was entitled to full salary and reinstatement.

Respondent's Submissions

The Respondent submits that the claim offends Section 4(1) of the Limitation of Actions Act and is for striking out. It relies on the Court of Appeal decision in **Dhanesvar Mehta v Manila M. Shah (1965) E.A 321** as follows;

"The object of any limitation in enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

The Respondent further relies on the decision of Radido J. in **Josephat Ndirangu v Henkel Chemicals (E.A)** where the Judge quoted with approval the decision of the Court of Appeal in **Divecon v Samani (1995 -1998) EA 48.**, to the effect that: -

"To us, the meaning of the wording of section 4(1) ... is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action ... A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked."

The Respondent further submits that in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR**, where the court was of the opinion that once the court realizes that the suit has been filed out of time, there is no help that the court can offer, but to strike out the suit. The court stated as follows;

*"Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of **Divecon Limited -vs- Samani [1995-1998] 1 EA P.48**, a decision relied upon by Radido, J. in **Josephat Ndirangu - vs - Henkel Chemicals (EA) Limited, [2013] eKLR**, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act."*

Determination

The issues for determination are whether the claim is statute barred, whether the claimant was dismissed and if he is entitled to remedies sought.

Whether the claim is statute barred

The Respondent has raised the issue of limitation under Section 4(1) of the Limitation of Actions Act. As has been observed the Respondent did not file any defence to the claim. It did not even file a notice of preliminary objection to enable the claimant respond to the same. The reason why parties are required to file pleadings is to let the other side know what its case is and to prepare and mount a defence to the same. Parties are not supposed to be ambushed in submissions.

Further courts have severally stressed that submissions are not pleadings and matters which are not raised in either pleadings or evidence cannot be raised in submissions. Refer to **Robert Ngande Kathathi v Francis Kivuva Kitunde (2020) eKLR** where Odunga J. after reviewing several authorities held that a trial before a Magistrate where the proceedings were based on submissions without any evidence was a nullity.

Having said that, the evidence of the claimant which is uncontested is that he was arrested and charged with the offence of stealing by servant, which offence was upon the complaint by the Respondent. He testified that after his acquittal he reported back to work for reinstatement but was not allowed to go back to work. The Claimant stated he did not receive any letter of termination from the Respondent. According to the claimant therefore, the clause of action arose upon the Respondent failing to allow him to go back to work after his acquittal, which was in 2015, the very year he instituted the instant suit.

For these reason the plea of limitation cannot stand as against the claimant. The same is accordingly rejected.

The evidence of the claimant is uncontested and uncontroverted, as the respondent did not file a response to the claim neither did they call any witness to rebut the same. The claimant testified that he was never issued with a letter of termination to date.

The claimant prays for re-instatement without loss of benefits

Section 12(3)(vii) of the Employment and Labour relations court provides “*that a court shall have jurisdiction to order for reinstatement of an employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law*”

The Employment Act further provides under Section 49(4) that reinstatement is to be ordered only in very exceptional circumstances, being an order for specific performance of personal services. The claimant has not demonstrated any exceptional circumstances to entitle him to an order of reinstatement. Further, the circumstances under which he left employment militate against granting him orders of reinstatement. The prayer I accordingly dismissed.

Claimant seeks compensation for wrongful dismissal and loss of employment

Section 47(5) of the employment Act places the burden of proving unfair termination upon the employee. The burden thereafter shifts to the employer to prove and justify the reason for termination and the fairness of the procedure followed before the termination.

In the instant case the claimant stated in his evidence that his last working day was 6th June 2011 when he was charged with the criminal offence of Stealing by servant. He did also confirm that the respondent did not give him any termination letter and that he sought for reinstatement after he was discharged from criminal charges on 10th April 2015. That is when he went to the respondent seeking reinstatement.

Pendency of a criminal case is not a reason for termination of employment. The respondent ought to have communicated to the claimant on his status of employment during the subsistence of his criminal case. The respondent did not inform the court of any efforts made towards reaching out to the claimant and putting him on notice of termination of employment.

In **Simon Mbithi Mbane v Inter Security Limited (2018) eKLR** Abuodha J. stated that “*an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.*”

The law requires an employer to take action and bring the matter to a close. On that ground I find that the claimant’s termination was unfair for want of procedure.

Remedies

1. The claimant’s prayer for reinstatement fails and is dismissed.
2. The claimant is awarded 6 months’ gross salary as compensation for the wrongful dismissal amounting to **Kshs.176,334/=**
3. Section 35(5) & (6) of Employment Act provides that

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

From the attached payslip, the claimant was a member of NSSF and the same was being deducted from his pay. As such the prayer for payment of service pay fails and is dismissed.

4. The Respondent to issue a certificate of service to the claimant for the period worked as provided in Section 51 of the employment Act.

5. The claimant is awarded costs of the suit and interest at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE