



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 152 OF 2017

KENYA COUNTY GOVERNMENT WORKERS UNION....CLAIMANT

v

COUNTY PUBLIC SERVICE BOARD, KISII.....RESPONDENT

JUDGMENT

1. The Kenya County Government Workers Union (the Union) sued the County Public Service Board, Kisii (the Board) on 19 July 2017 and the issue in dispute was stated as:

Unlawful summary dismissal of 1. Patrick Nyandoma Mataya 2. Simion Mokandu Onwoga 3. Peter Ogoti Mandi 4. Thomas Manono Gwaro 5. David Asiago Mosioma.

2. When the Cause was mentioned before the Court on 19 September 2017, an advocate who appeared on behalf of the Board informed the Court that the Statement of Claim had not been served. The Court directed the Union to serve the Claim.

3. When the Cause came up for directions on 14 March 2018, the Court scheduled the hearing for 5 December 2018.

4. When the Cause was called for hearing on 5 December 2018, both parties were present, but the Respondent indicated that the Statement of Claim had not yet been served.

5. The Court directed the Union to file an affidavit verifying that the Cause had been served. The hearing was rescheduled to 30 May 2019.

6. On the same day, Kennedy Chweya Onsembe Advocate filed a Notice of Appointment to act for the Board.

7. The next time the Cause was placed before the Court for hearing was on 8 October 2019. Both parties were represented. The Respondent sought time to file a Response. The Court gave the Respondent the last opportunity to file a Response within 21 days (the order was not complied with).

8. Therefore, on 12 November 2020, the Court directed that the Cause proceeds to formal proof as the Board had not filed a Response.

9. The hearing proceeded on 29 November 2020. One of the Grievants, Simon Mokandu, testified on behalf of the Grievants and the Union closed their case. The Union filed submissions on 29 January 2021.

10. The Court has considered the pleadings and submissions.

Limitation

11. The Court directed the Union to address the question of limitation in its submissions. It did not.

12. Under section 90 of the Employment Act, 2007, the prescribed limitation time in actions arising out of a *contract of service* is 3-years.

13. The Grievants learnt of their dismissal in January 2011, but they only commenced the action on 19 April 2017.

14. The cause of action having accrued in January 2011, the Union should have moved the Court latest by January 2014. It did not.

15. Even assuming that the cause of action arose at the conclusion of conciliation and issuance of a Certificate of Unresolved Dispute, time did not stop running for purposes of limitation (see Court of Appeal decision in *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR.

16. The Court, therefore, finds the cause of action advanced herein statute time-barred.

17. The Court will, however, examine the merits of the Cause on the assumption that it is wrong on its finding on limitation.

Unfair termination of employment

Procedural fairness

18. The Grievants were initially employed by the Municipal Council of Kisii. The employees had grievances which they felt required to be addressed by the employer.

19. Around 4 October 2010, the Grievants responded to a call by their Union and marched to the Town Clerk's office to seek an explanation on the grievances.

20. A meeting was held, and those present included the County Commissioner and the Mayor. A return to work formula was reached on 12 October 2010.

21. Despite the return to work formula, the Union and the Grievants alleged that the Grievants were unlawfully dismissed, and they learnt of their dismissal through the press.

22. The Grievant who testified stated that there were no Council minutes on their dismissal and that they were not afforded an opportunity to defend themselves.

23. The Court has looked at the documents filed in Court by the Union.

24. The Minutes of the Special Finance, Staff and General Purposes Committee meeting held on 6 January 2011 indicate that the Grievants appeared before the Committee and made representations.

25. The documents filed by the Union also indicate that the Grievants appealed to the Public Service Commission of Kenya, but the appeals were unsuccessful.

26. There is also a letter dated 19 February 2013 from the Permanent Secretary, Local Government to the Town Clerk indicating that the Grievants were dismissed after a Full Council meeting held on 6 January 2011.

27. The Union also produced a letter dated 16 March 2013 from the Town Clerk to the Permanent Secretary forwarding copies of minutes of a Special Finance, Staff and General Purposes Committee meeting held on 6 January 2011 and indicating that the minutes were never adopted by the Full Council.

28. The facts, as outlined above, show that the Grievants were dismissed. Were the dismissals unfair?

29. To pass legal muster, an employer should inform the employee of the allegations to confront and grant the employee an opportunity to make representations before termination of employment.

30. There is material to show that the charges against the Grievants were read to them and that they made representations.

31. The Court, therefore, finds that the Board was in substantial compliance with the procedural fairness requirements as envisaged under section 41 of the Act, notwithstanding the lack of minutes from the Full Council.

Substantive fairness

32. It was incumbent upon the Board to prove and prove as valid and fair the reasons for the Grievants' dismissal as required by sections 43 and 45 of the Employment Act, 2007.

33. The Board was expected to lay a foundation for the discharge of the statutory burden in its Response. No Response was filed. Even witness statements were not filed.

34. The Court has no other option but to find that the Board's failure to discharge the statutory burden leads to one conclusion: the dismissal of the Grievants was not for valid and fair reasons.

Remedies

Reinstatement

35. More than 3 years (11 years) have lapsed since the Grievants were dismissed, and therefore there would have been no legal basis upon which the Court could order reinstatement.

Compensation

36. The gross wages of the Grievants in 2011 was not disclosed.

37. But on the circumstances of the case, the Court would have awarded the equivalent of 4-months gross wages to each Grievant as compensation.

Conclusion and Orders

38. In light of the foregoing, the Court finds and declares that the cause of action herein was caught up by the law of limitation in terms of section 90 of the Employment Act, 2007. The Cause is dismissed.

39. No order as to costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union Ms Mwaka, Industrial Relations Officer

For Respondent Kennedy Chweya Onsembe, Advocate, County Attorney's Office (did not participate)

Court Assistant Chrispo Aura