



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 215 OF 2016**

**JOHN EBOSO.....CLAIMANT**

**VS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. John Eboso, the Claimant in this case, was a long serving employee of Kenya Ports Authority, the Respondent herein. Eboso brought this claim following his dismissal on 1<sup>st</sup> April 2009.

2. The claim is condensed in a Memorandum of Claim dated 18<sup>th</sup> March 2016 and filed in court on 21<sup>st</sup> March 2016. The Respondent filed a Response on 19<sup>th</sup> April 2016.

3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer (Discipline Section), Stephen Kiprono Kilel. Both parties also filed written submissions.

**The Claimant's Case**

4. The Claimant was employed by the Respondent on 6<sup>th</sup> January 1992, as an Artisan Grade *PA 10*. He was promoted to the position of Berth Clerk on 8<sup>th</sup> August 2005 and at the time of dismissal, he was working as a Staff Car Driver, Grade *HG2C*.

5. The Claimant accuses the Respondent of wrongful action by suspending him on 7<sup>th</sup> October 2008, interdicting him on 27<sup>th</sup> November 2008 and finally dismissing him on 1<sup>st</sup> April 2009.

6. The Claimant states that he was wrongfully interdicted by letter dated 27<sup>th</sup> January 2008, on allegations that he had attempted to remove ten cartons of assorted whisky from the Port, using the Respondent's Staff Car registration number KAR 326L.

7. The Claimant further states that while still on interdiction, the Respondent suspended him from duty by letter dated 7<sup>th</sup> October 2008, on account of the Claimant having been arrested and charged in *Criminal Case No 1234 of 2008*, in connection with the aforesaid allegations.

8. The Claimant's position is that his dismissal was wrongful because he was acquitted of the criminal charges under Section 210 of the Criminal Procedure Code.

9. The Claimant avers that he appealed against the dismissal on 7<sup>th</sup> April 2009 but he did not receive any response from the Respondent.

10. The Claimant claims that following intervention by the Dock Workers Union, the Respondent had reinstated eleven officers, who had faced the same charge as the Claimant, but had declined to reinstate another four officers, including the Claimant.

11. The Claimant's claim against the Respondent is as follows:

- a. Outstanding salaries from 1<sup>st</sup> April 2009

- b. Three months' pay in lieu of notice
- c. An order for specific performance directing the Respondent to reinstate the Claimant
- d. A declaratory order that the dismissal was unlawful and unfair and general damages for unlawful dismissal
- c. Costs plus interest

### **The Respondent's Case**

12. In its Response dated 18<sup>th</sup> April 2016 and filed in court on 19<sup>th</sup> April 2016, the Respondent admits that the Claimant was its employee.
13. The Respondent however denies the claim for wrongful dismissal and asserts that:
- a. The Claimant was arrested at Gate 10B, while irregularly removing ten cartons of whisky from the Port;
  - b. Preliminary investigations were carried out by the Principal Port Security Officer and a recommendation was made that appropriate disciplinary action be taken against the Claimant;
  - c. A report of the initial investigations was forwarded to the acting Managing Director, who approved it on 29<sup>th</sup> September 2008;
  - d. An internal memo was then written by the acting Personnel Manager on 30<sup>th</sup> September 2008 to the Human Resource & Administration Manager, asking for his approval to suspend the Claimant, which approval was granted on 2<sup>nd</sup> October 2008;
  - e. By letter dated 7<sup>th</sup> October 2008, the Claimant was suspended from duty in accordance with Section K.7(d) of the Disciplinary Handbook, 2008. He was also asked to show cause why disciplinary action should not be taken against him, within the next 72 hours;
  - f. The Claimant was however wrongfully interdicted because he was still serving his suspension, when he was served with an interdiction letter.
14. The Respondent states that after the suspension, the Claimant requested for a personal hearing which was afforded.
15. The Respondent points out that a Committee of Inquiry was constituted to hear and determine the Claimant's case. The Claimant appeared before the Committee with a representative from the Dock Workers Union.
16. The Respondent states that the Committee came up with a report recommending that the Claimant be dismissed from the service of the Authority in accordance with Section K.8(u) of the Disciplinary Handbook, 2008.
17. The Respondent goes on to state that on 26<sup>th</sup> March 2009, the Personnel Manager wrote to the Managing Director, through the Human Resource & Administration Manager, on observations, findings and recommendations of the Committee, hence asking for their approval.
18. The Managing Director gave his approval on 27<sup>th</sup> March 2009 and the Human Resource & Administration Manager gave approval on 30<sup>th</sup> March 2009. The Respondent then dismissed the Claimant on 1<sup>st</sup> April 2009.
19. Regarding the Claimant's appeal against the dismissal, the Respondent states the following:
- a. The Claimant submitted his appeal through the Dock Workers Union on 27<sup>th</sup> July 2009;
  - b. The Respondent constituted a Committee of Appeal to review the Claimant's case;
  - c. The Committee submitted its report, indicating that the Claimant's case did not have any merit, and concurring with the earlier decision of the Committee of Inquiry;
  - d. The Human Resource & Administration Manager approved the recommendations on 29<sup>th</sup> November 2009 and the Managing Director approved them on 23<sup>rd</sup> November 2009;
  - e. On 4<sup>th</sup> December 2009, the Personnel Manager responded to the appeal from the Union, stating that the Claimant's appeal had been declined.
20. The Respondent maintains that its administrative action was independent and self-regulating and was not affected by the criminal proceedings against the Claimant. The Respondent adds that that the decision in a criminal process did not have any bearing on the Respondent's administrative procedure.

21. The Respondent states that the other officers were reinstated on the basis of the merit of their cases.

22. The Respondent further states that the Claimant's terminal benefits were available for collection, upon the Claimant initiating the clearance process.

23. In its Response, the Respondent gave notice that it would raise an objection on a point of law on the ground that the suit offends the provisions of Section 90 of the Employment Act.

#### **Findings and Determination**

24. In its Response dated 18<sup>th</sup> April 2016 and filed in court on 19<sup>th</sup> April 2016, the Respondent states that the Claimant's claim is statute barred by dint of Section 90 of the Employment Act.

25. Based on the nature of the objection, which challenges the jurisdiction of the Court to entertain the claim, I am required to determine it *in limine*.

26. The objection is premised on Section 90 of the Employment Act, which provides:

**90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or 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.**

27. The Claimant was dismissed on 1<sup>st</sup> April 2009 and he lodged an appeal against the dismissal, which was finally determined by the Respondent on 8<sup>th</sup> July 2014.

28. The Claimant takes the view that time did not begin to run against his claim, until the final determination of his appeal. The Court of Appeal settled this matter in *Attorney General v Andrew Maina Githinji [2016] eKLR*. In the majority decision, **Waki JA** posed the question:

**“What is meant by a cause of action and when does it arise in a claim for unlawful/unfair termination?”**

29. The learned Judge of Appeal drew from the following definition by **Pearson J** in *Drummond Jackson v Britain Medical Association (1970) 2 WLR 688*:

**“A cause of action is an act which, on the part of the defendant, gives the plaintiff his cause of complaint.”**

30. In its own decisions in *Hilarion Mwabolo v Kenya Commercial Bank [2013] eKLR* and *Benjamin Wachira Ndithi v Public Service Commission [2014] eKLR* this Court held that in a claim for unlawful termination of employment, accrual of the cause of action takes effect from the date of termination as communicated in the termination letter, and the mere fact of lodging an appeal against the termination does not halt the running of time.

31. Having been dismissed on 1<sup>st</sup> April 2009, the Claimant had until 31<sup>st</sup> March 2012 to file his claim. The current claim filed on 21<sup>st</sup> March 2016 is therefore way out of time, and the Court has no jurisdiction to entertain it.

32. Being without jurisdiction, the Court must down its tools at this stage. This therefore is the end of the road for the Claimant's claim, as the Court has no power to go into the other issues raised in the claim.

33. The end result is that the Claimant's claim is struck out with no order for costs.

34. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF APRIL 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Akanga for the Claimant

Mrs. Ikegu for the Respondent