



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 939B OF 2017

PEANCY KAVITA MAKAU.....CLAIMANT

VERSUS

KANGUNDO HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. Peancy Kavita Makau instituted this claim against her former employer Kangundo High School vide a Memorandum of Claim dated 10th May 2017. In the suit she prays for Judgment against the Respondent for:

- a) A declaration that the Claimant was constructively dismissed without the due process.
- b) An order that the Claimant should be paid by the Respondent the arrears of the salary of Kshs. 913,210/-
- c) An order the Claimant should be paid Kshs. 30,940/- being salary in lieu of Notice.
- d) An order that Claimant be paid leave allowance of Kshs. 121,960/- for 2013, 2014, 2015, and 2016.
- e) An Order that the Claimant should be paid damages of Kshs. 366,880/- since the Claimant was unlawfully terminated his service
- f) Costs of the claim.
- g) An Order that the Claimant be paid his retirement benefits or gratuity.
- h) The Claimant be provided with a certificate of service.

2. The Claimant averred that he was employed by the Respondent on 17th November 1980 as a School Bursar at a salary of Kshs. 1,212/-. That he continued to work as Bursar up to 12th July 2012 when the Respondent gave him 3 months compulsory leave for purposes of examining its Books of Account and that his compulsory leave started on 1st July 2012 and was to end on 12th November 2012. He avers that the Respondent's Principal and Board met and decided to have him charged with the offence of having misappropriated Kshs. 2,741,348.50 and he was arrested and charged at Kangundo SPM Criminal Case No. 570 of 2012. That the Respondent acted maliciously and without any basis because the books of account were audited by the brother to the Principal of the Respondent and the alleged Auditor had no qualification to do the Audit. That he was later acquitted after the said criminal case was heard and eventually dismissed for no case to answer. The Claimant further averred that by a letter dated 16th December 2012, he was given annual leave of 90 days which was to start on 12th November 2012 and end on 20th February 2013 but while on leave, that the Respondent interdicted him vide a letter dated 21st February 2013. That during the time of his interdiction, he was not paid half salary when the criminal case was pending in Court from February 2013 to January 2017 and that he thus claims the unpaid half salary for the said period which the Respondent refused to pay him after he was acquitted in the criminal case. That the Respondent has also refused to reinstate him back to employment as a Bursar and which conduct amounts to constructive dismissal since his contract had not been terminated and neither had he been retired or dismissed by the Respondent. He avers that he was not subjected to any Disciplinary process at all and that the Respondent should pay him damages for the unlawful termination of his services.

3. The Respondent never filed any appearance or defence to the claim and the matter was set for formal proof being an undefended cause. During formal proof, the Claimant testified that he had been employed by the Board of Governors of the Respondent. He produced his letter of appointment together with his bundle of documents as exhibits and further stated that he did not get his job back after he was discharged from the criminal court case and that he specifically seeks his retirement benefits, the unpaid half salary of Kshs. 913,210/-, damages, costs

of the claim and an order to be paid service gratuity or retirement benefits. He stated that the half payment to be paid by the school is Kshs. 606,375/- and that his last salary was paid in 2017.

4. The Claimant filed his Written Submissions on 8th April 2021 wherein he submitted that he was aged 58 years and had 2 more years to work until the retirement age of 60 years at the time of his indefinite suspension/interdiction from work and subsequent early retirement by the Respondent. That such action amounted to Constructive Dismissal and that despite several requests to the Respondent to reinstate his full salary for the remainder of his working days until his retirement, the Respondent chose to retire him early via a letter dated 12th May 2017. The Claimant cited the case of **Humphrey Sitati v Board of Management Lenana School [2020] eKLR**, where O.N. Makau J. cited with approval the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the Court of Appeal discussed the issue of constructive dismissal as expounded by Lord Denning in **Western Executive (ECC) Limited v Sharp [1978] 1 CR 222** as follows:

“If the employer is guilty of conduct which is a significant breach that goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by the one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.”

5. He further submitted that the indefinite suspension with half pay even after his acquittal in the criminal case was not backed by the contract of service or any law. Further, that the Respondent’s conduct clearly showed it was no longer interested in continuing to employ the Claimant and its actions amounted to a breach of a repudiatory term of the contract of service. He submitted that he was therefore entitled to treat the contract as terminated by the Respondent and has proven he was constructively dismissed by the Respondent as required under Section 47(5) of the Employment Act. That the Respondent having not entered an appearance and as such not adducing any evidence to prove that the dismissal was grounded on a valid and fair reasons and that a fair procedure was followed as required by Section 45 of the Employment Act, this Court ought to find that the constructive dismissal of the Claimant was unfair within the meaning of Section 45 of the Act. The Claimant submitted that he is entitled to salary arrears from the date of his interdiction to the date he was acquitted by Court in Kangundo Criminal Case No. 570 of 2012. He cited the case of **Edward Otsieka Opiayo v Insurance Regulatory Authority [2020] eKLR** where the Court allowed the claim for the sum withheld after finding that the termination of the claimant’s employment was unfair and there was no dispute that the claimant’s half salary had been withheld during the suspension period. The Claimant submitted that the said Court went on to award damages under Section 49(1) of the Act and salary in lieu of notice using the undisputed monthly salary which the Claimant herein similarly prays for on consideration that he had worked for the Respondent for approximately 28 years and had not contributed to the termination. The Claimant further submitted that he is also entitled to one month’s salary of Kshs. 30,940/- for each of the 4 years being payment of leave allowance from 2013 to 2016. The Claimant submitted that he is entitled to service gratuity at Kshs. 945,165/- as calculated by the Ministry of Education and communicated to the Respondent via letter dated 14th July 2017. That the Ministry of Education was to partly pay the said service gratuity and which they have already paid him Kshs. 338,793/- and that the remaining Kshs. 606,375/- payable by the Respondent’s Board of Management is yet to be paid despite directions in the said letter from the Ministry of Education. He also seeks to be provided with a Certificate of Service.

6. Section 90 of the Employment Act, 2007 provides as follows:-

90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a 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.

7. In the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** Waki JA stated as follows:-

Such provision did not exist in the repealed Employment Act, Cap 229 which did not have elaborate provisions on ‘Termination and Dismissal’ as its supplanter does. Time limits in the former Act were subject to the Limitation of Actions Act which in some cases could be as long as 12 years and amenable to extension. By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word ‘shall’.

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. It follows that I would allow the appeal, set aside the Ruling and order of the Employment and Labour Relations Court made on 6th March 2015 and substitute therefor an order allowing the Preliminary Objection by the Attorney General. Consequently, the respondents’ claim filed on 6th June 2014 shall be and is hereby struck out in its entirety.

8. The Claimant has a good claim but he waited for too long to file it. He filed the case in 2017 while his dismissal was in 2012. The Claimant’s claim must therefore suffer the only fate befitting a stale suit – dismissal. Suit is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

Nzioki wa Makau

JUDGE