



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 133 OF 2017

(Before Hon. Justice Mathews N. Nduma)

CHERLY OCHOLLA.....CLAIMANT

VERSUS

CAR GENERAL (TRADING) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 3rd April 2017 seeking a declaration that termination of his employment by the respondent was unlawful, wrongful and unfair. The claimant sought compensation in respect thereof and payment of terminal benefits. The claimant further sought costs and interest.
2. CW1, the claimant testified that he was employed by the respondent in the year 2010 as a management trainee (Sales and logistics). That he worked for the respondent diligently and continuously until 18/10/2013 when the respondent caused and/or instigated Criminal charges against the claimant for theft by servant.
3. The claimant was arrested by the police, charged and prosecuted in Eldoret Criminal Case No. 543 of 2013. The claimant was acquitted by the Magistrate Court after a lengthy trial under section 215 of the CPC. That upon arrest the claimant's employment was terminated by the respondent without any valid cause.
4. The claimant testified that he was unfairly targeted and blamed for loss of money and stock. That the trial court found that the respondent had not put in place proper systems for control of stock movement which led to loss. The court found that there was no evidence to support the allegations that the claimant was responsible for the stock loss.
5. The trial court blamed the loss to the systemic mismanagement and loopholes which had not been fixed by the respondent despite audits being conducted and pointing to lack of controls in the stock movement.
6. The claimant testified that his seniors, and in particular one Meshack Ondari, the Eldoret Branch Manager who was overall responsible had failed in his duties. The claimant stated that he was in charge of sales and was not the overall supervisor at the Eldoret branch as alleged by the respondent or at all.
7. The claimant further testified that the audit had found that there was no proper declaration of duties at the branch and there was poor control and supervision in the Branch.
8. That the claimant stated that the 1st audit revealed a shortage in stock worth Kshs. 342,317. The claimant testified that he conceded to repay the stock loss to avoid losing his job but he was not responsible for the loss. That he had repaid Kshs. 200,000 by the time his employment was terminated.
9. That a 2nd audit was conducted which revealed another loss of Kshs. 635,526 in stocks. That the Branch sold motor bikes, Tuktuks, Generators and lawn mowers. That the audit report and the court pointed at the Branch Manager Mr. Meshack Ondari to be responsible for the losses incurred at the Branch.
10. The claimant stated that he was released on bond but the respondent did not call him for a disciplinary hearing before the termination. That he earned Kshs. 45,000 per month. That he had gone on leave but was not paid leave allowance. That he was not given notice of termination and was not paid in lieu of notice. That he was not paid service gratuity. That he seeks payment of the same and he be compensated for unlawful and unfair termination of employment.

11. CW1 testified that they were four(4) employees at the branch including Mr. Ondari, Mr. Ojwang and Robinson. That Meshack Ondari and the claimant were incharge of sales. CW1 stated that he sold units, recorded cash receipts and did banking.
12. That the reported first loss was spare parts lost and not cash. No cash receipts were missing. CW1 admitted under cross examination that stocks worth Kshs. 541,904 were missing and that it was in respect of cash and stock. CW1 stated that he was given a show cause letter and agreed to pay the loss. That the loss was deducted from his salary on a monthly basis. That by the time of his termination he had repaid Kshs. 200,000.
13. CW1 stated that Meshack was reported to have taken spares from the store and used then without accounting for them. That only CW1 was disciplined yet Meshack had been caught red-handed having fitted in his tuktuk.
14. CW1 stated that he tried to go back to work upon being released on bail but was not allowed back. CW1 insisted his termination was discriminatory, unlawful and unfair.
15. The defendant called RW1 Samson Thuo who testified that he would adopt a written statement dated 9/5/2018 and filed on 14/5/2018 as his evidence in chief. He produced the two audit reports in support of his testimony.
16. RW1 testified that he was an internal auditor but the audits were done by his assistant. That he relied on the reports. That the audits revealed stock and cash shortage and the claimant was surcharged Kshs. 342,000. That the claimant paid Kshs. 200,000 and was yet to pay the balance. The money was recovered through the payroll.
17. That the 2nd audit revealed a further stock loss of Kshs. 590,000. RW1 testified that they investigated how the loss occurred since the variance had gone up to Kshs. 635,000 in respect of loss of spares which the claimant was in charge of. RW1 stated that he had worked for the respondent for over 11 years.
18. RW1 stated under cross examination that the claimant worked as in charge Eldoret Branch. RW1 said he did not know the claimant's title. He said the claimant was sub-branch head. That Eldoret was not a full Branch. RW1 stated that he did not testify in the Criminal trial that he was head of internal Audit. That his assistant testified in the criminal case. RW1 stated that he did not visit Eldoret at all.
19. RW1 told court that his testimony related to work done by his junior and not himself. RW1 stated that he could not comment on how the audit was done since he was not there. That there was loss of money and stock in April and loss of stock in September and October. RW1 stated that the Audit reports do not state that he claimant was responsible for the loss of money or stock.
20. RW1 added that the report referred to staff in general terms and the claimant was not mentioned at all by name in the two reports. That Meshack Ondari was mentioned in the 2nd report for having misappropriated stock.
21. RW1 admitted that the Criminal trial records show Meshack Ondari was stated to be in –charge of the Eldoret Branch and not the claimant and that Fredrick Nyambura was stocks controller western Region. RW1 also conceded that the record shows that Fredrick Nyambura Nyambura blamed Meshack Ondari for the stock loss before the Magistrate Court and had mismanaged the Branch.
22. RW1 also conceded that Fredrick Nyambura was senior to him. RW1 also conceded that the trial record shows Meshack Ondari said he was in-charge of the Eldoret Branch in February 2013 and had taken over from another employee by the name Victor who was in –charge of sales.
23. RW1 also conceded that the trial record shows that Meshack Ondari testified that the Claimant did not steal form the company but said there was general lack of systems, management and control of stock. RW1 said he did not know why Meshack Ondari was not charged yet he had been directly implicated in theft of spares.
24. RW1 also said he did not know why other staff were not charged but the employees are surcharged if they are responsible of stock or money loss. RW1 added that the claimant was in- charge of sale of spare parts whereas Meshack Ondari was in- charge of unit sales.
25. RW2, Caroline Omanjo adopted a written statement filed on 14/5/2018 as her evidence in chief. RW2 testified that the claimant was a manager for Eldoret Branch. That the claimant was in-charge of overall management of the Branch including operations, cash collections, Banking, stocks and records.
26. That after the audit in 2013, the claimant was given a written warning and surcharged Kshs. 342,317. That the claimant had respondent to a notice to show cause and had admitted responsibility for the cash loss and accepted to refund the same. That he had paid Kshs. 200,000 and the balance was to be recovered from his monthly pay in installments.
27. However, further Audit done in September revealed more losses of stock and the claimant was given show cause letter and suspended. That the claimant did not respond to the show cause letter. That the claimant did not come back to work again.
28. The respondent did not terminate his employment. That the claimant absconded from work. RW2 stated that she was not aware that the claimant had been arrested and charged with a criminal offence. That there was no agreement to wait for the claimant to come back to answer the show cause letter. That the suit lacks merit and it be dismissed.
29. Under cross examination RW2 admitted that the claimant was arrested charged and acquitted before a Magistrate Court. RW2 insisted that the claimant was in-charge of Eldoret Branch. RW2 stated that Meshack Ondari lied to the Magistrate that he was in-charge of Eldoret

Branch. RW2 also stated Fredrick Nyambura also lied to the Magistrate that Meshack Ondari was in-charge of Eldoret Branch. That the claimant was in-charge. RW2 also said Innocent Ouko Ojwang a mechanic employed by the respondent at Eldoret also lied to the Magistrate that Meshack Ondari was in-charge of Eldoret Branch. RW2 said she was not called to testify before the Magistrate Court. RW2 admitted that the audit report mentions Meshack Ondari to have stolen spares but was not charged. RW1 stated that the claimant was overall responsible. RW2 also said Meshack Ondari was not surcharged also RW2 said she did not know why 3 employees lied to the Magistrate about the status of Meshack Ondari.

30. RW2 agreed that there was a serious management problem and lack of control at the Eldoret Branch. RW2 disagreed with the finding by the Magistrate Court that the claimant was not responsible for the loss.

Determination.

31. The issues for determination in this suit are: -

- i. Whether the suit is time barred.
- ii. Whether the claimant's employment by the respondent was terminated by the respondent or the claimant absconded work?
- iii. If the respondent terminated the employment of the claimant, whether it was for a valid reason following a fair procedure?
- iv. Whether the claimant is entitled to the reliefs sought.

Issue I

32. This matter went to full trial however the issue of time bar of the suit was not raised at the first instance in the statement of defence and before the commencement of trial.

33. However, going by the decisions of this court and the court of Appeal in numerous cases including the case cited by the respondent **The Hon. Attorney General & another –VS- Andrew Maina Githinji (2016)** eKLR in which Hon. Justice Waki held:

34. *“ I have considerable sympathy for reasoning in the above case which lead me to the conclusion that the cause of action in this case did not arise after conclusion of the Criminal Case against the Respondent.”*

35. The claimant stopped working for the respondent when he was suspended, and then was arrested and aligned before a Magistrate Court at Eldoret in Eldoret Criminal Case No. 543 of 2013. From the evidence before court the claimant was arrested on 15/4/2013 and was granted cash bail on 26/11/2013. The claimant testified that he tried to return to work upon being granted bail but was denied.

36. The claimant however filed this suit on 3rd April 2017 after the conclusion of the Criminal case on 3/2/2017 when the trial Magistrate acquitted the claimant.

37. There is no letter of termination of employment in this matter. However, it is common cause that the claimant stopped working for the respondent after the report of the 2nd audit revealed a further loss of stock at Eldoret Branch in the sum of Kshs. 590,000 and a cumulative variance of stock in the sum of Kshs. 635,000.

38. RW2 testified that she suspended the claimant from work and issued him a show cause letter but the claimant did not respond to it. The claimant testified that he was stopped from going back to work upon being released on bail whereas RW2 states that the claimant did not return to work.

39. From the above stated Version of events it is apparent that the employment of the claimant by the respondent ended from the date he was released on bail, upon arrest and was unable to continue working for the respondent for whatever reasons. This is the time the cause of action is presumed and indeed found by the court to have arisen being on or about the 26/11/2013.

40. The suit was filed on 3rd April 2017, being three (3) years and about four (4) months from the time the cause of action arose.

41. That claimant did not file application for extension of time before filing of the suit. In terms of section 90 of the Employment Act, read with section 4(1) of the limitation of Actions Act Cap 22 laws of Kenya, the Limitation period of any suit founded on contract is 3 years. The present suit is founded on contract.

42. The Limitations of Actions Act Cap 22 Laws of Kenya does not provide for extension of time in respect of suits founded on contract. This position was restated by the Court of Appeal in the case of Divecon – VS- Samari (1995 – 1998) EA 48 where the court of Appeal held that the provisions for extension of time under section 27 of Limitation of Actions Act Cap 22 laws of Kenya did not apply to contractual claims. This Principle was restated by Waki J in Andrew Maina Githinji (Supra).

43. Accordingly, and with sympathy to the cause by the claimant, the hands of the court are tied and the Court has no jurisdiction to determine the merits of the case despite the conclusion of the trial without any party raising the issue of limitation of time.

44. The Court shall not deal with issues (ii) (iii) and (iv) above since its hands are tied and it must down its tools forthwith.

45. The suit is therefore struck out as it was filed outside the limitation period of 3 years, the same being founded on contract of employment. All remedies sort in the suit emanate from the contractual relationship between the parties and no more.

46. The respondent was indolent in this matter and ought to have raised the issue of time bar at the outset. I find this an appropriate case for each party to bear their costs of the suit.

Dated, Signed and Delivered at Nairobi this 17th Day of September 2020

Mathews N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Kabiru for the Respondent

Mr. Obima for the Claimant

Chrispo: Court