



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 1419 OF 2012

ENG ERASTUS RUGENDO NGATUNY.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was on 14th May 1992 employed by the respondent as Engineer II Mechanical and the respondent's Nairobi Terminal – PS 10 Industrial Area. He rose through the ranks and by 20th May, 2000 he was the Depot manager in charge of the Embakasi Terminal.
2. The claimant further pleaded that on the night of 16th/17th October, 2005 a theft of petroleum product occurred at the respondent's pipeline system at Ps 9 Embakasi. The said theft was alleged to have been planned by some members of the respondent's staff in collusion with outsiders and was executed on weekend while the claimant was at his upcountry home in Meru.
3. On 7th March, 2006 the respondent without giving any notice, terminated the claimant's contract of employment stating that the claimant had failed to collect intelligence information early enough and to report the possibility of the crime being committed by his superior. The claimant averred that the termination was unfair and unjustified. Dissatisfied with the decision to terminate his services, the claimant lodged three appeals with the respondent's authorities requesting to be allowed back to work. By a letter dated 20th September, 2009 the respondent informed the claimant that the management had decided to uphold the decision to terminate his services.
4. The respondent opposed the claimant's claim and averred that the claim as filed was time barred and consequently incompetent. The respondent further averred that the claimant was in the respondent's employ and subject to a contract of employment between the parties as well as specific job description. The respondent further contended that the claimant covenanted to be bound by terms and conditions of the contract and all the guidelines and other rules.
5. According to the respondent, the claimant knew or was deemed to know that it was an implied term of his contract of employment to take all necessary measures including developing systems and structures to prevent the theft of petroleum products kept at the respondent's depot at Embakasi. On the night of 16th/17th October, 2005 the claimant's negligence and professional irresponsibility led to a significant loss of the respondent's petroleum products at the Embakasi depot.
6. In his oral evidence the claimant stated that there was theft on 16/17 October, 2005. Security people found the culprits in the act and that he was called from Meru on Sunday night by his boss to return to Nairobi. In February, 2006 circular he was moved to pumping No 10 Industrial Area headquarters. He then received a termination letter. The claimant further stated that it was not his responsibility to gather intelligence. He denied his leadership was wanting. According to the claimant, thieves opened the pipe and stole knowing it would take time before the information came.
7. He further informed the court that disciplinary proceedings were taken against some senior staff and that some were dismissed and others reinstated. He was a witness and that he was never asked to give his side of the story. The claimant further stated that the disciplinary committee was constituted according to staff level and as a depot manager, his committee would have been chaired by the Deputy Managing Director. He denied he was late in bringing the claim. The respondent gave their last work in 2009.
8. In cross-examination he stated that the termination letter referred to staff rules and regulations and did not dispute their existence. The rules gave the right of appeal. According to him there was no time limit for appeals and that his letter of 9th March, 2006 was written two days after termination. He further stated that two days was sufficient to make an appeal but two years was not unreasonable on a matter that was not closed. The claimant further stated that he did not raise unhappiness with the termination decision in his letter to the respondent and that the letters were written one year later. The respondent's counsel at the close of the claimant's case informed the court that he would not

be calling any evidence.

9. The claimant’s service was terminated on 7th March, 2006. The reason for which his service was terminated was that as a result of the loss of petroleum products at the respondent’s pipeline system P9 – Embakasi, investigation noted as depot manager in charge of overseeing the overall operations of the depot he failed to collect intelligence information early enough and report the possibility of crime being committed to his supervisor. The incident according to the respondent raised doubts in the claimant’s leadership and work performance.

10. The claimant appealed against the termination on 9th March, 2006. This was responded to by the respondent by a letter dated 23rd March, 2006 in which he was informed again that the decision to terminate his service still stood. By a letter dated 4th December, 2006 the claimant lodged a second appeal. this letter was responded to on 12th March, 2007 in which the respondent once again stood by the decision to terminated the claimant’s service.

11. By a letter dated 14th July, 2009 the claimant once more for the third time appealed against his dismissal to the respondent’s board and by a letter dated 25th September, 2009 he was once more informed that the respondent’s management still stood by its decision to terminated his service. He was further informed that the respondent considered the case closed.

12. The applicable law governing limitation of actions when the claimant’s service was terminated in March 2006 was the Limitation of Actions Act. Under this Act the period within which claims based on a contract including contract for employment could be brought to court was limited to six years with no option for extension. This period was reduced to three years in respect of claims brought under the Employment Act, 2009 or employment contract generally.

13. The claimant as observed earlier was terminated from service on 7th March, 2006. He appealed for the first time against the termination on 9th March, 2006 (2 days later). The respondent communicated back to him on 23rd March, 2006 informing him the decision to terminate his service would still stand. The matter went quiet for about nine months, that is on 4th December, 2006 when the claimant once more filed a second appeal and this was responded to by the respondent on 12th March, 2007 once more upholding the decision to terminate the claimant’s service.

14. The matter once more went quiet until 14th July, 2009, some almost two and a half years when the claimant once again appealed against the termination of his service. This again was declined and the claimant advised by the respondent that the matter stood closed as far as the respondent was concerned. While conceding that it was after six years and five months when the claim was filed, the claimant contended that he was following the matter under the respondent’s internal appeal process as provided by the staff regulations.

15. The claimant however did not produce the staff manual and or regulations relied on for perusal by the court. Further the respondent denied there existed any such manual. The gaps and infrequency in the claimant’s appeal process can reasonably be understood to mean that there was no such right of appeal. No reasonable employer can keep open indefinitely an appeal process and allow an employee aggrieved by a disciplinary decision to file as many appeals as they want and without regard to time within which such appeals should be filed.

16. On 17th May, 2013 Justice Rika directed that the respondent joins the preliminary objection with the merit of the case with the effect that the court gives it finding after the full hearing of the claim. Limitation is a matter of jurisdiction of the Court. This has to be determined in limine. If the court comes to the conclusion as is the case that a suit is statute barred, the court ceases to have jurisdiction and must down its tools. Looking at the merits or otherwise of the other aspects of the claim therefore becomes an exercise in futility and uneconomical use of judicial time.

17. The claim is therefore found to be statute barred and hereby struck with costs to the respondents.

18. It is so ordered.

Dated at Nairobi this 18th day of January 2019

Abuodha J. N.

Judge

Delivered this 18th day of January, 2019

Abuodha J. N.

Judge

In the presence of:-

..... for the claimant

..... for the Respondent

Abuodha J. N.

Judge