



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 434 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2019)

RAYMOND MBOYA NDIEGE.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....1st RESPONDENT

THE PRINCIPAL SECRETARY: MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

THE CHAIRMAN

MINISTRY OF WORKS SPORTS CLUB.....3RD RESPONDENT

JUDGMENT

1. The Claimant instituted the cause herein vide the Memorandum of Claim filed on 20th March 2014. However, it was amended by the Amended Memorandum of Claim filed on 17th October 2017, wherein the Claimant sought the following reliefs:-

a. A declaration that the dismissal was unlawful and payment of the sum of KShs. 10,348,057.30 as particularized below:-

- i. Salary in lieu of notice in the sum of KShs. 76,575.00.*
- ii. Service pay (15/30 x 25,525 x 14 years) in the sum of KShs. 178,675.00.*
- iii. Off days (90 x 850.83) in the sum of KShs. 76, 574.70.*
- iv. Overtime (110 hours x 850.83 x 2) in the sum of KShs. 187,182.60.*
- v. Annual leave accrued (13 years x 25,525) in the sum of KShs. 331,825.00*
- vi. House allowance (45 x 5,000) in the sum of KShs. 225,000.00.*
- vii. Salary arrears (45 months x 25,525) in the sum of 1,148,625.00.*
- viii. Annual leave travelling allowance (13 x 5,000) in the sum of KShs. 65,000.00.*
- ix. 22 years payment until maximum retirement age salary in the sum of KShs. 8,058,600.00.*

b. Certificate of service.

c. Maximum compensation for wrongful dismissal and lost income for 45 months in the sum of KShs. 1,148,625.00.

d. Cost of this suit.

e. Interest on (a), (c) and (d) above.

f. Any other relief this Honourable Court deems fit and just to grant.

Claimant's case

2. The Claimant's case is that he was first employed in 1998 by the 3rd Respondent as an Accounts Clerk and later promoted to an Accountant. He served diligently and during his tenure, the 3rd Respondent earned numerous accolades. However, on 27th July 2008 his services were unlawfully terminated. It was arbitrary without issuance of a notice. At the time of termination, he was earning a salary of Kshs. 25,525.00.

3. Further, the 3rd Respondent's board terminated his services by sanctioning a 3 months' compulsory leave without giving him reasons or paying his salary. He was denied the opportunity to resume his duties after completion of his leave. The Claimant wrote to the 3rd Respondent asking for his dues and reasons for his compulsory leave, but the 3rd Respondent has not responded to date.

4. The Claimant avers that the 3rd Respondent conducted a forensic audit of its accounting books between March and April 2012, to justify his termination. Additionally, he had not been previously issued with the findings once he concluded his leave. It is his case that he requested for a copy of the forensic audit report and the evidence of the allegations against him but his requests have never been responded to.

5. He avers that this cause would not have been instituted had his dues been paid. He testified as CW1 and led evidence that the matter was reported to the Ministry of Labour, the 3rd Respondent invited for a conciliation meeting to bring the necessary documents but failed to do so.

6. Upon cross-examination, it was his testimony that he received his salary until July 2008 but not for August, September and November. He testified that on 29th August 2008, he tendered his resignation which was declined by the 3rd Respondent and he resumed work on 27th November 2008. He maintained that despite being requested for the requisite details to facilitate payment of his dues, it was never paid. He received a dismissal letter in 2012.

7. He admitted that the Treasurer gave him a copy of the auditor's report in 2008. It was his testimony that he was not given the reasons for his dismissal and that the 3rd Respondent fabricated the report.

Respondent's case

8. The Respondents filed their Reply on 31st March 2014. They deny the contents of the Memorandum and aver that the Claimant was the author of his own misfortune and had the choice of seeking employment elsewhere. Further, that the Claimant was not entitled to his claim for 3 months' notice pay and was only entitled to 1 months' notice pay, if at all.

9. RW1, Lilian Koech, testified that when the Claimant was sent on compulsory leave, he was to hand over all accounting documents and reports to the club manager. He never did, instead, he opted to write a resignation letter on 28th August 2008. However, the Claimant did not report back upon the lapse of the 3 months leave period.

10. It was her testimony that the letter of 7th December 2008 was never received by the club. She asserted that the 3rd Respondent usually signed or stamped its documents. It was her further testimony that the letter of 27th November 2008 was sent to the Chairman but never received by the manager and that all the letters from November 2008 to March 2009 relied upon by the Claimant in his bundle of documents, were never received because they are not stamped.

11. She did not have any knowledge of whether the Claimant was paid while he was on compulsory leave but asserted that the 3rd Respondent did not owe the Claimant Kshs. 2,000,000.00 as alleged. Her concluding testimony was that the letter of 10th August 2008 signed by the Claimant was not on a letterhead hence not authentic. Further, that an Accountant could not allocate himself an allowance. On cross examination, it was her evidence that she joined the 3rd Respondent in 2018.

12. RW2, Paul Ichura Nguthiiru, testified that in accounting practice an Accountant who was going on leave or whose employment was ceasing, was required to write a handover report which was to be signed by him and a working officer and stamped thereafter.

13. It was also his testimony that an audit report was prepared by an auditor. The Claimant was not an auditor and neither was there a report prepared by him. On cross examination, RW2 testified that since he joined employment in 2015, he had only seen the Manager's letterhead. He conceded that auditors were also Accountants.

Submissions by the Parties

14. Vide his submissions filed on 28th April 2019, the Claimant submits that the Respondents have not demonstrated the prejudice they are likely to suffer if he is compensated by way of damages. It is his position that his evidence was not controverted and that the Respondents' evidence did not add weight to their Response.

15. The Respondents in their submissions filed on 12th June 2019, submit that the Claimant was sent on compulsory leave, he opted to resign vide his letters of 27th August and 2nd September 2008. He also failed to report back to work after the lapse of his leave.
16. It is the Respondents' position that the Claimant has failed to prove that he was unfairly dismissed. No further letters were received by the 3rd Respondent from the Claimant and there is no proof of delivery of the letters adduced by the Claimant in Court.
17. It is the Respondents' submission that pursuant to section 90 of the Employment Act 2007 and Section 4 (1) of the Limitation of Actions Act, the claim is time barred hence should not be entertained. In their opinion, time started running on 27th August 2008 when the Claimant opted to resign instead of going on annual leave.
18. It is their position that the 3rd Respondent's letter of 25th May 2012 was not a letter of dismissal, rather, it was in response to the Claimant's numerous letters of 1st and 19th March 2012 and 2nd and 23rd May 2012. They rely on the cases of **Kenya Scientific Research International & Allied Workers Union vs. T.N.S. Research International Limited; Cause 27(N) of 2010**, **Attorney General & Another vs. Andrew Maina Githinji & Another [2016] eKLR**, **Rift Valley Railways (Kenya) Limited vs. Hawkins Wagonza Musonye & Another [2016] eKLR** and **Times Newspaper Limited vs. O'Regan [1977] I.R.L.R 101**.
19. The Respondents submit that the Claimant is not entitled to any prayers sought as he resigned and rely on the cases of **Kenya Ports Authority vs. Edward Otieno CA NO. 120 of 1997** and **Gunton vs. London Borough of Richmond Upon Thame [1980] 3 ALL ER 577**.
20. I have examined evidence and submissions of both Parties. The issues for consideration are as follows:-
1. *Whether the claim is time barred.*
 2. *Whether Claimant resigned or was terminated.*
 3. *If terminated, if the termination was fair and justified.*
 4. *Whether the Claimant is entitled to remedies sought.*
21. On the first issue above, the Claimant resigned on 27th August 2008 and that the letter dated 25.5.2012 by 3rd Respondent was in response to the Claimant's numerous letters dated 1.3.2012, 19.3.2012, 2.5.2012, 3.5.2012 and 25.5.2012.
22. The Claimant's position is that he had actually resigned but the Respondent did not accept the resignation. He submitted the letter dated 28/8/2008 his Appendix RM3 which indeed shows that the resignation was rejected and the directive for him to proceed on 3 months leave upheld.
23. Indeed after this resignation was declined, the Claimant handed over the office and proceeded on leave and was never paid salary during the said 3 months leave. He indeed wrote to the Respondent on 7.12.2008 (Appendix RM6) on this issue asking the status of his employment. The issue of the Claimant resigning is therefore not true.
24. However, since 2008 August, to December 2008 when the leave ended, the Claimant was never paid any salary. The status of his employment was never communicated to him.
25. In a letter from the Ministry dated 25/5/2012, (Appendix RM24) the Ministry wrote to the Claimant informing him that he resigned on 27/8/2008 and in the circumstances the resignation was accepted as final.
26. In this Court's view, there is no other correspondence from the Respondent rescinding their own letter rejecting the resignation after their own letter of 28/8/2008.
27. It is only in 2012 when the Respondent now officially communicates to the Claimant vide their letter of 25/5/2012 indicating that he had resigned and the resignation accepted. This was actually not true because the Claimant's resignation had been rejected.
28. From 25/5/2012 is now when the Claimant gets this official communication showing he had been considered as having resigned in 2008 and is therefore the time the cause of action starts running.
29. The Claimant filed this claim in 2014 within the 3 years period as provided under Section 90 of Employment Act 2007. The claim is therefore not time barred.
30. The above position also answers issue No.2 above where I have made a finding that the Claimant had initially resigned but the resignation was rejected by the Respondent. He remained an employee of the Respondent until the 25/5/2012 when the Respondent wrote now indicating that they had accepted the resignation of 27th August 2008, which was not the position.
31. The Respondents letter vide their letter of 25.5.2012 is therefore a constructive dismissal of the Claimant without any due process.
32. There is no indication that though the Respondent may have found the Claimant culpable of some misgiving on mismanagement of the Respondent's accounts, these findings were given to the Claimant who was asked to submit to disciplinary hearing process.

33. Section 41 of Employment Act envisages that even where there is misconduct on an employee's part, he should still be informed of the alleged misconduct and taken through a hearing process where evidence is called and he is allowed to call witnesses of his choice.

34. The Respondent omitted to inform the Claimant they had considered him dismissed. They also did not give him any reasons if any for that position contrary to Section 43 of Employment Act 2007.

35. It is therefore my finding that the Claimant never resigned but was terminated by the Respondents vide their letter of 25/5/2015 without any due process. The termination was therefore unfair and unjustified.

36. Having found the termination unfair and unjustified, on remedies I find for Claimant and I award him as follows:-

1. 1 months' salary in lieu of notice = 25,525/=

2. Unpaid salary from August 2008 to May 2012 for 45 months = 25,525 x 45 = 1,148,625/=.

3. Payment of Claimant's terminal dues being service pay for 14 years = $\frac{1}{2} \times 25,525 \times 14 = 178,675/=$

TOTAL = 1,352,825/= less statutory deductions

4. Issuance of a certificate of service

5. Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 16th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

Odhiambo for Respondent – Present