

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 268 OF 2016

JOHN MAINA MATHAIYA.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent for the alleged dismissal from employment and failure to reinstate him to employment. He averred that he was employed on 1st August 1992 as a clerical officer in the Human Resource Department of the Respondent. He averred that on 22nd December 2011 he was charged and arraigned in the Chief Magistrate's Court at Nyeri in Criminal case No. 1205/2011 with the offence of stealing Telkom cables valued at Kshs. 1,199,387/- from the Respondent. He averred that the Respondent terminated his contract with effect from 28th April 2014. He was found guilty but was acquitted by the High Court on 15th September 2016 in his appeal. He averred that the case against the Respondent was for his reinstatement to his employment plus compensation for wrongful dismissal. He averred that he was entitled to general damages and emoluments/contingencies at the rate of 15% of the total amount. He thus sought an order directed at the Respondent to unconditionally reinstate the Claimant to his employment without any loss of benefits, seniority or conditions. He also sought compensation for the time lost and in the alternative to the foregoing, the Respondent be ordered to fully compensate the Claimant for the unfair, unlawful and wrongful termination of the Claimant together with all attendant benefits. The Claimant also sought costs of the suit.

2. The Respondent in its defence averred that it acted in accordance with justice and equity in dismissing the Claimant from its employment. The Respondent averred that the Claimant was convicted of the charges and was sentenced to serve 2 years non-custodial sentence. The Respondent admitted that the Claimant's appeal to the appellate court was successful and averred that its decision to summarily dismiss the Claimant was based on the conviction of the Claimant in Cr. Case No. 1205/2011. The Respondent averred that the reinstatement of the Claimant is not practical as there exists no minimum confidence between the Claimant and the Respondent based on the criminal charges. The Respondent further averred that the position that the Claimant held in the Respondent was filled by another person. The Respondent averred that the Claimant's claim for general damages, emoluments/contingencies at the rate of 15% did not lie in the Employment Act as the Act does not provide for general damages as a remedy for compensating employees for any wrongful acts done by employers.

3. The Claimant testified that he was an employee of the Respondent and was accused of stealing copper cables belonging to the Respondent. He stated that he was convicted and sentenced to serve 2 years non-custodial sentence which he appealed against. He said that he approached the Respondent for reinstatement upon acquittal and the Respondent declined. He thus sought reinstatement and payment of salary that was outstanding until his retirement as well as the costs of the suit and if not reinstated to be paid damages for dismissal. In cross-examination he stated that he was arraigned for theft by servant and was convicted in 2014. He testified that he was dismissed without being heard. He stated that he was called during the pendency of the criminal trial. He said that the judgment of the criminal court was overturned. He was re-examined and stated that the Respondent declined to reinstate him and failed to give him any reason. He testified that before taking him to court there was no disciplinary process and that the dismissal came after the conviction by the criminal case.

4. The Respondent's witness Kennedy Wanyakwara Mokuia testified that he was a senior HR Officer in the Respondent till December 2018 and was conversant with the facts. He stated that the Respondent instituted proceedings against the Claimant and that the Claimant did not attend. He testified that the Claimant was to give an explanation and the Respondent gave a summary dismissal letter. He stated that the Claimant was given the reasons for the dismissal and that it was unaware that the appeal by the Claimant until the demand letter. He testified that the Claimant's position was filled due to its nature. In cross-examination he stated that the Claimant was notified by letter of 21st March inviting him and that the Respondent was unaware the Claimant had appealed until the demand letter. He stated that what the Respondent was aware was that the Claimant had already been convicted and that was enough to dismiss him. His position was that the Claimant was not entitled to reinstatement as the dismissal followed the conviction. In re-examination he testified that the Claimant's dismissal was after the outcome of the lower court.

5. The Claimant submitted that what was for determination was whether the termination of the Claimant's employment and failure by the Respondent to reinstate him to his employee's services was unlawful. He submitted that in its defence the Respondent asserted that the Claimant was summoned for a disciplinary process but he did not attend. He submitted that the Respondent did not produce any evidence to that effect and that the only presumption then would be that the Claimant was not given a chance to mitigate his case thus a miscarriage of justice. He submitted that the argument that reinstatement is not practical as there exists no minimum confidence between the Claimant and the Respondent is disrespectful and contemptuous. The Claimant submitted that he was the offended party who subjected himself to the court process and found him not guilty. The Claimant sought the grant of the orders sought.

6. The Respondent submitted that the reinstatement was untenable as his position was filled and there exists no minimum confidence between the parties. The Respondent submitted that it was noteworthy that proceedings were initiated against the Claimant which proceedings were stayed to await the outcome of the court process. The Respondent submitted that the issues for determination was whether the termination of the Claimant was unfair and whether the Claimant is entitled to the remedies sought. The Respondent submitted that the

termination of the Claimant was fair as the Claimant had committed a criminal offence against the Respondent which was grounds for termination under Section 44(4)(g) of the Employment Act. The Respondent submitted that the quashing of the conviction by the appellate court did not take away from the Respondent's disciplinary procedures. The Respondent relied on the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR**. The Respondent submitted that the Claimant had admitted to the existence of disciplinary proceedings and the proceedings were stayed awaiting the outcome of the criminal proceedings which resulted in the conviction of the Claimant. The Respondent submitted that the remedy of reinstatement under Section 12(3)(vii) of the Employment Act should be within 3 years of dismissal and the Claimant was not entitled to this remedy. It was submitted that the general damages for time lost out of employment did not form part of the remedies under Section 49 of the Employment Act. The Respondent submitted that there was no evidence presented to court to guide it in any award of the reliefs he seeks. The Respondent submitted that the burden of proof lay upon the Claimant per Section 108 of the Evidence Act and that he had not discharged this burden. The case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** was cited in support of arguments that the Claimant had failed to plead for an award for wrongful and unfair termination. The Respondent submitted that the Claimant had not proved his claim and it should be dismissed with costs.

7. The Claimant chiefly sought unconditional reinstatement to his employment plus general damages and emoluments/contingencies at the rate of 15% of the total amount as well as an order directed at the Respondent to reinstate the Claimant to his employment without any loss of benefits, seniority or conditions. The Claimant also sought compensation for the time lost and in the alternative to the foregoing relief, he prayed that the Respondent be ordered to fully compensate him for the unfair, unlawful and wrongful termination together with payment of all attendant benefits. The Claimant sought a relief that is untenable being the reinstatement as he was dismissed in 2014 a period of 5 years. The Claimant ought to have sought a remedy of compensation not as an alternative to reinstatement. He nevertheless sought some general damages emoluments/contingencies at the rate of 15% of the total amount plus costs and interest of the suit. The Claimant did not particularise or even quantify his claim or produce any documentation to guide the court as to what he earned. What the Claimant claimed remained enigmatic and he thus failed to prove his case on a balance of probabilities. The suit is dismissed but each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar