

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE NO. 80 OF 2018

PAUL KAMAU KIRAGU.....CLAIMANT

VERSUS

ACTION FOR CHILDREN IN CONFLICT.....1ST RESPONDENT

JOHN MUIRURI.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for the alleged unfair termination of his employment. He averred that the 1st Respondent was a Non Governmental Organisation duly registered as such and that the 2nd Respondent was the principal officer and/or agent of the 1st Respondent. The Claimant averred that he was an employee of the 1st Respondent from 2011 having been appointed in the position of a livestock caretaker and that he earned Kshs. 8,000/- a month. He averred that he was arrested in September 2013 for alleged attempt to steal from the Respondent. He was suspended from duty on 13th September 2013 and informed that independent investigations were being carried out. He was asked to vacate the premises and in October was advised to await the outcome of the criminal case. He averred that the criminal case was discontinued on 31st August 2017 for lack of witnesses yet the 2nd Respondent had been in Thika all along. The Claimant averred that for the period he was on suspension he was never called for a hearing. He also averred that he never received half salary as required for the entire suspension period for which he sought reimbursement. The Claimant averred that due to the action of the Respondents of unfairly and unjustifiably recommending his prosecution by making a report to the Police of a preposterous allegation of theft considers himself to have been constructively dismissed from his employment upon termination of the criminal proceedings and failure to reinstate him to his employment despite the long suspension status. The Claimant averred that the dismissal was unlawful, unfair, unwarranted, wrongful, illegal, unprocedural and vindictive as it violated the Claimant's rights to fairness and violated his labour rights. He thus sought a declaration that the termination of his employment was unlawful and violated his rights to fairness and fair labour practices. He prayed for payment of the unpaid salary and allowances for September 2013 – Kshs. 8,000/-, one month salary in lieu of notice – Kshs. 8,000/-, accrued salaries since October 2013 to September 2017 – Kshs. 384,000/- making a total of Kshs. 400,000/-. He also sought compensation for the illegal, unfair and wrongful termination of employment, costs of the suit and interest at court rates.

2. The Respondents in their reply to the memorandum of claim by the Claimant averred that the Claimant was employed by the 1st Respondent on a one year contract from 2011 with the option to renew annually. The Respondent denied that the Claimant worked continuously or that he was diligent in his work. The Respondents averred that the Claimant was involved in unscrupulous activities including theft and that it had no obligation to inform the Claimant of his impending arrest for theft as the power of arrest lay with the Police. The Respondents averred that suspension of the Claimant was procedural and in line with the 1st Respondent's human resource manual. The Respondents averred that the 2nd Respondent reported the theft to the Police as law abiding citizen and there must have been reasonable grounds to proceed with the criminal charges against the Claimant. The Respondents averred that the contract the Claimant had was from 1st April 2013 and that the same terminated by effluxion of time on 31st March 2014 and the Claimant's failure to apply for renewal. The Respondents averred that they never dismissed the Claimant and that his contract lapsed and the Claimant never applied for employment or renewal of his contract to the 1st Respondent. The Respondents averred that the Claimant never applied to the 1st Respondent upon his discharge from the criminal prosecution and that the Claimant was not entitled to the prayers sought in his claim.

3. The Claimant testified and the Respondent did not attend the hearing. He stated that he was a livestock caretaker at Karibaribi, Thika and was paid Kshs. 8,000/- a month. He produced exhibits including the contract of employment and the copy of proceedings in the criminal trial. He testified that he was alleged to have stolen a sack of pork feed. He stated that he had not stolen the feed. He testified that he was given the suspension letter and was removed from the house on the farm and that he was suspended not dismissed. He stated that he never got a dismissal letter and that he went to court for 4 years but no witness came to testify. He stated that the 2nd Respondent was the witness and he never came to court and the court discharged him. He testified that he went to the office and told the 2nd Respondent he wanted to be reinstated and he was notified that there was no work. He sought the assistance of Kituo Cha Sheria and later met the present advocate who took his case. He stated the demand letters from Kituo Cha Sheria were delivered through Chief Karenya at Karibaribi. He stated that he had suffered immensely and thus sought the prayers as pre his claim.

4. The Claimant filed submissions and in the submissions he asserted that the Respondents filed a response which remained mere averments as they never cared to defend the same in court and the claim was thus uncontroverted. He relied on the case of **Sheebal Limited v County Government of Machakos [2018] eKLR** where Odunga J. (as he then was) held that *In this case the plaintiff has given evidence on oath supported by documentary evidence which go to prove its case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases it is on a balance of probabilities...* The Claimant submitted that the Respondents simply deny the allegations in the statement of claim in their defence but no effort was made to substantiate its defence. The Claimant submitted that the Respondents never participated in the hearing and having not testified, the contents of the response means the Claimant's evidence is unchallenged and therefore should be taken by the court as the only plausible factual foundation of this case. The Claimant submitted that he testified on oath and laid a basis for the grant of the relief he sought in his claim. The case of **Paul Ngeno v Pyrethrum Board of Kenya [2013] eKLR** was cited for the proposition that an employee on suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. He submitted that it would be unfair labour practice to deny an employee payment

during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. The Claimant thus urged the grant of the relief as prayed in his memorandum of claim.

5. The Claimant was suspended from employment 13th September 2013. At the time, the Claimant had a contract of employment that ran from 1st April 2013 to March 2014. In the letter dated 20th February 2013, the Claimant was advised as follows:-

The year 2012 to 2013 is coming to an end on the 31st March 2013 and hence the end of your contract for that period.

You are therefore required to apply for renewal of your contract for a further one year starting on 1st April 2013 to March 2014.

The import of the letter from the 2nd Respondent who was the Director of the 1st Respondent is that the Claimant had to apply for renewal of the contract. From 2014 onwards, there is no indication the Claimant applied for renewal of his contract. No evidence was adduced that he continued to be employed beyond March 2014. To boot, he faced criminal charges on 21st October 2013. Granted that he was not in employment from March 2014, his rights crystalized in April 2014. He should have taken action within 3 years of the termination of his contract and not wait for 4 years for the criminal case to come to an end. His suit for the relief he sought against the Respondents was time barred in terms of Section 90 of the Employment Act. He additionally should not have sued the Director of the Respondent unless it was in a civil case on malicious prosecution. In the premises, having taken the view the suit was not filed timeously there is no need to discuss the merits of his claims against his former employer the 1st Respondent herein. I dismiss the suit and order each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 15th day of October 2019

Nzioki wa Makau

JUDGE