



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 204 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

KENNETH KIPKEMBOI SETTIM.....1ST CLAIMANT

JOSSY M. KIOKO.....2ND CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND

THE BOARD OF TRUSTEES.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Arusei & Company Advocates claiming damages for:

1. Breach of Regulation 3:6(a) and (b) of the NSSF code of regulations for all members of staff by the Respondent by serving the Claimants with dismissal letters.

2. Failure by the Respondent to observe the terms of the letter dated 9th December 2002 by the Respondent to the effect that the Claimant's suspension from duty had been reduced to interdiction with effect from the 6th November 2002 pending the outcome of the criminal proceedings.

3. That while the criminal proceedings were pending and despite the issue No.2 above, the Respondent had no jurisdiction to go ahead and dismiss the Claimants from service on 9th July 2003.

4. Breach of the staff regulation governing the employment of the Claimant.

5. Whether an employee on interdiction on account of criminal charges can be dismissed before the conclusion of the criminal trial.

6. Whether this is therefore a proper matter for the Claimants to be reinstated to the interdiction status as stated in the Respondent letter dated the 9th December 2002 and thereupon paid all the accrued salaries per month (several) (half-pay) and allowances in terms of the NSSF code of Regulation for all members of staff Regulations 3:6(a) and (b) respective amounts worked out by the Respondent regard having to the claimant appointment, last pay slip, rank, promotion etc.

2. The Claimants aver that on or about the 19th January 1999, the 1st Claimant was appointed as Inspector III while the 2nd Claimant was appointed on the 14th July 1994 to the position of Inspector III. The appointments were subsequently confirmed and both appointments were made by the Respondent.

3. They aver that over the years they served the Respondent organization, and or about 24th April 2002 they were arrested and jointly charged with criminal offences, the crime being of a corruption nature where the proceedings are pending in the Criminal case No. AA 27/02.

4. They further aver that on the 29th June 2004, the trial magistrate referred the matter to the High Court for the resolution of the serious and substantial matters of law raised by the accused in the said case but the Claimants had on 30th June 2002 been suspended from duty and handed suspensions of duty letters.

5. They state that upon suspension from duty, they made representation seeking that the suspension be withdrawn and on 9th December 2002 the Respondent reduced the suspension to that of interdiction with effect from 6th November 2002 pending the outcome of the criminal proceedings. That despite this, the Respondent still went ahead and effected the dismissal upon the Claimants.

6. They further state that under the terms and conditions of service read together with the staff regulations governing the employment of the Claimant, an employee on interdiction on account of criminal charges cannot be dismissed before the conclusion of the criminal trial which will determine the innocence or guilty of such an employee and they shall receive such salary not being less than half of his or her salary.

7. They contend that it was not open to the Respondent to dismiss the Claimants and deny them their respective half pay as the dismissal. They aver that denial of salaries was a pure breach of contract of employment and the NSSF Code of Regulation for all members of staff. The Claimants contend that despite the demand and notice of intention to sue having been issued, the Respondent refused to make good the Claimants' claim.

Respondents evidence

8. The Respondent filed their Memorandum of Reply where they aver that the dispute between them and the Claimants stems from the dismissal of the Claimants from service on account of compromising the Respondent's interest amounting to gross misconduct on 9th July 2003 where the Claimants had on 24th April been arrested by police and subsequently arraigned in Court on 26th April 2002 for involvement in soliciting for themselves Kshs. 200,000 bribe and receiving Kshs. 50,000 bribe on 23rd July 2002 and 24th July 2002 respectively from proprietor of Visa Place Restaurant in Upper Hill Nairobi, following which the Respondent took administrative action to dismiss their services in 2003.

9. They further aver that the Claimants instituted proceedings against the Respondent at the Industrial Court 8 years after the termination on claim of unfair termination of employment where the Respondent filed a defence giving a notice to raise a Preliminary Objection on grounds that the claim was time barred.

Submissions

10. The Claimants submitted that they are both facing criminal charges which charges are still pending in Court and as a result they were placed under interdiction with effect from 6th November 2002 pending outcome of the criminal proceedings.

11. They aver that under the NSSF Code of Regulation for all members staff, an employee on interdiction shall receive such salary not be less than half pay plus all allowances. However regardless of the letter of interdiction, the Respondent dismissed the Claimants which was an act of bad faith, malafides, breach of the law, breach of contract of employment, the NSSF Code of Regulation for all employees and the breach of the Section 62(1) of the Anti-Corruption and Economic Crimes Act No.3 of 2003 part VIII.

12. The Claimants state that the claim for an order for the reinstatement to the interdiction status with effect from 9th July 2003 pending the outcome of the criminal proceedings and an order of payments of their respective half salary and allowances with effect from 9th July 2003 till the conclusion of the criminal proceedings. The matter came up for hearing on 26th March 2012 at the Industrial Court but the Claimant's Advocate was not ready to proceed with the hearing and the Court advised the parties to attempt out of Court settlement but the order for Conciliator was heard and dismissed.

13. They further state that the report filed does not amount to a conciliation report as it did not disclose the parties who appeared before him, the dates and minutes of the proceedings, it was also not accompanied by certificate as required. The report was also riddled with factual errors, mistakes and contradictions.

14. The Respondents filed their submissions where they aver that the Claimants' submission that the Court should adopt and give effect to the recommendations of the Conciliator's report is tantamount in asking the Court to abdicate its responsibility to adjudicate the dispute to the Conciliator as the role of adjudication of dispute is a judicial function that cannot be delegated to non-judicial officer.

15. They further aver that the Claimants were liable to summary dismissal for committing or/on reasonable and sufficient grounds being suspected of having committed a criminal offence and asked the Court to proceed and fix a date for hearing of the matter and that the Conciliator report be disregarded in consideration and determination of the matter as parties have not agreed on the recommendations.

16. I have considered the documentary evidence of the parties and submissions filed herein. The issues for determination by this Court are as follows:-

1. Whether this claim is time barred.

2. Whether the action by the Respondent dismissing the Claimants was fair and justified.

3. What orders this Court can grant in the circumstances.

17. On the 1st issue, this Court takes note of the fact that the Claimants were dismissed on 9.7.2003. Under the then Employment Act Cap 224, there was no provision of limitation. However, under the Trade Disputes Act, Section 14(9) (f) states:-

9) "The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith:-

f) where the trade dispute solely concerns the dismissal or reinstatement of any employee, unless the Court has received, in addition to the certificate required by paragraph (e) the written authority of the Minister for that purpose:

Provided that this subsection shall not apply to any reference or appeal to the Court under Part III, Part V or Part VI.

18. Thus the Industrial Court as it then was could not take cognizance of any claim unless the claim had gone through conciliation.

19. This claim being a claim under contract, Cap 22 Limitation of Actions Act would come in. In this case Section 4 of Cap 22 states as follows:-

“Actions of contract and tort and certain other actions.

The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

a) actions founded on contract

b)”

20. In this respect, assuming that this claim was falling under contract under the Repealed Employment Act Cap 224, then this claim was to be filed within 6 years from the time the Claimants were dismissed which was by February 2009.

21. This claim was however filed on 16.2.2011. In this respect it is my finding that this claim is not only improperly before Court having not gone through the conciliation process but is also time barred.

22. It would not be necessary in the circumstances for Court to interrogate any other aspects of this claim including the arbitrariness or otherwise of the Respondents actions or the prayers sought.

23. I therefore dismiss this claim in its entirety with no order as to costs.

Dated and delivered in open Court this **30th day of May, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo for Respondent – Present

Claimant in person – Present