



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 12 OF 2018

(Formerly Nyeri ELRC No. 29 of 2017)

PAUL KIRIMI.....CLAIMANT

VERSUS

MERU CENTRAL DAIRY CO-OP LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 2nd February 2017 seeking recompense for the alleged wrongful, unfair and constructive dismissal. He averred in his memorandum of claim that he was employed in the position of executive driver from 1st June 2008 under a written contract of service. He averred that he earned Kshs. 12,000/- , a house allowance of 35% of the basic salary and a medical allowance of Kshs. 850/- payable monthly. He was suspended on 18th July 2011 for alleged failure to submit sales totalling Kshs. 349,222/- by 18th July 2011. The Claimant was charged at the Chief Magistrates' Court at Meru with 2 counts of stealing by servant contrary to Section 281 of the Penal Code and creating a disturbance likely to cause a breach of the peace. Specifically the Claimant was accused in count 1 that on diverse dates between 1/7/2011 to 9/7/2011 he stole 85 buckets of ghee each weighing 18 kgs all valued at Kshs. 357,000/- which came into his possession by virtue of his employment. Count 2 was that on 25/7/2011 he stole 50 buckets of ghee all weighing 13 kgs valued at Kshs. 198,000/- which came into his possession by virtue of his employment. On the third count he is alleged to have created disturbance on 19/8/2011 at the Respondent's marketing manager's office. The Claimant was acquitted of all the charges in a ruling delivered on 12/2/2015. He averred that he was not recalled back by the Respondent nor paid his benefits for the period he was under suspension. The Claimant averred that the actions of the Respondent clearly indicated that he had been constructively dismissed without any justifiable cause even after the collapse of the criminal case which was the basis of his suspension. The Claimant averred that the failure to reinstate him was malicious and is fuelled by the bad blood between him and the Respondent's management. He averred that his fundamental rights had been violated and his termination was unfair and contrary to the dictates of natural justice, fundamental human rights and equity. He therefore sought for a declaration that the termination of his services was wrongful, malicious and/or unfair, an award of general damages for breach of contract, an award of damages of 66 month's salary from the date of suspension from 18th July 2011 to date at the rate of Kshs. 17,050/- a month – Kshs. 1,125,300/-, reinstatement to his former employment without any loss of benefit and or seniority, and any other further relief the court may deem just and fit to grant. To his claim, the Claimant attached his statement, the letter of appointment dated 11th June 2008, the letter of offer dated 16th June 2008, letter of suspension dated 18th July 2011, court proceedings in the criminal case, pleadings in the civil suit before the Chief Magistrate's court at Meru wherein he sought damages for malicious prosecution against the Respondent as well as the demand letter to the Respondent.

2. The Respondent filed a defence on 5th May 2017 wherein it averred that the termination of the Claimant's services was in accordance with the law and all rules of natural justice. The Respondent put the Claimant to strict proof on his averments.

3. The Claimant testified on 6th March 2018 and stated that he had been employed from 2005 as a casual till 2008 when he was confirmed as permanent. He was a driver and worked until 18th June 2011 when he was suspended. After suspension he was charged in court and was acquitted on 12th February 2015. He was not paid since his suspension to date. He testified that he was not given a letter of termination. He thus sought the prayers in his claim.

4. In cross-examination, he testified that he was charged in the criminal case but was acquitted. He was referred to the proceedings of the criminal trial and confirmed that there was testimony by the defence witness Catherine Gachungu Domiano who was found with a letter marked return to sender. He conceded he did not ask questions and that according to him, he was still on suspension. He stated that he knew he could protest the non-payment of half salary and the limitation on the cause of action for non-payment of salaries. He did not agree that time had lapsed though from then it was 5½ years from the date of suspension on 18th July 2011 and the filing of the case on 2nd February 2017. He stated that the delay was on account of his charges in 2011 which subsisted until 2015 when the criminal trial was concluded. He testified that he wrote a demand letter on 16th April 2015 demanding to be returned to work failing which he would seek recourse in court. He stated that his half salary was unpaid from 2011 to 2015 and this was a continuing wrong. When a question was put to him that if he had

filed the suit in time the documents could have been available and this case would have been concluded, he replied that it was not his duty to keep police or court files and that he knew he should have kept the time lines set by court in mounting his case.

5. In re-examination he testified that the dismissal letter was as per the proceedings in the criminal trial posted on 11th November 2011 yet the testimony of the witness was that the letter was of 2012. He stated that it seemed the letter was posted before it was written and that the letter was posted to the address of the Respondent being Box 43 Nkubu. He testified that he never used the address given that his postal address is not Box 43 Nkubu. He never received the letter and it was not produced to him or given to his lawyer. He did not receive any payment after his suspension and the Respondent was responsible for payment of salary. He stated that he filed the suit after obtaining funds to mount the case. He confirmed that he was not called before the board and did not recall any board minutes being produced at the criminal trial. He testified that he should have been called by the board, heard then dismissed. He stated they did not follow the right procedure and the Respondent was to pay half-salary while he was on suspension.

6. The defence did not offer any witness and parties were to file written submissions. The Claimant filed his submissions on 29th March 2018 while the Respondent filed submissions on 6th April 2018. The Claimant submitted that he was suspended on 18th July 2011 and was later charged on 22nd August 2011, he was not paid the half salary he was entitled to while on suspension. He submitted the trial concluded on 12th February 2015 when he was acquitted on all counts. He sought reinstatement on 16th April 2015 and payment of the half salary while he was on suspension. The Respondent did not respond to the demand letter and after waiting patiently the Claimant filed this suit. The Claimant submitted that in response to his claim the Respondent filed a defence that raised only two issues which was that the Claimant had been lawfully terminated long before the criminal trial was finalised and that the termination was in accordance with the law and all the rules of natural justice were observed. The Claimant isolated issues for determination as

- (a) Whether the Claimant's indefinite suspension amounted to constructive dismissal
- (b) Whether the Claimant is entitled to salary payment for the period he was on suspension
- (c) Whether the Claimant should be awarded damages being damages for constructive dismissal
- (d) Whether the Claimant should be reinstated to his former position
- (e) Whether the Claimant should be granted costs of the suit and any other reliefs.

The Claimant submitted that the letter of termination was never issued to the Claimant and that the proceedings in the criminal trial show the letter was returned to the Respondent and the Respondent never gave him the letter even after it was noted that he was not issued with a dismissal letter. The Claimant submitted that the allegations that he was dismissed lawfully remained mere conjecture as no evidence was led to show there was dismissal. He submitted that in the absence of the Respondent's witness his evidence remained uncontroverted. Reliance was placed on the case of **Jackson Nzioka Ndundav Viable Deco Solutions [2015] eKLR** where Onyango J. held where the Respondent did not call any evidence the claimant's evidence remained uncontroverted and urged the court to hold the same. The Claimant stated that even if the Respondent summarily dismissed the Claimant, which was not the case here, the Respondent was bound to follow the law. He cited the case of **Festus Munyao Makau v Rods and Steel Limited [2017] eKLR** where Mbaru J. held that *section 44 of the Employment Act allows an employer to summarily dismiss the employee for gross misconduct. Such can be done without short notice but section 41 of the Employment Act makes it mandatory for an employer to ensure sun an employee is given a hearing. Where it is not possible to hear the defence of the employee, the duty is on the employer to demonstrate the exceptional circumstances prevailing that prevented the same.*

The Claimant submitted that even if he was summarily dismissed, albeit without his knowledge, then the Respondent was in violation of the law as enunciated in the above case. The Claimant urged the court to find the indefinite suspension and failure to reinstate the Claimant after he was acquitted in the criminal case amounted to unlawful dismissal and direct the Respondent to pay the withheld salary of the Claimant for the period of suspension, order payment of the compensation by payment of 12 month's salary, costs of the suit and any other relief this court may deem just and fit to grant.

7. The Respondent submitted that the Claimant was suspended on 18th July 2011 and was subsequently charged with a criminal offence for which he was discharged on 12th February 2015 in an acquittal. The Respondent submitted that the Claimant ostensibly denies any knowledge of formal termination of employment and alleges constructive dismissal. The Respondent referred to the proceedings in the criminal court and submitted that in cross-examination by the Claimant's advocate, the CEO who was the Respondent's witness stated that he terminated the Claimant's employment on 28th October 2011 and that the letter posted on 11th November 2011 was returned unclaimed. The Respondent submitted the letter of dismissal came to the overt knowledge of the Claimant and his counsel when it was referred to in the criminal case and that the advocate for the Claimant extensively cross-examined the witnesses in respect to the termination letter. The Respondent submitted that the Claimant filed his claim out of time as the limitation period had set in. The Respondent cited the case of **Mehta v Shah [1965] EALR 321** at page 330 where Crabbe JA in a unanimous Court of Appeal held that *the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for the defence from being disturbed after a long lapse of time. The effect of limitation is to remove remedies irrespective of the merits of the particular case.* The Respondent submitted that under Section 90 of the Employment Act, 2007, the time for filing suits of this nature is limited to 3 years generally and to 12 months in the case of a continuing injury. It was submitted that the time for filing the suit lapsed in December 2014. The Respondent cited the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** where the Court of Appeal held that the pendency of a criminal case arising out of or about a contract of employment does not adjourn or stop the time of limitation for a cause of action accruing from that contract of employment. The Respondent urged the court to be guided by the above case cited with approval in the case of **Franklin Mbae Mburia v Meru Central Farmers Co-op Union Ltd & 2 Others [2017] eKLR** and strike out the suit with costs to the Respondent.

8. The Claimant has listed a series of issues which he sought a determination on. However, the Respondent raised the issue of limitation which goes to the jurisdiction of the court and shall be dealt with first.

9. The Claimant was suspended in July 2011 and subsequently charged in a criminal case with various counts of theft by servant and a charge of disturbing the peace. He filed the suit in 2017 alleging constructive dismissal. He was suspended on 18th July 2011 and by a simple arithmetic, if the suspension lasted for one year, his claim started going stale from 18th July 2012. He had three years to file suit in terms of Section 90 of the Employment Act 2007. He ought to have filed suit by 18th July 2015 at the latest. Even if we apply the time reckoned by the Respondent on the impugned dismissal letter of December 2011, the Claimant was to have filed suit by December 2014. Whichever way it is flipped, the case was hopelessly out of time. As Crabbe JA held in the case of **Mehta v Shah** (supra) the effect of limitation is to remove remedies irrespective of the merits of the particular case. The Claimant no doubt had a meritorious claim on the non-payment of his half salary, the manner of dismissal but he waited for too long before lodging his claim. By the time he filed suit it was difficult for the Respondent to mount a defence as the documents could not be traced fitting precisely within the prism of the words of Waki JA in the case of **Attorney General & Another v Andrew Maina Githinji & Another** (supra) where he held that limitation is meant *to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable*. The inevitable conclusion is that the suit is unfit for consideration given the limitation. The issues listed by the Claimant therefore do not fall for determination. The suit is struck out but each party shall bear their own costs.

It is so ordered.

Dated and delivered at Meru this 8th day of May 2018

Nzioki wa Makau

JUDGE