



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1636 OF 2011

MORRIS SHIKUVALE MURUNGA.....CLAIMANT

- VERSUS -

THE DIRECTOR KENYA AGRICULTURAL RESEARCH

INSTITUTE (KARI).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 23.09.2011 through Gulenywa Jonathan & Company Advocates. The respondent prayed for judgment against the respondent for:

- a. Salary in arrears Kshs.550, 000.00.
- b. Terminal benefits for 16 years Kshs.208, 000.00.
- c. Leave allowance for 4 years Kshs.16, 000.00.
- d. House allowance Kshs. 150, 000.00.
- e. Reinstatement of claimant declaration that the termination of service was unlawful and retirement age of 60 years applies to the claimant hence the salary should be paid until that period.
- f. Costs of the suit interests at Court rates.

The respondent's memorandum in reply was filed on 07.10.2011 through Pauline Mbuthu Masila Advocate. The respondent prayed that the claimant's suit be dismissed with costs. On 26.06.2018 the respondent changed its advocates to Millimo, Muthomi & Company Advocates.

The evidence in this case is as follows. The respondent employed the claimant by the letter of temporary appointment dated 04.09.1989 to the position of security guard. Later the claimant was designated a clear and painter and he stated that he was thereafter never promoted. His last pay was for January 2007 being Kshs. 10, 485.00.

The claimant was suspended from duty by the letter dated 07.02.2007. The letter addressed to the claimant stated as follows:

“RE: SUSPENSION

It has been reported that on Sunday 28th January 2007, you were caught by the Centre security guards breaking into one of the offices at the Centre after which you were arrested and taken to Spring Valley Police Station awaiting to be charged in court. This is a criminal act, which may render you liable to summary dismissal from service with loss of all terminal benefits.

In view of your misconduct, it has been decided that you be and are hereby suspended from performing the functions of your office with immediate effect, pending further disciplinary action against you. During the period of your suspension, you will not receive your salary and will be required to report to Centre Director and sign an attendance register on days to be determined at the centre.

In the meantime, severe disciplinary action is contemplated against you. However, before this is done, you are required to show cause in writing why further disciplinary action should not be taken against you. Your written representation should reach this office within fourteen (14) days from the date of this letter.

S.M.Ndetei

For: Director, KARI

It is endorsed on the letter that it was dispatched on 09.02.2007 and the letter was addressed to the claimant through The Centre Director, KARI Kabete, P.O. Box 14733, Nairobi.

The claimant testified that he received the letter of suspension and denied the allegations as levelled against him. He testified that on the material day his wife had been taken ill and on his way to seek assistance, the security guards without any reasonable ground suspected that he had stolen the respondent's property – and he was not aware of lost drugs or drugs allegedly stolen from the respondent's store.

The claimant was subsequently dismissed from the respondent's service by the letter dated 18.12.2007 effective 01.01.2007 on account of attempted theft and loss of trust. The letter advised that the claimant had 6 weeks to submit an appeal against the decision. The letter stated in part, **"The Committee considered your defence and noted that you denied the allegations. After giving due consideration to your defence, it was noted that although you deny the accusations and claim that you were simply passing by the offices, having been caught with your head inside the room through the window roofers and a metal bar was an indication of your ill intention. The Committee further noted with great concern that you had in the past been implicated in cases of theft."**

The claimant appealed against the dismissal by the letter dated 16.01.2008. By the letter dated 07.12.2011 the claimant was invited to appear before the Ad hoc Committee of the Board of Management on Appeals against Dismissals on 21.12.2011 at 12.20pm held at KARI Headquarters Boardroom to submit his defence for determination. By the letter dated 30.04.2008 the respondent asked the claimant to vacate the housing accommodation he had been allocated. He was to vacate effective 01.05.2008 failing to be forcefully evicted on 30.06.2008. The claimant testified that he vacated and left the premises about June 2008 From January 2007 to the time he vacated he had not been paying the monthly rent of Kshs.1, 000.00.

The claimant was charged with the offence of theft in Criminal Case No. 843 of 2007 in the Chief Magistrate's Court at Kibera and the Court found that no evidence was tendered and on the date fixed for the hearing no prosecution witness was present in court. The case was therefore dismissed on 03.11.2009 under section 202 of the Criminal Procedure Code.

The **first** issue for determination is whether the suit was time barred. The respondent submits that the termination was by the letter dated 18.12.2007 and effective 01.01.2007. Under section 90 of the Employment Act, 2007 the suit ought to have been filed within 3 years from the date of the dismissal but it was filed belatedly on 23.09.2011. The Court finds that the 3 years of limitation of action lapsed on or about 01.01.2010 and indeed the suit was time barred. Accordingly, the issue of time of limitation goes to the jurisdiction of the Court and the suit will be dismissed accordingly. The respondent specifically raised the objection based on time of limitation belatedly on the hearing date and then extensively in the final submissions and each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for:

- a. dismissal of the claimant's suit; and
- b. each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE