



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.376 OF 2015**

**FRANCIS KIMANI KIIGE.....PLAINTIFF**

**- VERSUS -**

**THE NATIONAL HOSPITAL INSURANCE FUND.....DEFENDANT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> November, 2018)

**JUDGMENT**

The plaintiff filed the plaint on 13.03.2015 through O.P. Ngoge & Associates. The plaintiff prayed for judgment against the defendant for:

- 1) Special and general damages.
- 2) Exemplary damages.
- 3) Costs of the suit.
- 4) Interest on (a), (b) and (c) above at the Court rates from the date of termination of employment contract until payment is made in full.
- 5) Any other or further reliefs that the Honourable Court deems fit.

The memorandum of defence was filed on 15.05.2015 through Koskei Monda & Company Advocates. The defendant prayed that the plaintiff's suit to be dismissed with costs.

The plaintiff was employed by the defendant as a clerical officer effective 09.11.1998. On 29.10.2003 the defendant received information that the plaintiff while on duty at Kenyatta National Hospital had been arrested by the police for lodging fraudulent hospital claims. By the letter dated 17.11. 2003 the defendant suspended the plaintiff from exercise of his duties pending the consideration and determination of the case and in accordance with section 14.22.2(a) and (b) of the defendant's Staff Terms and Conditions of Services which provided for such suspension. The suspension was effective the date of arrest 29.10.2003. The plaintiff was served the show-cause notice of 10.01.2005. It stated that the plaintiff had been arrested between 29<sup>th</sup> and 30<sup>th</sup> October 2003 and charged for irregularly issuing certificate of contributions paid (CCP) book to Body Guard Bakers while the firm was not registered with the respondent. The letter stated that initially the plaintiff had denied the allegations but latter admitted that he had helped the firm to obtain the CCP book the letter asked the plaintiff to reply within 14 days.

The plaintiff denied the allegations in his replying letter of 21.01.2005. He further stated that the matter was before Court and he stated that the Court would determine whether the allegations were true or not.

By the letter dated 17.09.2007 the claimant was informed that the Staff Advisory Committee had met on 20.03.2007 and resolved that the plaintiff's employment be terminated effective 20.03.2007 on account of loss of trust between the claimant and the respondent. The letter stated that the plaintiff could appeal within 28 days as would be necessary. The claimant appealed by his letter dated 27.09.2007 stating that the termination had been retroactive; and that he was entitled to terminal dues including unpaid salary arrears from November 2003 to September 2007; and an extra month's leave in lieu of notice.

The Staff Advisory Committee met on 23.05.2008. It recorded the grounds of appeal as the acquittal of the plaintiff of all criminal charges thereby exonerating him from any wrong doing in discharge of his duties; and the letter terminating his services was dated 17.09.2007 and effective 20.03.2007, 6 months retroactive effect. He therefore demanded to be paid unpaid salary from November 2003 to September 2007 and a month's salary in lieu of notice. The Committee resolved that the salary arrears did not apply because he was on suspension; he be paid one month in lieu of termination notice at the monthly pay as at time of dismissal; and he be accorded a second appeal which should be heard

by the Executive Committee. The defendant's case is that the criminal case had been terminated under section 87 (a) of the Criminal Procedure Code so that the case had been withdrawn and the charges may be reinstated. Thus the plaintiff was not entitled as prayed for.

The plaintiff states that he never received communication of the decision on his administrative appeal. Thus the plaintiff filed Judicial Review Application No. 13 of 2009 and the Court ordered the defendant to decide the appeal in 60 days. The judgment by Korir J was delivered on 27.03.2012. The defendant decided the appeal on 28.04.2012.

There is no dispute that the plaintiff was dismissed by the letter dated 17.09.2007 and effective 20.03.2007. The Court finds that the claimant knew about that dismissal promptly because he appealed by his letter dated 27.09.2007. As at that time the Employment Act, 2007 had not commenced as the commencement date was 02.06.2008 and assent date was 22.10.2007. Thus the Court returns that the statute governing the time of limitation was the Limitations of Actions Act Cap. 22 section 4 under which institution of an action in contract was limited to 6 years from the date of the cause of action. The six years were ending on or about 17.09.2013 but the suit was filed belatedly on 13.03.2015, the cause of action having accrued on 17.09.2007 – the date of the dismissal letter. The Court returns that the administrative appeal process did not stay or defer or adjourn the running of the time of limitation.

Hence the Court returns that the present suit was time barred. The claimant's suit will therefore collapse as it will not be considered on its merits.

The parties did not urge the issue of the cause of action being time barred and the Court returns that each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the defendant against the plaintiff for dismissal of the suit with orders that each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 16<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**