



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 930 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

PAUL WERE.....CLAIMANT

-VERSUS-

KENYA RAILWAYS CORPORATION.....RESPONDENT

JUDGEMENT

1. The Claimant herein Paul Were filed his Statement of Claim dated 19.6.2013 on even date through S. O. Owino & Associates Advocates. His claim is that he was employed by the Respondent and served the Respondent for 16 years. He avers that on 2.2.2009 the Respondent retrenched him with effect from 31.12.2006.
2. He contends that prior to 2009 he had been on suspension. This suspension was lifted vide a letter from the Respondent dated 2/2/2009 upon his acquittal of the charge he was facing in criminal case No. 2228/2006.
3. The Claimant's claim from the Respondent is for payment of his terminal dues which he avers amounts to Kshs.686,830/= and which he avers has not been paid to date.
4. The Claimant avers that the Respondents contention that the Claimant owes them Kshs.547,666 is baseless as it is derived from a false and baseless document known as Miscellaneous Suspense No. 03(MS 03) and which sum the Claimant denies owing.
5. The Claimant avers that since his suspension he was never paid any salary and wants to be paid all his salary for the period plus the retrenchment package. He submitted that salary during the suspension period totals 7,955,148/= and the retirement package is 604,430 all totalling 9,445,619. He also seeks costs of this suit.
6. The Respondent on their part filed a Defence and later an Amended Defence on 25/3/2014 and 30/11/2018 respectively. The latter was expunged from the records by Court.
7. In the defence the Respondents aver that they interdicted the Claimant and placed him on ½ salary from 1.9.2006 to 3rd November 2006 for being suspected of fraudulent activities.
8. They aver that they reviewed the interdiction and refunded him the half salary withheld from 1st September 2006 to 30th November 2006 and paid him his full salary for December 2006. Upon arrest he was suspended from 8/12/2009 and he was not entitled to any salary during this period. They aver that they reinstated him the day he was acquitted.
9. They contend that the period between 1st January 2007 to 1st February 2009, the time he was arraigned in Court amounted to a break of service according to the Corporation Regulations and so he was not entitled to pay, accrual benefits and increment of salary.
10. They aver that when RVR was formed, some staff were selected to join it on 1.11.2006 but the Claimant was not selected and so he was considered retrenched from 1.1.2007.
11. They aver that he is only entitled to the retrenchment package of 686,830 less 597,666 which he owes the Respondent and this amounts to Kshs.89,164/=.
12. They contend that the Claimant started receiving his pension from 1.3.2009 and therefore allegations that he has never received any

payment from suspension to date is false. They aver that they paid him 98,164/= lump sum.

13. They aver that the Claimant is not entitled to the amounts he has computed and ask Court to dismiss this Claimant accordingly.

14. I have examined all evidence and submissions of the Parties. The main contention by the parties is the calculation of the retrenchment package of the Claimant.

15. The Respondent do not deny that the Claimant was placed on suspension between 8th December 2009 to February 2009 when the suspension was lifted. The Respondents have however submitted that this claim is time barred as filed contrary to the provisions of the law. The Respondent cited Section 87 of the KRA which provides that:-

“where any action or other legal proceedings is commenced against the Corporation for any act done in pursuance of execution or indeed execution of this Act or of any public body or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority -----.

b) the act or legal proceedings shall not lie or be instituted unless it is commenced within 12 months next after the act, neglect or default complained of or in the case of a counting injury or damage, within 6 months next after the cessation thereof”.

16. Section 90 of Employment Act 2007 directs the time of filing an employment claim within 3 years and the Claimant submitted that Section 90 of Employment Act supersedes Section 87 of KRA.

17. The above notwithstanding, the Claimant seeks payment of salary withheld during the suspension between 2006 and 2009 and also payment of his retrenchment package. The Claimant referred Court Section 16A of Pension Act which states as follows:-

“A person to whom a pension or other allowance is payable under this Act shall be entitled to be retained in the service until the payment in full of the gratuity payable to him consequent upon the exercise by him of his option to receive such gratuity under the provisions of this Act”.

18. Indeed the law is clear that where pension due remains unpaid, it can be assumed that the pensioner remains entitled to be treated as an employee.

19. In **Charles Shitiavai vs City Counsel of Nairobi (2012) eKLR**, this Court considered a similar issue where Claimants pension remained unpaid for some time and relying on Section 16A of Pension Act held that:-

“The provision is explicit that what is due or owing for a Pensioner must be paid in full. If these amounts remain outstanding, it is deemed that the recipient is still in employment and shall be entitled to his full pay”.

20. The Respondent on their part indicated that the Claimant was paid all his pension from 2009 and moved to pension department as per the pension statement No. 4 of Respondent’s documents.

21. Indeed it is true that the said documents show that the Claimant is a pensioner even at the moment. The contention is whether he was paid the rightful pension. He contends that the Respondent deducted some money from his pension amounting to Kshs.597,666 and paid him only Kshs.89,164 alleging he owed the Respondent some money from MS-03.

22. The amount in question is indeed questionable as seen from the Claimant’s Appendix 1 which indicated as follows:-

“it has been observed that MS-03 (Personal Suspense Account Statement) and General Ledger (EA 73) do not agree due to non-capturing of payments of advances (Type P) and also revenue receipts (Type R) on MS-03.”

23. Due to this anomaly in the MS-03 Suspense Account, it was wrong for the Respondent to purport to deduct pension dues from Claimant’s entitlement on account of such amount and which had not been established.

24. The amount in question being a pension payment cannot be said to be time barred until paid in full. I therefore find that the Claimant is entitled to a refund of Kshs.597,666/= deducted by the Respondent from his pension dues.

25. The other claim made by the Claimant is for payment of his salary withheld between 2006 and 2009 when he was on suspension. The Claimant’s suspension was lifted on 15.6.2009. The Respondent however backdated the same to 31.12.2006. The Claimant filed this case on 19.6.2013. The claim for unpaid dues during suspension, the suspension having been lifted in 2009 June, should have been filed before this Court by June 2012.

26. This claim having been filed in 2013, and seeking dues that were payable in 2009 was time barred. I agree with the Respondent that the claim for dues withheld during the suspension is time barred and therefore the prayer sought under this head cannot be granted.

27. I find that in the circumstances of the case, the only prayer the Claimant is entitled to is his pension dues that were erroneously deducted of **Kshs.597,666/=** leaving the rest of the claim as being time barred.

28. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of filing this claim.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochieng for Respondent – Present

Mukeli holding brief Owino for Claimant