



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC NO. 772 OF 2014

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

JAMES OTIENO OPONDO.....CLAIMANT

VERSUS

INSPECTOR GENERAL

OF NATIONAL POLICE SERVICE.....1ST RESPONDENT

CHAIRMAN

NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this claim on 9.5.2014 through Onyony & Company Advocates. The Claimant is suing the Respondents for wrongful, unfair and unlawful dismissal and seeks the following prayers:-

- a. A Declaratory Order that the Claimant was unfairly, wrongfully and unlawfully dismissed;*
- b. An Order for the payment to the Claimant for the actual pecuniary loss suffered as the result of wrongful discharge from the date of discharge to the date of such determination;*
- c. An order for reinstatement to the place of work without loss of benefits or seniority;*
- d. General and exemplary damages for malicious, wrongful and unfair dismissal from employment.*
- e. Cost of the suit and interest in (b) and (d) above;*
- f. Any other relief that this Honourable Court may deem just and expedient to grant.*

2. The Respondents denies the claims set out in the Memorandum of Claim and prays that the suit be dismissed with costs to the Respondents, as the Claimant is not entitled to the orders sought. The Respondents have also opposed the jurisdiction of this Honourable Court as the matter is res judicata.

The Claimant's case

3. The Claimant was a Police Constable attached to Garissa Police Station District and appointed by the Kenya Police Force (now Kenya Police Service) on 25th March 1989.

4. On 30th July 2010, a prisoner by the name Aden Abdille escaped while the Claimant was on duty but had been in the custody of Police Constable Anthony Kuria from the Anti-Terrorism Police Unit (ATPU). The Claimant was told to record a statement and was charged on

31st July 2010 with the offence of negligently allowing a prisoner committed to his charge to escape contrary to **Regulation 3 sub-regulation 16 of the Police Regulation Orders**. Orderly Room Proceedings were instituted where facts brought to light by Vincent Langat were never considered and no further investigations carried out based on the revelations. Police Constable Anthony Kuria was never called to testify at the proceedings.

5. The Claimant was dismissed from service on 26th August 2010 and was compelled to return all government property in his possession, to pay for any discrepancies, to vacate the government house that he had been occupying and was issued with a Certificate of Discharge. The Claimant appealed the termination decision on 30th August 2010 to the Commissioner of Police who upheld the Claimant's dismissal.

6. The Claimant instituted **JR Case No. 147 of 2011; Republic vs. The Commissioner of Police ex parte James Otieno Opondo** seeking orders of certiorari to quash the decision of the Commissioner of Police. Judgment was entered for the Claimant where his appeal was remitted to the now Inspector General to consider the appeal afresh. The 1st Respondent upheld the Claimant's dismissal.

7. The Claimant avers that he was wrongfully, unfairly and unlawfully dismissed from employment following a false conviction on assumed facts and frivolous, baseless and unsubstantiated allegations of negligently allowing a prisoner committed to his charge to escape.

The Respondents' case

8. The Respondents aver that the Claimant's discharge from service was done procedurally and in observation of the laid down rules and procedure.

9. On 30th July 2010, the Claimant negligently allowed a prisoner committed to his charge to escape. The officer in charge of the station (OCS) and other officers made futile attempts to trace the prisoner. Consequently, the Claimant and his colleague were summoned to orderly room proceedings. The Claimant pleaded not guilty, necessitating full proceedings where the Claimant was given an opportunity to defend himself and call his witness. The Claimant was found guilty and sentenced to dismissal.

10. The Claimant appealed, which appeal was heard by the Appeal Board that had been constituted by the Commissioner of Police. The Board disallowed the appeal, which decision was adopted by the Commissioner. The Inspector General of Police was directed to consider the appeal afresh by the Court in **JR Case No. 147 of 2011; Republic vs. The Commissioner of Police ex parte James Otieno Opondo** with the Court still holding that the Claimant remained dismissed from service. The Claimant's appeal was reconsidered and his dismissal was upheld and the Claimant appropriately informed by the Respondents vide the letter dated 8th July 2013. The Respondents aver that the judgment did not compel the Respondents to reinstate the Claimant.

11. The Respondents aver that the Claimant is reopening issues, which were canvassed in **JR Case No. 147 of 2011; Republic vs. The Commissioner of Police ex parte James Otieno Opondo** and which the Respondents complied with and as such the Court is *res judicata*. Further, the Claimant ought to have appealed the decision of the High Court if he felt aggrieved by the decision of the Respondents rather than appealing the decision to the Industrial Court.

12. The Respondents further aver that the present case is statutorily time barred.

13. The Respondents deny liability against the Claimant and state that the suit should be dismissed with costs.

The evidence

14. CW1, James Otieno Opondo and the Claimant in this case, chose to rely on his witness statement dated 23rd July 2015 and list of documents dated 8th May 2014 and 30th June 2014. He reiterated his employment history, terms and conditions of service as averred in his Memorandum of Claim. He stated that before his dismissal he had never had any disciplinary issues.

15. The Claimant stated that on 30th July 2010 he reported to work at Garissa Police Station with PC Mulinge and took 50 prisoners from the previous shift. At 11:15 am, PC Anthony Kuria requested to remove Aden Abdille for interrogation and booked his removal in OB no. 32 of 30th July 2010. He went with the prisoner to the office and later brought him back. At around 1 pm, IP Moses Mwangi came to release a prisoner held for incitement. The prisoner was released and when the Claimant was updating his cells register, he noticed that the entry of Aden Abdille indicated that he had been returned under OB no. 39 of 30th July 2010. PC Anthony Kuria did not indicate who the prisoner had been returned to. The Claimant testified that according to the standing orders: the person returning the prisoner must bring him to the report office, where he is interrogated and then a record is made in the OB that the prisoner had been returned, who had returned him and in what condition.

16. When it became apparent that the prisoner was missing, CW1 reported the matter to the OCS who came and confirmed that the prisoner was indeed missing. The OCS told Anthony to go and recapture the prisoner but the prisoner was never found.

17. The Claimant stated that after his own investigations, he found that the return had been recorded in the crime branch and not the report office. The Claimant testified that if a prisoner had been found missing, an inquiry file ought to have been opened. However, this was not done. Further, suspects were to be interdicted but this was also not done.

18. After the orderly room proceedings, the Claimant was served with a dismissal letter but was not served with the decision. The Claimant stated that his testimony and that of his witness were never considered. He further stated that he was of the view that his case has never been concluded. He went to the Police Headquarters to follow up and found a letter dated 8th July 2014, which was never delivered to him.

19. The Claimant stated that he was never paid anything.

20. Upon cross-examination, the Claimant stated that it was IP Mwangi who came to release the prisoner and who made the Claimant aware that the prisoner had disappeared. He conceded that there was another entry after 12:30 pm and argued that the OB moved from one office to another.

21. RW1, CIP James Ngao, testified that he had been instructed by the OCS to conduct an investigation on the disappearance of the prisoner, which he did and found that he had disappeared while in the custody of the Claimant and his colleague at report office. He further stated that the decision of the orderly room proceedings was communicated to the Claimant.

22. Upon cross-examination, RW1 admitted that Mr. Kuria had not been a witness in the orderly room proceedings.

The Claimant's Submissions

23. The Claimant in his written submissions dated 15th November 2018 and filed in Court on even date, submitted that his employment was unfairly, wrongfully and unlawfully dismissed by the Respondent. The Claimant relied on the case of **Kenfreight (E.A.) Limited** where the Court of Appeal held that termination was unfair where it is based on an invalid reason. He also relied on the case of **George Onyango Akuti vs. Security Services Kenya Limited (2013) eKLR** where Radido J. held that termination was unfair where no notice is issued as required by **Section 35 (1) of the Employment Act** or because the employee was not afforded a hearing as required by **Section 41 of the Employment Act**.

24. The Claimant submitted that his rights under **Articles 41, 47 and 50 of the Constitution** were infringed upon by the Respondent. He relied on the decision in **George Onyango Akuti vs. Security Services Kenya Limited [Supra]** and on the decision of Ongaya J in **Shankar Saklani vs. DHL Global Forwarding (K) Limited [2012] eKLR** where he held that the Respondent was bound to accord the Claimant the right to fair administrative action through observation of the rules of natural justice.

25. The Claimant submitted that he is entitled to the prayers sought arguing that **Section 12(4) of the Employment Court Act 2011** allows the Court to make such orders as to costs as the Court considers just. He also relied on the case of **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR** which cited the case of **Republic vs. Rosemary Wairimu Munene ex parte Applicant vs. Ihururu Dairy Farmers Co-operative Sacco Limited** where Mativo J. held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.

26. I have considered the averments and submissions of both parties. The Respondents have submitted that this matter is res judicata and also time barred. On res judicata, I do not find that to be the position as the JR decision of the High Court only dealt with issues of the legality or otherwise of the Respondent's decision. This did not bar the Claimant from filing a claim seeking damages and prayers sought in the claim.

27. The Constitutional Court only dealt with issues of appeal by the Claimant which had not been considered and ordered the same be considered. I note that the Respondent actually considered the appeal in an awkward manner. The appeal was considered without giving the Claimant an opportunity to be heard which was also against the principles of natural justice.

28. The High Court had directed that the Respondent consider the appeal within 60 days. The 60 days from date of judgement expired on 19.6.2013. However then no decision had been communicated to the Claimant on the position of the appeal. It therefore remains the fact that the claim is not res judicata.

29. On the issue of time barredness of the claim, I note that the Claimant had been dismissed from the service on 26.8.2010. He filed the JR Application in 2011 and this claim on 9.5.2014. This claim was therefore filed after the 3 years window period from the time of dismissal as required by Section 90 of Employment Act. The contention that this claim is time barred is therefore true.

30. In the circumstances, I do not have jurisdiction to deal with this matter the same being time barred. I therefore dismiss this claim accordingly.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Amanya holding brief Onyony for Claimant – Present

Claimant – Present