



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2233 OF 2017**

**(Formerly HCCC No. 384 of 2011at Nairobi)**

**DERICK MUGAMBI KITHINJI.....CLAIMANT**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 14<sup>th</sup> December, 2018)**

**RULING**

The claimant filed a plaint on 07.09.2011 in person and prayed for judgment against the respondent for:

- a) General damages.
- b) Aggravated damages.
- c) Reinstatement into the police force.
- d) Costs and interest of the suit.
- e) Any other relief the Court deems fit to grant.

The claimant was a police constable attached to Tigoni Police Station at the material time. His case was that on 12.03.2007 the defendant's authorised agents maliciously and without reasonable or probable cause arrested and locked-in the claimant at Tigoni Police Station and later arraigned him in Chief Magistrate's Court at Kiambu on 23.03.2007 whereby he was charged in Criminal Case No. 577 of 2007 with the offence of failing to keep secure and in safe custody of a firearm contrary to section 18(3), (4) of the Firearm Act Cap 114 of the Laws of Kenya. The claimant was subsequently acquitted under section 210 of the Criminal Procedure Code on 30.10.2008 upon finding that no prima facie case had been established against him. The claimant alleged malice because he was arrested and locked in police cells without a reasonable justification; being arraigned in court and prosecuted while it was known that he had already been tried and disciplined under the police rules; being charged without any reasonable justification; and being dismissed without any justifiable cause. The claimant further claimed that his reputation was injured and he had suffered loss and damage including loss of earnings, embarrassment and gross injury to reputation and psychological trauma.

The defence was filed on 20.03.2012 through Kariuki Mugo, Litigation Counsel, for Attorney General. The respondent denied the claimant's allegations and claims and prayed that the suit be dismissed with costs.

The material on record show that on 12.03.2007 at around 4.30am a report was made to Tigoni Police Station that a vehicle belonging to G4S had been carjacked by robbers. The OCS and his team followed up and one gangster was killed within Kamandura area and a rifle S/No. 6739786 loaded with 18 rounds of 7.62mm were recovered from him. The said rifle belonged to Tigoni Police Station and had been issued to the claimant on 11.03.2007 when he was the crime standby for the night. The claimant did not report any loss of his rifle to anybody. He was questioned and he gave no viable or satisfactory account of himself and that of the firearm. It was apparent he had lent out the firearm to the robbers since he had not at any time during his tour of duty reported the loss of his firearm or otherwise. The claimant was charged with the same facts in an orderly room proceeding and in court. He was dismissed from the police service.

The claimant subsequently appointed C.M. Ongoto & Company Advocates to act in the case. The amended memorandum of claim was filed on 16.05.2018 and the prayers in the plaint were retained. The response to the amended memorandum of claim was filed on 30.10.2018 through K. Motende, Senior State Counsel, for Attorney General. It was prayed that the suit is dismissed with costs as the same was frivolous, vexatious, and ill-conceived and an abuse of court process. The claimant filed another amended memorandum of claim on

29.11.2018 now changing the prayers to:

- a) Reinstatement to the police force.
  - b) Special damages.
  - c) Accrued leave 60 days Kshs. 47, 000.00.
  - d) Damages for unlawful termination Kshs.282, 000.00.
  - e) Total amount claimed Kshs. 328, 000.00.
  - f) Employment terminal dues and benefits including but not limited to pension.
  - g) Costs and interest.
- h) Any other relief the Court may deem fit to grant in the circumstances.

The respondents in the response to the memorandum of claim filed on 30.10.2018 pleaded that the suit was time barred because it offended the mandatory provisions of section 90 of the Employment Act, 2007 as the claimant was terminated on 13.03.2007 and the suit filed on 13.03.2010.

It is not in dispute that the claimant has pleaded that he was dismissed on 13.03.2007 but as of that date the Employment Act, 2007 has not been shown to have already come into operation. Further section 3 (2) of the Act provides that it does not apply to certain officers including the police officers such as the claimant. Thus the Court returns that the preliminary action as based on the section 90 of the Act will fail.

The next limb of the preliminary objection is that the claimant was given a right of appeal to the Commissioner of Police in accordance with his terms of service but he failed to appeal so that his case is an abuse of the Court process because failure to appeal amounted to waiver of the right to challenge the dismissal. The record shows that the claimant appealed to the Commissioner of Police and by the letter dated 12.10.2010 the Commissioner upheld the sentence of dismissal. Thus the Court returns that the claimant exhausted the administrative appeal procedure and that ground of preliminary objection will fail.

However, the Court has considered all the material on record. The claimant purported to introduce fresh claims for special damages amounting to Kshs. 329, 000.00 and employment terminal dues and benefits. The Court finds that such claims were time barred under section 4 of the Limitation of Actions Act, Cap 22 as 6 years of limitation had lapsed. The only substantive remedy remaining is reinstatement to the police force but the Court returns that the same was equally time barred under section 12 of the Employment and Labour Relations Court Act, 2011 as reinstatement cannot issue after 3 years from the date of dismissal. As the court has taken up the issues on its own motion, each party shall bear own costs of the suit.

In conclusion the suit is hereby determined with orders as follows:

- a) The suit is dismissed.
- b) Each party shall bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 14<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**