



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1043 OF 2017

(Formerly HCC No. 1487 of 2005 at Nairobi)

EDWARD A.H. ONYANDO.....CLAIMANT

- VERSUS -

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

JUDGMENT

The claimant filed the plaint on 13.12.2005 through Opande & Company Advocates. The prayer was for judgment against the respondent for:

- a) A declaration that the plaintiff is entitled to be paid his salary and pension thereof for the period February – December 1993, January – December 1994 and 9 days for 1995.
- b) An order that the defendant do pay special damages as per paragraph 15 (being as prayed in (a) above).
- c) Costs of and incidental to the suit and interest at Court rates.

The claimant's case is that he was employed by the respondent by the letter dated 06.06.1979 as a clerk and promoted to the level of section head. Further, by the letter dated 25.05.1992 the defendant confirmed the plaintiff's position as a section head at a salary of Kshs. 25, 360.00 plus house allowance of Kshs. 1, 720.00 per month. The claimant's further case was that he was a member of the respondent's retirement benefits scheme. Further on 02.02.1993 the plaintiff was arrested, charged and arraigned in the Chief Magistrate's Court in criminal case No. 694 of 1993 for the offence of stealing by servant and he was suspended from duty indefinitely. The claimant's case was that internal inquiry showed that he was innocent and he was reinstated on duty by the letter dated 29.12.1994 as a section head. Despite the reinstatement, it is the claimant's case that the respondent failed to pay him the withheld pay during the period of suspension from February to December 1994, January to December 1994 and 9 days for the year 1995. Further at all material times the claimant had been a member of the Kenya Bankers Union and as per the binding CBA, he was entitled to his full salary and pension as per clause 5 (a) and as prayed for. The claimant subsequently retired on 28.11.2000 under the respondent's Early Retirement Scheme.

The respondent filed the statement of defence on 20.01.2006 through Wetang'ula & Company Advocates. While admitting the employment relationship as pleaded for the claimant, the respondent denied that the claimant was found innocent through the internal inquiry and denied that for the period of suspension the claimant was not an employee and was not entitled as claimed. The respondent stated that the claimant's dues had been settled under the Early Retirement Scheme and the present suit was an afterthought and the suit was time barred under section 4 (i) of the Limitation of Actions Act.

The claimant filed the reply to defence on 01.02.2006 and pleaded that for the period in his claim he was merely under suspension and he had not been terminated. Further the reinstatement by the letter dated 29.12.1994 and the CBA were to be construed "*contra proferentum*". Further upon retirement only part of the payment was made and the suit was not time barred because the cause of action accrued on 30.11.2000 or shortly thereafter when the claimant had retired.

The Court has considered the material on record and returns that the suit must fail due to the following findings:

- 1) The claimant appealed for reinstatement by his letter dated 07.03.1994. The claimant appealed that his case be considered compassionately to assist him and his family. The respondent reinstated the claimant on humanitarian grounds effective 09.01.1995 upon conditions enumerated in the letter including, "**(c) The period you have been away will be treated as leave without salary.**"

The claimant indicated the acceptance of the terms stated in the reinstatement letter by signing the copy of the letter and returning it to the respondent. By that agreement, the Court returns that the parties were bound accordingly and the claimant cannot turn around and claim the pay he clearly relinquished.

2) Clause A5 (c) (iii) of the CBA provided that if during the suspension the employee is proven innocent within the said period of ninety (90) days, or longer in respect of sub paragraph (ii) (where there is a criminal trial), the employee shall be reinstated in his employment and shall be paid his full salary for the period during which he was suspended. The claimant's case was that the investigations had exculpated him and he was listed as a prosecution witness in the related criminal case against the bank employee who was suspected of stealing from the respondent. Despite the provision of the CBA, the parties agreed that the period of suspension would be leave without pay. The claimant agreed that the period be treated as leave so that he cannot claim on the basis of a suspension which was effectively transformed into leave by agreement of the parties. The consequence of that agreed term of reinstatement was to extinguish the suspension. The Court finds accordingly.

3) The claimant prayed for withheld salaries as at 09.01.1995. As submitted for the respondent, the 6 years of limitation of action under section 4 of the Limitation of Actions Act lapsed on or about Tuesday 09.01.2001. Nothing precluded the claimant from filing the suit within the statutory period of limitation and the Court had no jurisdiction to extend the period of limitation. In any event by 28.11.2000 he had retired and there was room to file suit within time of limitation before 09.01.2001 once that contract of service had ended but the claimant failed to act accordingly. The suit was indeed time barred and the Court returns as much.

4) Taking into account the time that has lapsed from the date of filing the suit the Court returns that the claimant will pay 20% of the respondent's costs of the suit or such amount as parties may agree upon.

In conclusion the claimant's suit is hereby dismissed with orders that the claimant will pay 20 % of the respondent's costs of the suit or such amount as parties may agree upon.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE