



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 58 OF 2015

BETWEEN

HARRISON MUSYOKA KITALA..... CLAIMANT

VERSUS

KENYA PORTS AUTHORITY..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gachiri Kariuki & Company Advocates for the Claimant

Addraya Dena Advocate instructed by Kenya Ports Authority for the Respondent

JUDGMENT

1. This Claim was initially filed in the Chief Magistrate's Court at Mombasa, registered as Cause Number 226 of 2009. It was filed on 9th February 2009.
2. The Claimant alleged he was employed by the Respondent as Serang Grade HG3. He was summarily dismissed by the Respondent on 22nd July 2004. This was after one person, working on board MV CGM Labourdonais, fell and died in the course of duty. It was alleged the deceased worked in the group headed by the Claimant without authorization. The Respondent referred to the deceased as "Bangaiza" (unrecognized, illegitimate member of the group led by the Serang).
3. Following the death of the 'Bangaiza,' the Claimant (Serang) was interdicted, heard, and eventually summarily dismissed. He filed the Claim in the Chief Magistrate's Court, praying against the Respondent for :-
 - a) General Damages for unlawful and wrongful dismissal and gratuity for years worked.
 - b) Salary from July 2004 to the date of decree and 1 month's salary in lieu of notice.

c) Costs and interest on (a) and (b) above.

d) Any other relief this Honourable Court deems fit to grant.

4. The Respondent filed its Statement of Defence on the 25th March 2009. Its position is that the Claimant allowed unauthorized person to work in the group which the Claimant headed. The person fell and died while working. The Claimant was interdicted, charged, heard and dismissed. Dismissal was fair and lawful. The Respondent stated further that the Claim was statutory barred under the provision of Kenya Ports Authority Act, governing limitation of time.

5. The Claim was transferred to the Employment and Labour Relations Court, on jurisdictional ground. It was registered as Cause No. 58 of 2015.

6. Parties agreed in Court to have the Claim determined on the strength of their Pleadings, Documents and Submissions on record.

The Court Finds:-

7. The dispute was reported to the Minister for Labour. It was accepted, and an Investigator appointed. There were findings by the Investigator that the Claimant could not escape responsibility, for the presence of the 'Bangaiza' within his working group. It was concluded he failed in pointing out who allowed the unauthorized person to work in the group. The Investigator recommended Respondent's summary dismissal decision be upheld.

8. Report to the Minister, investigation, Findings and Recommendation, happened under the Trade Disputes Act, Cap 234 the Laws of Kenya. The Report was made by the Claimant's Trade Union, Dock Workers' Union.,

9. The Claimant did not accept the Report of the Investigator appointed by the Minister.

10. Section 8 of the Trade Disputes Act stated that where a dispute reported to him, was not settled under section 5, 6, and 7 of the Act, the Minister would refer the dispute to the Industrial Court.

11. No reference to the Industrial Court was made under Section 8 of the Trade Disputes Act.

12. The Claimant instead of pursuing reference to the Industrial Court through his Trade Union, filed a Civil Claim at the Chief Magistrate's Court.

13. At the time of that filing, the Trade Disputes Act had been repealed, and replaced by the Labour Relations Act Number 14 of 2007.

14. Section 84 of the Labour Relations Act regulates transition from the Trade Disputes Act, to the Labour Relations Act. The Regulations are contained in the 5th Schedule.

15. Any trade dispute that arose before the commencement of the Labour Relations Act; any trade dispute referred to the Industrial Court before the commencement of the Act; any revision or interpretation of an Award by the Industrial Court; and any summary dismissal that took place before the commencement of the Labour Relations Act are matters to be dealt with under the provisions of the Trade Disputes Act.

16. The Claimant should therefore have proceeded under Section 8 of the Trade Disputes Act, not file a Plaint in the Chief Magistrate's Court.

17. Encountered with the defence of limitation of time, the Claimant went before Hon. SRM M. Kizito, and obtained an order extending time. The order was made *ex-parte*. The Claimant appears to have agreed that he was time-barred, hence the attempt to extend time.

18. Later on 18th May 2011, Parties appeared before Hon. P.M. R. Kirui. The Claimant's Advocate Ms. Waithera explained the change in the forum to have been necessitated by Claimant's belief, that Hon. M. Kizito did not have jurisdiction to hear the matter, yet M.Kizito had given order extending time.

19. The SRM did not have jurisdiction in extending time limited by an Act of Parliament. Superior Courts have ruled such limitation is a matter of jurisdictional, rather than procedural law, incapable of extension. The Chief Magistrate's Court did not have jurisdiction in receiving and entertaining a dispute originated under the Trade Dispute Act.

20. The Claimant did not follow the procedure laid down by the law in filing his Claim, in extending time, and in approaching the Employment and Labour Relations Court. Transfer to the E&LRC, did not heal these historical defects.

21. He has not in any case, shown the Court why he disagreed with the Report filed by the Investigator appointed by the Minister for Labour.

22. That Report was the outcome of the last correct procedural step taken by the Claimant. It has not been dislodged by any of the materials filed by the Claimant.

IT IS ORDERED:-

a) Management's decision summarily dismissing the Claimant, as recommended in Report of J.N. Mwanzia, Chief Industrial Relations Officer dated 22nd September 2006, is upheld.

b) The Claim is rejected.

c) No order on the costs.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge