



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 1631 OF 2013

SAMUEL OKELO NDEDA.....CLAIMANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on the 22nd October 2008 at the High Court of Kenya before the suit was transferred to this Court on 4th October 2013 after constitution of this Court under Article 162. The Claimant averred that he was employed by the Respondent from 28th July 1987 as an Assistant Senior Standards Officer in the Department of Textiles and that he rose through the ranks to the position of Senior Standards Officer, Departmental Head and finally as Principal Laboratory Analyst from 1st July 1997. It was pleaded that on 29th September 1999 the Claimant was asked to show cause why he should not be disciplined and that he was interdicted and placed on half salary. He averred that he was unlawfully and summarily dismissed from employment by the Respondent on 7th February 2002 with effect from 5th February 2002. He claimed that the dismissal was capricious and against the rules of natural justice and contract of employment. The Claimant averred that the Respondent's misdirection and wrongful actions led to the Claimant's charge before the criminal law courts in case No. 399 of 200 which resulted in an acquittal for lack of evidence. The Claimant averred that he would have remained in the Respondent's employ until he attained the age of 55 years. The Claimant averred that by reason of the above breaches of contract he was deprived of salaries, house allowance, medical allowance, commuter allowance, staff benefits, career progression and income till the mandatory retirement age of 55 years. He quantified his loss and damages as half salary from 29th September 1999 till 5th February 2002 Kshs. 429,045/-; salary from 6th February 2002 to September 2008 Kshs. 2,788,820/-; house allowance from February 2002 to September 2008 Kshs. 3,600,000/-; medical allowance from 6th February 2002 to September 2008 Kshs. 406,800/-; commuter allowance from 6th February 2002 to September 2008 Kshs. 253,400; lump sum upon retirement Kshs 2,290,908.80 making a total of Kshs. 9,859,973.80/-. The Claimant sought a declaration that the purported dismissal from his employ was unlawful, wrongful, unilateral, malicious, arbitrary and in breach of the contract of employment; general damages for loss of career progression; general damages for malicious prosecution; special damages of Kshs. 9,859,973.80; an order directing the Respondent to pay the Claimant all his terminal benefits in full under the permanent and pensionable scheme of the Respondent; an order of monthly pension payments as provided under the Pensions Act cap 189 of the Laws of Kenya, an order directing the Respondent to pay the Claimant's statutory contribution, salary arrears, salary and benefits for the unexpired period before the attainment of the retirement age; interest on the sums claimed; costs of the suit and any other or further relief that this honourable court may deem fit and just to grant.

2. The Respondent filed a defence in which it was averred that the disciplinary action taken against the Claimant was for gross misconduct, unbecoming conduct, abuse and neglect of his duties and breach of the terms of his employment therefore entitling the Respondent to take disciplinary action and interdiction thereafter resulting in lawful summary dismissal of the Claimant from employment. The Respondent averred that the commencement of criminal prosecutions in any court of law is constitutionally vested in the office of the Honourable Attorney General and the Commissioner of Police who ordinarily investigate and prosecute criminal offences. The Respondent averred that it was merely a complainant and not the investigator or prosecutor in Cr. Case no. 399 of 2000 and any claim against it in regard to the prosecution therefore is misplaced and frivolous. The Respondent averred that the contract of service could be terminated before the attainment of the retirement age of 55 years and denied that the Claimant was deprived of salaries, house allowance, medical allowance, commuter allowance, staff benefits, career progression, income and lump sum payment until the purported mandatory retirement of 55 years. The Respondent pleaded that the suit was statutorily time barred under the Limitation of Actions Act cap 22 and ought to be struck out with costs on the higher scale. The Respondent filed a notice of preliminary objection on 26th March 2010 to the effect that the suit was time barred per the provisions of the Limitation of Actions Act cap. 22 Laws of Kenya. An amended defence was filed on 16th April 2010 per consent of parties. The Claimant filed a witness statement on 15th June 2011 and a list of documents on 27th March 2012 while the Respondent filed witness statements on 6th June 2016.

3. The Claimant testified on 17th June 2015 and 2nd November 2015 while the Respondent's witnesses testified on 27th November 2017, 1st December 2017. The Claimant testified that he was employed in December 1987 by the Respondent as a Senior Assistant Standards Officer and confirmed on 1st May 1988. He stated that he was promoted over the years and that he ultimately held the position of Principal

Laboratory Analyst as the time of the dismissal. He testified that the Ministry of Health submitted samples of cellular blankets for testing to confirm the suitability and use of the blankets. He stated that the officers Nguyo and Kilungu were to sample the products and that the specimens were to be prepared and the data presented to him for analysis. He testified that he made remarks upon receipt of the sample submission form and the letter from the Ministry together with the samples. He stated that he did not make any commitment that the samples could be used or not used. He handed the certificate to the head of materials branch on 27th September 1999 and that he signed the certificate which was one of his responsibilities. He received the show cause letter on 29th September 1999 and he was accused of improper release of the certificate among other accusations and he responded to the show cause. He stated that he gave an explanation as to how he treated the samples and that it was the Ministry of Health that had requested the tests and that it was not a quality control sample. He received another letter of 26th October 1999 accusing him of preparation of draft certificate contrary to procedures and tampering with test results. He testified that he was the overall in charge lab analysts and that all the work done by officers passes through him and that he did an analysis of the test results. He stated that due to shortness of staff he did prepare the certificate and that there was no impediment for him to prepare the certificate. He stated that the analyst will look at the data and make a determination of what the data means. He testified that he gave an explanation for his actions in the response to the show cause letters. He stated that he was interdicted on 29th September 1999 which placed him on half salary and was asked to report to the offices of the Anti Corruption Commission where he was interrogated and subsequently arrested on 18th February 2000 and charged on 22nd February 2000 with the offence of abuse of office and that he released a certificate which contained false particulars and act prejudicial to the Government of Kenya. He confirmed that he received a change pay advice in April 2000 stopping his half salary and no reason was given for the pay change advice. He testified that he received the dismissal letter and that per the provisions of the Respondent's manual the Public Service Commission was to be involved. He stated that there was no communication received from the PSC and that he was charged before the anti-corruption court and was later acquitted under Section 87(a). He stated that after acquittal he appealed to be reinstated to his employment and the Respondent replied indicating that the reasons for his termination stood.

4. He was cross-examined and stated that he was dismissed on 7th February 2002 and that he filed the suit on 22nd October 2008. He testified that he filed the suit 6 years and 6 months after the termination. He stated that he had appealed and had cases in court which were financially draining and it was not feasible to open other proceedings before cases were concluded. He testified that the tests went through the right process and the head of materials took the results to the sample control centre for final release. He stated that he did not alter the results. He testified that he appealed on 15th February 2002 after dismissal on 7th February 2002 to the PS Ministry of Trade with a copy to the MD of the Respondent. He made another appeal after a period of three years. He stated that he did reply to all the allegations as to tampering and that the results went through the normal test process.

5. In re-examination he testified that the samples were given for tests to be undertaken. He stated that there are many ways samples can reach the lab and sometimes it was through random sampling. He testified that in this case the Ministry of Health requested the Respondent to do a random sample and that the report of the investigation or explanation was not sought it should be treated as an error of judgment. He stated that his first appeal was in February 2002 which was within the 42 days provided for an appeal.

6. The Respondent called Bernard Munene Nguyo who testified that he was a manager Inspections Department and that in 1999 he was a Quality Assurance Officer. He recalled the letter from the Ministry of Health and stated that the letter had requested the sampling and testing of some blankets imported by the Ministry. He testified that he was to undertake inspection with Mr. Kilungu and were to sample the product at the premises on 16th September 1999. He stated that they took the samples for testing and took them to the Respondent's labs and that he filled the sample collection forms given to the sample control center. He testified that the certificate was released by the Claimant and what he expected was the test certificate was to come to him through the head of department but he did not receive the result. He stated that he recorded a statement with the Kenya Anti-Corruption Authority accounting how the samples were drawn and how the submission of the samples was done. He testified that he did not know if the Claimant was charged. He stated that from his observation it was not procedural to submit the result to the Ministry. He testified that private sample entails payment to the Respondent for the sampling or testing done.

7. In cross-examination he testified that he collected the samples from the Ministry of Health and the supplier of the products and that the Ministry was asking for confirmation that the product conformed. He stated the Ministry did not produce cellular blankets and sought that the Respondent confirms if the product was suitable for use by the hospitals. He stated that private entities can write to seek a test to be undertaken and that is a private sample and that the private samples are delivered by the entity. He stated that complaint sample is a sample over which there is a complaint as to the quality and there is generation of instruction by the person interested in having the sampling done. He testified that he submitted a sample for which he needed a report and that he did not get his test results as the certificate was to be released to him. He stated that the Sample Control Center (SCC) was the one that coordinates between the submitting officers and the laboratory. He was not aware of the results were altered as he did not see the results and further stated that he was not aware of the delivery of the results to SCC. He testified that even from the certificate it was clear that this was not a private sample.

8. In re-exam he testified that he never received the results and that he was to look at the results and after checking was to advise if the samples met the national standards. He stated that it was not for the laboratory to determine and that the person the certificate should have been directed to is the person who gave the samples and that was him.

9. The Respondent then called Joshua Wasigala a senior HR officer of the Respondent. He stated that among his duties was the handling of employee discipline. He testified that he knew the Claimant who was a former employee of the Respondent. He stated that from the records it was apparent that there was an allegation that the Claimant had issued test results that were inappropriately done. He stated that the first accusation was tampering with test results and the second was failure to use test sample form and the other was failure to follow procedure. He testified that the Claimant was investigated by the former Kenya Anti-Corruption Authority and was charged with abuse of office. He stated that the Claimant was asked to show cause and he was asked to explain why he had issued test results and had responded to both letters. He testified that the Claimant was dismissed and that the Respondent complied with the process under the law. He stated that the Respondent did not prosecute the Claimant and also that it did not manage the pension scheme.

10. In cross examination he testified that he was employed in June 2000 and was not in the employ of the Respondent in June 2000. He stated that the Human Resource is the one that had written the dismissal letter and that it was in the records. He stated that the Claimant was dismissed for gross misconduct and that the employer can terminate the services of an employee. He admitted that there was no investigation

report before the court. He stated that the interdiction was in 1999 and the dismissal was in 2002 after investigations were finalized. He testified that the Claimant was found guilty of 4 charges and that the Respondent did not summon him for investigations. He stated that the Claimant was dedicated to his work and that the Claimant appealed against his dismissal. He stated that the appeal in February 2002 was not considered and that an appeal was part of the disciplinary process. He was aware that the criminal proceedings were terminated for lack of evidence and that the Respondent did not consult with the Attorney General. He stated that the organization was not barred from taking action though there were cases ongoing. He testified that there is a regulation that allows the Respondent to proceed with disciplinary case. He testified that per the 1985 regulations if there are criminal proceedings in place there can be no disciplinary process before termination. He stated that there was a payment voucher for Kshs. 1,361,282.70 the last pay certificate for the Claimant. He testified that the Respondent had written to the scheme manager computing the retirement benefits of the Claimant and the Board of Trustees was to handle the interest issue.

11. In re-exam he testified that the charges against the Claimant were abuse of office charges and the same dealt with the alteration of the certificate. He stated there was no new evidence exonerating the Claimant and that the list of offences in the manual were not exhaustive and there was basis for the dismissal.

12. Parties filed written submissions and the Claimant filed the initial submissions on 6th December 2017 and the subsequent ones pursuant to leave on 13th December 2017. The Respondent filed its submissions on 8th December 2017. In his submissions the Claimant submitted that he was entitled to the grant of the prayers sought in his claim as there were no investigations and there was non-compliance with the law regarding his dismissal. The Claimant relied on the case of **Menginya Salim Murgani v Kenya Revenue Authority [2008] eKLR** for the position that disciplinary procedures in public bodies are tribunal matters requiring fair procedures of resolution in tandem with rules of natural justice. The Claimant submitted that there was breach of the PSC Regulations on fair procedure and cited **Ezekiel Nyangoya Okemwa v Kenya Marine Fisheries Research Institute [2016] eKLR**. The Claimant submitted that there was need to demonstrate substantive and procedural justice in public service. Reliance was placed on the case of **Julius Leriama Lelesiit v AG & Another [2012] eKLR** and the case of **Tom Joseph Orina v Kenya Bureau of Standards & Another [2013] eKLR** on the running of time. It was submitted that the time would begin to run after all the channels and processes of appeal are exercised and closed.

13. The Respondent submitted that the Claimant's case was time barred in terms of the Limitation of Actions Act cap 22 Laws of Kenya. Reliance was placed on the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** for the proposition that the cause of action takes effect from the date of termination. The Respondent submitted that the Claimant was given an opportunity to show cause prior to the dismissal and that the Respondent complied with the requirements to give the Claimant the safeguards provided for in law. The Respondent relied on the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** and **Mobile Link v Tabitha Masege [2017] eKLR** for the proposition that gross misconduct or existence of facts violated the conditions of employment and was fundamentally inconsistent with the employees obligations to the employer. The Respondent submitted that the criminal prosecution was distinct from the internal disciplinary processes and that even pending the criminal process the Claimant could be terminated from service.

14. The claim on limitation was raised in the defence filed against the Claimant's case. In the defence and the preliminary objection filed, it was asserted that the Claimant ought to have filed the claim before the expiry of 6 years. In the case of **Attorney General & Another v Andrew Maina Githinji & Another** (supra) the Court of Appeal (Waki, Nambuye, Kiage JJA) per Waki JA held that the cause of action accrued on the termination. I am persuaded that an analysis of the evidence is superfluous as the limitation period set in law is 6 years for a claim that arose before June 2008 when the Employment Act 2007 was effective and now limited to 3 years under the provisions of Section 90 of the Act. The case before me should have been filed within 6 years of 7th February 2002 which is 7th February 2008. It was filed in October 2008 which was some 6 months later. In light of the decision of the Court of Appeal in the case of **David Ngugi Waweru v Attorney General & Another [2017] eKLR** I cannot extend time. I however note that the Claimant herein was entitled to payments that were computed and not paid being some Kshs. 1,361,282.70 as the final dues as well as the pension benefits. He is entitled to those sums as of right and the certificate of service.

It is so ordered.

Dated and delivered at Nairobi this 18th day of December 2017

Nzioki wa Makau

JUDGE