



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 2297 OF 2014

AMOS MCHARO MECHA.....CLAIMANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent on 24th December 2014 seeking determination of the issues he framed as wrongful termination and refusal to pay full terminal benefits. The Claimant averred that the dismissal was due to the loss of faith in the manner the Claimant had handled official documents. The Claimant averred he was called from leave and was arrested and taken to the Industrial Area Police Station and charged with two offences of forgery contrary to Section 349 of the Penal Code. He averred that he was acquitted of the charges on 12th August 2013 and that he appealed against the dismissal and sought reinstatement to his employment on 10th January 2014 and 22nd April 2014. He averred that he was not served with any warning letter and that his unilateral, wrongful and unmerited act of dismissal was contrary to the clear provisions of the Employment Act on termination. He asserts there was no valid reason for his dismissal and preceding the arrest and arraignment in court he was subjected to degrading and inhuman treatment and thus sought the following reliefs:-

- i. One month's salary in lieu of notice Kshs. 60,000/=
- ii. Leave due 14 days Kshs. 32,307.69/=
- iii. Service gratuity for 6 years at rate of 15% of basic per year Kshs. 54,000/=
- iv. 12 months compensation for unfair loss of employment Kshs. 720,000/=
- v. A certificate of service.

The Claimant also sought a declaration that his dismissal was unfair and unlawful; reinstatement to his previous employment without loss of benefits and continuity of service as well as payment of the full salary and allowances withheld during the suspension and dismissal; in the alternative, he be paid his full terminal dues as calculated above; damages on the footing of aggravated and exemplary for unlawful search, torture and mental anguish; costs of the suit and interest on the sums claimed at court rates.

2. The Respondent filed a defence on 5th February 2015 and in the defence averred that the employment of the Claimant was premised on the contract terms which gave either party the right to terminate the contract. The Respondent averred that the alleged arrest, incarceration and criminal charges at the Chief Magistrates' Court was by the police who undertook independent investigations and decided to charge the Claimant. The Respondent pleaded that the acquittal of the Claimant of criminal charges was based on the standard of proof required in criminal proceedings and did not in whatsoever manner affect the decision of the Respondent to take disciplinary action against the Claimant. The Respondent averred that the Claimant was given an opportunity to be heard before the disciplinary action was taken and his termination followed the tenets of the HR policy manual as well as the employment laws. It was pleaded that the appeal he sought was rejected and that the termination was valid and procedural. The Respondent averred that the Claimant was not entitled to reinstatement by reason of misconduct and acts of forgery. The Respondent sought dismissal of the Claimant's claim with costs.

3. The Claimant testified on 17th October 2017. He stated that he was employed by the Respondent in 2003 as a graphic artist assistant and was dismissed in June 2009 after being arrested and arraigned before the Chief Magistrates Court Makadara. He testified that he was called by his immediate supervisor while on leave and asked to go to the MD's office where he found colleagues in the boardroom and was asked to tell the story. He could not comprehend what was required of him and he testified that he was handcuffed and taken to the Industrial Area Police Station where he was interrogated and subsequently arraigned before the court on charges of forgery of a standardisation mark. He

testified that at the time of termination he was on half-pay. He sought the payment of the dues as tabulated in his claim and reinstatement to his employment. He had appealed his termination and was advised that his appeal was time barred.

4. In cross-examination he testified that he was charged before the Chief Magistrates Court and that his co-accused were the late Peter Oduor and Thomas Musau. He stated that they were charged with forgery of standardisation permits and that he did not confess to being involved. He testified that he received the notice to show cause and he replied and also that he appealed the decision to terminate his contract. He admitted that he wrote and indicated that the matters before court could not be subject to process outside court. He denied that he had waived his chance to be heard. He stated that he should have been called and informed what charges he was facing and be heard on the explanation given. He testified that he was not aware of any internal investigation and that he was acquitted.

5. In re-examination he testified that he was not aware of the forgery nor was he privy to the offence if any was committed. He stated that he was not informed of any disciplinary hearing. He testified that he was not convicted of any criminal offence that there was no evidence of a confession.

6. The Respondent called Eric Chesire and he testified after the court ascertained that there had been no attempt to interfere with the witness by the Respondent's Legal Officer who was in court. He stated that he was product certification manager at the time of the case and had given the Respondent a brief to management on the case of forgery of standardisation mark. He testified that the internal report indicated the suspects as Peter Oduor, Thomas Musau and Amos Mecha and that in the report it was indicated by Peter Oduor that Peter had obtained the blank standardisation mark permit from Amos Mecha after paying him 5,000/-. He stated that the case was reported to Industrial Area Police Station and the Claimant was among those charged at the Makadara Law Courts and that the Claimant was later dismissed from employment. He testified that the basis for dismissal was the forgery.

7. In cross-examination he testified that the brief to management was on 4th April 2009 and it was on the case of forgery and that he was the author of the report from his department. He testified that he was not in a position to confirm if there was a confession from Peter Oduor a suspect in the case. He stated that Peter was an employee at the laboratory, Thomas Musau worked at the MD's office and the Claimant worked in printing room. He testified that the criminal case collapsed due to the failure of the document examiner to turn up and that was the responsibility of the police not the Respondent. The next witness for the Respondent was Joshua Wasigala who testified he was the HR Officer in-charge of discipline management among others. He testified that the Claimant was working in the standards department in the printing unit and was in charge of graphic design. He confirmed receipt of the confidential memo from Eric Chesire and from the information in the confidential memo, the Claimant had been implicated in the forgery of a standardisation mark. He stated that the Claimant was given a show cause and the Claimant responded in writing and that after consideration of the circumstances of the case the Claimant was charged in the Makadara Law Courts and the management made a decision to dismiss the Claimant. He stated that the Claimant appealed the decision and the appeals were dismissed. He testified that the Claimant had been suspected of forgery of standardisation marks. He stated that the disciplinary committee could not be formed as the Claimant in his reply dated 22nd April indicated that the matter was in court and he was not willing to raise issues on the same. He testified that the Claimant's dues were computed and a last pay certificate issued. The Claimant was to collect Kshs. 44,866.30 after deductions and was to clear with the Respondent before collecting the dues. He was not aware if the Claimant had cleared with the Respondent.

8. In cross-examination, after describing his academic qualifications, he testified that the Claimant was faced with a serious disciplinary offence and that due to the Claimant's response to the show cause letter the Respondent could not proceed with the disciplinary process. He confirmed that there was no order specifically barring the Respondent from proceeding with the disciplinary process. He testified that the Claimant's salary was stopped after the Claimant received his letter of termination. He admitted that no warning letter was issued.

9. In re-examination he testified that the Respondent called in the Police and that the Respondent was not in control of the prosecution. He stated that the Claimant had waived his right to hearing in writing. That marked the end of oral testimony.

10. The parties filed written submissions and the Claimant's submissions were filed on 23rd October 2017 and the Respondent filed its submissions on 9th November 2017. In the submissions, the Claimant submitted that there was no hearing accorded to him contrary to the law. He indicated 4 issues were for determination

- i. Whether there was a valid reason to terminate the Claimant's services
- ii. Whether procedure was followed
- iii. Whether the Claimant is entitled to the reliefs sought in the claim
- iv. Costs of the claim

The Claimant submitted that Section 43(1) of the Employment Act provided that there had to be proof of reasons for termination. He submitted that the report by Chesire was made after the charges had been laid and was without any preliminary investigations at all. The Claimant asserts that he was not afforded an opportunity to air his views on the allegations he faced. He submitted that the Respondent's HR Policy manual on staff discipline was not followed. He cited Section 41(1) and (2) of the Employment Act and submitted that he was not called for any disciplinary meeting as required by the provisions of the Employment Act and the HR manual. He submitted that he had proved his case and thus prayed that the Court awards the reliefs sought in the claim.

11. The Respondent submitted that the claim was filed out of the statutory time limits. It was also submitted that the dismissal was fair and was not in breach of the provisions of the rules of natural justice. The Respondent submitted that the Claimant was implicated in the forgery of a standardisation mark and that after police investigations the Claimant was charged alongside 2 others in the Chief Magistrates court at Makadara. It was submitted that the charges made the contract of employment unsustainable and that the Claimant was given a show cause to give written representations before any disciplinary action could be taken. It was submitted that the claim was time barred in terms of Section

90 of the Employment Act as read with the Limitation of Actions Act cap 22. It was contended that the Claimant waived his right to be heard before dismissal. Article 7 of ILO Convention Termination of Employment No. 158 of 1982 was cited and the South Africa labour court case of **Modise v Steve Spar Case No. JA 29/99** as well as the case of **Republic v Municipal Council of Ruiru ex parte Stephen Kimani Muhiu [2015] eKLR**. The Respondent submitted that the Respondent had complied with the law in the termination and therefore the claim was misplaced.

12. The claim was filed on 24th December 2014. The dismissal of the Claimant occurred in June 2009. The period within which the Claimant was entitled to commence the action was limited by Section 90 of the Employment Act to June 2014. The Court has no capacity to extend time. See **David Ngugi Waweru v Attorney General & Another [2017] eKLR** where the Court of Appeal succinctly points out that one cannot extend time however sympathetic the court may be to the plight of the claimant. I would dismiss the claim on that score alone. However, I will consider the other aspects of the claim should this position be held to be incorrect on appeal.

13. The Claimant was dismissed after allegations of a forged standardisation mark had been made. The Respondent maintains that the mark was issued with the connivance of the Claimant and he asserts that he was not involved in the fiasco. He was acquitted by the trial court before the Makadara Law Courts. He claims the Respondent did not accord him a chance to be heard. One cannot wax both hot and cold. He had been given an opportunity through the letter of show cause from the Respondent. In his reply, he specifically pointed out that he could not respond as the matter was actively before a court of law. In my view, he waived his right to a hearing. Under ILO Convention 158 on the Termination of Employment, Article 7 thereof provides as follows:-

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

14. The Claimant by refusing to be subject to the disciplinary process because his case was pending before the court was the author of his own misfortune regarding a hearing before dismissal. The standard of proof required in a criminal court is beyond reasonable doubt while for the employer, the standard is one on balance of probabilities. The Claimant was implicated in a criminal act and the employer had basis and reason to dismiss the Claimant. For this reasons the claim would collapse even if it was filed on time as it was not proved on a balance of probability that the dismissal was without basis or unlawful. The Claimant thus fails and the suit is dismissed but I make no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 13th day of December 2017

NZIOKI WA MAKAU

JUDGE