



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.638 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd October, 2015)

FREDRICK OUMA NDARCLAIMANT

VERSUS

TELKOM KENYA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Fredrick Ouma Ndar filed his Memorandum of Claim in Court on 8/5/2013. His claim is that he was employed by the Respondent for a period of 3 years under contract and served until 1/10/1981 until his purported dismissal on 29/4/2004. He annexed his Certificate of Service dated 14/1/2013, appointment letter dated 22/10/1981 and letters renewing his contracts.
2. He avers that he served the Respondent diligently and with honesty until his dismissal without a lawful reason.
3. He contends that on 18th December 2003, he was maliciously and without any proof and/or good reason whatsoever interdicted by the Respondent and later dismissed on 29/4/2004.
4. The Respondent later revised the dismissal on 31/3/2005 but on condition that he forfeits all the dues arising out of any unlawful dismissal and further purporting to award him a benefit of doubt after considering his appeal.
5. The Respondents then retired him on 13/12/2013 but did not pay him his dues that arose out of unlawful dismissal effected on or about the month of December 2003.
6. He annexed the interdiction letter as Appendix FON 6. He avers that the Respondents disciplinary process was unfair, unjust and undeserved since the Respondents never gave any reason for the dismissal.
7. At the time the Claimant was serving in the capacity of Intervention Senior Technician in Information Technology and Network Department as per his Certificate of Service and earning a salary of Kshs.55,724/= per month (Appendix FON 7). He avers that the Respondents action of retiring him forcefully was also malicious.
8. The Claimant's claim is for payment of Kshs.167,172/= being 3 months salary in lieu of notice and also 12 months salary being salary for the month of April 2004 to March 2005 the dismissal period being 668,688/= .He also prays for 12 months salary as compensation for unfair and

- unlawful dismissal plus costs and interest.
9. The Respondent filed their Memorandum of Reply to the claim on 1/7/2013 through the firm of P.K. Mbabu & Company Advocates. They have admitted that they had employed the Claimant subject to terms and conditions in the contract of employment and any action they took was in accordance with the contract and the law.
 10. They also aver that they reviewed the Claimant's dismissal after his appeal and reinstated him on 31/3/2005 on condition that he forfeits his salary and benefits for the period he was dismissed. He voluntarily accepted and resumed work. They therefore aver that the filing of this claim nine years later is an afterthought and a bid to defeat the consensus/agreement.
 11. They aver that they acted within the law applicable at the time and within the terms of the contract of employment between themselves and the Claimant. They contend that their action was fair, just, lawful and deserved.
 12. They have submitted that the cause of action if any accrued in 2004 and the claim was filed in 2013 and is therefore time barred and should be dismissed. They have attached the Claimant's payslip of 2004 as Appendix 2 and aver that he was earning a total of 24,801.60/= and not 55,724/= as pleaded.
 13. On Claimant's retirement, they have stated that he was retired as per the contract and was not forcefully retired. They deny any witch hunting, malice and breach of employment laws on their part. They aver that the claim is misconceived and is an abuse of the Court process and should be dismissed.
 14. I have considered all evidence and submissions of both parties. The issues for consideration are as follows:
 1. ***Whether this claim is time barred.***
 2. ***Whether the claim by the Claimant is sustainable.***
 15. The letter that dismissed the Claimant is dated 29/4/2004- (Appendix 2(b)). He appealed against this dismissal and on 31/3/2005 he was reinstated on the following terms:

“On reinstatement, the following condition shall apply:- Salary and other privileges for the period between dismissal and reinstatement shall be forfeited to the company....”.
 16. The Claimant agreed to be reinstated on this condition and served the Respondents until 2012 when he was retired. He has submitted that he was forcefully retired but the documentation for the said retirement were not submitted to Court nor the retirement letter produced in Court as an exhibit. It is this Court's view that from the time of the reinstatement, the Claimant if not satisfied with the condition stated should have proceeded to file a claim within 6 years as provided for under Section 4 of Cap 22 which states as follows:

“(1). The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

 - a. ***Actions founded on contract***”
 17. The claim by the Claimant if any accrued in 2005 which is under the dispensation of the Employment Act Cap 226 (now repealed) which did not provide for the limitation period hence my reliance upon Cap 22. It is apparent that 6 years after 2005 expired in 2011 and therefore filing a claim in 2013 was an abuse of the Court process and I find that this claim is time barred.
 18. Concerning the claim for unlawful retirement there is no evidence adduced by the Claimant on this issue and I find that the entire claim by the Claimant is time barred and I dismiss the same accordingly with costs to the Respondents.

Read in open Court this 23rd day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent