



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 97 OF 2013**

**MICHAEL MWAI.....CLAIMANT**

**VERSUS**

**JOSIAH MUGWE THATIA.....1<sup>ST</sup> RESPONDENT**

**WINFRED MURIITHI.....2<sup>ND</sup> RESPONDENT**

**MILLICENT N. KINUTHIA.....3<sup>RD</sup> RESPONDENT**

**(AS CHAIRMAN, TREASURER, AND SECRETARY OF THE SCHOOL  
MANAGEMENT COMMITTEE, ARCHBISHOP GITARI BOARDING SCHOOL)**

**ARCHBISHOP GITARI BOARDING SCHOOL.....4<sup>TH</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> October, 2015)

**JUDGMENT**

The claimant filed the statement of claim on 13.09.2013 through Ngigi Gichoya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Payment of Kshs.467,670.00 for loss and damage.
- b. Payment of salary and house allowance.
- c. That the claimant be reinstated in his employment.
- d. Costs of this suit.
- e. Interest on a, b, c, and d above at court rates.
- f. Any other or better relief that the court may deem fit to grant.

The respondent filed the statement of response on 16.06.2014 through Magee Wa Magee & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent employed the claimant as a watchman from 1.12.2002 and at termination he earned Kshs.6,750.00 per month as gross pay.

It is the claimant's case that he received the letter dated 5.05.2008 which stated that he had been suspended from duty following the theft on 31.03.2008 which took place while the claimant was on duty. The letter stated that the suspension was with effect from 1.04.2008 until the investigations were over. The respondent has denied suspending the claimant by stating instead that the claimant's employment

was terminated with effect from 1.04.2008 as per the letter dated 5.05.2008. The claimant has denied that he ever received the letter of termination.

After the theft of 31.03.2008, the claimant was charged with the offence of failing to prevent a felony in criminal case No. 395 of 2008 at Gichugu.

On 5.6.2008 the criminal case was withdrawn by the prosecution under section 87(a) of the Criminal Procedure Cod with a view to proceeding with full investigation to arrest the correct culprit. The court therefore discharged the claimant forthwith. The claimant then wrote the demand letter dated 7.09.2009 seeking withdrawal of the suspension letter of 5.05.2008, reinstatement to his position, release of withheld pay and for all his privileges.

The **1<sup>st</sup> issue** for determination is whether the claimant was terminated or suspended by the letter dated 5.05.2008. The alleged letter of termination does not state the reason for the alleged termination and there is no evidence that the claimant received the letter. The flow of events shows that there is no reason to doubt that the claimant was suspended from employment by the letter of 5.05.2008 following the theft in issue.

The **2<sup>nd</sup> issue** for determination is the date the cause of action accrued and whether the suit is time barred. The claimant was suspended on 5.05.2008 and discharged in the criminal case on 5.06.2008. In the opinion of the court, the date of the discharge being 5.06.2008 constituted the date the cause of action accrued because that was the date the claimant knew that the suspension as based on the theft case leading to the criminal prosecution had been baseless. While making that finding the court considers that after the discharge and the respondent having not acted to lift the claimant's suspension, the claimant was entitled to consider himself terminated; the termination was constructive soon after the discharge and there being no lifting of the suspension. Under section 90 of the Employment Act, 2007 and which applied to the case, the claimant was required to file the case within 3 years being on or about 5.06.11. The case was filed on 13.09.2013, long after lapsing of the 3 years. Accordingly the court finds that the suit was time barred and is liable to dismissal.

In conclusion, the claimant's suit is dismissed with costs as it was time barred.

**Signed, dated and delivered in court at Nyeri this Friday, 9th October, 2015.**

**BYRAM ONGAYA**

**JUDGE**