



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 692 OF 2012

MATHEW OBUKO OSINYA.....CLAIMANT

VERSUS

ATTORNEY GENERAL..... 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 25th April 2012 and in it the Claimant averred that he was employed as a mechanic/driver by the 2nd Respondent from 2nd November 1994 until October 2001 when his services were terminated through a letter of summary dismissal. He averred that his dismissal from service was unfair, unlawful and was authorised by malice, ill will and recklessness and without due regard and consideration of the law, procedure and fair place hence illegal. The Claimant was suspended on 1st July 2001 on allegations of having stolen motor vehicle parts belonging to Ministry of Roads & Public Works. He was charged in the Senior Resident Magistrates court Vihiga and the charges later dropped. He averred that he appealed the decision to dismiss him and the second appeal against dismissal was disallowed on 7th October 2002. He thus sought a declaration that his dismissal from service was wrong, unfair and unlawful; that the decision to dismiss the Claimant was too harsh and extreme in the circumstances and the same be set aside; an order that the Claimant be reinstated back into employment with the Government at his then scale and service; and the Claimant be paid all his unpaid salary and allowances for the period he has been out of service. In the alternative he sought an order that the dismissal be set aside and substituted with normal termination; an order that the Claimant be paid full benefits computed as one months' salary in lieu of notice, statutory compensatory damages for wrongful and unfair termination calculated at 12 month's salary, retirement benefits he would have been entitled to had he worked and retired normally. He also sought that the Respondents do bear the costs of the suit.

2. The Respondents filed a Reply to Memorandum of Claim on 4th June 2012 and in it the Respondents averred that under the regulations applicable to the Claimant's employment at the time administrative action could be taken notwithstanding that a court case was pending. The Respondents averred that the 2nd Respondent had received the Claimant's appeal but could not allow it as there were no justifiable grounds. The Respondents averred that the Claimant's employment was lawfully terminated and he was not entitled to the remedies he sought. The Respondent also averred that the suit was statutorily barred and should be dismissed with costs.

3. The Claimant amended his Claim orally on 15th July 2013 and averred that his date of employment was 1st December 1982. He testified that he was employed as a subordinate staff by the Ministry of Public Works in 1982 and was promoted after a grade test. He testified that he was dismissed in 2001 and that at the time of dismissal was not given a chance to defend himself or given a show cause letter. After dismissal he wrote an appeal on 7th November 2001 and a second appeal on 7th October 2002. The 2nd Respondent replied that the case was closed. He sought the intervention of the Obudsman and after a series of letters the 2nd Respondent replied on 29th July 2010 that the case was closed. He thus sought the dues in his claim.

4. In cross-examination he testified that he was hired on temporary basis as subordinate staff in 1982 and was promoted to plant mechanic position after a grade test. He stated that there was no pension payable in his new position as it was not permanent and pensionable. He testified that he was assigned a Isuzu Canter GK Q667 and that if an item is lost in the vehicle he would be the first person to be asked. He was given a letter which indicated that he had removed vehicle parts from that vehicle and was given 21 days to exculpate himself. He appealed and his appeal was rejected and similarly the second appeal was dismissed. He stated that he was given a chance to defend himself by appealing. He stated that he was not aware there was a time limit to the filing of his claim. He conceded that the 2nd Respondent closed the file in 2002.

5. In his re-exam he stated that he was not convicted in the criminal case contrary to the content of the letter by the 2nd Respondent.

6. The Respondents called Mr. Harold Avisia Kiguli a Human Resource Management officer with the 2nd Respondent. He testified that he knew the Claimant through the records kept by the 2nd Respondent and that the matter came to the 2nd Respondent by way of an appeal which was considered and disallowed and the decision communicated to the Claimant. The right of second appeal was exercised by the Claimant and his second appeal was also considered but disallowed and the case closed. Only two appeals were available to the Claimant under the regulations in place at the time.

7. In cross exam he testified that the Claimant responded to the show cause letter and was given a hearing as per the regulations in force at the particular time. The regulations in force at the time required that an appellant or someone was to be heard by making representations in writing. The 2nd Respondent considered the representation made by the officer and made a determination that he was culpable and he was charged with the offence of stealing a part from a vehicle. He testified that the criminal case was not heard up to conclusion but was withdrawn at some point. He stated that there was no suggestion that the Claimant was innocent as alleged in the Court. He conceded that there was a mistake when conveying the outcome of the appeal as the decision to dismiss was for gross misconduct and not conviction

8. The case by Claimant is that the 2nd Respondent unlawfully terminated his employment. In the case, the Claimant had been accused of the theft of motor vehicle parts from a vehicle he was assigned to drive being Isuzu Canter GK Q667. He was charged in the magistrates court but the charges were dropped under Section 87(a). During the pendency of the trial he was dismissed from service and he appealed the decision. His appeal was disallowed and in line with the regulations in place at the time filed a second appeal. His second appeal was considered by the 2nd Respondent and the dismissal of the appeal communicated to the Claimant in October 2002. The letter is dated 7th October 2002. His cause of action against the Respondents accrued on that day. At the time the law in force was the Employment Act cap 226 which had no express provision on the limitation period. Recourse was to Section 4(1) of the Limitation of Actions Act for most employees and Section 3(2) of the Public Authorities Limitation Act cap 39 of the Laws of Kenya. The Public Authorities Limitation Act provided a limit of 3 years. This means the Claimant ought to have filed the claim within 3 years of the letter of 7th October 2002 as the letter was the final administrative action and indicated that the appeal process was over. Even if the outer limit imposed by Section 4(1) is considered the claim was to be filed before 7th October 2008 when the six years would have run out. The claim was filed on 25th April 2012 which is close to 10 years since accrual of the cause of action. This is manifestly out of time and incurable.

9. In the case of **Bata Shoe Company (K) Limited V Laban Chema Libabu [2013] eKLR** I held that I cannot confer jurisdiction on myself. Jurisdiction is everything. Without it a court can do nothing. There is no jurisdiction to entertain the claim which was filed hopelessly out of time. I thus will dismiss the suit with costs.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of July 2014

Nzioki wa Makau

JUDGE