



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 266 OF 2013

(Originally Nairobi Cause No. 2462 of 2012)

JAMES K. NYARIBO.....CLAIMANT

v

PERMANENT SECRETARY, MINISTRY OF PUBLIC WORKS.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. James K. Nyaribo (Claimant) through a motion dated 28 November 2012 sought and was granted leave to file suit against the Respondents out of time by Nzioki wa Makau J on 29 November 2012. This was in Nairobi Cause No. 2401 of 2012.
2. Pursuant to the leave, the Claimant, through the firm of Keengwe & Co. Advocates filed a Statement of Claim on 7 December 2012 against the Permanent Secretary, Ministry of Public Works (1st Respondent) and the Honourable the Attorney General (2nd Respondent) .
3. The Claimant alleged unfair termination on 23 June 2007 on ground of desertion of duty. He sought Kshs 178,704/- being 12 months compensation for wrongful dismissal, damages for unfair dismissal and costs and interest.
4. The Respondents were served and on 15 March 2013, the Respondents through the 2nd Respondent raised a Notice of Preliminary Objection on the ground that the Claim was statute barred pursuant to section 90 of the Employment Act.
5. On 27 August 2013, the firm of Mang'are & Associates came on record for the Claimant
6. On 9 May 2014, Ongaya J upheld the preliminary objection and dismissed the Cause with costs leading the Claimant to file an application on 20 May 2014, seeking to have the dismissal order set aside.
7. Ongaya J allowed the motion and reinstated the Cause on 20 May 2014.
8. The proceedings of 4 June 2014 indicate that the Court directed that the hearing of the Cause proceed on 4 November 2014, and that a preliminary objection which was pending be heard as part of the main Cause.
9. The Respondents filed their joint Response on 13 June 2014.
10. My perusal of the record does not show that there was a pending preliminary objection. The Cause proceeded to hearing on 4 November 2014 as scheduled.

Claimant's case

11. The Claimant's pleaded case is that he was an employee of the Ministry of Public Works until 23 June 2007 when he was unfairly dismissed on ground of desertion of duty. He further pleaded the

- dismissal was prompted by criminal charges he faced and from which he was acquitted.
12. The Claimant further pleaded he was not heard before the decision to dismiss him was taken and that he became aware of notice to dismiss after the period indicated therein had expired.
 13. The Claimant testified. He stated that he was employed by 1st Respondent on 31 May 1979 as an office messenger and that he rose to the position of Charge Hand/Mechanical Electrical Motor mechanic.
 14. He also stated that he received a dismissal letter dated 25 June 2007 and that he was not given notice or show cause letter prior to dismissal. He stated that he received a desertion letter dated 23 November 2006 on 13 February 2007.
 15. He also stated that he responded to the desertion letter through a letter dated 8 February 2007, but did not get a response but instead received the dismissal letter.
 16. He further stated that he made an appeal dated 9 October 2007 and a reminder on 24 July 2008.
 17. On the allegation of desertion, the Claimant stated that he had fallen ill and attended Kenyatta National Hospital on 20 November 2006 and after leaving the hospital he was arrested and charged with attempted rape. He was acquitted on 6 May 2008 under section 202 of the Criminal Procedure Code.
 18. In cross examination, the Claimant stated that he had the permission of his officer in charge but not in writing and, that his postal address was P.O. Box 1179 Nyamira and he got the desertion letter after about three months and that he resumed duty on 29 December 2006.
 19. The Claimant admitted that in his witness statement he had stated that he had gone to visit his sick brother but that in testimony he stated that he sought permission to go seek treatment. He said there were two reasons for the absence.
 20. In reexamination, the Claimant stated that he had an appointment letter at home but had not produced it in Court and that at time of dismissal he was earning basic pay of Kshs 11,152/- and house allowance of Kshs 3,000/-.
 21. The Claimant made reference to the documents annexed to the Statement of Claim.

Respondent's case

22. The Respondents did not call any witnesses but stated they would rely on the record.
23. The Response filed by the Respondents made bare denials and put the Claimant to strict proof.

Questions for determination

24. From the pleadings and testimony and submissions the issues for determination are the applicable law, whether the dismissal was unfair and appropriate remedies.

Evaluation

Applicable law

25. The Claimant's pleadings are anchored on sections 35, 40, 43 and 49 of the Employment Act, 2007. The Act commenced operations on 2 June 2008. The Claimant was dismissed through letter dated 25 June 2007. The Employment Act, 2007 is therefore not applicable.
26. The Claimant did not make reference to any other law/ statute.
27. The applicable law prior to 2008 was the Employment Act, cap 226 (repealed).

Whether dismissal was unfair

Procedural fairness

28. The Claimant contended that he was not afforded an opportunity to be heard.
29. The Employment Act, cap 226 (repealed) did not provide a right to hearing before dismissal.
30. But the documents produced by the Claimant include a show cause letter dated 23 November 2006. The letter sought his explanations as to why he had not reported on duty, before 1 December 2006.

31. The letter was addressed to the Claimant's home postal address. He stated he received it in February 2007.
32. In my view, the 1st Respondent made a reasonable attempt to reach the Claimant through his postal address and it cannot be faulted in this regard.
33. From the Claimant's letter dated 8 February 2007 in response to a letter from the 1st Respondent dated 13 December 2006 (and which was not produced) it appears that the 1st Respondent wrote to the Claimant more than once.
34. Despite the correspondence, in my view, the Claimant has not laid any contractual or other statutory basis for a right to a hearing before dismissal. He was ably represented by counsel.
35. With the material placed before the Court, it is not possible for the Court to find that the Claimant's dismissal was procedurally unfair or against the rules of natural justice.

Substantive fairness

36. In 2007, an employer could dismiss without cause provided pay in lieu of notice equivalent to contractual notice period was paid or if there was no provision for notice, reasonable notice depending on the circumstances of the case.
37. An employer could generally dismiss for a bad reason, a good reason or no reason at all.
38. The Claimant did not produce his appointment letter and the Court cannot tell whether a notice period was provided for.

Appropriate relief

Compensation of Kshs 178,704/-

39. The Claimant sought Kshs 178, 704/- being the equivalent of 12 months gross salary for wrongful dismissal pursuant to section 49 of the Employment Act, 2007. This Act was not applicable in his case and the relief is declined.

Damages for unfair dismissal

40. The measure of damages for wrongful dismissal at the material time was the equivalent of what the Claimant might have earned during the notice period.
41. Notice period was not established and this head of claim is declined.

Conclusion and Orders

42. The Claimant's pleadings were poorly drafted. The facts constituting the cause of action and the applicable statutory and or legal framework were not correctly laid. The prosecution of his case was also dilatory.
43. The claim is therefore dismissed with no order as to costs.

Delivered, dated and signed in open Court in Nakuru on this 5th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant: Mr. Maatwa instructed by Mang'are & Associates Advocates

For Respondent: Mr. Mbaka, Litigation Counsel. Office of the Attorney General