



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 52 OF 2013

JOHN K. CHELIMO.....CLAIMANT

-VERSUS-

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2013)

JUDGMENT

The claimant **John Kipchumba Chelimo** filed the memorandum of claim on 21.03.2013 through Musembi Ndolo & Company Advocate praying for judgment against the respondent for:

- a. **Claim for Kshs. 553,554/=.**
- b. **Interest from August, 1995 at court rates until payment in full.**
- c. **Costs of this suit.**
- d. **Any other relief that the honourable court may deem fit to award.**

The respondent **the National Cereals and Produce Board** filed the statement of reply on 20.04.2013 through Lutta & Company Advocates and prayed that the claim be dismissed or the court to make such order as it deems expedient to meet the ends of justice.

The claimant filed a further statement in reply to the claimant's statement of reply.

The case was heard on 17.06.2013 when the claimant gave evidence to support his case. The respondent's witness was its Assistant Human Resource Manager, George Abila.

The claimant was employed by the respondent as a stores clerk with effect from 15.10.1986 and deployed to the Nakuru Depot. The respondent business entails buying, storing and selling of the maize grain. During the 1994 to 1995 buying season, the claimant was deployed to the respondent's Kericho Primary Marketing Centre under the Kericho Depot. The claimant testified that his manager verbally instructed him to rebag about 7,000 bags of the maize into bags weighing averagely 87 kg for purposes of the then national relief food programme. After rebagging, there was a loss of 213 bags.

He wrote the letter of 23.06.1995 being No.1 on the respondent's list of documents explaining that the average weight of the bags was 87 kg due to over staying and infestation and destruction by rats so that the loss was due to that unforeseen circumstance and not intentional. He promised to **"....do good...."** on the loss through his dues and salary as stated in that letter. After that explanatory letter, he continued to work as usual. The letter by the Depot Manager Kericho of 20.07.1995 being No. 2 on the respondent's list of documents shows that reports were made about loss of other bags of maize attributable to the claimant making the total loss of 417 bags.

By the letter dated 14.08.1995, the claimant was suspended from duty with effect from 19.07.1995 on account of the shortage of the 413 bags of maize and on account of his desertion from duty with effect from 19.07.1995 to the date of the letter as his whereabouts was not known to the respondent. The letter invited the claimant to show cause within 15 days why he should not be dismissed from the employment. He was to choose any of the respondent's duty stations he would report to every first Friday of each month at 10.00 am during the suspension and in alternative to submit a reliable address in which event he would not need to report anywhere. The suspension letter directed the claimant that he was not allowed to access any of the respondent's premises without permission. He was to acknowledge receipt of the letter by signing a copy and returning to the respondent.

The claimant wrote the reply to the show cause letter as per his letter of 5.09.1995 being No. 4 on the respondent's list of documents. He acknowledged receipt of the show cause letter on 14.08.1995; denied responsibility of the shortage of 413 bags of maize; and that he did not desert duty on 19.07.1995 because he had gone to seek medical attention with his health becoming worse until 4.09.1995 when he was able to report on duty. He provided his reliable address as P. O. Box 1286, Nakuru.

After his replying letter, the claimant testified that he never received any further communication from the respondent. He denied ever receiving the letter of dismissal dated 22.01.1997 being document No. 5 on the respondent's list. The letter was addressed to the claimant at P. O. Box 1286, Nakuru and being the reliable address the claimant had provided for use by the respondent. The letter dismissed the claimant from the respondent's employment with effect from the suspension date of 14.08.1995 for loss of confidence in view of the matters in the suspension letter. He was to be paid his final dues less any liabilities he may have owed to the respondent and subject to completing the clearance certificate. He was to acknowledge receipt of the letter by signing a copy and returning to the respondent.

In his testimony, the claimant said he wrote the hand written letter of 5.09.1995 attached on memorandum of claim providing his reliable address as P. O. Box 43, Eldama-Ravine. Thus, he stated that on 5.09.1995, he submitted two letters to the respondent, the hand written one for the address and the typed one replying to the show cause letter.

The issues for determination in this case are as follows:

- 1. Whether the claimant's employment was terminated.**
- 2. Whether the termination was fair.**
- 3. Whether the cause of action was time barred.**
- 4. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.**

The first issue is whether the termination ever took place. There is no doubt that the claimant was an employee of the respondent. The court holds that termination of employment is a prerogative, inherent and statutory power of the employer. Once the employer has stated that the power to terminate was invoked, there would be no ground to dispute that fact. The only issue that may follow for interrogation is whether the termination was fair, lawful, just or wrongful.

In this case, the claimant took the view that he was never terminated because he had allegedly never received the termination letter. The claimant suggested that he gave his reliable address in the handwritten letter. Nevertheless, he does not dispute that he also gave another reliable address in his letter in reply to the show cause letter. The court holds that in such circumstances the respondent was entitled, even if the handwritten letter was received, to use either of the two addresses as provided. If at all the handwritten letter was delivered to the respondent, it is not known which of the two letters was earlier in time. In so far as the dismissal letter was

addressed to one of the addresses, the court finds that the respondent discharged the obligation to convey the dismissal decision.

The claimant has submitted that the respondent never conveyed the dismissal decision. The court has carefully evaluated the evidence and material on record. No doubt the claimant was suspended effective

14.08.1995 and the termination is said to have been by letter dated 22.01.1997. Other than the reply to the show cause letter, the claimant appears not to have taken any step about his fate in employment for over 16 years when he moved to file this suit. In the opinion of the court, his employment was such an important and crucial matter that such deep silence and inactivity in urging his rights cannot be trusted on account of the respondent's directive that the claimant sets no foot on the respondent's premises. In any event, the suspension letter precluded such visits if they were devoid of permission and the claimant has not shown that he was denied such permission. Further, the claimant was at liberty to write and seek information on determination of the disciplinary case. The claimant's inactivity weighs towards the court finding that at all material time the claimant was aware of his dismissal and on a balance of probability the court finds that the claimant was dismissed as per the dismissal letter.

The next issue for determination is whether the termination of the claimant was fair. The usefulness of an inquiry into this issue is predicated upon the findings on the third issue which is whether the cause of action is time barred.

At paragraph 2 of the statement of reply, the respondent pleaded that at the hearing it will raise a preliminary objection that the suit was statute barred having been filed without leave of the court. The claimant did not address this point of law in his reply to the respondent's statement of reply. On 20.05.2018, at the court's proceedings of 9.50 am, the claimant's counsel sought to prosecute the preliminary objection and counsel for the claimant urged that the main issue was whether there was any dismissal. In the circumstances, the court directed the parties to take up the issue substantively in their submissions after the hearing and recording of the evidence. The claimant did not make any specific or general submissions on the issue.

The respondent submitted that the suit was time barred under section 90 of the Employment Act, 2007 which states that the suit should have been filed within three years of the cause of action, the act complained about having occurred more than 17 years ago. It was further submitted that the cause of action was time barred under section 4(1) (a) of the Limitation of Actions Act, Cap. 22 Laws of Kenya which prescribes six years as the limitation period for actions in contract.

The suspension was effective 14.08.1995 and the dismissal disputed by the claimant was by the letter dated 22.01.1997 and effective 14.08.1995. The court has considered the respondent's submissions favourably and finds that the cause of action was indeed time-barred by the statutory provisions whether the action was founded upon the dismissal or the suspension decision.

In view of the findings on the third issue for determination, an interrogation into the second and fourth issues for determination will not serve any useful venture.

In conclusion, judgment is entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at **Nakuru** this **Friday, 19th July, 2013**.

BYRAM ONGAYA

JUDGE