



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 164 OF 2012

RUFUS KAIMENYI JOSEPH .....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY SPORTS CLUB MBARAKI .....RESPONDENT

**J U D G M E N T**

on 29/8/2012 the claimant sued the respondent seeking the following orders:

- a. **declaration that his suspension from work on 1.4.2005 was unlawful**
- b. **reinstatement to his position of Head Waiter on permanent basis**
- c. **payment of dues amounting to ksh.1,171,800**
- d. **certificate of service.**
- e. **Any other relief the court may deem fit.**
- f. **costs of the suit.**

The respondent denied liability and averred that the claimant was properly suspended on /4/2005 and later dismissed on 5/10/2005 for gross misconduct. That all his dues were paid vide cheque number 1199 dated 8/10/2005. That on 1/8/2010 she re-employed the claimant as Cleaner at a basic salary of ksh.8300 plus house allowance 2000 but that the respondent did not at any time lift the dismissal made on 5/10/2005. The respondent also raised objection to the suit on ground of statutory limitation.

The suit was heard on 12/6/2013 and 18/7/2013 when the claimant testified as CW1 and Sylvester Ndongoli and Fraishiah Wakonyo testified for the respondent as Rw1 and 2 respectively. CW1 stated that he was employed by the respondent in December 1993 vide an oral agreement. That he continued to work until when 1 /4/2005 when he was suspended. That as at that time his basic salary was ksh.12400 plus house allowance of ksh.5400 and a night allowance of ksh.500. He produced payslip for 31/3/2005 as Exhibit 1.

That after suspension he appealed and he was reinstated by the MD of the Kenya Ports Authority on 27/2/2008 but that the respondent's manager refused to reinstate him to his position of Head Waiter and instead gave him the work of a Cleaner on casual basis and for a monthly salary of ksh.5000/-. That he complained to the respondent's secretary and he gave him an appointment letter dated 1/8/2010 titled appointment to the position of Cleaner but the body of the letter indicated that the appointment was for the position of a Club Waiter. That on 12/5/2012 he instructed his advocate to claim underpayment from 27/2/08 when he was reinstated to 2012. That the actual claim was ksh.527,800 being the difference between the salary he was earning before suspension and the one paid after reinstatement as a casual Cleaner.

That he was also seeking the salary for the period he was under suspension between 1.4.2005 and 27/2/2008 amounting to ksh.644,000. That he was never heard on the reasons given for the suspension by the management committee and no communication came from the respondent after he wrote his reply to the show cause letter.

On cross examination he confirmed that he was employed by the respondent as a waiter and later as the Head Waiter. He relied on letter dated 4/1/1997 (appendix 5) to prove that he was promoted to be the Head Waiter. On being told that Daniel Deche was appointed Head Waiter on 21/10/2001 at a salary of ksh.3900 plus house allowance of ksh.1200, the claimant said that he was never demoted as Head Waiter and was a stranger to terms of appointment of Mr. Deche if at all he was ever appointed to that position.

He admitted that on 12/3/2005 he was given a show cause letter accusing him of uttering obscene words at the club and he responded to it. That on 1.4.2005 he was suspended without pay. That thereafter he never visited the club except on 10/7/2005 when he went to check the progress of his case after waiting for too long. He denied making any noise there.

That he only saw the dismissal letter after the response to the Claim was filed and served in October 2012. He denied ever telling the author of the letter dated 27/2/2008 (appendix 6) that he had been dismissed. That as at the time the said letter was written, he had not learned that he had been dismissed. He denied collecting any cheque No. 1199 for his terminal dues on 8/10/2005. or even signing the voucher number x/05 dated 5/10/2005 for Ksh.53,280.70. He denied the signature on the voucher.

He however admitted that the payslip dated 30/1/2009 (appendix 9) showed that he was a casual Cleaner earning ksh5000 per month. That the payslip was for the period after his reinstatement. That from April 2005 to 31/12/2008 he was not on duty. That after reinstatement he was given cleaning duties and later confirmed as a waiter.

RW1 is the secretary for the respondent since 2008. He testified that the claimant went to see him after his election as the secretary and explained his problems after his dismissal. That after consulting with his colleagues, the claimant was offered a fresh job to work in the club field and he accepted. That new job was not reinstatement and a letter of appointment was given dated 1/8/2010. That the letter had an error in that the position of appointment was Cleaner but in the body of the letter he mentioned Club Waiter. That the re-employment followed after the minutes dated 10/9/2009.

That he was not aware of any reinstatement done as at 1/1/2009 but only casual re-employment pending observation of his behaviour. That the claimant claim was not valid because he was never reinstated after dismissal in 2005 but only re-employed after payment of all his dues.

On cross examination he maintained that the letter dated 4/11/2008 was only a request for reinstatement which was declined. He did not produce a copy of the cheque for terminal dues but directed the question to the RW2. He could not also prove that the dismissal letter dated 5/10/2005 was ever served on the claimant. He however admitted that the claimant was never given a personal hearing before dismissal. He maintained that the claimant was re-employed in September 2009 as per the minutes. He confirmed giving the claimant a letter dated 1/8/2010 appointing him as club waiter erroneously.

RW2 is the club manager for the respondent since August 2010 but from office records she could confirm the claimant was served with a show cause letter on 12/3/2005 accusing him of misconduct of shouting obscene words at the club. That there was no record of any response to the show cause letter but a suspension letter dated 1.4.2005 which barred him from visiting the club.

That the records show that on 4/7/2005 a Disciplinary hearing was done by the Management Committee and produced the minutes as defence exhibit 2. That on 5/10/2005, a dismissal letter was written to the claimant and terminal dues paid. That the dues included salary for the period between April and September 2005. In total ksh.73,646.70 less statutory deductions was paid vide cheque number 199. That the counterfoil of the cheque was however not available for purposes of production as an exhibit. That the dismissal was fair and the claimant was at all material times aware of the dismissal otherwise he

should not have received the payment on 5/10/2005 after receiving the dismissal letter.

That in 2009 he approached the committee for re-employment and on 10/9/2009 he was given a new staff personal number 9137. That his new designation was Club Cleaner starting as a casual and later as a permanent employee. That in January 2009 he was not yet re-engaged. She confirmed that in 2000 he was the Head Waiter but in 2001 a new Head Waiter was appointed at salary of ksh4800. She contended that the payslip dated 31/5/2005 for ksh.12500 basic salary (exhibit C.1) was not a genuine payslip and maintained that the claimants basic salary as at the time of dismissal was ksh.6900 plus house allowance of ksh.2000/

On cross examination she maintained that the evidence of the claimants receipt of the dismissal letter was his signing for the terminal dues. She confirmed the the payment of the terminal dues was never approved by the approving authority but the Treasurer. She could not produce copy of the cheque or bank statement to prove that the claimant was paid his terminal dues. She contended that there were minutes to prove that the claimant was accorded a disciplinary hearing (exhibit d.2)

She denied that the letter dated 4/1/1997 appointing him as Head Waiter was nit valid because the person signing it was not the club secretary. That she relied on minutes dated 19/4/199 to prove that the club secretary then was Boaz Ouko. She however could not tell which month of the 1997 was Ouko elected the secretary and especially whether it was before 4/1/1997. After the hearing both parties filed written submission.

I have carefully perused the pleadings and considered the evidence and the written submissions. I am satisfied that the court has the jurisdiction to determine the dispute herein because it relates to employment and labour relations as contemplated by Section 12 of the Employment Act and Article 162 of the Constitution of Kenya. The issues for determination arising from the pleadings evidence and submissions are:

- a. **whether or not the suit was filed out of time**
- b. **whether the claimant was unfairly suspended on 1 /4/2005**
- c. **whether or not the claimant was reinstated to work after suspension on 1 /4/2005.**
- d. **whether the claimant is entitled to the relief sought.**

In answer to the first issue the court takes more of the fact that the preliminary objection was never prosecuted to determine the suit in limine. The court also notes that the claims for the payment of salary during the period of suspension is related to the issue of whether or not reinstatement was done or not.

In my view issue of limitation of time can only arise once the court determines the issue of reinstatement. The suit is therefore properly before the court for the court to determine the legality of the events which occurred chronologically from 1 /4/2005 to 2012 when the suit was filed and defence followed.

As regards the second issue of the fairness of the suspension, the court notes that there was no eye witness of the process of the suspension. The RW2 only relied on the records which came to her position in the course of employment. The court took key interest in the minutes of the personal hearing of the claimant dated 4/7/2005 (defence exhibit 2). The observation of the chairman in his paragraph 1 second bullet, stated that the decision to suspend Kaimenyi was made without following proper procedure and cautioned the committee of the consequences. The committee after hearing the witnesses concluded that the claimant's suspension be lifted and called back to work but on demotion to football pitch attendant.

That before coming back he was to sign the new work regulations which Mr. Toya was directed to make. That his new functions were to be supervised by experts in Field maintenance. Members of the committee that made the aforesaid resolutions was never called to testify in this case. This court will not fish for evidence outside the said defence exhibit 2 to determine whether or not the suspension of the claimant was unfair. The answer is those minutes which found that the procedure was not proper. The alleged shoddy work Regulations were never produced as evidence to show the procedure of suspending

an employee. The court however is satisfied that they were the basis for chairman's observation that the suspension was through improper procedure.

This flawed procedure rendered the suspension unfair and the committee reinstated the claimant to his employment but on a lower grade of field attendant. No reason for the demotions, though, was given despite the fact that the committee rejected the recommendations by the disciplinary committee in the report dated June 2005. The answer to the second issue for determination is therefore that the suspension of the claimant on 11/4/2005 was unfair and unlawful.

As regards the answer to the 3rd issue, it is obvious from my analysis of the evidence while answering the second issue above that the respondent reinstated the claimant to work by her minutes dated 4/7/2005 (defence exhibit 2). It is highly probable that after the reinstatement the claimant was to be paid his accrued benefits contained in the inter memo dated 5/10/2005 but which was never paid to him because he was a stranger to the same until a defence was filed and served on him in the present case. Otherwise one who wonder why would the employer pay salaries for the period of suspension if at all after disciplinary hearing he is found guilty and dismissed.

The only rational conclusion would be that the employer found the employee innocent and lifted the suspension as it is the case herein and undertook to pay accrued dues. It follows from the foregoing therefore that the letter for dismissal dated 5/10/2005 is without any basis. It was malicious and made to unfairly punish the claimant for visiting the respondent to find out the position of his case after waiting for a long time after suspension. That the dismissal letter was never served on the claimant as no evidence was tendered to prove such service.

In any case even if the letter was written by the chairman of the respondent, the same was of no legal consequences because he could not alone overturn a decision of the committee that reinstated the claimant to work. The finding of the court with respect to the 3rd issue is that the claimant was reinstated to work on 4/7/2005 but was never formally notified of that decision until late 2008. That such reinstatement only occurred after a new team including the RW1 was elected into the management committee and implemented the decision made on 4/7/2005 by reinstating the claimant but at lower grade of Cleaner and field attendant. That after observing him for some time RW1 found his work performance very good and after consulting colleagues he gave him an appointment letter to go back to the position of club waiter.

The allegation that RW1 intended to appoint the claimant as a Cleaner and not Club Waiter is rejected. The correct position probably is that as recommended by the previous committee, the claimant was placed under close supervision in the football grounds and was found to be fit to go back to his job of waiter for which he had a lot of experience. As consequences of the foregoing finding, the court resolves the issue of statutory limitation because the claim becomes one continuous cause of action running to 2010 when the claimant discovered that he had indeed been reinstated to his office of club waiter.

The last issue to consider is whether the claimant is entitled to the relief sought. The respondent was aware of the consequences of unfair labour practices when reported to court at least going by the defence exhibit 2. The claimant's claim is in two fold. Firstly he claims for his accrued salary for the period of suspension from 1 /4/2005 to 27/2/2008 when he was reinstated which he has calculated to ksh644000. Secondly he claims the difference in salary between his salary as permanent employed waiter and his new salary after reinstatement at a lower grade form 27/2/2008 as a casual Cleaner until proper reinstatement to his position as Head Waiter.

The court has considered the two levels of pecuniary claim and is of the view that the second level must fail. This is because of the earlier finding that when the committee of respondent reinstated the claimant on 4/7/2005 it recommended for a demotion to the position of a field attendant otherwise called a Cleaner. That decision bound the claimant as it did to the subsequent committees of the respondent.

The claimant however will get the first level of the claim. The respondent will therefore pay to the claimant all the accrued salary for the period of the suspension. This period includes the period from 1

/4/2005 to 4/7/2005 when the decision to reinstate was made plus the period thereafter until 27/2/2008 when the claimant said on oath that he was reinstated verbally to work as a Cleaner on “casual basis”. I will not stretch the period to 1/8/2010 when a formal letter was given because the claimant has personally alleged that he resumed work from 27/2/2008.

The question that arises is what is the applicable salary to the claim for salary arrears. The claimant has produced payslip for 31/3/2005 reflecting a salary of ksh.12500 basic pay, ksh5400 house allowance and ksh.500 night shift allowance which total to ksh.18400. The respondent has disputed that figure and insisted that the claimant's salary was ksh.6900/ plus house allowance of ksh.2000 to total to ksh.8900/. I agree with the respondent.

As correctly submitted by the defence, the payslip dated 31/3/2005 is not consistent with the salary for other employees in the cadre of the claimant. The claimant will therefore get ksh.8900 per month for period of suspension running from 1.4.2005 to 31/1/2008 which is 33 months. I dismiss prayer for reinstatement and certificate of service because the claimant is already back to work as resolved by the committee on 4/7/2005 vide defence exhibit 2.

In summary therefore the court enters judgment for the claimant against the respondent for the following orders:

- a. **declaration that the suspension of the claimant from work on**
- b. **1.4.2005 was unlawful.**
- c. **The respondent to pay the claimant salary arrears of ksh.293,700/.**
- d. **The respondent will also pay costs and interest form the date of filing this suit.**

Orders accordingly.

**Signed dated and delivered this 6th September 2013**

**ONESMUS MAKAU**

**JUDGE**