



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 23/2013

(Before Hon. Justice Hellen Wasilwa on 12th November, 2013)

ARTHUR LIAKOPA ISOKONI CLAIMANT

-VERSUS-

THE BOARD OF GOVERNORS LIRHEMBE GIRLS SEC. SCHOOL RESPONDENTS

JUDGMENT

The claimant herein Arthur Liakopa Isokoni filed his memo of claim dated 25.8.2012 on the 21.1.2013 through the firm of M/s J. I. Khayumbi & Co. Advocates. The claimant's case is that he was employed by the respondents as a groundsman on 1.1.2001. On 27.11.2003, the claimant received a warning letter with alleged case of indiscipline and irregularities. On the 2nd August 2006, he was served with a dismissal letter. It is the claimant's contention that he reported this dismissal to his union Kenya Union of Domestic Hotels, Education and Allied Workers Union, KUDHEIHA. KUDHEIHA wrote a letter on his behalf dated 9.10.2006 to the Principal/Secretary BOG Lirhembe Girls High School ref No. KUDHEIHA.T.M/BS/06 seeking for a date to meet at their office to discuss the matter of the said claimant Arthur Liakopa's dismissal. The meeting did take place on 18.10.2006 at the respondents premises. There was a subsequent meeting on 30th March 2007 where KUDHEIHA established that the respondents did not follow the right channel of law to dismiss the claimant herein. The union further demanded that the respondents pay the claimant his terminal dues by 25.6.2007. By an agreement dated 21.10.2010 the respondents agreed to compensate the claimant in the sum of Kshs 98,568. The respondents however reneged on their promise and never paid the claimant anything. The claimant's contend that the respondents never gave him a chance to defend himself on the claims of indiscipline and irregularities as alleged vide the warning letter BOG/66/03 dated 27.11.2003. He avers that his dismissal was therefore unlawful and wrongful. Further the claimant contends that he was not paid his terminal dues, leave nor salary in lieu of notice for the period he worked for 8 years and was expected to work until retirement. He now seeks prayers as itemized in his statement of claim.

The respondents on the other hand filed their reply to the memo of claim on 17.4.2013 through the firm of M/s D. Akwala & Co. Advocates. The respondents case is that the termination of the claimant by the respondent was proper. They also content that the claimants claim is a non – starter, statute – barred, without substance and is frivolous, vexatious, scandalous, untenable and raises to cause of action. They content that the claimant was afforded ample opportunity to be heard but he deliberately failed and/or

refused to offer any explanation and the respondent was under no duty or obligation to compel the claimant to present his version of the case. They annexed a bundle of letters showing that the claimant was invited for disciplinary meetings and he failed to attend.

The respondents also contend that the claimant's dismissal was based on sound and concrete evidence of the claimant's acts of indiscipline, criminal acts and gross misconduct and he claimant having not bothered to respond to the numerous correspondence issued to him.

The respondents further deny that they ever met with the officials of KUDHEIHA and agreed to pay the claimant Kshs 98,568/= as alleged. The respondents also contend that this claim was filed after time, the cause of action having occurred on 1.8.2006 and the claim being filed on 14.3.2013 without seeking orders of court for grant of extension of time to file suit. They asked court to dismiss this claim accordingly.

I have considered evidence of the parties plus their respective submissions filed before this court. The issues for determination are:-

1. Whether this claim is statute – barred.
2. Whether the respondents followed the correct procedure before terminating the claimant's services.
3. Whether the claimant is entitled to any of the remedies he seeks.

In relation to the 1st issue, the claimant has informed court that he was dismissed vide a letter dated 2.8.2006. At the time the cause of action arose, the operative law on dismissals was the Trade Disputes Act Cap 234 Laws of Kenya (now repealed). Under S. 14(a) (b) of the said Act:-

“The court shall not take cognizance of any trade dispute or deal with any matter connected therewith:-

“Unless the trade dispute has been reported to the Minister and twenty – one days have elapsed since the date on which dispute was reported.”

Under S. 14 (a) (f):-

“Where the trade dispute solely concerns the dismissal or reinstatement of any employee, unless the court has received, in addition to the certificate required by paragraph (e) the written authority, of the Minister for that purpose”.

In the case of the claimant herein, after dismissal, he, did not pursue the case through the Minister as envisaged by law. In this case, the conciliation process through the Minister for Labour was mandatory and the claimant failed to pursue this path.

In any case, the respondents have submitted that the claimant is time barred by virtue of Section 4(1) of the Limitation of Actions Act which states and S. 90 of the Employment Act 2007 which states that:-

“Notwithstanding the provision of S. 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or contract of service in general shall lie or be instituted unless it is commenced within three years after the act, neglect or default complained of or in case of continuing injury or damage within 12 months next after the cessation thereof.”

It is the finding of this court however that S. 90 of the Employment Act 2007 does not apply as in this case, the cause of action arose before the Employment Act 2007 came into force and so will not apply retrospectively.

Despite that finding, it is apparent that the claimant took seven years to file his suit and without

leave of court and in any case without pursuing the case through the Labour Ministry as was the law then. The court should therefore proceed and decline to take cognizance of this dispute nor deal with it at all

That being the position of the court, I find that this suit is statute barred and this is adequate to dispose of this case without going into the merits or otherwise of the dismissal complained of. I hereby dismiss the claimant's case accordingly. Each party shall bear it own costs.

HELLEN WASILWA

JUDGE

12/11/2013

Appearances:-

M/s J. Khayumbi & Co. Advocates for claimant

M/s Akwala & Co. Advocates for respondents

CC. Sammy Wamache.