



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 163/2013

(FORMERLY NRB 2156 OF 2011)

(BEFORE HON. JUSTICE HELLEN WASILWA ON 6TH NOVEMBER, 2013)

GLADYS AMUKOYA WERE CLAIMANT

-VERSUS-

MUMIAS SUGAR COMPANY RESPONDENT

JUDGMENT

The claimant herein Gladys Amukoya Were filed her Statement of Claim on the 24th October, 2012 through the firm of Ashioya & Co. Advocates. The issue in dispute was unlawful and unfair termination of the claimant from employment by the respondent. It is the claimant's contention that she was employed by the respondent as a Security Services Administrator. That on 19.5.2009, she was suspended by the respondent from employment and later summarily dismissed on 8.6.2009 on allegation of a lost banker's cheque. The claimant avers that such allegation instituted by the respondent caused the arrest and eventual charge of the claimant on trumped up charges whereof the claimant was tried in Butere Criminal Case No. 438 of 2009 and was eventually acquitted.

The claimant avers that her suspension and subsequent dismissal were malicious, illegal, unfair and in breach of the respondent's terms and conditions for management staff as she was never accorded an opportunity to defend herself before any of the respondent's committees and/or organs as is so required. At the time of dismissal, the claimant was earning Ksh 87,266/= per month which amount she now claims for the 16 years she would ordinarily have been in the respondent's service till retirement at the stipulated age of 60 years.

It is the claimant's contention that she was unfairly terminated for reasons that:-

- (1) The respondent refused to accord her an opportunity to be heard before any committee or set organ of the respondent before termination.
- (2) The respondent failed and refused to heed to the claimant's plea and request to be accorded an opportunity to be heard.
- (3) The respondent terminated her services without giving proper reasons for such termination.
- (4) The respondent refused to give the claimant proper reasons for such termination.

The claimant further avers that she was charged at the SRM's Court at Butere vide Criminal Case

No. 438 of 2009 on trumped up charges but was duly acquitted. However, the respondent refused to reinstate her to her previous position nor compensate her for the illegal termination. She seeks prayers as itemized in her Memorandum of Claim.

The claimant gave oral evidence before this court. She informed court that she was a dedicated worker and had initially been employed in May 1988 as a purchasing clerk in Finance Department. She rose through the ranks to the position of investigation officer - grade of confidential staff. In December 2008, she even received a long service award after serving the company for 20 years – Exh No. 1.

She told court that on 19.5.2009, she received a suspension letter alleging that she had colluded with others and stolen a cheque and used it to steal sugar worth 7 million. The letter required her immediate defence within 48 hours. She made a defence on 27.5.2009 as she could not hand in her defence within 48 hours because as soon as she received her suspension letter, she was handed over to the police and taken to the police cells where she was held until 22.5.2009. She therefore put in her defence on 27.5.2009. She indicated that she was released on bail on 22.5.2009 as per her document at page 21. She indicated that she was acquitted under S. 215 of CPC as the court did not find merit in the charges. She attached the judgment as Exhibit. She put in her defence on the suspension on 27.5.2009 however on 8.6.2009 she received a letter summarily dismissing her (App 19). She appealed against this dismissal attaching her defence but her appeal was not allowed. After her acquittal in the criminal case, she wrote to the respondents attaching the judgment and demanding she be reinstated. The respondent never responded to her letter.

She has told court that she was not party to the allegations levelled against her. She also told court that she had sought for leave to be away from work for 4 days from 14.5.2009 to 20.5.2009. The reason was she was expected to go for treatment at Kikuyu Orthopedic Hospital where she went on 18.5.2009. She produced her hospital card as exhibit. She says she was unfairly treated and it appears her dismissal was pre-determined. She says she has filed another case at Busia Court concerning her illegal confinement where she has sought for damages. She had in the claim in Busia put in a claim for special loss which she withdrew as per her documents No. 24.

In cross examination she told court that the respondents were the complainants in the criminal case and some employees of the respondent gave evidence in the said case. She says her claim before this court is different from that in Busia.

The respondents filed their response to claim on 14.1.2013 through the firm of Prof. Tom Ojienda and Associates. They called no witnesses. In their response, it is the respondent's contention that the claimant's dismissal was not maliciously done, illegal or unfair as claimed by the claimant. They also aver that a fair opportunity was granted to the claimant to defend herself which opportunity she failed to utilize hence the subsequent termination. The respondent's further contend that the termination of the claimant's employment was reasonable, regular and lawful having been preceded by the claimant's failure to submit any defence accordingly when the opportunity was extended to her and subsequent investigations into the matter concluded that the claimant stole the company property that she was supposed to take care of.

Further, the respondent contend that the decision to terminate the claimant was arrived at after a careful consideration of the claimant's case against the investigation report annexed and in accordance with the provision of her employment contract, respondents rules and regulations for staff and that contrary to the claimant's assertions, she was given the reasons for her termination.

In relation to criminal charges levelled against the claimant, the respondent contends that they do not have the mandate to commence and conduct criminal cases in any court of law within the Republic of Kenya nor are prosecution officers, employees of the respondent thus the conviction or acquittal of the accused person does not rest with them. They submit that the suit is incompetent and should be struck out as there is a suit with a similar subject matter, same parties and same prayers pending hearing and determination before High Court of Kenya at Busia under HCC NO. 81 OF 2011. They deny receiving demand but admits the jurisdiction of this.

Having heard the parties herein and upon perusal of their respective memorandum and submissions, the issues for determination are as follows:-

1. Whether this claim is statute barred.
2. Whether the issues before court are *sub judice*.
3. Whether due process was followed before claimant was dismissed.
4. Whether the claimant is entitled to any remedies as prayed.

On the first issue, the claimant was indeed terminated by the respondent on 8.6.2009 as her letter produced before this court. Following this dismissal, the claimant was arraigned before the Butere SRM's Court and charged with as criminal offence as per the judgment produced before court and attached at page 22 of claimant's documents. The claimant was charged with others on 3 counts:-

1. Stealing contrary to Section 275 of the PC and
2. Uttering a document contrary to Section 353 of the PC.

The judgment in this case was delivered on 26.11.2010. Under S. 90 of Employment Act 2007:-

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

The question then is when the act complained of ceased. The claimant was indeed terminated on 8.6.2009 and going by S. 90 of Employment Act, then she should have filed her suit by 7.6.2012. She however filed her claim on 24.10.2012. Could she have filed when the criminal proceedings were pending in court. I believe not because as provided for under the last limb of S. 90 of Employment Act:-

“--- or in case of continuing injury or damage within twelve months next after the cessation thereof”.

It is my finding that the damage or injury was in motion during the pendency of the criminal case until judgment was delivered on 26.11.2010. The claimant was then expected to move and file her claim within 12 months as envisaged herein. This 12 months then ended on 27.11.2011. In either case, the claimant filed her case over the 3 years period or over one year after the cessation of the injury. It would have been prudent for her to come before court and seek leave of court to file the matter out of time which she failed to do. This contravenes the law – S. 90 of the Employment Act and the Limitation of Actions Act.

On this ground of Limitation alone, I find that the case of the claimant must fail. I do not have the discretion to extend this time unless having been requested before the commencement of the suit. It will therefore be futile for me to delve into the other issues of *sub judice* and due process as they cannot be cured unless the claim was filed within time allowed. For this reason therefore, I find the claimant's case cannot stand and I dismiss it accordingly. Each party will bear its own costs.

HELLEN WASILWA

JUDGE

6.11.2013

Appearances

Obara h/b Ashioya for claimant present

Mrs Onyango h/b Mr. Maura for respondent

CC. Wamache