



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE 811 OF 2011

JOSEPH OMWENGACLAIMANT

VS

KENYA REVENUE AUTHORITYRESPONDENT

JUDGEMENT

Issue in dispute;-unfair or wrongful termination

On the 3rd day of March 2011, the Claimant herein Joseph Omwenga filed this suit against the Respondent Kenya Revenue Authority seeking the following orders, that;-

1. The decision by the Respondent to terminate the Claimant from his employment be set aside forthwith.
2. The Claimant be reinstated to his previous employment with the Respondent forthwith and without loss of benefits, continuity of service, promotion and any other lawful entitlement or benefit due to him.
3. The Claimant to be paid his full salary and allowances during the period of interdiction and dismissal.
4. In the alternative and without prejudice to the above, the Claimant be paid in full all his terminal dues as follows;-
 - i) Salary arrears and allowances of kshs 47639 per month to january 2011 all totalling Kshs 5,716,680/=.
 - ii) Compensation for twelve months of Kshs.47,639/= totalling Ksh.571,668/=.
5. The Respondent be ordered to compensate the Claimant for unlawful dismissal at the equivalent of twelve months salary of Kshs.47,639/= per moth all totalling Kshs. 571, 668/=.
6. Any other orders as the court deems fit.
7. Costs.
8. Interest on these amounts.

The parties having filed their pleadings agreed not to call any witnesses but to file their written

submissions. The court has therefore proceeded to write this judgement based on the parties pleadings and annexures plus their submissions. The Claimant has in his statement of claim stated that he was employed by the Respondent on the 1st day of July 1996 as an Accounts Assistant. He was subsequently confirmed in employment on the 2nd of May 1997 and promoted to the position of Accountant I with effect from 15th October 1998.

He says that he took up his appointment with a lot of dedication until the 13.8.2002 when he was suspended from duty vide a letter dated the same day. The claimant states that he responded to this letter accordingly vide his letter dated 2.9.2002 stating that proper investigations were never conducted. The Claimant states that he was unlawfully arrested and suspended from the services of the Respondent. Before the Claimant's suspension he had been arrested and arraigned before the Chief Magistrates Court in Mombasa with other persons and charged with various offences. The Claimant contends that the said criminal charges were stage managed and poorly investigated as he was not involved in any wrong doings. He was subsequently acquitted under Section 210 of the Penal Code of all the charges levelled against him. The Claimant petitioned the Respondent for reinstatement but the respondent refused to comply. The claimant states that he diligently performed his duties with the Respondent which saw him promoted to the position of Accountant and that he had no disciplinary record or warnings of any kind until on or about 18th June 2003 when he received a letter of dismissal on allegations that he was involved in fraudulent activities. The Claimant avers that since he went through a criminal trial and was acquitted, the Respondent's action of dismissing him on the same facts was unfair and exposed him to double jeopardy. The Claimant avers that the Respondent's action was contrary to the Principles of natural justice since he was not given a chance to defend himself before such dismissal. He seeks orders of compensation accordingly.

When the Respondent was served with a memorandum of claim, they filed their Statement of Response and denied the claimant's contention. The Respondent's position is that the Claimant was an Accountant I in charge of the Respondent's customs department cash office at Kilindini Mombasa prior to his dismissal. That the claimant was suspended after he was arrested with other employees of the Respondent on charges of fraudulent utilisation of cheques paid to the Respondent by various oil companies. The cheques by oil companies were used to clear other goods as a result of which government revenue was lost. The Respondent further states that the investigations conducted by the Respondent's internal audit department revealed that the Claimant who was the accountant in charge failed to ensure that the cheques presented for payment of duties were properly accounted for. That the claimant was also negligent in that he failed to inspect the work of each cashier and reconcile the amount of revenue reported in the daily cash abstracts as expected.

The Respondent says that the Claimant was arrested after reports were made that the Government was losing revenue through diversion of cheques belonging to oil companies. The Respondent denies that he was the one responsible for the prosecution of the criminal case. The respondent further denies that the investigations were stage managed and poorly investigated. The Respondent stated that the Claimant's services were terminated procedurally and in accordance with the Respondent's Code of Conduct and was not determined on the basis of the criminal case. That Respondent denies that the rules of natural justice were breached. That the Claimant was accorded a chance to be heard and in his response the Claimant did not give a satisfactory reason as to why his dismissal should not be revoked and as such he was not entitled to reinstatement. The Respondents had also in their pleadings pleaded limitation which matter they intended to raise as a preliminary objection. It appears the Respondents shelved this issue and did not argue their application.

In their submissions, the Claimant first raised the issue of the suit being time barred. They stated that this is a matter on which would best have been resolved by the court upon hearing both parties and thereafter exercising its judicial discretion in one way or another. The Claimants position is that the time started to run with effect from 25th November 2008 when the Respondent communicated its decision to disallow the Claimant's appeal.

The Claimant further submitted that given the fact that the Claimant was acquitted of the charges leveled against him, there was no evidence against him which would warrant his dismissal from duty. That

further the Claimant was not given a chance to be heard and therefore the conclusion by the Respondent that was negligent and facilitated the fraud by cashiers under him was arrived at erroneously. The Claimant submits further that the Respondent breached section 41 of the Employment Act by not giving the Claimant an opportunity to be heard orally and explaining to him reasons for the intended dismissal. The Claimant asked court to order for his reinstatement to the previous employment. The claimant cited *Industrial Cause no 740 of 2011, Elyna Sifuna Vs Kenya Broadcasting Corporation* and *Industrial Court Cause No 346(N) of 2009, Kenya union of Sugar Plantation Allied Workers Union VS South Nyanza Sugar Company Limited*.

The Respondent on the other hand submitted that this claim is time barred by dint of section 4 of Cap 22 which states that an action in contract may not be brought after six years from the time the cause of action arose. That this action arose on 18th June 2003 when the Respondent communicated to the Claimant his dismissal and the suit was filed on 30th May 2011 and therefore it is time barred. That the Claimant did not seek leave of court to file the suit and therefore the entire case must flop.

On the substantive issue, the Respondent submitted that the Claimant was dismissed for lack of integrity or dishonesty by employee as provided for in the Respondent's Code of Conduct. That he was found to be negligent, lacked accountability and due care of an employee leading to loss of government revenue. The Respondent urged court to examine the said Code of Conduct, a copy of which the Claimant received and signed as a commitment to abide by with his letter of appointment. The Respondent also asked court to consider the Respondent's Internal Audit Department Investigation report which revealed that the Claimant as the Accountant in Charge failed to ensure that the cheques presented for payment of duties were properly accounted for. That the Claimant as the accountant in charge further failed to inspect the work of each cashier and reconcile the amount of revenue reported in the daily cash abstracts as a result of which revenue was lost.

The Respondent further submitted that the Respondent was entitled to summarily dismiss the claimant on account of gross misconduct as provided for under section 44(4) of the Employment Act. The fact of the claimant being acquitted in the criminal case notwithstanding, the Respondents submitted that the code of conduct section 3.6.1 at page 12 still entitled the Respondent to dismiss the claimant for misconduct. They further submitted that they did not cause the prosecution of the Claimant in the criminal case and in any case, the dismissal was not based on the outcome of the criminal case. The Respondent have asked this court to find that the claimant's prayer for reinstatement is unconstitutional in the circumstances and to find that his dismissal was not irregular nor in breach of the tenets of natural justice.

Having examined the evidence and submissions of the parties herein, this court has to decide on the following issues;

1. Whether this claim is time barred
2. If the claim is not time barred, whether the Claimant was wrongfully or unfairly terminated?
3. If the Claimant was wrongfully terminated, which remedies are available for him?

In answering the first issue, the court is aware that though the Respondent had wished to argue this matter on a preliminary point, they did not so and only raised it in their submissions. A matter of limitation is so crucial and should always be argued at the onset because it may in some cases cause the court to determine a matter at that point and save court a lot of useful time. Section 4(1) of Cap 22 provides as follows:-

“the following actions may not be brought after the end of six years from the date on which the cause of action arose- (a) actions founded on contract”

Under section 26 and 27 of Cap 22, the limitation period can be extended by court based on fraud or mistake of the defendant or his agent and in cases of negligence where there is ignorance of material facts. In both cases however, leave of court to file suit out of time must be sought.

In the instant case, the Claimant was suspended from work through a letter of suspension dated 13th August 2002. By this letter, the Respondent alleges that it had come to their notice that the Claimant had received a cheque of Kshs.35,353,397/= from Caltex Oil (K) Ltd but allowed the same cheque to be used to clear seized goods belonging to another company. The Respondent informed the Claimant through this letter that they were contemplating dismissing him from duty for lack of integrity or dishonesty as provided for in the Respondent's code of conduct (section 3.5.1 of the KRA Code of Conduct). The Respondent also informed the Claimant that he was also in breach of section 3.5.14 of the same Code as the Respondent had lost substantial amounts of money due to the Claimant's act of negligence or want of care. The Claimant was vide this letter given an opportunity to show cause why he should not be dismissed from duty on grounds of gross misconduct. He was asked to give a reply within fourteen (14) days. The Claimant replied to this letter vide his letter dated 2nd September 2002 and received by the Respondent on the 9th September 2002 of course beyond two weeks from the time the reply was supposed to have been given. This notwithstanding, the Respondents did send another letter to the Claimant dated 18th June 2003 dismissing him from his services. This is annexed as annexure 3a. He was also given a corresponding leave to file another appeal challenging his dismissal within 30 days. The Claimant seems to have filed an appeal on 11th July 2003 as indicated in his letter dated 3rd August 2007 marked as exhibit 4a. A copy of this letter was however not submitted to court as part of the annexures. Nothing seems to have happened in between again until the Claimant later wrote two other letters appealing over the dismissal dated 3rd August 2007 and 10th November 2008 respectively. The Respondent finally did write to the Claimant on the 25th November 2008 stating that the appeal was disallowed as communicated in their letter dated 3rd November 2008.

Given this scenario, when did the Claimant exhaust his quest to be reinstated back to work by the Respondents? Given that he was informed that the appeal had been dismissed on the 25th November 2008, this is the time time started running. The Claimant filed this case on 24th May 2011. In matters of contract, the Claimant ought to have filed this claim within six years from the time time started running. In this case, the six years lapsed on the 25th November 2011 and the Claimant filed within that period. This matter is therefore not statute barred by dint of limitation. That answers my first question.

On the second question, given that the suit is not time barred, was the Claimant wrongfully or unfairly dismissed? Under Section 45 of the Employment Act 2007, no employer shall terminate the employment of an employee unfairly. Under the same section, employment termination is considered unfair if the employer fails to prove;-

(a) that the reason for the termination was valid

(b) that the reason of the termination is a fair reason

- i. related to the employees conduct, capacity and compatibility
- ii. based on the operational requirements of the employer and
- iii. that the employment was terminated in accordance with fair procedures.

In deciding whether it was fair and just to terminate the employment of an employee, for purposes of section 45, the court shall consider;-

1. The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and handling of any appeal against the decision.
2. The conduct and capability of the employee up to the time of termination.
3. The extent to which the employer has complied with any statutory requirements connected with the termination with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41.

4. The previous practice of the employer in dealing with the type of circumstances which led to the termination, and
5. The existence of any previous warning letters issued to the employee.

In considering the circumstances under which the Claimant herein was dismissed, the reasons given was the loss of government revenue for which the Claimant was responsible as accountant in charge. An audit done by the Respondent at its report page 7 stated that;-

“Mr. Omwenga was the supervisor and accountant in charge of the Kilindini main office and Warehouse cash office. It was his duty to ensure that all revenue collected were correctly receipted, accounted for appropriately and banked intact. To ensure this, Mr. Omwenga was expected to inspect the work of each cashier, reconcile the amount of revenue reported to the daily cash abstracts, agree the receipts issued to the amount posted in the books of account, reconfirm the accuracy of the analysis of revenue between cheques and cash, revenue and cheques collected visa viz the banking pay in slips prepared by each cashier, ensure timely banking and preparations of periodic reports to regional office for consolidation with revenue from other sources. Arising from his duties, it is clear that Mr. Omwenga failed in his duty by not ensuring that the receipts issued to Mr. Wanjohi were properly accounted for. He also allowed the use of a main office cheque in the warehouse and to credit accounts of importers other than Caltex Oil (K) Ltd. Through his reconciliation of cheques with the pay in slips, Mr. Omwenga was supposed to detect the use of Caltex Oil (K) Ltd cheque by Bureau Clearing Agents. Consequently, his negligence facilitated the defrauding of revenue”

Section 10 of the Employment Act 2007 states what a contract of employment should contain. It should state certain pertinent issues amongst them the job description of the employee. I have looked at the letter of offer of employment of the Claimant which is listed among the Respondent’s list of documents. I consider this to be the contract of employment in the absence of any other to the contrary. No job description of the Claimant is stated. The promotion letter is also vague and only states that he will be informed of his new assignment by his head of department. Whether the Claimant was actually informed of his new assignments by his head of department remains a matter of evidence which this court was not informed of. When the Claimant now states in his evidence that he performed his duties dutiful and diligently, a contrary position can only be ascertained by linking his performance or otherwise to his contract letter.

Concerning the criminal charges that were preferred against the Claimant, he was acquitted and in any case, the Respondents stated that they had no connection with the dismissal of the Claimant. From the proceedings of the criminal trial, the court was of the view that there was no case made against the Claimant and he was acquitted under section 210 of the penal code. For this reason then this court cannot rely on the criminal trial to infer any bad conduct on the part of the Claimant.

Another consideration by this court is the procedure adopted by the Respondent in dismissing the Claimant. He was initially asked to respond to accusations against him which he responded to in writing. However, the Claimant was never accorded an opportunity to be heard before a panel where he was to present his case. He was thus denied this basic and important right to be heard. Art 50 of the Constitution states that

“Every person has a right to have any dispute that can be resolved by an application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”

The importance of observing this right was expounded by the Court of Appeal in *Civil Appeal no 266 of 1966 in Kenya National Examination Council Vs Republic exparte Gathenji and others*. The court observed that the right to be heard is a right which must be observed before any adverse orders are given which will affect the rights of any individual. The Claimant herein was actually condemned unheard by the Respondent who made their findings based on an audit report where the input of the Claimant was not solicited.

Given the above scenario, this court concludes that the Claimant was unfairly dismissed. This answers my second question.

I now come to my last question. What remedies are available to the Claimant in view of the unfair dismissal? Under section 49 of the Employment Act various remedies are envisaged for unfair dismissal. Under section 12 of the Industrial Court Act 2011 other remedies that can be given by court are also listed and these include an award for damages, and an order for reinstatement.

The Claimant had sought orders for reinstatement among others. The Claimant has been out of the employment of the Respondent for close to a decade. A remedy for reinstatement may be way out of the norm considering this length of period. He may not fit in the office he formally occupied ten years ago. The practicality of being reinstated will not be easily realized. In any case the Claimant is an able accountant professionally and can easily get employment in any other firm or concern. I therefore decline to order for reinstatement. The Claimant was also a contributor to his employer's pension scheme. This evidenced from his pay slip which shows contributions to the said scheme. As provided for under section 35(6) of the Employment Act, he is not entitled to any service pay.

I accordingly make orders as follows;-

1. The dismissal of the Claimant by the Respondent is set aside and is converted into a normal termination.
2. The Claimant be paid one month's salary in lieu of notice Kshs.47,638/=.
3. Damages for wrongful dismissal calculated at Kshs.47, 639/= x 12 = Kshs.571, 668/=.
4. Damages for loss of employment at an equivalent of six months pay Kshs.47,639/= x 6 = Kshs.285,834/=
5. The Claimant be provided with a certificate of service.
6. The claimant is entitled to costs of this suit

Total award Kshs.905,140/=.

The Claimant is free to execute this judgment as a decree within 30 days if not paid within that period.

These are the orders of this court.

Dated, signed and delivered in open court this **18** day of **September 2012**

HELLEN WASILWA
JUDGE