



Njoroge v Kenya Railways Corporation & another (Cause E719 of 2020) [2024] KEELRC 1927 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1927 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E719 OF 2020
B ONGAYA, J
JULY 26, 2024**

BETWEEN

LUCY ANNE WANJIRU NJOROGE CLAIMANT

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

THE MANAGING DIRECTOR, KENYA RAILWAYS CORPORATION 2ND RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated 05.11.2020 through Ochieng' K. & Associates Advocates praying for judgment against the respondent for:
 - a. A declaration that the termination of the Claimant's employment was unlawful.
 - b. An order for reinstatement of the Claimant to the position of Head of Department - General Manager Supply Chain Management.
 - c. In the alternative or in addition to the prayers (a) and (b) above, an award of a sum of Kshs.26,902,206.12 as pleaded and particularized in paragraph 36 with interest thereon at court rates.
 - d. Certificate of Service.
 - e. An order for the 1st respondent to pay the claimant severance pay and notice period for the employment contract dated 9th November 2010 up to 28th February 2018.
 - f. Costs of these proceedings.
 - g. Any other relief that this Honourable Court may deem fit and just to grant.



2. The claimant averred that she was employed by the 1st respondent as a Procurement Manager (Head of Procurement Department reporting to the Managing Director) with effect from 15th November 2010 and in accordance with the terms and conditions set out in her letter of employment dated 9th November 2010. The claimant's employment was subsequently confirmed on 16th May 2011 and her initial monthly remuneration was Kshs.220,000.00 inclusive of house allowance and commuter allowance but exclusive of a monthly telephone allowance of Kshs.11,000.00.
3. The Claimant's case was that by a letter dated 27th February 2018, the 1st Respondent's Managing Director (hereinafter "the MD") informed her that following the reorganization of the 1st Respondent's organizational structure, its Board had offered her the position of Procurement Manager on a five (5) year contract with effect from 1st March 2018. She averred that this position as offered to her was at Railway Grade 3 (RG3) reporting to the Head of Department - General Manager, Supply Chain Management at Railway Grade 2 (RG2). That the position offered to her was a demotion because a position had been created above her, which would be the one to report to the MD and she would no longer be the Head of Department. The claimant contended that since it was not made clear to her what to make of her previous contract dated 9th November 2010, she formally sought for numerous clarifications from the then MD, but her queries were never answered.
4. The claimant asserted that she followed advice to take time away from the office to think about the new offer, which she did with effect from 7th to 29th March 2018 but when she returned to the office, she found that the Head of Department approval rights had been taken away from her. She noted that on 4th May 2018, she accepted the new position albeit reluctantly but the transition was not effected due to a halt in the 1st respondent's restructuring process. The claimant averred that she thus continued reporting to the MD as Head of Department since the position of General Manager (Supply Chain Department), created above hers, was vacant. That whereas she was also given approval rights as the Head of Department, it was without a formal letter, which the then MD attributed to the pending court case relating to the 1st respondent's restructuring.
5. It was the claimant's averment that in purported compliance with the Presidential Proclamation of 1st June 2018 on fresh vetting of public officers heading accounting and procurement units, the 1st respondent sent her on 30 days compulsory leave through a letter dated 5th June 2018, with effect from 6th June 2018. The letter further instructed her to hand over with immediate effect the duties of Head of Department to the Supply Chain Manager - Compliance & Reporting. According to the claimant, she had been sent on compulsory leave as the substantive Head of Procurement of the 1st Respondent and not as acting head of the said Department and that the Presidential Proclamation never required acting heads of department to proceed on leave.
6. The claimant further averred that after she was vetted on 24th June 2018, communication on her clearance from the Office of the President took longer than the initial 30 days. She asserted that following the suspension of the then MD and the appointment of the 2nd respondent as the acting MD sometime in August 2018, the 1st respondent advertised the position of Head of Department (General Manager Supply Chain Department) on 17th May 2019, with a closing date of 31st May 2019. She noted that though the said position was the same one under which she was sent on compulsory leave, she took no action and decided to await the outcome of the vetting process.
7. It was the claimant's case that when she was finally cleared by the Presidency, she sought a meeting with the 2nd respondent for a way forward considering the clearance and advertisement of her position happened at the same time. Moreover, she and the 2nd respondent had a previous strained working



relationshipnd respondent as the Research and Planning Manager was Project Manager and on which matter she had blown the whistle. She pleaded that the 2nd respondent had never forgiven her for whistleblowing. The claimant averred that on 24th June 2019, she met the 2nd respondent who confirmed having received the claimant's letter of clearance following the vetting process. That the 2nd respondent thereafter informed her that he would formally be communicating to her on resumption of duties, assured her that he had no issues with her resuming her duties, and, further advised her to apply for the advertised position of Head of Department (General Manager Supply Chain Department). That the 2nd respondent also asked her to submit an appeal to the 1st respondent's Board for the application to be admitted. Subsequently, she made the application on 1st July 2019 and the same was accepted by the 1st respondent's Board and communicated to her by a memo dated 18th July 2019.

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8. The Claimant noted that the formal communication on her clearance and reinstatement upon the vetting only came on 9th July 2019 yet she was informed that her reinstatement was communicated to the 2nd respondent by a letter dated 13th June 2019. That in effect, the 2nd respondent took a whole month to communicate to her about the reinstatement and did not explain the reasons for the delay.
9. It was the claimant's case that she reported to work on 15th July 2019 and her approval rights as Head of Department were restored on 17th July 2019. Furthermore, by memo dated 23rd July 2019, the 2nd respondent instructed the Supply Chain Manager - Compliance & Reporting to hand to her the duties of Head of Department. However, the 2nd respondent also purported to reassign her duties of General Manager Supply Chain Management in an acting capacity yet she had been cleared for the position of Head of Department. She noted that in doing so, the 2nd respondent made reference to her letter of appointment dated 27th February 2018 and ignored the letter that sent her on compulsory leave on 5th June 2018 as the Head of Procurement.
10. The claimant further averred that on 30th August 2019, the 2nd respondent accused her of an alleged failure to facilitate timely supply of various materials for the MV Uhuru Project in Kisumu Port, which project she found ongoing when she took back the office of Head of Department. She responded to the accusation through a Memo dated 3rd September 2019 and stated that she believed the same was the plan of the 2nd respondent to portray her as a poor performer. She went on to narrate other incidents she encountered with the 2nd respondent leading to him interdicting her through a letter dated 15th October 2019 sent to her through electronic mail on 16th October 2019 at 17:46 hours. The claimant noted that she was interdicted from duty for alleged "major offences and gross misconduct" and she appealed against the same to the 1st respondent's Chairman through a letter dated 24th October 2019.
11. It was the claimant's case that subsequently, the 1st respondent purported to substitute her interdiction from duty with a suspension from duty by a letter dated 25th October 2019, for "unacceptable general conduct and work performance that warranted dismissal on account of gross misconduct. She was consequently required to stay away from office to allegedly allow investigations to be conducted. She averred that she was thereafter invited to a belated disciplinary hearing through a letter dated 1st November 2019 that raised fresh charges against her. That her request for more time to prepare her defence and to source for a suitable expert of her own choice to accompany her to the disciplinary hearing was denied, forcing her to inform the 1st respondent of her inability to attend the disciplinary hearing. The claimant averred that on 12th November 2019, the respondents unilaterally, unlawfully and capriciously terminated her contract of employment without giving her a reasonable opportunity, or at all, to present her defence in answer to the allegations levelled against her. She then conducted the exit interview on 14th November 2019 in the office of the 1st respondent's General Manager.



12. Regarding the termination of her employment, the claimant stated that she was never given a fair or reasonable opportunity to a hearing. Furthermore, that due process was never followed in the purported interdiction from duty, suspension and finally termination of her employment. She pleaded that the 2nd respondent concocted baseless accusations against her so as to get rid of her for being a whistle-blower in a previous occurrence. She stated that none of her rights under the employment laws or the 1st respondent's HR Policy and Procedures were observed and that she had also been issued with a certificate of service.
13. The respondents' statement of response is dated 26.02.2021 and filed through Waweru Gatonye & Co. Advocates. They prayed that the claimant's claim be dismissed with costs to the respondents as it lacked merit.
14. The respondents' case was that the claimant was given an opportunity for the position of General Manager, Supply Chain Management through a suitability interview with the Board. That she however failed to perform to the satisfaction of the Board in the interview and the Board resolved that she be retained in the position of Procurement Manager but with improved remuneration, being a raise in salary from Kshs.220,000/= to Kshs.279,946/=. The respondents argued that the issue of demotion did not therefore arise and has no factual or legal basis. They maintained that at no time was the claimant advised that she would be appointed as the General Manager.
15. The 2nd respondent stated that the claimant's allegations that there was a strained relationship between her and the 2nd respondent flowing from an alleged whistleblowing action by the Claimant concerning a procurement matter, are unsubstantiated and unsupported. The 2nd respondent contended that for the matter regarding the rehabilitation of MV Uhuru, the memo issued to her was only meant to seek her explanation as the acting Head of Department to effect that she had not facilitated sourcing of some components for the said rehabilitation.
16. The respondents denied that the 2nd respondent interdicted the claimant from duty as alleged and averred that the Corporation followed due process as provided for in its HR Policy. The 1st respondent clarified that the claimant's suspension was not based on her appeal but was a resolution of the Board at its special meeting held on 25th October 2019. They further denied that the interdiction letter brought fresh charges against the claimant and disputed that she was given very short notice of the disciplinary process.
17. The respondent averred that the claimant has not availed herself for the Certificate of Service, which she alleges the 1st respondent has refused, neglected, or refused to issue her with. In response to her dues as claimed, the 1st respondent stated that the computations of the claimant's terminal dues was done correctly and paid to her. The Respondents denied the computations as enumerated in the claim, averring that the computations are inapplicable as the claimant based the amounts on grade RG2, which is a position she never attained. Without prejudice to its foregoing averments, the respondents stated that they lawfully, fairly, justly, legally, and procedurally terminated the employment of the Claimant.
18. The claimant's reply to the respondents' response was dated 11th May 2021 and reiterated her averments as pleaded in the memorandum of claim.
19. The parties tendered their evidence before the Court and thereafter filed their respective submissions. The claimant testified to support her case and the respondent's witness (RW) was Asava Kadima, the Human Resource Manager. The Court has considered the material on record and returns as follows:



- a. The parties were in a contract of service. The respondent from November 2010 to November 2019 employed the claimant. The claimant was employed in 2010 as a procurement manager.
 - b. The claimant's terms of service were translated to 5-years' term contract by letter dated 27.02.2018 and she accepted the terms on 04.05.2018. In the translated and accepted terms of service she was employed at Railway Group 3 (RG-3) as Procurement Manager reporting to the General Manager. While alleging a demotion, the Court returns that there was no demotion because the claimant voluntarily signed the contract which binds the parties. She was to report to a General Manager but by her own evidence she continued to report to the Managing Director. Further, while she performed the roles of the Head of Procurement, there is no established justification that she was mistreated as she worked per the contract she had agreed to sign. The Court returns that as submitted for the respondents there was no basis for the claimant to allege demotion or to claim payment at the higher rank of RG2. The claims and prayers in that regard will collapse. She was placed on compulsory leave as Head of Procurement. That was factually true as she performed the duties as such and upon the contract she had signed for RG-3. She is bound accordingly and the respondent's submissions upheld in that regard.
 - c. The procedure the respondent adopted during the disciplinary process was unfair. The claimant was entitled to attend with an expert per clause 11.4.1 of the staff manual. Instead of permitting her to attend with an expert of her choice, the respondent imposed that she attends with a co-employee. She appealed but the appeal was declined. Accordingly, the claimant was unable to attend the hearing. The Court finds that the procedure was unfair and without the disciplinary hearing, it cannot be found that the termination was based upon genuine and fair reasons per sections 43 and 45 of the *Employment Act, 2007*. The termination is found to have been unfair in procedure and substance. The submissions made for the claimant are upheld in that regard. RW confirmed that the staff manual provided for an expert of her own choice.
 - d. The Court has considered the factors to consider in awarding compensation for unfair termination. The Court finds that the claimant contributed to the unfair termination when she failed to attend the hearing before the board and at which she would have raised objections about insufficiency of time to respond, need for more information, and the grievances about attendance with an expert. In that consideration, she is awarded 6 months' salary in compensation at Kshs.295,946.00 (per the gross monthly pay stated in payment of final dues dated 15.01.2020) making Kshs.1,775,676.00 payable less PAYE. In awarding the 6 months' salary, the Court has as well considered the unexpired tenure of the fixed term contract. The same applies to the unjustified claim of payment for years pending mandatory retirement age and which would not apply in view of the fixed tenure of five years.
 - e. The parties recorded a consent on issuance of the certificate of service. The respondent's submission that there was no redundancy to justify severance payment is upheld. The claims on payments based on claims of RG-2 have all been found unjustified per submissions made for the respondent. Similarly, payment for unexpired contractual period are declined as there is no established disablement attributable to the respondents that has been shown to deny the claimant chance to engage gainfully after the termination.
 - f. The claimant has substantially succeeded and is awarded costs of the suit.
- In conclusion, judgment is hereby entered for the claimant against the 1st respondent for:
1. Payment of Kshs.1,775,676.00 payable less PAYE by 01.10.2024 failing interest to be payable thereon at court rates from today until full payment.



2. The respondent to pay costs of the suit.
3. Respondents to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 26TH JULY 2024.**

BYRAM ONGAYA

PRINCIPAL JUDGE

