



**Kitonyi v Nationals Cereals Produce Board (Cause E202 of 2022)  
[2025] KEELRC 1523 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1523 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E202 OF 2022**

**JW KELI, J  
MAY 23, 2025**

**BETWEEN**

**ROSEMARY KITONYI ..... CLAIMANT**

**AND**

**NATIONALS CEREALS PRODUCE BOARD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant aggrieved by failure of the employer to reinstate her to work following acquittal in a criminal case against her, filed her Statement of claim herein dated 23rd March 2022 seeking prayers that: -
  - a) An order compelling the Respondent herein to reinstate the Claimant to her employment.
  - b) An order compelling the Respondent herein to pay to the Claimant a total amount of Ksh.6,157,425/= as particularized in paragraph 14, 15 and 16 of this Claim.
  - c) Interest on (b) above at court rates from the date the amounts accrued until payment in full.
  - d) Costs of these proceedings and interest thereon at court rates from the date of judgment until payment in full.
2. The statement of claim was supported by the Witness statement of the claimant herein, the Claimant's List and Bundle of documents dated 23rd March 2022 and the Claimant's Supplementary list and bundle of documents dated 2<sup>nd</sup> September 2024.
3. The Respondent herein did not file a response to the Claim herein despite being given several opportunities to do so by this Honourable court. On 12th June 2024, this Honourable court issued directions that the Respondent herein file its response and supporting documents within Thirty (30) days from the said date, failure to which the Cause will proceed as an undefended Claim. The respondent still failed to file any response.



4. The claimant's case proceeded as an undefended cause. The claimant's case was heard on the 18<sup>th</sup> December 2024. During the hearing, the Claimant adopted her witness statement filed herein as her evidence in chief and produced her supporting documents listed in her list and bundle of documents and Supplementary list and bundle of documents under the supporting affidavit dated 23<sup>rd</sup> March 2022. Counsel for the Respondent, Ms. Muthoni h/b Ngugi cross-examined the claimant.
5. Ms. Muthoni informed the court that the respondent was not calling any witness and the respondent's case was marked as closed.
6. The court issued directions for filing of written submissions. Only the claimant filed.

#### **Claimant's case in brief:-**

7. The genesis of the Claim herein is the Suspension letter issued by the Respondent to the claimant on the 13<sup>th</sup> day of October 2009 which suspended the Claimant from employment. In the said letter, the respondent at Paragraph 5 stated that the suspension takes immediate effect until further notice. In her evidence, the Claimant stated that she responded to the said suspension letter as required but did not receive any further communication from the Respondent and instead the respondent caused her to be arrested and charged in court in Nairobi Criminal Case number 1784 of 2021. The Respondent stopped paying the Claimant's salary immediately after she was issued with the suspension letter, and she has never been called to attend any disciplinary hearing. The Claimant stated that she was acquitted against all charges in the Criminal case on 17<sup>th</sup> September 2021, after which she sought audience with the Respondent to have her reinstated and assigned duties but the Respondent failed to do so. The Respondent further ignored a letter from the Claimant's Advocates to have her reinstated and paid her salary arrears.

#### **DETERMINATION**

8. Issues for determination
  1. Whether the Claimant has proven her case against the Respondent.
  2. Whether the Claimant is entitled to the prayers sought in the Claim herein.

#### **Whether the Claimant has proven her case against the Respondent.**

#### **Claimant's submissions**

9. That the Claimant has proved her Case against the Respondent. The Respondent did not file a response to the Claim or documents controverting the Claimant's Case. During cross-examination of the Claimant, the Claimant was able to respond satisfactorily to all questions put to her during cross examination. The claimant urged the court to find that the Claimant has proved her case against the Respondent in absence of any evidence by the Respondent contrary to the evidence by the Claimant herein.

#### **Decision**

10. What was the case against the respondent ? The claimant's case was of reinstatement and the failure of the respondent to reinstate her upon acquittal in Nairobi criminal case no. 1784 of 2009. Justice Ocharo in a ruling dated 8<sup>th</sup> April 2024 in the instant suit held that the cause of action as regards the claim for reinstatement of the claimant arose on the 17<sup>th</sup> September 2021 when the claimant brought the fact of her acquittal of the criminal case to the attention of respondent who refused or neglected



to reinstate her. The Judge further held that if unjustified, the payment of salary during suspension amounted to continuing injury and was rightfully sought as per the decision of the Court of Appeal in *German School Society v Helga Ohany* as consolidated with *Helga Ohany v German School society* (2023)e KLR. The ruling was not appealed on. The claimant's case that she was not reinstated after the acquittal of the criminal charges was unchallenged.

**Whether the Claimant is entitled to the prayers sought in the Claim herein.**

11. The claimant sought the following reliefs:-
  - a) An order compelling the Respondent herein to reinstate the Claimant to her employment.
  - b) An order compelling the Respondent herein to pay to the Claimant a total amount of Ksh.6,157,425/= as particularized in paragraph 14, 15 and 16 of this Claim.
  - c) Interest on (b) above at court rates from the date the amounts accrued until payment in full.
  - d) Costs of these proceedings and interest thereon at court rates from the date of judgment until payment in full.
12. On the order compelling the Respondent herein to reinstate the Claimant to her employment. Reinstatement to employment is a special remedy under section 49 of the Employment Act to wit the court ought to consider the practicability of recommending reinstatement or re-engagement. Section 49 (4)(d) of the *Employment Act* obliges the court to consider the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;(section 49(4)(c and d). The court noted that the trial court in the criminal case noted that the claimant was the last one on the chain to sign. The fact is, she still executed the documents leading to the fraud. The burden of proof in criminal cases is that of beyond reasonable doubt and hence not applicable to employment cases where the burden is that of balance of probability and a reasonable employer and as stated in section 43 of the *Employment Act*. The court taking into account the lapse of the 3 years since the cause of action arose being 17<sup>th</sup> September 2021 as held by Justice Ocharo and the offence the claimant was charged with finds that reinstatement was not available to the claimant. The court in lieu of reinstatement and for failure of the respondent to institute procedural process towards termination of employment issues to the claimant payment of 1 month notice.
13. On the issue of salary during suspension, the court took judicial notice that the respondent is a parastatal under the public service hence the *Public Service Act* was applicable. Section 71 of the *Act* states:- '71. Suspension (1) Where a public officer has been charged with a serious criminal offence, an authorized officer shall suspend the public officer from the exercise of the functions of the public office pending consideration of the public officer's case under this Act. (2) An authorized officer may suspend a public officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, the authorised officer determines that the public officer ought to be dismissed. (3) A public officer who is suspended shall receive a half basic salary and full house allowance but other benefits shall be withheld by the authorised officer: Provided that an officer on suspension shall be paid medical allowance or medical insurance premium remitted whichever is the case. (4) Where a public officer has been suspended but is not dismissed or otherwise punished under this Act, any salary, allowances or any other benefit withheld under this section shall be restored to the public officer upon termination of such proceedings. (5) Where a public officer has been suspended and the public officer is not dismissed but a penalty under this Act is imposed, any salary, allowances or any other benefit withheld under this section shall not be restored upon termination of such proceedings: Provided that upon termination of such proceedings, the officer shall be reinstated to the public office held at the commencement of the proceedings or demoted in accordance with the prevailing terms and



conditions of service applicable to the office and with effect from the date of the decision to terminate the proceedings. (6) A public officer who is suspended shall not leave the duty station without the permission of the authorized officer or of any public officer who is empowered to give such permission on behalf of the authorized officer”.(emphasis given)

14. The court, taking into consideration the provisions of section 71 of the *Public Service Act, supra*, then finds that the claimant is entitled to entire salary from date of suspension to 17<sup>th</sup> September 2021 as held by Justice Ocharo. Thus Kshs. 6,157,425 less salary excess of 18<sup>th</sup> September 2021 to 28<sup>th</sup> February 2022 (224532.50) thus award of salary for period of suspension awarded at Kshs. 5,932,892.50.

### **Conclusion**

15. The claim was merited. The court held the order for reinstatement was not practical taking into account the breakdown of trust and time the claimant has been away from work that is 2009.

Judgment is entered for the claimant against the respondent as follows:-

- A. Notice pay of I month salary Kshs. 41,325
  - B. Salary arrears for the entire period of suspension till 17<sup>th</sup> September 2021 kshs. 5,932,892.50
  - C. Interest at court rate from date of judgment until payment in full
  - D. Costs of the suit.
16. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Claimant : Wabale

Respondent:-Absent

