



**Oyagi v Nairobi City County (Employment and Labour Relations Cause E654 of 2021) [2024] KEELRC 736 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 736 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E654 OF 2021**

**MN NDUMA, J**

**APRIL 4, 2024**

**BETWEEN**

**VIOLET AVOGA OYAGI ..... CLAIMANT**

**AND**

**NAIROBI CITY COUNTY ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 10/8/2021 seeking the following reliefs:-
  - a. Reinstatement of the claimant to her employment (ante) as at 23<sup>rd</sup> April 2018 with all the perks and privileges thereon.
  - b. General damages
  - c. Aggravated damages
  - d. Costs of the suit
2. The claimant (CW1) testified that she was employed by the respondent in 2007 in the position of Legal Officer. She rose to the position of Acting Director – Legal.
3. On 23<sup>rd</sup> April 2018 the respondent interdicted the claimant vide a letter dated 23/4/2018. That she responded to the notice to show cause by a letter dated 8/5/2018. That she was not accorded a hearing.
4. The claimant was charged in a criminal case no. 84 of 2018 at Milimani Law Courts. The claimant was placed on half salary during the period of interdiction.
5. That for three (3) years, she was surviving on a paltry salary of less than Kshs. 610 per month.
6. That the claimant was acquitted of the criminal charges under section 210 of the penal code.



7. That the claimant wrote several demand letters in December 2018 and March, May and July 2019 to be reinstated with full remuneration which the respondent ignored until the suit was filed.
8. That the claim be allowed and the claimant be granted the reliefs sought including:-
  - i. Kshs. 1,298,000/= in arrear salary for 36 months during suspension.
  - ii. Lost yearly increment for 36 months in the sum of Kshs. 90,000/=
  - iii. Non-practising allowance for 36 months Kshs. 180,000/=.
  - iv. Commuter allowance for 36 months Kshs. 108,000 and
  - v. Leave allowance for 4 years in the sum of Kshs. 280,000/=.
9. That the interdiction and prosecution were based on malice on the part of the respondent which has caused the claimant damage, pain, loss of income and stagnated career progression.
10. That the claimant suffered mental anguish; public ridicule and financial distress.
11. That the claimant seeks general and aggravated damages as a result thereof.
12. The respondent filed a statement of response to the claim dated 27/9/2021 in which the claim is denied in total and puts the claimant to strict proof thereof. That the suit was filed prematurely since the respondent was in the process of considering reinstatement of the claimant and payment of arrear remuneration.
13. The respondent called one Victor Juma (RW1) who adopted his witness statement dated 15/7/2022 and produced documents marked exhibits '1' to '6'. RW1 testified that the claimant was employed as a Senior Legal Officer and Acting Director, Legal and Litigation. That on 23/4/2018, the claimant was interdicted upon being charged in a criminal case.
14. That the claimant was acquitted on 4/12/2020. That after the acquittal, the respondent engaged in a process vide the respondent's Human Resource Advisory Committee which was to make a recommendation to the county, public service Board on the matter of reinstatement of the claimant.
15. That the Board recommended her reinstatement and payment. That the claimant being a legal person is aware of that process in terms of the Human Resource and Discipline Manual of the respondent. That the respondent communicated to the claimant to await the process.
16. That the claimant was reinstated in October 2021 before a ruling was made by the court on the matter. That the claimant was paid all withheld salary in the sum of Kshs. 2,127,824 which amount included additional Kshs. 171,000/=. The claimant had sought to be paid Kshs. 1,950,000/=.
17. That the claimant was in September 2017, sent on compulsory leave and was recalled in October 2017. That the claimant had filed another case being petition no. 9 of 2017. The matter was heard and concluded and she was paid damages in the sum of Kshs. 2 million per decree dated April 2019 before court.
18. That the claimant was paid practicing allowance of Kshs. 5,000/= every month since date of engagement. That the claimant was paid salary for the period of interdiction in the sum of Kshs. 741,000/= and upon deduction of loans taken by her, she was left with a balance of Kshs. 610,000/=.
19. That the claimant was not prosecuted maliciously. The Director of Public Prosecutions who has not been sued conducted investigations and recommended prosecution of the claimant. The claimant was promoted to Principal Counsel job Group P and retained as Acting Director and her salary was



- increased. That the claimant's career has not stagnated. That it is not true that the respondent is in the habit of interdicting people. That she has not been interdicted again. The claimant is not entitled to any damages since no harm has been caused to her by the respondent.
20. RW1 withstood close, cross-examination by Mr. Njugi, Advocate for the claimant. RW1 reiterated the evidence adduced in chief. RW1 said due process was followed prior to interdiction. That she was given a show cause letter to which she had responded to.
  21. That the suit was filed in August 2021 and the decision to reinstate the claimant was conveyed in October 2020 after the acquittal and due process was followed.
  22. That suspension was lifted by a letter dated 4/10/2021 and the claimant was acquitted on 13/7/2021.
  23. That the respondent received various demand letters from the claimant for reinstatement and payment of arrear remuneration.
  24. RW1 said the process of reinstatement commenced before the suit was filed. RW1 said that the court ordered payment of Kshs. 1,956,700/= to the claimant on 16/12/2021 and the payment was done vide several payslips.
  25. RW1 denied that the claimant could have applied for promotion while she faced criminal charges. That gradual payment of arrears was done to avoid excessive payment of taxes by the claimant.
  26. RW1 prayed that the suit be dismissed with costs.

### **Determination**

27. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:-
  - i. Whether the claimant upon reinstatement has been paid full arrear remuneration due to her.
  - ii. Whether the claimant has proved a case of malicious prosecution against the respondent.
  - iii. Whether the claimant is entitled to the reliefs sought.
28. In the ruling dated 10<sup>th</sup> December 2021 the court already found that the continued interdiction of the claimant upon acquittal by the magistrate court in a ruling dated 4<sup>th</sup> December 2020, was irregular. In that ruling, the court ordered reinstatement of the claimant to her job and payment of arrear salary and allowances at the time in the sum of Kshs. 1,956,700/= less statutory deductions.
29. The court is satisfied that the respondent obeyed the court orders by reinstating the claimant to her job and had already paid arrear salary and allowances due and owing then.
30. Upon considering the evidence before court, it is however clear to the court that the respondent had interdicted the claimant by a letter dated 23<sup>rd</sup> April 2018 pending investigations for dereliction of duty, collusion with external lawyers and compromising county litigation by giving external lawyers instructions to enter consents without the authority of Peter Kariuki, County Secretary.
31. In the same letter, the claimant was required to show cause why she should not be dismissed from the County public service within 14 days of the letter.
32. The claimant on 8<sup>th</sup> May 2018 responded to the said notice to show cause giving explanation why she should not remain in interdiction or be dismissed from service because she had done no wrong.



33. On the same date, being 8/5/2018, the claimant was charged by the Director of Public Prosecutions with criminal offences arising from the said complaint by the respondent in Milimani court criminal case no. 829 of 2018.
34. It is the claimant's case that the charges were instigated by the respondent whereas the respondent testified that the Director of Public Prosecutions independently preferred charges against the claimant upon investigating the matter after receipt of the complaint by the respondent.
35. It is important to note that the claimant did not name the Director of Public Prosecutions as a respondent in this case. A complainant who alleges that they have been maliciously prosecuted cannot sustain a suit against the complainant without joining the office of the Director of Public Prosecutions as a party.
36. For this reason alone, the claim for damages arising from malicious prosecution cannot be sustained against the respondent in the absence of the Director of Public Prosecutions. For the aforesaid reasons, that claim fails at the outset.
37. The claimant seeks damages for the unlawful interdiction. The evidence before court is that the respondent followed the Human Resource and Discipline Manual to interdict the claimant on half pay pending investigations.
38. The respondent upon receipt of the response by the claimant on 8/5/2018, did not proceed with the hearing to determine the disciplinary allegations against the claimant until the interdiction was enjoined by the court in its ruling dated 16/2/2021 which was after a period of three (3) years and 8 months from the date of interdiction.
39. In the said ruling the court found that the claimant had established a prima facie case against the respondent that the prolonged interdiction was unlawful and unfair.
40. During the hearing of the case on the merits, the claimant adduced evidence that she was innocent of the alleged disciplinary charges. That the respondent ought to have given her a hearing within a reasonable time and reinstate her back to work with full remuneration. That the respondent failed in this regard to the loss and detriment of the claimant. That she suffered immense financial hardship during the period of prolonged unjustified interdiction; she suffered pain and psychological trauma. That she suffered personal and public shame and ridicule and is entitled to an award of damages.
41. The respondent did not offer any plausible explanation why it did not hear and determine the disciplinary case for such a prolonged period.
42. The respondent had hidden under the umbrella of the criminal charges that had been instituted by the Director of Public Prosecutions on 8/5/2021. It is trite law that a disciplinary process at work commenced before or after criminal charges have been instituted by the Republic does not have to await the conclusion of that criminal case.
43. In the present case, the interdiction was not premised on the institution of the criminal case. It was done much earlier and so was an independent process from the criminal case and ought to have been heard and concluded within a reasonable time.
44. The respondent treated the claimant most unfairly by keeping her under interdiction for a period of over three years on half pay and without hearing. The interdiction of the claimant for that prolonged period was unlawful, unfair and abuse of her right to a fair hearing and fair administrative action.
45. The claimant as a result suffered loss and damage as described in the statement of claim.



46. In *Fredrick Saunder Amolo v Principal Namaga Mixed Day Secondary School and 2 others* [2014] eKLR, it was held:-

'15' Therefore before an interdiction can be found to be valid the same must be based on fair reasons and must be implemented pursuant to fair procedure."

47. The criteria for fair interdiction is three dimensional and constitutes justifiable reasons to believe the employee engaged in seniors misconduct; There is an objective and justifiable reason to keep the employee away from work to preserve the integrity of the investigations, and to keep the work station safe and removed from interference; and the employee must be given opportunity to be heard.

48. Similarly, awaiting a criminal process to conclude especially when such process is visited with inordinate delay as in the present matter does not suffice. There is no requirement for an employer to await such a process while an employee, unfairly remains in limbo.

49. Accordingly, the prolonged interdiction of the claimant though may have been justified initially was unlawful and unfair and had subjected the claimant to hardship, injustice and financial depravity. The conduct of the respondent is an aggravating factor in considering the damages the claimant is entitled to for the wrongful and unfair interdiction.

50. The court has taken into account the fact that the claimant was reinstated back to work with full back pay by the court which amounts have now been fully paid.

51. The suffering aforesaid for a period of three years was however not fully remedied by the reprieve afforded to the claimant by the court. The respondent lacked good faith in the way it treated the claimant.

52. In *Margaret Anyuna Katunga v Attorney General* [2018] eKLR the court awarded the complainant Kshs. 4,000,000/= in aggravated damages where as in this case the respondent had ignored the claimant's plea for hearing and reinstatement.

53. In the present case, a wait of over three years is on the upper side and seriously aggravated the suffering by the claimant.

54. The court awards the claimant general damages in the sum of Kshs. Five (5) million for the wrong the respondent visited upon her for a period of three years and eight months while she endured unlawful interdiction.

55. The court is satisfied that the payments sought by the claimant under paragraph 6 of the statement of claim in the sum of Kshs. 1,956,700/= have been fully satisfied. The court does not award the claim any further special or aggravated damages.

56. In the final analysis, judgment is entered in favour of the claimant against the respondent in the sum of Kshs. 5,000,000/= being general damages for unlawful and prolonged interdiction.

57. For the avoidance of doubt, the claim in respect of malicious prosecution is not sustained against the respondent for lack of merit.

58. The award is payable with interest at court rates from date of judgment till payment in full.

59. The respondent to meet the costs of the suit.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL, 2024.**

**MATHEWS NDERI NDUMA**



## **JUDGE**

Appearance:

Mr. Ngugi for claimant

Ms. Karanja for respondent

Mr. Kemboi Court Assistant

