



REPUBLIC OF KENYA



**Kiiru v Ministry of Lands & Settlement & another (Cause 1560 of 2018)  
[2024] KEELRC 2824 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2824 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1560 OF 2018  
B ONGAYA, J  
NOVEMBER 15, 2024**

**BETWEEN**

**NANCY WAMBUI KIIRU ..... CLAIMANT**

**AND**

**MINISTRY OF LANDS & SETTLEMENT ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant filed the Further Amended Plaintiff dated 14.12.2023 through J.A. Guserwa & Company Advocates, praying for Judgment to be entered against the respondents for:
  - A. Special damages as detailed in paragraph 5A of the further amended plaintiff.
  - B. General damages for unlawful termination of employment and for psychological and mental distress.
  - C. Damages for pecuniary losses.
  - D. Damages for constitutional violations.
  - E. Costs of this suit.
  - F. Interest on (A), (B), (C), (D) and (E) above at Court rates.
  - G. Damages for injury to reputation.
  - H. Any further or other relief as this Honourable Court deems just and equitable in the circumstances.
2. The plaintiff pleaded that she should have retired on 05.12.2021 upon attaining the retirement age of 60 years and further claimed as follows in paragraph 5A of the further amended plaintiff:



- a. Kshs. 148, 739.00 being unpaid employment dues for the period from 14.10.1997 to 04.05.1999 when she was wrongfully interdicted.
  - b. Loss of earnings for the period 05.05.1999 to the date of retirement being 05.12.2021 to be computed and supplied to the Court at the hearing.
  - c. Retirement benefits as provided for in the [Pensions Act](#) to be computed and paid per the applicable law.
  - d. The plaintiff claimed for damages.
3. The claimant averred that on or about 16.11.1999, the 1<sup>st</sup> respondent unlawfully and unfairly terminated her services with effect from 05.05.1999. She claimed that the dismissal was malicious and wrongful as particularised hereunder:
- a. The Assistant Director of Survey, Mapping Department, Mr. Mathenge, had been making sexual advances on the claimant and when she refused to yield to his demands, he suspended her from regular employment on 14.10.1997.
  - b. The said Mr. Mathenge acted ultra vires the Code of Ethics and Regulations for Civil Servants, which vested in the Permanent Secretary of the 1<sup>st</sup> respondent (hereinafter “the PS”) the sole power to suspend and/or interdict an officer.
  - c. The said Mr. Mathenge presented false reports to the PS alleging inter alia that the claimant had been hostile to fellow staff members, habitually absent, constantly late and had failed to sign the attendance register.
  - d. The claimant was suspended for nine (9) months with half salary before her matter was finalized, contrary to the Code of Regulations for Civil Servants, which provided for a time limit of six (6) months.
  - e. In her letter dated 08.04.1999, the claimant highlighted to the PS the sexual harassment she had gone through but no investigative action was taken before she was suspended from work.
  - f. The claimant was issued with verbal instructions to submit an apology over her complaint but was not able to comply with the said instructions hence her termination from employment.
  - g. By a letter dated 16.11.1999, the claimant was dismissed for gross misconduct without being informed and given the particulars of the alleged misconduct and neither was she accorded a fair hearing nor at all.
4. The claimant’s case was that the 1<sup>st</sup> respondent is vicariously liable for the acts of its officers as the said actions were done in the course of their duties. She has consequently suffered injury to her reputation, emotional and psychological distress, loss, and damage, for which she claims general damages. She has further lost her earnings and deprived of her benefits, as she was a permanent and pensionable employee that would have retired on 05.12.2021 upon attaining the age of 60 years. She therefore sought special damages as follows:
- i. Kshs. 148,739 being unpaid employment dues for the period 14.10.1997 to 04.05.1999 when the claimant was wrongfully interdicted.
  - ii. Loss of earnings for the period 05.05.1999 to date of retirement being 05.12.2021, to be computed and supplied to the Court at the hearing.



- iii. Retirement benefits as provided for in the *Pensions Act*, to be computed and paid as per the applicable law.
5. The claimant further asserted in her witness statement dated 14.12.2023 as follows:
- i. She was first appointed to the Ministry on 28.12.1981 as a Cartographer Trainee and finished her training on 29.11.1985, upon which she was engaged as a Cartographer III on contract terms of service. After working for the government for six (6) years on contractual terms, she was engaged on permanent and pensionable terms with effect from 29.11.1991.
  - ii. Mr. Mathenge suspended her from work on or about 14.10.1997 for “recent indiscipline attitude”, without giving particulars on the allegation. She complained about the issue and thereafter the PS interdicted her from work through a letter dated 21.11.1997 and backdated the interdiction to 14.10.1997, as Mr. Mathenge had no power to suspend or interdict.
  - iii. The charges levelled against her reopened the charges of absenteeism made against her in 1993, yet the charge had been resolved. She explained to the PS that she had been unwell and was then reinstated back to work on or about 14.07.1998 and cleared of all charges.
  - iv. Upon being reinstated, she was unable to immediately report to work as she was severely sick with hypertension and when her condition improved, she wrote to the then PS explaining her absence. However, when she returned to work and reported to the then Assistant Director in charge of Mapping, she was informed she could not resume work. She thereafter received a letter from the PS dated 22.10.1998 indicating that her whereabouts were unknown yet she had written to the PS.
  - v. She was thereafter charged with being absent from duty without permission. She responded to the charges, was reinstated back to work on 10.03.1999 and reported back to work. Furthermore, her salary that had been stopped was reinstated effective 14.10.1997 after she complained.
  - vi. Despite reinstatement of her salary, the same was never paid to her and her file was withdrawn from the salary department on 05.05.1999.
  - vii. The PS later suspended her from work for declining to apologize to Mr. Mathenge. On 22.07.1999, the PS issued her with a show cause letter on why she should not be dismissed for making unsubstantiated claims against senior officers of the Ministry and for disobeying lawful instructions. The charges of 1993 and 1997 were also reopened despite having been resolved.
  - viii. She responded to the Notice to Show Cause through her letter dated 09.08.1999 and thereafter received a dismissal letter dated 16.11.1999 on grounds of misconduct effective 05.05.1999.
  - ix. She made a first appeal against the dismissal to the Public Service Commission (PSC) but was unsuccessful in the appeal as indicated on the letter dated 07.04.2000. She then made a second appeal in which she withdrew her letter dated 08.04.1999, which letter was the source of her dismissal after she complained against Mr. Mathenge. The second appeal was also unsuccessful as indicated in the letter dated 16.11.2000 and the case was closed.
  - x. On 12.03.2001, FIDA Kenya wrote to the PS requesting them to pay her salary for the period 14.10.1997 to 04.05.1999 but the request was rejected.
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents’ Reply to the Further Amended Plaintiff dated 20.02.2024 and the 1<sup>st</sup> respondent’s witness statement made by Evans Kimutai Chelanga on 16.02.2024, were both filed



- through the Hon. Attorney General. The respondents denied the prayers sought by the claimant, asserting that her own actions and misconduct including absenteeism, lateness and failure to report to her new work place upon transfer informed her dismissal from service. They prayed that the suit herein be dismissed with costs to the respondents.
7. The respondents' case was that the claimant was found reading a newspaper during working hours upon which her supervisor (Mr. Maina) cautioned her on 02.05.1991. She repeated the act the following day and refused to respond when she was questioned, prompting Mr. Maina to confiscate the magazine. Without any respect for her supervisor, the claimant followed Mr. Maina to his office and tried to snatch the magazine in the presence of other clients in the office thus causing a lot of embarrassment to her supervisor.
  8. It was the respondents' case that the claimant was called upon to show cause why disciplinary action should not be initiated against her for habitually reporting late to work and spending most working hours reading newspaper. She was consequently suspended and her salary stopped with immediate effect. The claimant acknowledged instances of lateness in reporting for duty stating the same had been caused by scarcity of public transport and that she had reformed.
  9. The respondents pleaded that through a letter dated 20.09.1993, the PS issued the claimant with a final warning that lifted her suspension. Consequently, her salary increment was deferred for one (1) year and the days she was absent without permission were computed and recovered from her salary.
  10. The respondents averred that the claimant's behaviour caused her to be recommended for transfer for not discharging her duties accordingly and having poor relationships with other staff. She was later deployed in October 1997 and cautioned to co-operate with senior officers and colleagues. However, her behaviour led to another suspension on account of absenteeism from duty without permission between 12.08.1997 to 15.09.1997. She was subsequently granted 21 days to show cause why further action should not be taken against her for the absenteeism and for sneaking from the office on 09.09.1997. By operation of the said show cause letter, the Ministry interdicted her with instruction that she was entitled to one-half of her salary and was not to leave her duty station without permission of the Assistant Director Surveys.
  11. The respondents further averred that the claimant got possession of the register, signed and made copies of the same without authority. That on 21.08.1997, she signed to falsify her presence only to later cancel it after realizing it was contradicting her earlier alibi of being on sick leave. The Director of Surveys thereafter recommended to the PS that the claimant be warned against making false entries in the attendance register and be given a last chance as regard absenteeism and reporting to work late without permission. Consequently, the PS lifted the claimant's interdiction and told to desist from being late and absent.
  12. The respondents further pleaded that the claimant's continued habit of absconding led to another Notice to Show Cause Letter from the PS requiring her to submit her defence within 21 days. The PS then transferred her to the Headquarters of Surveys for close supervision. However, the PS noted that the claimant had not acknowledged the transfer hence they could not re-instate her in the payroll. She was warned and a disciplinary letter was addressed to her; giving her 14 days to submit her acknowledgement letter. The claimant responded to the transfer letter accusing a senior principal officer for frustrating her since her salary was yet to be reinstated and thus sought leave of absence on humanitarian grounds.
  13. It was the respondents' further case that the PS suspended the claimant after she failed to submit an apology over the allegations made in her letter dated 08.04.1999. She was issued with a show cause letter based on a series of misconduct as indicated in the Show Cause Letter dated 22.07.1999 from



the PS. The claimant was thereafter dismissed from service by the PSC because of gross misconduct and all her privileges and retirement benefits were forfeited. The PSC later considered and disallowed her appeal on the premise that there were no convincing grounds and she was informed of her right to a second appeal within one year. The PSC yet again considered but disallowed the claimant's second appeal and closed her case.

14. The claimant, with the leave of Court, filed a supplementary witness statement dated 29.04.2024 in which she stated as follows:
  - i. That on 03.05.202 her boss, Mr. Maina, the Ag. Chief Cartographic Assistant assaulted her in his office but when she reported the matter to the administrative officer in the department of survey, no action was taken against him. She was suspended from work two years later on 18.06.1993 based on alleged record of lateness lodged against her from when she reported Mr. Maina on 06.05.1991 up to June 1993 when she was suspended. Following her defence before the PS, she was reinstated back to work on 20.09.1993 and consequently, all the minutes she was late were added and the total time lost recovered from her salary.
  - ii. That the letter dated 18.05.1998 purportedly written by the Director of Surveys to the PS is a forgery as it is written on a plain paper without a letterhead and it bears no signature.
15. Parties tendered their evidence before the Court and thereafter filed their respective submissions.
16. To answer the 1<sup>st</sup> issue, parties are not in dispute that they were in a contract of service and which was terminated by the letter of dismissal from the service dated 16.11.1999. The letter stated that the Public Service Commission had decided that the plaintiff was dismissed from the service with effect from 05.05.1999 because of gross misconduct and that the plaintiff thereby forfeited all her privileges and retirement benefits. The plaintiff's appeal was dated 17.12.1999 and disallowed by the Commission by the letter dated 07.04.2000. her second appeal was dated 26.09.2000. The plaintiff in her second appeal stated that the allegations in the letter to show cause related to indiscipline in 1993 and then 1997 had been handled and concluded by her Permanent Secretary. Further, she stated thus, "Lastly Sir, I wish to withdraw my letter to the Permanent Secretary dated 8<sup>th</sup> April 1999. Kindly note that I am apologetic for the misdeeds I am deemed to have done." The Commission's decision disallowing the second appeal and closing the case was conveyed to the plaintiff by the letter dated 16.11.2000. It is noteworthy that the plaintiff's letter dated 08.04.1999 was addressed to the Permanent Secretary and was to the following effect:
  - a. Acknowledged the Permanent Secretary's letter dated 10.03.1999 and thanking the Permanent Secretary for the kind reinstatement back to work.
  - b. Consequential to the reinstatement, the payment of her salary had not resumed.
  - c. The Senior Principal Personnel Officer one Mr. Kagwe who was to implement the reinstatement decision by processing the payment appeared to use his office to deny the plaintiff her justice.
  - d. One Mr. Mathenge had mistreated her by interdicting her upon no grounds and delayed to forward her defence to the Permanent Secretary. The interdiction had run for 9 months instead of the prescribed maximum six months.
  - e. Further, she stated that her situation and Mr. Mathenge had not been good and in the following terms, "Lastly, Sir, it's with deep regard/respect to your office that I feel compelled to present my view that women should be protected from men who after leaving their wives in the country side, they impose themselves on other women against their will. The situation



becomes more dangerous when such men use their positions and influence to destroy reluctant victims.”

It is that letter of 08.04.1999 that the plaintiff withdrew and was apologetic about in her second appeal to the Commission.

17. The 2<sup>nd</sup> issue is whether the plaintiff's dismissal was lawful, fair and with due procedure. The Court returns that looking at the plaintiff's response to the show cause letter, the first and second appeals, the only procedural issue is that the interdiction had run for 9 months being way beyond the prescribed 9 months. However, the plaintiff also confirmed that the interdiction was with respect to levelled allegations that the Permanent Secretary had considered and concluded. Indeed, on 10.03.1999 the Permanent Secretary wrote strongly warned the plaintiff against the shortcomings observed against her namely hostility and irate behaviours towards fellow staff members; smear campaign against the names of senior officers of the Ministry; habitual absenteeism; lateness for duty; sneaking from work and failure to sign the attendance register. She was to refrain from such behaviour and to improve failing, disciplinary action for her dismissal from the public service would issue. The letter dated 05.05.1999 suspended the plaintiff from work upon the reason that she had failed to submit her apology with respect to her allegations in the letter dated 08.04.1999 and as verbally directed by the Permanent Secretary to apologise. The suspension was effective 08.04.1999. It appears to the Court that the main reason for the suspension and the subsequent disciplinary proceedings was the allegation by the claimant against Mr. Mathenge with respect to, "...men who after leaving their wives in the country side, they impose themselves on other women against their will." The Court notes and finds that all allegations in the letter on discipline and being the letter to show cause dated 22.07.1999 were with respect of matters already decided with finality by the Permanent Secretary and the only new allegation that was current (coming after the Permanent Secretary's warning letter of 10.03.1999) was stated in the letter to show cause thus, "(iii) Similarly, you were directed by the Authorised Officer to withdraw your unsubstantiated allegations against senior officers in the Ministry which you had made in your letter of 08.04.99 but you did not do so." The Court finds that the plaintiff was not accorded due procedure to the extent that the letter to show cause required her, for the second chance, to answer to allegations for which decision had already been made previously and punishment issued by way of warnings or the plaintiff found to have exculpated. Such amounted to double jeopardy and it was unfair. In particular, the allegations were about absenteeism, lateness or failure to sign attendance register in 1991, 1992, 1993, falsification of attendance register on 01.09.1999 (meaning 1997) to 09.09.1997, sneaking from duty on 09.09.1997, defying lawful instructions on 06.05.1991, refusing to stop reading a newspaper during working hours on 02.09.1991 and 03.09.1991, and being warned on 10.03.1999. All those were already determined matters as previously levelled against the plaintiff.
18. Was it inappropriate for the plaintiff to raise her grievances about Mr. Mathenge as was done in her letter of 08.04.1999? Was the plaintiff's grievance unjustified or not well grounded? The letter to show cause and the suspension letter show that the Permanent Secretary received the plaintiff's grievance. Instead of investigating it, the plaintiff was verbally directed to apologise. There appears to be no basis for asking the claimant to apologise because no investigation or inquiry appears to have taken place to show that the grievance was unfounded as baseless. The Court upholds the plaintiff's case and testimony that the only reason she was dismissed was that she reported a grievance against her supervisor about her sexual harassment. In any event, the dismissal letter failed to narrate the particulars of gross misconduct that justified the dismissal. There is no rebuttal evidence on the part of the respondents against the plaintiff's testimony during cross-examination thus, "I allege harassment by my immediate supervisor being sexual harassment. The form of harassment is stated. After telling my PS about harassment, I was asked to apologise. I refused. I was then dismissed. The supervisor



who harassed me was Mr. Mathenge, Assistant Director Mapping. We disagreed on personal issues not related to work. He used the disagreements to oppress me by presenting false accusations. He suspended me from work. He was not entitled to suspend me. I never reported to police.” Further, the plaintiff’s testimony during re-examination has not been unsettled thus, “I see page R68. The details of gross misconduct not given. I reported sexual harassment to Permanent Secretary. I was suspended for making the report. It was not investigated.”

19. The respondents’ witness (RW) was Evans Kimutai Chelanga, Assistant Director of Human Resources. He testified and confirmed as follows:
  - a. The letter of dismissal stated the reason of dismissal as gross misconduct and without particulars thereof.
  - b. Prior to May 1999, the plaintiff must have fully explained all the allegations as had previously levelled in her record of service and the previous allegations could not have a bearing on her subsequent dismissal.
  - c. He had not seen minutes of the disciplinary proceedings against the plaintiff so that she was not heard at all or given chance to explain herself. He saw no record of meetings held for the plaintiff to explain herself.
  - d. He did not know the parties involved in the sexual harassment in issue.
  - e. The respondents currently have a sexual harassment policy but he could not tell the status of the policy at the time of plaintiff’s dismissal. While the plaintiff reported sexual harassment, he did not know steps taken in that regard.
20. In view of the evidence and findings, the Court returns that the plaintiff’s dismissal was unfair, unlawful and based upon her making of a well-founded grievance against her supervisor alleging sexual advances or harassment. The Court has also found that being desperate for a livelihood and need to continue in employment and career she had heavily invested in by undertaking due training, the claimant belatedly purported to withdraw her complaint or grievance in her second appeal but the Commission disallowed the appeal. The Court returns that it was an unfair outcome free from justice.
21. The 3<sup>rd</sup> issue is on remedies. For the respondents, the only submission is that the dismissal was not unfair or unlawful and no remedy is due. The Court has already found otherwise. For the plaintiff it is submitted that the plaintiff had served for over 19 years with a clean and exemplary record, she was willing to continue in employment, but she was maliciously dismissed. It was also submitted that the plaintiff was denied an opportunity to work up to her retirement age upon flimsy and unproved grounds. The Court is alert that as at the plaintiff’s dismissal the *Employment Act* was not in force. Claims based upon compensation for unfair termination under section 12 of the *Employment Act*, 2007 would not be available. Submissions based on constitutional violations as prayed for have been urged but no specific constitutional violations have been shown to be violated in the instant case.
22. In the instant case and evaluating the case as against the prevailing law as at the dismissal, the dismissal amounted to breach of contract and the best the Court can do is to place the plaintiff in a position she would be had she not been unfairly or unlawfully dismissed. The Court considers that, but for the dismissal, she would have continued to work, honourably retired on 05.12.2021, and thereafter-earned pension – but having not retired, it would be impossible to award and compute pension under the *Pensions Act*. The plaintiff has since attained the mandatory retirement age of 60 years. The earnings that would have been earned have been computed at Kshs. 7, 462, 866.00 and the respondents have not objected to that computation at all. The lump sum pension is computed at Kshs. 1, 527, 750 with a monthly pension of Kshs.19, 097.00. The Court considers that since the plaintiff did not retire, it



has not been shown how she could access and have pension computed or paid per the *Pensions Act*. Payment of the pension therefore appears unavailable. In the special circumstances of the case, a back payment as though she had worked up to retirement age, should be a fair balance of justice for the parties in this unique case that has taken a very long time in the corridors of justice. The Court has considered the margins of success and the respondents to pay costs of the suit.

In conclusion, judgment is hereby entered for the plaintiff against the respondents for:

1. Payment of Kshs. 7, 462, 866.00 by 01.08.2025 failing interest to run thereon at Court rates from the date of this judgment until the date of full payment.
2. The payment of costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15<sup>TH</sup> NOVEMBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

