



**M’ikiugu v Principal Secretary Ministry of National Treasury & Planning & another
(Cause E1214 of 2018) [2023] KEELRC 2035 (KLR) (8 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2035 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1214 OF 2018
AN MWAURE, J
AUGUST 8, 2023**

BETWEEN

PHYLLIS KAJUJU M’IKIUGU CLAIMANT

AND

**PRINCIPAL SECRETARY MINISTRY OF NATIONAL TREASURY &
PLANNING 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1 Claimant vide her Amended Memorandum of Claim dated September 21, 2018 avers that the Respondent breached her right to human dignity and fair labour practices contrary to the provisions of Article 28 and 40 of the [Constitution of Kenya](#).

The Claimant prays for Judgement against the Respondent for the following orders:-

- i. Full payment of the Claimant’s salary from March 2017 to the date of determination of this suit at Kshs 71,000/- per month;
- ii. Compensation for violation of right to human dignity, right to freedom from psychological torture and right to fair labour practices
- iii. The Claimant’s reinstatement to her position with full remuneration and privilege as of February 2016
- iv. In the alternative of (iii) above
 - a. Notice pay Kshs 71,000/-



- b. Compensation for unlawful termination (71,000*12 months) Kshs 852,000/-
- v. Certificate of Service
- vi. Interest on i, ii, iii and iv above
- vii. Costs of the cause
- viii. Any other reliefs this honorable court may deem fit.

The Claimant's Case

2 The Claimant avers that she is a permanent and pensionable employee of the 1st Respondent having been employed on April 22, 1992 as a Shorthand Typist IIA which role she served diligently.

3 The Claimant avers that she was promoted to the position of a Personal Secretary II Job Group J on May 10, 2004 vide a promotion letter dated May 31, 2004. Her job group was upgraded to Job Group K vide a letter dated July 31, 2006 and subsequently promoted to Senior Personal Secretary under Job Group L as of March 1, 2009 vide a promotion letter dated April 21, 2009.

The Claimant avers that she worked in aforementioned positions in various ministries and was commended by her employer for commendable/ exemplary work and that at the time of this dispute she was stationed at the Ministry of Treasury Gender Department.

4 The Claimant avers that in September 2015, she was selected to attend a training in Arusha and despite the training generating a lot of politics at her workplace she attended the training. However, upon her return she was faced with hostility from the Respondent's senior officers in particular the human resource office.

5 The Claimant avers that in February 2016, she proceed for her annual leave but however she was shortly summoned back to the office by the Senior Human Resource Manager with instructions to appear before the Human Resource Director on completion of her leave. She says that upon resumption of duty on May 5, 2016, she reported to the Human Resource Director, Miss Mucheru as instructed whereby she was informed of her redeployment to another department and requested to wait for her redeployment letter.

6 The Claimant avers that while waiting for the said letter, the Human Resource Director became hostile and ordered her out without issuing her the letter and despite reporting to the office as requested she has never been redeployed or issued with the redeployment letter.

7 The Claimant avers that in March 2017, she noticed her salary had been discontinued without notice and despite her effort to be reinstated the Respondent has not responded to any of the complaint letters.

In support of her claim, the Claimant filed her amended witness statement and amended list of bundle of documents dated September 21, 2021.

The Respondents' Case

8 In response to the Claimant's amended claim filed an undated reply to the Amended Memorandum of Claim in which the Respondents admitted that the Claimant was indeed an employee of the 1st Respondent, however, it denied that the Claimant was diligent in her duties and averred that she was dismissed through a letter dated June 6, 2017 owing to her absence of duties.



9 The Respondents' avers the Claimant was redeployed to the Pensions Department vide a letter No 1992008248/13 dated May 5, 2016 and the Director Pensions Department was instructed to inform the Human Resource office once the Claimant reports to her new station. However, on May 8, 2017 the Director confirmed that she never reported for duty since her initial deployment.

10 The Respondents' aver that on May 16, 2017, the Claimant's salary was stopped and a show cause letter dated June 6, 2017 addressed to her. However, the Claimant responded to the show cause letter complaining of stoppage of her salary and did not address the content of the letter.

The Respondents' aver that upon the Claimant's failure to respond to the show cause letter the matter was submitted to the MHRMAC meeting held on January 18, 2018 where the committee recommended her dismissal on account of absence of duty without permission, leave or lawful authority and the same was conveyed to the Claimant vide a letter dated May 2, 2018.

Hearing

Claimant evidence

11 The Claimant testified that her salary was stopped without any reason by the 1st Respondent and that she was not taken through any disciplinary process.

The Claimant testified that she was deployed to the gender office and in February 2016 she proceeded on leave, however, upon resumption on May 15, 2016 she was informed she had been deployed to another office.

12 The Claimant testified that she did not receive the letter dated May 5, 2016 and that she only saw it much later with her lawyer. She stated that on the day Miss Mucheru threw her out of her office and informed of her redeployment she was instructed to be checking on her but was not issued any letter.

The Claimant testified she never received the letter dated June 5, 2017 whose subject was absence from duty and that she only saw it with her lawyers and by then her salary had already been stopped.

She further testified that letters used to be delivered and then the recipient would sign in a book confirming receipt.

The Claimant testified that she never received the letter of dismissal of service and that the postal address used by the 1st Respondent was not hers but an old address belonging to her former work place. She further stated none of the letters were served upon her.

13 On cross examination, the Claimant testified that she currently is not working as she sued her employer, the 1st Respondent for stopping her salary without a reason. She testified she was attached for 2 years under the office of a gender officer named, Robert Kige until May 2016. Upon resumption from her 45 days annual leave from February 2016 to May 5, 2016 she was informed of her redeployment.

14 The Claimant further testified that she waited for the deployment letter on May 5, 2016 till 4pm and continued to go to the same office for several months for the letter without any luck. She testified she never received any deployment, show cause and/or dismissal letter from the Respondent. Further Miss Mucheru was the HR Director and that she never wrote any instruction to her.

15 The claimant further testified that she is aware of the [PSC Regulations](#) and that the regulations require she can be sent anywhere and that she was not posted to the Pensions Department.

The Claimant testified she did not provide her address as she used the Office of the President address PO Box 30083



Post address.

Respondent's evidence

16 The defence hearing was heard on January 30, 2023 where the Respondents presented their witness Kenneth Odhiambo. He testified that he works at the National Treasury as the Deputy Director HR and Management and he affirmed that he shall rely on his undated witness statement and amended list of documents as his evidence in chief.

The witness testified that he knows Ms Mucheru who was the Director HR but that she has since retired. He further testified that he knows the Claimant and that she was indeed an employee of the 1st Respondent but that he never worked closely with her.

The Respondent witness testified that the Claimant was dismissed for being absent from duty without lawful cause and that she was issued and served with a notice to show cause letter.

17 He further testified that there was a disciplinary hearing and in attendance were 7 members although the Claimant was not present. He further testified that the postal address used to send the letters to the Claimant was indeed hers as she confirmed she received her promotion letters.

The Respondents witness testified that the Claimant was aware she was redeployed as she was given her deployment letter by her supervisor.

Submissions

18 The claimants filed her submission dated March 7, 2023 and respondents submission are dated March 20, 2023 which were considered by this court.

Issues for determination

1. Was the Claimant unlawfully terminated from employment or did she abscond from her employment?
2. Is the Claimant entitled to the reliefs sought

Was the claimant unlawfully terminated from employment?

19 The Respondents' aver that the Claimant was dismissed from her employment for absconding her duties without any lawful cause. Conversely, the Claimant maintains that she was removed from her place of work and informed that she was redeployed to another office but never received any communication of the same since then.

20 The charge of desertion is serious as provided in section 44 (4) (a) of *Employment Act* where the law provides that an employee can be summarily dismissed from employment if without leave or lawful case an employee absents himself from the place appointed for the performance of his work.

21 The law is clear that for the charge of abscondment to stand the employer must prove that the employee deserted employment with no intention to go back. In this case the claimant says she was asked by the respondent to await redeployment letter. Apparently she kept following the re deployment letter. This was May 5, 2016 up to March 2017 when her salary was stopped. When she inquired why her salary was no longer being paid she was informed that the Human resource department had ordered that she be removed from the payroll.

22 She says that despite consistent communicating with the respondent she has neither been reinstated nor has her salary been paid.



23 There are numerous authorities to the effect that an employer who claims employee has deserted employment is obligated to prove efforts made to trace the employee and prove that the employee has no intention to go back to his employment. In the case No 236 of 2016 [Ronald Daudi Nyambu vs Tornado Carriers Ltd](#) the court held:

"Desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissal. This is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice of termination of employment on this ground is under consideration. This was also held in the case of Evans Ochieng Olouch vs Njimia Pharmaceuticals Ltd 2016 eKLR."

This is a case where the employer alleges employee a senior government officer deserted duty from May 2016 to March 2017. There is no evidence tendered of efforts made to reach out to the claimant. In fact her salary was stopped in March 2017 without any evidence that the respondent attempted to reach out to her or to put her through disciplinary proceedings. When claimant inquired why her salary was stopped she was informed that she had been removed from the payroll.

24 The respondent says claimant was sent a show cause letter dated June 6, 2017 requiring her to explain why she had not reported to her new work station. This was after her salary had been stopped in March 2017.

25 The claimant is emphatic he did not receive the notice to show cause anyway. The redeployment letter dated May 5, 2016 and notice to show cause letter dated June 6th 2017 has no forwarding address. The claimant avers she never received those letters.

26 It is curious the respondent did not send her the letters through her postal address. The most fool proof method was to send the letters to the claimants address through registered mail. It is very possible the claimant did not receive the letters. In any case the notice to show cause letter is dated one year after the so called redeployment letter to the Pensions Department. The court would therefore say the respondents failed to establish a case of abscondment from duty.

27 Also there is no evidence that the claimant was put through the mandatory disciplinary process provided in mandatory terms in section 41 of [Employment Act](#) which provides:

"Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

28 The respondent therefore failed to give a valid reason for terminating the claimant from her employment and also failed to follow the provided mandatory process as aforesaid.

29 In the case of [Absalom Ajusa vs Kenya Nut Company Ltd](#) No 2522 of 2012 the court held:

"From the evidence on record the respondent did not comply with the procedural fairness test requirement set out in section 41 of the employment act. The court therefore finds that apart from failing to prove valid reason for termination of claimant's employment the procedure followed fell below the required threshold of the law."



30 In this case as well the respondent fell actually more than below the required threshold. This was an employee who had worked for the government for about 25 years and the employer did not even have the courtesy to give her a hearing before terminating her employment by stopping her salary without even informing her. The court finds she was truly unfairly and un procedurally terminated from her employment. The court therefore has entered judgment in favour of the claimant.

31 As a result thereof she is awarded the following reliefs.

- a. Notice pay 71,000
- b. Compensation at 12 months for unlawful termination considering she worked for the government from 1992 to 2017 $71,000 \times 12 = 852,000/-$
- c. The court will not reinstate her to her position since it is over 3 years since she was terminated and the 12 months compensation is good cushion for prayer i and ii of her prayers.
- d. She is awarded costs and interest at court rates form date of judgment till full payment.
- e. The total award is kshs 923,000/-. She is entitled to her certificate of service. The same to be released within 14 days from today's date.

32 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF AUGUST, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A SIGNED COPY WILL BE AVAILED TO EACH PARTY UPON PAYMENT OF COURT FEES.

ANNA NGIBUINI MWAURE

JUDGE

