



Kenya Union of Commercial Food & Allied Workers Union v Kenya Post Office Savings Bank (Cause 122 of 2003) [2022] KEELRC 12701 (KLR) (18 January 2022) (Ruling)

Neutral citation: [2022] KEELRC 12701 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 122 OF 2003
M MBARÚ, J
JANUARY 18, 2022**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS
UNION CLAIMANT**

AND

KENYA POST OFFICE SAVINGS BANK RESPONDENT

RULING

1. Judgement herein was delivered on September 1, 2004 in favour of the claimant and which directed that the grievant, Agnes L Ogolla be unconditionally reinstated back to her employment by the respondent and there be continuity of service and seniority including promotion with effect from August 20, 2002. The court also directed that the grievant be paid her full salary including house allowance, leave and medical allowances with effect from August 20, 2002.
2. The court directed for an alternative order/relief that the grievant be given normal termination of service and she be paid her full terminal dues and in addition she is paid compensation equivalent to 12 months salary for wrongful termination or loss of employment based on her last salary when she was wrongfully terminated from employment.
3. The grievant made demand for the payment of her dues all at Ksh 36, 214,075.49 which the respondent contested. The court directed each party to file an affidavit and make oral submissions.
4. The respondent filed affidavit sworn by Grace Maina the legal manager and who avers that upon judgement herein the court ordered for the reinstatement of the grievant and payment of her full salary and benefits or in the alternative payment of compensation and on April 8, 2005 the respondent opted to comply with the alternative orders and to pay termination of employment dues. In an application dated May 29, 2009 the grievant sought to have the court direct the respondent to show cause as to why there was no compliance with the judgement herein and for the managing director to be found in



- contempt and on March 11, 2021 the court ordered that the managing director should attend court to show cause why there was no compliance on March 17, 2010.
5. On the due date the grievant submitted that 6,114,506.50 were outstanding from the respondent and to which the respondent objected and filed a response. On May 10, 2010 the court ordered that;
 - a. The sum of Ksh 6,114,506.50 be certified as reasonably correct and due to the claimant;
 - b. The same be paid to the claimant within 14 days from the date of the order; and
 - c. In default the claimant is at liberty to institute contempt of court proceedings against the Managing Director and the Company Secretary of the respondent.
 6. Subsequently, the respondent filed petition before the High Court JR No 193 of 2010 challenging the above orders and on December 5, 2011 the court issued orders declaring the same null and void and set aside.
 7. The court award was extracted and gazetted on March 19, 2012 and June 8, 2012.
 8. The court award did not award any interests on the decretal sum or costs.
 9. This was confirmed to the grievant by letter dated November 5, 2020. The grievant has since been paid all her dues. this is for the period of August 20, 2002 to March 4, 2020 at a gross salaries of Ksh 284,160 for 12 months at Ksh 14,779,153.86 plus the earned leave days total paid ksh 16,102,027.79.
 10. On the award, the respondent has made the following payments;

December 2, 2019 gross paid ksh 13,005,584.41 less PAYE Ksh 2,129,635.40 net = Ksh 10,875,946.01

On 10th February, 2020 paid ksh 9,707,959.10 less PAYE Kshs 2,912,387.73 net = Kshs 6,795,571.37; and

Total paid ksh 17, 671,517.38.
 11. That the total judgement sum was Ksh 16, 102,027.79 and the grievant had been paid a total of 22,713,540.51 and there is an overpayment of Ksh 6, 611,512.72.
 12. The respondent has since complied with the judgement and the claimant should be made to refund the overpaid monies.
 13. The grievant filed her affidavit in reply and avers that upon judgement herein the respondent failed to honour the same save for partial payment following threats for execution and on March 4, 2021 issued her with the letter terminating employment a confirmation that employment only ceased then.
 14. The respondent filed suit before the High Court to forestall contempt of court proceedings but the judgement herein was never set aside. The respondent started payments to the grievant;

On November 29, 2019 paid ksh 10,875,985 in part payments and

On February 7, 2020 paid ksh 6, 795,571.35 in part payment.
 15. There is no error made by the respondent in tabulation of payments or any overpayment as alleged. The respondent has not paid the full judgement amount and order 1(b) of the court herein.
 16. The termination letter was issued on March 4, 2020 thereby the respondent acknowledged that the grievant remained an employee for the period of 2002 to 2020 and full payments are due;



Salary arrears from 2002 to 2020 Ksh 12,658,603.20 less paid ksh 7,364,365.31 balance Ksh 5,294,238;

Leave days Ksh 1345, 276.68 less paid Ksh 626, 637.11 balance Ksh 718, 639.57;

Leave allowance ksh 73, 400 due;

House allowance Ksh 1, 384,240 total due;

Medical benefits Ksh 385, 300 total due;

Commuter allowance Ksh 244, 400 total due;

3 months' notice pay Ksh 259, 622.10;

12 months compensation pays ksh 1038, 488.40

Total dues ksh 9, 398,327.

17. These payments have been outstanding for 18 years and should be paid with interests from the date due and until paid in full all at ksh 32, 656,051.85.
18. On costs, a successful litigant is entitled to costs. The dues owing remain unpaid and such should be paid with costs and interests and the total balance due is ksh 42, 054,378.
19. There is no overpayment as alleged and the employment only terminated following the respondent's letter dated March 4, 2020 without full payment of terminal dues.

Determination

20. Judgement herein was delivered on September 1, 2004.
21. The award was published in the Kenya Gazette on March 19 and June 8, 2012 which gave it the force of law subject of enforcement.
22. The court orders were that;
 - 1 (a) That the grievant be reinstated forthwith and unconditionally to her job, with continuity of service and seniority including promotion, if any, with effect from the date of her alleged termination on August 20, 2002.
 - (b) That the grievant be paid her full salary including house, leave and medical allowances, etc. With effect from August 20, 2002 until full implementation of this Award.

Or in the alternative,
 - 2 (a) the grievant be given normal termination of service and she be paid her full terminal benefits under 1(b) hereinabove.
 - (b) That in addition, the grievant is paid compensation equivalent to twelve (12) months salary for wrongful termination or loss of employment based on her last salary when she was wrongfully terminated from employment.
23. There was inaction by the respondent since until letter dated March 4, 2020 referenced *Termination of Employment* and that following judgement on September 1, 2004 the respondent had opted to terminate employment in accordance with order 2(a) of the Judgement with effect from November 30, 2019



24. On November 19, 2019 the grievant wrote a demand letter seeking payment of her due. In reply on December 17, 2019 the respondent noted that various part payments had been paid to the claimant. Then the letter allegedly terminating employment referenced above was issued.
25. The judgement of September 1, 2004 and published is not contested.
26. The primary orders were that;
 1. (a) That the grievant be reinstated forthwith and unconditionally to her job, with continuity of service and seniority including promotion, if any, with effect from the date of her alleged termination on August 20, 2002.
27. The election of the respondent to follow the alternative orders is not communicated in writing until the letter dated March 4, 2020.
28. The court reading of the orders of September 1, 2004 is that the primary remedy of reinstatement was immediate and instant and the alternative order directed the respondent was to:
 - 2 (a) the grievant be given normal termination of service and she be paid her full terminal benefits under 1(b) hereinabove.
29. In employment and labour relations, issuance of a letter terminating employment is bound in law to comply with the provisions of section 35, 41, 43 and 45 of the *Employment Act*, 2007. Even where the respondent were to apply the repealed Employment Act, the statutory requirements for issuance of a notice terminating employment must be lawful or in accordance with the agreement or terms of employment. An employer cannot stand by for 18 years and then wake up one morning and seek to enforce a judgement order allowing termination of employment whereas there is a primary order directing immediate and instant compliance and has done absolutely nothing to enforce the same.
30. For this court to allow such practice would be to negate the very essence of its existence. Protection of employment and labour relations and for connected purposes. Such would be an abuse of court process and defeat the course of the rule of law. For this court to allow such a practice to take root would amount to abdication of its constitutional duty. Such practice should be abhorred and with dealt instantly.
31. In this regard, the grievant was forthwith reinstated back to her employment with the respondent and such employment continued until letter dated March 4, 2020 which ought to be addressed on its own as it has no space in these proceedings. It is overtaken in time and import. The judgement of September 1, 2004 speaks for itself. As of such date, the grievant stood reinstated forthwith and entitled to;
 - (b) That the grievant be paid her full salary including house, leave and medical allowances, etc. with effect from August 20, 2002 until full implementation of this Award.
32. The full salary and benefits are payable until the full implementation of this Award. No costs or interests were awarded.
33. Accordingly, the claim for the payment of the full award as at March 4, 2020 when employment terminated is the sum of Ksh 9,398,327 which remains unpaid and due and shall be paid with costs and interests from March 4, 2020 and until paid in full.

DELIVERED IN COURT AT NAIROBI THIS 18TH DAY OF JANUARY, 2022.

M. MBARŪ
JUDGE



In the presence of:

Court Assistant: Okodoi

..... and

