



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1395 OF 2018

BETWEEN

EMY AMWAYI MATTAKWA.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY..... RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Mutisya & Company Advocates for the Claimant

Leparashao Patricia, Advocate for the Respondent

JUDGMENT

1. The Claimant filed her initial Statement of Claim on 21st September 2018.
2. She filed an Amended Statement of Claim on 4th June 2020.
3. She avers that she was employed by the Respondent as a Clerical Officer Grade 14, under the Domestic Tax Department, vide a letter of appointment dated 31st March 2006.
4. She was later moved to Customs Department, where she worked diligently, until 1st March 2012 when she was interdicted on various grounds.
5. Her contract was terminated more than 6 years later, on 31st August 2018 contrary to the law and Respondent's code of conduct.
6. There was an ongoing criminal case against the Claimant, relating to the same subject, and she was therefore subjected to double jeopardy.
7. The Investigating Officer exonerated the Claimant, yet the Respondent took the Claimant through a disciplinary process, and terminated her contract.
8. Some of the Claimant's colleagues, who were suspected of involvement in the same employment offences, were never interdicted or dismissed. Some continued to work normally, were retired and paid their benefits. Termination against the Claimant, was discriminatory.
9. The Claimant appeared before the disciplinary committee on 28th January 2016. She had, on 19th March 2012 written to the Respondent asking for further investigation. She had not been issued letter to show cause. She was not advised of her right to representation at the

disciplinary hearing. She was not provided relevant documents before the hearing.

10. The Respondent delayed hearing her case, contrary to the dictates of Article 47 of the Constitution, the Respondent's Employee Code of Conduct, and Guidelines issued by the Head of Public Service. Her right to fair administrative action was violated.

11. She prays for Judgment against the Respondent for: -

- a. Declaration that termination is illegal, null and void.
- b. Reinstatement.
- c. Compensation.
- d. General Damages.
- e. Costs.
- f. Any other relevant relief.
- g. Interest on [c], [d], [e] and [f] above.

In the alternative:

- a. Damages for unlawful termination of employment.
- b. Costs.
- c. Any other relevant relief.
- d. Interest on [a], [b] and [c] above.

12. The Respondent filed its Statement of Response on 4th December 2018. Its position is that the Claimant was employed by the Respondent as a graduate trainee, and confirmed in appointment as a Revenue Officer 2, with effect from 2010.

13. Her contract was governed by the Employment Act, the Respondent's Code of Conduct and other relevant Tax Laws.

14. In October and November 2009, she neglected her duty by irregularly releasing containers from the port, without payment of duty.

15. She was arrested, and with other colleagues, charged before the Chief Magistrate's Court Mombasa, with conspiracy and permitting fraudulent release of containers.

16. The Respondent interdicted the Claimant vide a letter dated 1st March 2012, in accordance with the Code of Conduct. The Respondent is mandated to interdict, once an Employee is charged with an economic or corruption offence.

17. She was given a fair hearing. She was advised on the allegations against her; she was invited to submit her defence; she made a statement in defence; she appeared before the disciplinary panel on 28th January 2016; the charges were formally read to her; she was given opportunity to present oral or written evidence; all issues were evaluated; a decision was made to dismiss her; and the decision was communicated without delay.

18. The Respondent denies that it breached Article 47, the Employment Act, or the Code of Conduct. Due process was followed.

19. She was placed on half pay while under interdiction from 1st March 2021. She continued to enjoy her employment medical cover. The Respondent undertook to pay her arrears of half the salary from the date of interdiction.

20. The Respondent lost trust and confidence in the Claimant, and cannot continue employing her. The Respondent prays that save for the claims admitted expressly by the Respondent, the Claim should be dismissed with costs.

21. The Claimant gave evidence and rested her case, on 28th January 2021. Assistant Human Resource Manager Franklin Kiogora, gave evidence for the Respondent on 5th March 2021, 8th October 2021 and 16th November 2021 when hearing closed. Parties confirmed filing and exchange of closing submissions on 17th December 2021.

22. A few weeks ago, the Claimant filed an application dated 2nd March 2022, seeking to be allowed to file supplementary submissions, arguing that she had been acquitted in the criminal case after the hearing in this matter closed, and wished to incorporate this aspect of this dispute in her closing submissions. The Court allowed the application, with corresponding leave granted to the Respondent to supplement its closing submissions.

23. The Claimant adopted her Pleadings, Witness Statement and Bundle of Documents in her evidence in chief. She told the Court that she was a witness in a criminal case, where her colleagues were implicated in release of containers without payment of duty. A second case was presented in Court, where the Claimant herself was roped in as an accused person. She told the Court that she was victimized for whistleblowing.
24. She wrote to the Respondent's Commissioner on 19th February 2012 complaining about this, and calling for further investigations.
25. She was discriminated against. Her colleagues, charged alongside her, were not interdicted. They continued working.
26. She had excellent performance. She had letters of commendation issued over the same period she was alleged to have been involved in crime. Someone was trying to fix her. Other commendation letters issued after the Claimant was found to have meet her targets and clearing all backlog, despite persistent system breakdown.
27. The minimum interdiction period under the Respondent's Code of Conduct is 6 months. The Claimant was interdicted for over 6 years, from March 2012 to August 2018.
28. Cross-examined, the Claimant told the Court that the commendation letter issued in 2011, while the charge sheet related to 6th October 2009. There was performance evaluation. There was connection between performance evaluation and the criminal charges.
29. She was bonded as a witness in the first criminal case that was instigated against some of her colleagues. She did not have the charge sheet on this case. Some of her colleagues were not interdicted. She did not have any documents to show that they were still in employment.
30. She was paid half salary and allowances while on interdiction. She utilized her medical cover during interdiction. She responded to the letter of interdiction. She was invited for disciplinary hearing 4 years after interdiction in 2016. She received termination letter dated 31st August 2018. The reasons for termination were stated.
31. She was offered withheld salary for the period of interdiction. She told the Court that she had not cleared with the Respondent, and intended to pursue the offer. She seeks reinstatement, but agreed that there could be loss of trust between the Parties. She did not work for 6 years. She seeks general damages. The criminal case relating to fraudulent release of goods, was still pending at the time the Claimant testified. The Code of Conduct allows for termination, suspension or interdiction in event of criminal prosecution. The Respondent was engaged in a witch-hunt against the Claimant. She conceded that she did not have evidence of witch-hunt.
32. The whistleblower policy was generated in 2016. Interdiction was in 2012. She was bonded as a witness in the first criminal case in 2010. The policy does not apply retrospectively. She suffered for the period of interdiction, because she could not secure fresh employment. She primarily wishes to be reinstated.
33. Redirected, the Claimant told the Court that the criminal case against her was malicious. She wrote a letter whistleblowing, and reported the criminal activities at Kilindini Port Police Station. She could not have done this, if she was complicit in the crime. Whistleblower policy was in force in 2018 when the Claimant was dismissed. Her performance was rated excellent. It was overall rating, for the period she was alleged to have committed the crime. Some of her colleagues were still working.
34. Franklin Kiogora told the Court that the Claimant was dismissed for violating the Code of Conduct. It was reported that 9 containers left the port, without duty being paid, while the Claimant was on duty. She was charged in a criminal case, following the breach.
35. She was taken through a disciplinary process. Each of her colleagues who were suspected of involvement in the breach, were processed separately. She appeared in person, was heard, and a decision taken against her. She was advised on her right of appeal.
36. The internal disciplinary process and the criminal proceedings were different processes. She was interdicted on 1st March 2012 and dismissed in 2018. Delay was occasioned by investigations which were carried out by a multi-agency team. She continued to enjoy half salary, allowances and medical benefits during interdiction. She was not rendering any service.
37. In addition, the Respondent undertook to pay her 3 months' salary in lieu of notice; withheld half salary for the period of interdiction; and pension dues. The Respondent made this commitment in the letter dated 31st August 2018, and its payroll section confirmed that these benefits would be paid to the Claimant.
38. Her gross monthly salary was Kshs. 146,000. She received half during interdiction.
39. Other Employees who were charged alongside the Claimant received terminal packages of close to Kshs. 4 million.
- [At this point of Kiogora's evidence, the Court suggested that the Parties attempt a voluntary settlement. The witness was stood down to facilitate negotiations. Parties were not able to reach consensus, and the witness resumed evidence on 8th October 2021].
40. Kiogora told the Court that the Claimant is not entitled to general damages. She away for 6 years. She did not work and was paid half her salary, allowances and medical allowance. There is no longer trust and confidence, and reinstatement is not reasonable or practicable. All officers involved had their contracts terminated. She has not shown evidence that any of the involved officers was retained.
41. The criminal proceedings did not affect the administrative process. The Claimant did not ask for any document to assist her cause at the

disciplinary hearing. Her Claim has no merit.

42. Cross-examined, Kiogora stated that he joined the Respondent in 2016. The Claimant was confirmed on 29th April 2010. The crime was committed in 2009-2010. It was committed on various dates.

43. Kiogora was not aware of the consolidated charge sheets. The criminal case was mentioned in the letter of termination. Kiogora was not a witness at the criminal case. He did not work at the port. The Respondent relied on investigations report. Hearing was in January 2016, termination on 1st August 2018. It was 2 ½ years after the disciplinary hearing.

44. It was not in question whether containers left the port. Their identification marks were not disclosed before the Court. The Claimant did not request for the minutes of the disciplinary hearing. Kiogora was not the investigator and did not therefore know the contents of the investigation report. He did not know about unique identification features on the containers, and whether printouts on the release of the containers, should have been part of the investigation report. Release entails physical, as well as online work. Claimant disputed that she was at work, on the dates the containers left the port. The Code of Conduct requires that disciplinary cases are determined within 6 months.

45. Kiogora states in his witness statement that the offence was committed in 2009. The Claimant was still on probation. It was unlikely that she would be confirmed, if she was not successful on probation. Investigations were still going on. He was not aware that the Claimant was a recipient of commendation letter from the Respondent.

46. Kiogora was aware of the whistleblower policy of 2016. He was not sure that there was one in place, prior to this. Offence was in 2009 and charge in 2012. The Claimant was working between these years. The Respondent did not charge her in afterthought. He did not know that the Claimant was a witness in another related criminal case, before she was made an accused person. Not every case warrants letter to show cause. She responded to the issues raised against her, and there was no need to issue a letter to show cause. She had no right to ask for further investigations. Kiogora was not aware that Muli, Mungosa and another Employee who were implicated in the crime, are still working. He did not know that Gerry Wabwire, an Employee against whom the Claimant was a witness in the first criminal case, was still in employment.

47. The Claimant was advised about her procedural rights. She was told she could appear at the hearing in the company of her representative. Kiogora did not know if she was represented. He was not aware that she was a whistleblower who was punished for whistleblowing. He did not know that she had a clean record. He knew that she expected to go on working.

48. Redirected, Kiogora told the Court that the Claimant responded to the letter on interdiction. She did not seek clarification. She did not deny her presence at the place the crime was committed.

49. She lost nothing during interdiction. She continued to receive half her salary, allowances and medical benefit. She was given fair chance to respond to the charges against her.

50. The issues in dispute as traditionally is, in Claims for unfair termination are: whether termination was based on valid reason or reasons, under Section 43 and 45 of the Employment Act; whether it was executed fairly, under Section 41 and 45 of the Employment Act; and whether the Claimant merits the remedies claimed.

The Court Finds: -

51. There is no clear evidence on the date the Claimant joined the Respondent. At paragraph 3A of the Amended Statement of Claim, she states she was employed in the year 2006.

52. A letter dated 5th May 2005 to her, from P.N. Munuhe, Senior Assistant Commissioner- HR, refers to 'following your recent appointment.'

53. It is however agreed that she was confirmed in appointment as Revenue Officer II, with effect from 29th April 2010, upon completion of the graduate training programme and probationary period of 6 months.

54. She was deployed to the port at Mombasa on 28th July 2009.

55. It was while she worked at the port, that she was charged alongside 4 of her colleagues, at Mombasa Chief Magistrate's Court Criminal Case Number 1422 of 2013, with 2 counts relating to release of containers from the port, without payment of the requisite duty.

56. The Claimant and her colleagues were tried in the criminal case, and only acquitted on 11th February 2022, after 10 years.

57. The Respondent interdicted the Claimant on 1st March 2012. The letter of interdiction states that, while on duty on 6th October 2009 and 4th November 2009, the Claimant fraudulently released 9 containers, without payment of taxes. The letter states that the allegations, if found to be true, would portray the Claimant as a dishonest Employee, and render her to disciplinary measures as provided for under the Respondent's Code of Conduct.

58. Notably, the Claimant was still a graduate trainee, under probation, and had not been confirmed, at the time the criminal offences were alleged to have taken place in 2009.

59. She was only confirmed with effect from 29th April 2010.
60. This raises certain fundamental questions on the validity of the allegations made by the Respondent against the Claimant, which related to the period before her confirmation.
61. It does not appear logical to confirm a graduate trainee, after she was involved in crime at the employment place. It does not make sense to find the Claimant to have completed her probationary period successfully, if she was during probation, involved in serious employment and criminal offences.
62. While still under the cloud of suspicion, for involvement with fraudulent clearance of containers at the port, the Claimant was on 23rd September 2011, the recipient of a commendation letter from the Respondent. She was commended for her diligence and commitment in performance of her duties at the port gates. She was commended for clearing all backlogs in the month of June 2011, in spite of frequent downtime in the Respondent's systems. She was commended for working excess hours, despite being ineligible for overtime pay.
63. Her explanation that she had been bonded on 21st and 22nd July 2010, to give evidence in the first criminal case, where her colleagues Suleiman Mohamed Ibrahim and others were charged with the offence of making document without authority, and that she was victimized for whistleblowing, is persuasive.
64. The Bond to Attend Court, is exhibited. This criminal case gave way to Criminal Case No 1422 of 2013, where the whistleblower, was charged alongside Suleiman Mohamed Ibrahim and others. The whistleblower became an accused person.
65. The Trial Court, in the Judgment of 11th February 2022, confirmed that indeed the Claimant was a whistleblower, who was victimized for raising the red flag, on the fraudulent release of containers at the port.
66. The Respondent was not compelled to wait for the outcome of the criminal proceedings. As stated by its witness Franklin Kiogora, the criminal process and the administrative process are different processes.
67. The letter of interdiction however referred to the criminal case, and states that if "the allegations against the Claimant were proved to be true." The Court understands this to entail proof of the allegations at the workplace and/or in the criminal case in which the Respondent was the complainant.
68. The Respondent again refers to the criminal case, which "is still ongoing," in the letter of termination. The Respondent appears to have given weight to proof of the allegations, in the criminal case, as a determinant in the culpability of the Claimant.
69. The Claimant was only heard in 2016, after interdiction in 2012. There was nothing at the disciplinary hearing, to justify the accusations against the Claimant, on the fraudulent release of the containers. Kiogora told the Court he did not have the identification marks of the containers alleged to have been moved from the port without payment of duty. He did not have the minutes of the disciplinary committee. He was not the investigating officer to know the outcome. He did not know who commissioned investigations. There was no investigations report, accompanied by exhibits such as unique identification features and printouts, availed to the Court.
70. With this evidence from Kiogora, can it be said that there was proof of the allegations against the Claimant administratively, at the workplace?
71. The Claimant however, has not convinced the Court about her assertion that she was discriminated against, as some of her implicated colleagues, were reinstated. She just mentioned names, without evidence of reinstatement. She did not show, which of her co-accused or other colleagues suspected in involvement in the crime, were reinstated. She did not name the station or stations where such colleagues are currently serving. While the Court is persuaded that the Claimant was victimized for whistleblowing, there is no evidence that she was discriminated against. She has not indicated who her comparators were, and show that they were in the same situation, and were reinstated while she was dismissed.
72. The Court is convinced overall, that there was no valid reason or reasons to justify termination of the Claimant's contract. The findings and conclusion of the criminal trial, while not binding the Respondent in its administrative process, confirm that the Claimant was a whistleblower, whose only fault was in whistleblowing. The administrative process did not yield any proof, that the Claimant was involved in fraudulent release of containers from the port.
73. Termination was not based on valid reason or reasons under Section 43 and 45 of the Employment Act,
74. Procedure was manifestly unfair. Interdiction was in 2012. Disciplinary hearing was in 2016, 4 years after interdiction. The decision was made in August 2018, over 2 years after the hearing.
75. The Claimant was a public officer. Her protection as a public officer, granted under Article 236 of the Constitution was violated. She was victimized for whistleblowing, and for acting in accordance with the Constitution and the law. She was denied the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, under Article 47 of the Constitution. Kiogora conceded that under the Respondent's Code of Conduct, disciplinary cases should be concluded within 6 months. The Claimant's cases took over 6 years, in contravention of the Constitution of Kenya, the law and the Respondent's own Code of Conduct.
76. The Respondent did not adhere to the Guidelines dated 24th May 2010 issued by the Head of Public Service, with respect to investigating the allegations against the Claimant. The Guidelines contemplate an expeditious process, with thorough internal investigations, before

escalation of cases to external agencies.

77. Termination was substantively and procedurally unfair.

78. The Claimant seeks the remedy of reinstatement. The 3-year limit, from the date of termination, imposed on the remedy under Section 12 [3] [vii] of the Employment and Labour Relations Court Act, has expired. The remedy of reinstatement is not legally available.

79. Section 49 [3] [b] of the Employment Act, allows the Court to grant the remedy of re-engagement in work comparable to that in which the Employee was employed, prior to his/ her dismissal, or other reasonably suitable work, at the same salary. This remedy is not subject to the limitation imposed under Section 12 [3] [vii] of the Employment and Labour Relations Court Act.

80. Factors to be taken into account in granting the remedy of reinstatement or re-engagement, under Section 49 of the Employment Act, include: the wishes of the Employee; practicability; other opportunities available to the Employee; the conduct of the employee; and failure by the Employee to mitigate loss of employment.

81. The Respondent kept the disciplinary proceedings hanging for a considerable period of time, making it difficult for the Claimant to move on. She was interdicted in 2012, and her contract terminated in 2018. She could not start thinking of alternative work, while the Respondent kept her case dangling in the wind. Her conduct leading to termination was in accordance with the Constitution and the law. She courageously brought to the attention of the Respondent, the fraudulent activities that were unfolding at the port. She acted as a whistleblower and was lined up as a witness in the first criminal case, before being arrested and joined to the second criminal case. She was trained by the Respondent from the inception, and it is not likely that her training, on domestic taxes and customs, would render her useful to other potential Employers. Her opportunities in the labour market are narrow. The Respondent is a public body. It had moved the Claimant in different roles, which she discharged commendably. She left employment in 2018. It is practicable to her return to work. Return to work is her preferred remedy.

82. The Respondent argues that there is no longer trust and confidence between the Parties. This position is not premised on fact. The Claimant has been taken through a criminal process and cleared. If there was loss of trust and confidence, or diminished trust and confidence, before the criminal process ended, the Court is persuaded full trust and confidence can be rebuilt, after the Claimant was cleared of all the charges against her. With no proof of the allegations at the criminal proceedings and at the workplace, the position by the Respondent that there is loss of trust and confidence, stands on very shaky ground. Loss of trust and confidence must be based on facts. The Claimant wishes to return to work.

83. The Court declares that termination of the Claimant's contract was unfair and unlawful.

84. An order of reinstatement is not legally available. The remedy of re-engagement is available, and shall meet the Claimant's wish to return to work. Section 62 [3] of the Anti- Corruption and Economic Crimes Act, 2003, which Act the Respondent cited in its letter of termination, requires that a public officer ceases to be on suspension, if proceedings against him are discontinued, or if he is acquitted. Withheld salary is restored. This provision suggests that upon trial and acquittal of a public officer in a corruption and economic crimes criminal case, the most reasonable recourse for the Employer, is re-instatement of the Employee. The contract is restored. While there is in general employment law, little or no correlation between criminal processes and internal disciplinary processes, it is required of the Court to look into the particular law governing public service, and act as intended by the law. There are various legal principles on employment in the public service, which are unique to public service. If a public officer under criminal trial on corruption and economic crimes is acquitted, or the proceedings are discontinued, the public officer ought to continue serving the public. It is not intended that suspension is lifted and the public officer dismissed, after an acquittal. **The Respondent shall re-engage the Claimant to work, comparable to that in which the Claimant was employed, prior to her dismissal, or other reasonably suitable work, on the same salary.**

85. The Respondent offered to pay the Claimant's withheld salary for the period of interdiction. Her gross monthly salary was Kshs. 146,000 as captured in her pay slips. **The Respondent shall pay to the Claimant withheld salary for the period under interdiction, [2012 -2018].**

86. The Claimant prays for compensation and damages. These are pleaded under paragraphs [c] and [d] of the Amended Statement of Claim, and also pleaded as alternative prayers. The Claimant did not plead her alternative prayers clearly. No clear line was drawn between compensation, damages and general damages.

87. The Court is however entitled to consider the alternative remedies, though not clearly drawn.

88. That alternative route shall include **3 months' salary in notice, full pension dues, and withheld salary over the period of interdiction.** These remedies were proposed by the Respondent in its evidence and pleadings.

89. The alternative route shall also include compensation for unfair termination. The Claimant had worked from 2005 to 2012- a period of 7 years before she was interdicted. She had a clean record and commendations from the Respondent. She expected to go on working until the mandatory retirement age, applicable to public officers. Her expectations were curtailed by the Respondent, on account of her whistleblowing. She did not contribute to the circumstances leading to termination of her contract. As an alternative to re-engagement, she is allowed **compensation for unfair termination equivalent of her 12 months' gross salary at Kshs. 1,752,000.**

90. There is no justification for other forms of damages and compensation pleaded by the Claimant. The remedies granted, proportionately redress all grievances raised by the Claimant. Anything beyond what has been granted, would border on unjust enrichment.

91. Costs to the Claimant.

92. *Interest allowed at court rates from the date of Judgment.*

IN SUM, IT IS OREDERED: -

- a. *It is declared that termination of the Claimant's contract was unfair.*
- b. *The Respondent shall re-engage the Claimant to work comparable to that in which the Claimant was employed, prior to her dismissal, or other suitable work, on the same salary.*
- c. *The Respondent shall pay to the Claimant withheld salary for the period of interdiction [2012 -2018].*
- d. *Alternative to [b] above, the Respondent shall pay to the Claimant compensation equivalent to 12 months' gross salary at Kshs. 1,752,000; 3 months' salary in lieu of notice at Kshs. 438,000; withheld salary for the period of interdiction [2012-2018]; and full pension.*
- e. *The Claimant shall in any event, communicate to the Respondent in writing, her option under [b] and [d] above, within 14 days of this Judgment.*
- f. *The Respondent shall act on the option communicated by the Claimant, within 30 days of receiving Claimant's communication under [e].*
- g. *Costs to the Claimant.*
- h. *Interest allowed at court rates from the date of the Judgment till the Judgment is satisfied in full.*

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 29TH DAY OF MARCH 2022.

JAMES RIKA

JUDGE