



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1394 OF 2018**

**JACQUELINE M. MUTISO.....CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**JUDGMENT**

1. The Claimant's case is contained in the Amended Memorandum of Claim filed on 17.6.2020 in which she contended that her suspension of 5 years instead of 6 months, the delay in concluding her disciplinary case and her dismissal infringed her rights to fair administrative action under Article 47 of the Constitution and went against the Employment Act, the respondent's Code of conduct, Rules and Regulations. Therefore she sought the following prayers:

- a. A declaration that termination of her services by the Respondent, and the attendant delay in taking administrative action is illegal, null and void.**
- b. An order that the Respondent immediately reinstates the Claimant to work.**
- c. An order that the Claimant be adequately compensated for time lost out of employment.**
- d. General damages.**
- e. Costs of the suit.**
- f. Any other relevant relief.**
- g. Interest on c, d, e and f above.**

**In the alternative and without prejudice:**

- h. Damages for unlawful termination of employment.**
- i. Costs of the suit.**
- j. Any other relevant relief.**

2. The Respondent filed a Memorandum of Response on 30.11.2018. It contended that the Claimant unprocedurally gated in container number PCIU1245250 without verification; that she was suspended from duty effective 3.10. 2013 and issued with Show cause letter; that she responded on 16.10.2013 and was invited to appear before a disciplinary panel on 17.11.2015; and that on 29.6.2018, it dismissed her after taking into consideration the outcome of the disciplinary hearing.

3. It denied violating the Claimant's constitutional rights and averred that owing to the sophisticated and serious nature of the offence, and extensive multi-agency investigations needed to be conducted, the disciplinary process took considerable time, which is excusable in the circumstances. However, the Claimant filed a Response to the Memorandum of Response on 2.5.2019 denying the Respondent's allegations.

**Evidence**

4. The Claimant testified as Cw1 and adopted as evidence her witness statement dated 2.4.2020 in which she stated that she was employed by the Respondent at its Customs Department until on 29.6.2018 when she was dismissed on unfounded allegations. She further stated that she

had been on suspension for 5 years from 3.10.2013 to 29.6.2018 before termination contrary to the 6 months maximum period provided by the law, rules and regulations.

5. She testified that although she appeared before the Disciplinary Committee on 24.11.2015, her prior request to be provided with documents relating to her case was declined and the right to representation was never explained to her at the hearing. She contended that besides violating her constitutional rights, the delay in determining her case was against the Guidelines issued by the then Head of Public Service Amb. Francis Muthaura on 24.5.2010 that suspected cases of corruption by public officers were to be dealt with without delay. According to her the disciplinary procedure followed in her case was flawed and discriminatory since her co-workers who had been accused of similar allegations were reinstated.

6. Upon cross-examination, the claimant confirmed that she did not do a physical check on the container because there was no requirement to do so. She testified that the disciplinary process was flawed because she was suspended in 2013, it took 2 years before being called for the disciplinary hearing instead of the required 6 months and that she further waited for another 2 years before receiving the termination letter.

7. She testified that in her letter dated 31.8.2016, she requested for several documents including the investigations report, entry 2013 MSA 4181405 and a copy of her response. She further testified that though the letter dated 6.10.2016 stated that it forwarded these documents she never received the letter or the documents.

8. She contended that she was not accorded the right to representation during the disciplinary hearing. However, she admitted that having worked for the Respondent for over 20 years it is right to assume that she knew the provisions of the code of conduct. She maintained that the Code of Conduct provides for hearing within 6 months and there is no room for enlarging that time.

9. She admitted that the termination letter provided that she was to be paid her salary and allowances upto 30.6.2018 as well as 3 months' salary in lieu of notice. She contended that the salary was inclusive of the period of her suspension and pension.

10. On the other hand, Grace Mwangi the Respondent's Human Resource Manager Discipline Management testified as Rw1. She adopted as evidence her witness statement dated 13.5.2018 in which she stated that the Claimant was a Support Staff (Assistant Revenue Officer) Customs and Border Control Department prior to termination for gross misconduct with effect from 30.6.2018.

11. She further stated that the claimant was suspended and given Show cause letter dated 3.10.2013 for breaching Clauses 6.2.2.12, 6.2.5.2, 6.2.5.4 and 6.2.5.6 of the respondent's Code of conduct and responded by the letter dated 16, 10.2013; that she appeared before Disciplinary panel on 1.12.2015 and after defending herself she was informed to await communication of the final decision; and that in the end she was found culpable for gross misconduct and her services were terminated vide the letter dated 29.6.2018. Thereafter, the Claimant was paid her salary and allowances (house and transport) from the date of suspension to the date of termination plus 3 months' salary in lieu of notice.

12. She stated that the Claimant requested for the documents relating to her case and she was provided with the same vide the letter dated 6.10.2016. According to Rw1, due process was followed and it culminated to termination of the claimant's services on grounds of negligence for failure to perform her work diligently as expected.

13. Rw1 further contended that the claimant's assertion that she was discriminated upon since her co-workers were reinstated lacks merit because the other officers performed different duties and each case was considered on its merit. She maintained that the action of suspending and subsequently dismissing the claimant was procedural and lawful.

14. Finally, Rw1 contended that the case dragged for long as a result of the complex nature of the investigations and consultations with different stakeholders in order to clarify matters to aid in an objective determination. According to her, the respondent was within the dictates of Clause 8.2.7 of the Code of Conduct which provides that suspension/interdiction should be dispensed within 6 months as much as it may be possible.

15. On cross-examination, she confirmed that the Claimant was suspended for 4 years. She further admitted that the letter dated 6.10.2016 purporting to forward the requested documents to her did not bear the Claimant's signature for acknowledging receipt. Finally, she confirmed that she sat at the disciplinary proceedings against the Claimant.

16. Upon re-examination, she testified that clause 8.2.7 of the Code of Conduct provides that the period of suspension or interdiction of 6 months may be dispensed with as much as it is possible, which according to her, means that where it is not possible to conclude a case within 6 months the period may be extended. Finally, in her view, the case could not have been concluded within 6 months because of its complexity and the need for a multi-agency investigation because it involved the export of ivory.

## Submissions

17. The Claimant submitted that the allegations that various players were involved in the investigations cannot justify the said prolonged delay and contended that the action shows the impunity exercised by the Respondent against its employees. According to her she the termination of her services was unfair and unlawful and she prayed for judgment against the Respondent.

18. She relied on **Rebecca Ann Maina & 2 Others v Jomo Kenyatta university of Agriculture and Technology [2015] eKLR** where the Court cited **P.V. Mahadevan v M.D. Tamil Nadu Housing Board (2005) 6 SCC 636** where the Court held that it would be in the interest of a government employee and the public to avoid a protracted disciplinary inquiry against a government employee.

19. She argued that the natural consequence of the delay to conclude her case for almost 5 years was that she suffered obvious mental torture and agony and her fundamental right to fair administrative action under Article 47 of the Constitution was violated. She relied on **Margaret**

**Ayuma Katungu v Attorney General [2018] eKLR** where the Court held that the prolonged interdiction of the Claimant from October 2010 to January 2014 was unlawful and awarded the Claimant the reliefs she sought.

20. In the instant case, the claimant prayed for Kshs. 10 Million as general damages for the prolonged suspension which caused her mental agony, suffering and anguish. She further prayed for 12 months' salary as compensation for unlawful termination.

### **Analysis and determination**

21. There is no dispute that the Claimant was employed by the Respondent in its Customs and Border Control Department from 1.7.1996 to 29.6.2018 when her services were terminated with immediate effect for gross misconduct. Section 45 (2) of the Employment Act provides that a termination of employment is unfair and therefore unlawful if the employer fails to prove that the reason for the termination is valid and fair and that the termination was in accordance with fair procedure. Consequently, the issues for determination herein are:

**a. Whether the reason for the termination was valid and fair.**

**b. Whether a fair procedure was followed before the dismissal.**

**c. Whether the Claimant is entitled to the reliefs sought.**

### **Reason for the termination**

22. The reason cited in the termination letter dated 29.6.2018 was that the Claimant acted negligently in the performance of her duty by failing to verify and confirm the details of the physical seals with the details in the Simba system, before sending message to Kenya Ports Authority for that container No. PCIU1245250 could be gated.

23. During cross-examination, the Claimant confirmed that she did not do a physical check of the container since there was no requirement to do so. In her response dated 16.10.2013 she stated:

**“On the said day, I reported on duty at 0800 hrs at gate 9/10, and I was the one who was manning the gate used for entering of export containers. My duties were to allow export containers after physically verifying on the simba system whether they have followed the correct procedure and also to send a memo to the KPA clerk for the gate pass.**

**On the said day at around 21.31 hrs I was working on different documents and I randomly sampled ten (10) out of twenty (20) containers at that time to confirm details as indicated in the documents as well as in the Simba system were correct...**

**Due to the workload on that day there were more than One hundred and Twenty (120) containers and the best judgment I saw was to send the said containers to be scanned as directed by the verification officer before exportation, that's how I found that I had to perform and exercise my powers”.**

24. In her hand written statement recorded with the Respondent's Ethics & Integrity Department – Internal Affairs Division, the Claimant admitted that she did not do the physical checks on the container because of the work load and that she allowed the container without the customs seal because the Stuffing Officer was the one to seal the container. She also admitted that she did not notice that the container had delayed from 25.6.2013 to 5.7.2013 before reaching the port and that had she noticed the same she would have consulted her boss because it was a suspicious delay.

25. In the same statement she confirmed that it was her duty to verify the details in the Simba system such as any stuffing, alert messages, the seal numbers among others. These roles are similar to the procedure at gate 9/10 (where the Claimant was stationed) as elaborated in the Memo dated 5.9.2013 “Illegal Exportation of Ivory”.

26. Having considered all the foregoing matters, I find that the Claimant admitted that she did not do a physical check of container Number PCIU1245250 to verify if the details matched what had been captured in the Simba system which was her duty to do. As result of the said default she facilitated illegal exportation of Ivory at Kilindini as charged in the Suspension letter dated 3.10.2013. The said default constituted a valid reason to terminate her services under Clause 6.2.5.6 and section 44 (4) (c) of the Employment Act for negligently performing work, which was her duty under her contract of service to have performed carefully.

### **Procedure followed**

27. Section 41 of the Employment Act provides:

**“(1) 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.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”**

28. The Claimant testified that she was on suspension for almost five years and that this was contrary to the 6 months limit provided in the Respondent's Code of Conduct. The Claimant further averred that the case against her dragged for long which contravened her rights under Article 47 of the Constitution and the Guidelines issued on 24.5.2010 by the then Secretary to the Cabinet and Head of Public Service.

29. However, the Respondent contended that the sophisticated and serious nature of the offense and extensive multi-Agency investigations were the cause of the delay in concluding the claimant's case. She further testified that Clause 8.2.7 of the Code of Conduct allows for extension of the suspension period if the case is not concluded within 6 months. Clause 8.2.7 deals with interdiction and therefore the correct provision is clause 8.4.7 which provides that:

**“Suspension cases will be determined within six months as much as may be possible.”**

30. Having considered the evidence on the chronology of events herein, I have no doubt that the disciplinary process against the claimant took unreasonably long time before conclusion. First the claimant was swiftly suspended and invited to show cause why disciplinary action should not be taken against her. Second, although the claimant responded to the show cause promptly, the respondent delayed to call her for hearing for two years without any good cause or formal extension of the suspension beyond the 6 months provided under the respondent's own Code of Conduct. Third, the respondent delayed its verdict for over two years after the hearing without any good cause before communicating to the claimant vide the letter dated 29.6.2018.

31. The said prolonged process, in my view, does not accord with fair procedure contemplated under section 45 of the employment Act, Clause 8.4.7 of the respondent's Code of Conduct and Article 41 and 47 of the Constitution. Article 41(1) provides that every worker has the right to fair labour practices while Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

32. The explanation given for the delay in finalizing the disciplinary process, to say the least, is hollow. The claimant did not require the outcome of a multi-agency investigations to conclude the disciplinary case against the claimant. It is now trite law that criminal process and internal disciplinary process are parallel and their respective outcomes do not necessarily bind the other. Therefore I reiterate that the delay in concluding the claimant's disciplinary process for over 4 years was without proper basis and it rendered the termination unfair and unlawful within the meaning of section 45 of the Employment which bars employer from terminating the services of his employee unfairly. The matters were even made worse by the failure to give the claimant the right to call a fellow employee to accompany her to the disciplinary hearing as required under section 41 of the Act.

33. I gather support from **Peter Mbutia Gitau v Kenya Revenue Authority [2019] eKLR** Onyango J expressed herself as follows concerning the failure to comply with said Clause 8.4.7 of the respondent's Code of Conduct:

**“The Respondent did not bother to give further explanation on the delay, which was in clear violation of its own Code of Conduct, whose Section 8.4.7 set 6 months as the upper time limit for determination of cases of suspension.**

**The Respondent had 6 months to conclude the Claimant's case but what did it do? It suspended the Claimant and stopped there as if the suspension was the final action...”**

#### **The reliefs sought.**

34. Having found that there was no justifiable reason for the over 4 years delay in concluding the disciplinary process, I make a declaration that the administrative action against the claimant (termination of claimant's services) was unlawful and unfair.

35. With respect to reinstatement, Section 12 (3) (vii) of the Employment and Labour Relations court Act provides that the Court may only issue an order for reinstatement within 3 years of the dismissal. In this case the 3 year period lapses on 29<sup>th</sup> June 2021 which is this month. However, considering that the termination was justified by her gross misconduct, and the claimant has not proved that her reinstatement will be practicable, I hold that reinstatement is not an appropriate remedy in the circumstances of this case.

36. I gather support from **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** where the Court of Appeal held that:

**“...the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered.”**

37. Consequently, I award the alternative relief of compensatory damages under section 49(1) of the Employment Act. The said section provides for a maximum of 12 months' gross salary for unfair termination but I award the claimant six months' salary compensation considering her long service of 22 years, and the fact that she contributed to the dismissal through gross misconduct. I have also considered the admission by the claimant that after the dismissal the employer paid her all the salary for the period of suspension, other accrued benefits plus three months' salary in lieu of notice.

38. The claim for general damages and adequate compensation for time lost while out of employment are dismissed because the above award of compensation for unfair termination under section 49(1) of the Act is sufficient remedy in the circumstances of the case. The Claimant was also paid all her salary for that period.

39. In the end, I enter judgement for the Claimant declaring her dismissal by the respondent on 29.6.2018 unfair and award her the following

based on her actual gross salary, less overtime and acting allowance, being Kshs.116,00:

- a. Kshs. 116,000 x 6 .....Kshs. 696,000 less statutory deductions.
- b. Costs of the suit.
- c. Interest at court rates from the date hereof.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**