



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 874 OF 2017

BETWEEN

MICHAEL MBWAVI LUSINDE.....CLAIMANT

VERSUS

1. FRED O. OYUGI

2. AMANI Y. KOMORA

3. KENYA PORTS AUTHORITY.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Diro & Company, Advocates for the Claimant

Addraya Dena, Advocate for the Respondents

JUDGMENT

1. The Claimant states he is employed by the 3rd Respondent, as Principal Risk Management Officer, Grade HM 1 Post No. 120-1002.
2. 3rd Respondent is a State Corporation, responsible for Kenyan Ports.
3. The 1st Respondent heads Internal Audit and Risk Management Department of the 3rd Respondent, under which the Claimant works.
4. The 2nd Respondent heads 3rd Respondent's Human Resource Department.
5. The Claimant states that around September 2017, he started to be subjected to unwarranted frustration and harassment by the 1st Respondent.
6. He wrote to the 2nd Respondent, asking to be transferred to any other Department within the 3rd Respondent, from the Department headed by the 1st Respondent.
7. The letter elicited no response. On 16th October 2017, the 1st Respondent issued a Memo, unilaterally transferring the Claimant to the position of Principal Internal Auditor, Operations, which is within 1st Respondent's Department.
8. The Claimant rejected this transfer, but his letter communicating rejection, again elicited no response. The 1st Respondent later on issued another letter, complaining about the Claimant. The 2nd Respondent, in collusion with the 1st Respondent, issued a letter dated 9th November 2017, ratifying the decision of the 1st Respondent to move the Claimant to the position of Principal Internal Auditor, Operations.
9. The 1st Respondent ordered the withdrawal of Claimant's access rights into the IT system, access which was necessary in Claimant's

discharge of function. The 1st Respondent intended to set up the Claimant for failure and disciplinary action. The Claimant feels his expectation of peaceful service with the 3rd Respondent is being endangered by the actions of, or lack of proper corrective actions by, the Respondents.

10. He therefore prays for Judgment against the Respondents as follows:-

- a. A declaration that the harassment and frustration the Claimant is being subjected to is both illegal and unfair.
- b. A permanent injunction restraining the Respondents from continued harassment and frustration of the Claimant in whatever way, and effecting the purported transfer of the Claimant from the job of Principal Risk Management Officer to that of Principal Internal Auditor (Operations).
- c. A mandatory injunction directing immediate transfer of the Claimant from Internal Audit and Risk Management Department, to any other Department within 3rd Respondent's establishment.
- d. Costs of the Cause.
- e. Any other suitable order.

11. The Respondents filed a Joint Statement of Response on 7th December 2017. They concede description of the Parties. They do not dispute that the Claimant is employed by the 3rd Respondent, in the Job and Department, stated in his Claim.

12. He was subject to a probationary period of 6 months upon employment, as per his employment letter dated 14th September 2016. He was appraised during probation. The 1st Respondent wrote to the 2nd Respondent indicating that the Claimant failed in his appraisal. It was recommended probation period is extended for another 6 months. It was recommended by the 1st Respondent also, that there be conducted a proper background check on the Claimant, with enquiry extending to the Organizations he served before employment with the 3rd Respondent.

13. The Internal Audit and Risk Department comprises 5 units, each headed by Principal Officer Grade 1. These Officers are rotated within the units. The Claimant's transfer was recommended by the 1st Respondent, and approved by the Managing Director. The position of Principal Internal Auditor was at the time being held in an acting capacity by S. Ngumi. The Claimant was transferred to fill the position substantively. Internal transfers are normal practice. The Claimant declined to take up his new role and could therefore not have access to the IT system.

14. The Respondents pray the Court to dismiss the Claim.

15. While the Cause was pending before the Court, 3rd Respondent's Management appointed a Committee of Inquiry in accordance with its Human Resource Manual, 2017 to investigate the dispute, and make a report on its findings and recommendation.

16. The Report, which was availed to the Parties and the Court, established and observed *inter alia*, that: -

- The 1st Respondent appraised the Claimant well after the probationary period had lapsed. Appraisal was done in the absence of the Claimant.
- The 1st Respondent extended Claimant's probation for more than 14 months contrary to the Employment Act and the 3rd Respondent's Human Resource Manual.
- The Claimant was transferred to the position of Principal Internal Auditor, Operations. S. Ngumi was promoted to the same position at the same time resulting in overlap. 1st Respondent's actions were un-procedural.
- The Claimant is a Board Appointee, and his transfer ought to have been done by his Head of Department in consultation with the General Manager Human Resources and Administration. This was not done. Memo was written directly to the Managing Director by the 1st Respondent, seeking approval.
- The Claimant was unilaterally appraised poorly and given a score of 38% by the 1st Respondent.
- He was appraised on the position of Principal Risk Management Officer, Grade HM1 on 23rd October 2017, a position he no longer held, having been transferred with effect from 16th October 2017.
- The Committee established there was bad blood between the Claimant and the 1st Respondent.

17. The Committee recommended, *inter alia*,:-

- The Claimant should be transferred out of the Internal Audit Department.

18. Parties recorded a consent order to have the dispute considered and determined on the strength of the Pleadings, Documents and Submissions.

The Court Finds:-

19. The Committee of Inquiry prepared its Report based on confidential and personal files of the Claimant; the Disciplinary Handbook and Human Resources Manual; and oral evidence of Witnesses who included Principal Human Resources Officer, the 1st Respondent and the Claimant.

20. The same issues before the Court were examined comprehensively by the Committee of Inquiry. There were findings and recommendations which conclusively show, that the Claimant suffered untold harassment and frustration from his Head of Department, the 1st Respondent herein.

21. It is appreciated that transfer of an Employee, as argued by the Respondents in their Submissions, and upheld by the Court in an interlocutory application in the dispute, is the prerogative of the Employer.

22. However, where the transfer is made with malice or improper motive, the Employee merits the protection of the Court. It is correct submission, that Courts should avoid interfering in general, with managerial prerogatives. It is equally correct, that managerial prerogatives must be exercised in good faith and in accordance with the internal human resource policies of the particular Employer, as well as the Employment Act.

23. The Committee of Inquiry confirmed that the 1st Respondent appraised the Claimant irregularly; he extended his probation contrary to internal policy and the law; he recommended transfer of the Claimant irregularly; and exhibited bad blood in dealing with his junior. The Court need not enquire further into the facts involving this dispute. There is an e-mail originating from the 1st Respondent, directing that the Claimant is withdrawn from ‘ ‘ all SAP system workflow related roles and audit display authorization.’ ’ Another e-mail on record, written in Kiswahili, which the Claimant appears to attribute to the 1st Respondent, states, ‘ ‘ tunafuata kwa makini, kesi ulioweka mahakamani... tangu uje umekuwa mwiba...usipoondoa kesi...kuna njia nyingi za kunyamazisha paka...’ ’ [loosely translated in English to say, ‘ ‘ we are following the case you filed in Court...since you joined KPA, you have become a thorn in our flesh...if you do not withdraw the case you filed...you will come to learn there are many ways of silencing a cat...’ ’]. These e-mails, viewed together with other evidence on record, would suggest the claims of harassment and frustration of the Claimant, have foundation. The e-mail in Kiswahili, would suggest, the Claimant was followed to Court by malignant elements, who continued to threaten his right to continue working for the 3rd Respondent in peace, and his constitutional right to access industrial justice.

24. Although the issue has not been raised by the Parties, the Court does not think that the 1st and 2nd Respondents were improperly joined as Respondents, being Employees of the 3rd Respondent. The Employment Act defines an Employer to include Managers of the principal Employer. There are situations, such as faced the Claimant, where Heads of Departments may be called to account, for discharging of managerial functions capriciously.

25. The Court must defer to the work of the Committee of Inquiry.

IT IS ORDERED:-

a. It is declared harassment and frustration endured by the Claimant at his workplace is illegal and unfair.

b. The Respondents are restrained from continued harassment and frustration of the Claimant, and in particular from transfer of the Claimant to the position of Principal Internal Auditor, Operations.

c. The Respondents are directed to immediately transfer the Claimant from Internal Audit and Risk Management Department, to any other Department within the 3rd Respondent, as recommended by the Committee of Inquiry.

d. Costs to the Claimant.

Dated and delivered at Mombasa this 28th day of January 2020.

James Rika

Judge