

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 228 OF 2017

DAIZY CHEROGONY.....CLAIMANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent her former employer for her alleged wrongful dismissal. The Claimant averred that she was employed by the Respondent in the position of a Security Warden Job Grade 11 from 17th February 2006. She averred that she was later on 19th January 2009 promoted to a senior warden grade S.4 with a starting salary of Kshs. 23,367/- and a house allowance of Kshs. 14,018/-. She averred that on 31st August 2015 she was promoted to the position of Security Supervisor Grade S.5 with a gross salary of Kshs. 128,900/-. She averred that on 5th April 2017 she reported to work at 1800hrs and continued with her duties until 0500hrs. She averred that the situation worsened as it started raining and traffic increased. The Claimant averred that the passengers started shouting but the Claimant calmed them down and went to open the second gate. She averred that it was at that point that she saw the Education Cabinet Secretary Dr. Fred Matiang'i claiming that he was subjected to embarrassment by the Claimant by requiring him to line up for security check up. The Claimant averred that on the 6th April 2017 she received a verbal request from the manager requiring her to write a statement on what transpired on 5th April 2017 and specifically about the mistreatment of Education Cabinet Secretary Dr. Fred Matiang'i. The Claimant averred that she handed her statement to the Airport Manager and on the 7th April 2017 she received a letter requiring an explanation for mistreating and humiliating the Cabinet Secretary Dr. Fred Matiang'i by requiring him to line up for security check up at terminal 1D. She averred further that she received another letter suspending her from duty with immediate effect to pave way for further investigations. She averred that she was invited to a disciplinary hearing by letter dated 12th April 2017 and she was to appear on 19th April 2017. She averred that on 11th May 2017 she received a summary dismissal letter on grounds of gross misconduct. The Claimant averred that she wrote a demand letter on 15th May 2017 seeking for reinstatement, review and/or compensation and that the Respondent's officials received the letter but refused to stamp on it. The Claimant averred that she had been assaulted previously by VIPs at the airport. The Claimant averred that she did not violate any of the Company's policies or commit any gross misconduct as she acted in accordance with the security procedures and security manuals under Aviation Security Programme (ASP) which requires that all cabinet secretaries are supposed to undergo normal checks like ordinary passengers. The Claimant averred that her dismissal was discriminatory, unfair, unlawful and wrongful. The Claimant prayed for judgment against the Respondent for a declaration that she was unlawfully dismissed from employment; an order directing the Respondent to reinstate her. The Claimant averred that as a result of the foregoing she was entitled to payment of one month payment in lieu of notice Kshs. 128,916/-; 12 months compensation for wrongful termination Kshs. 1,547,001.60; unpaid salary increment as per the CBA 2015-2016 Kshs. 82,391.04; unpaid salary increment as per the CBA 2015 and 2017 Kshs. 34,329.60; house allowance increment as per the CBA 2015 Kshs. 60,000/-; pro-rata leave Kshs. 43,137.50; unpaid holidays Kshs. 545,380/- making a total of Kshs. 2,441,156.44. The Claimant amended her claim to include the prayer for a declaration that her rights to fair labour practice under Article 41(1) of the Constitution of Kenya had been violated by the Respondent and a declaration that the act of the Claimant of requiring the Education Cabinet Secretary Dr. Fred Matiang'i to line up and go through security screening did not violate any laws and does not amount misconduct to warrant summary dismissal of the Claimant by the Respondent. She averred that she was entitled to a claim for punitive, exemplary and aggravated damages for loss of career prospects assessed at one month's salary per year for the remaining years to retirement at the age of 60 – Kshs. 2,965,068/-; damages for loss of employment up to retirement age of 60 years at a monthly salary of Kshs. 128,916/- amounting to Kshs. 35,580,816/-; an order for the Respondent to pay the Claimant terminal benefits and compensatory damages totaling to Kshs. 40,987,039.74.

2. In its defence, the Respondent averred that on the morning of 6th April 2016, it was reported from the Respondent's customer service officer that the Cabinet Secretary for Education Dr. Fred Matiang'i was departing to Kisumu through Jomo Kenyatta International Airport on Kenya Airways flight KQ 650. The Respondent averred that the flight was to depart at 0615hrs. The Respondent averred that the Cabinet Secretary accompanied by his personal aide arrived late at the terminal building as they were delayed at the primary screening and the Cabinet Secretary complained that he was harassed and made to queue by the Claimant. Due to the delay, the flight he was travelling in closed its doors and was ready to depart but Kenya Airways intervened and he was boarded and the flight departed at 0642hrs. The Respondent averred that according to the investigations and as evidenced by the CCTV cameras, the Claimant ignored the Cabinet Secretary who approached her in request of facilitation to the terminal building. The Respondent averred that the Claimant's conduct was found to be in breach of Human Resource's Manual Sec N. 4(a), (m) and (u) and it was recommended that disciplinary action be taken against her for negligence and reckless handling of the Cabinet Secretary. The Respondent averred that the Claimant was issued with a notice to show cause letter to which she responded to after which she was invited to a disciplinary hearing. The Respondent averred that at the hearing she denied having seen the Cabinet Secretary at the glass door, however the CCTV footage showed that the Cabinet Secretary was indeed standing right in front of her but she instead continued to beckon the passengers who were lined up behind him. The Respondent averred that the Claimant was issued with a show cause letter in which she was informed that it had been reported that she had uttered the words "*I do not care who you are and you have to queue like all other passengers*" even after the Cabinet Secretary had introduced himself. The Respondent averred that the Claimant was further informed that her actions had caused the delay in departure of Kenya Airways flight 650 to Kisumu by 32 minutes. The Respondent averred that the Claimant responded to the show cause letter on 10th April 2017 and in her response stated that she did not singlehandedly mistreat the Cabinet Secretary and that she never physically saw him. It was averred that at the hearing the Claimant was shown the CCTV footage for the material date and it showed the Claimant ignoring the Cabinet Secretary who was right in front of her and instead beckoning to passengers who were lined up behind him. The Respondent averred that the Claimant stated that she was

concentrating on other passengers and thus she did not look up and further stated that she later apologized to the Cabinet Secretary after he had complained about harassment. The Respondent averred that the disciplinary committee found the Claimant's explanations and mitigations unacceptable and not valid enough to make her behave the way she did. It was averred that the Claimant was lying as the CCTV footage showed the Cabinet Secretary standing in front of her yet she claims not to have seen him. The Respondent averred that the Committee recommended that she be summarily dismissed for gross misconduct save for one member who recommended termination. The Respondent averred that it was justified in summarily dismissing the Claimant from employment since as an employee she was required to be disciplined, respectful and courteous to clients, however her actions caused the delay in departure of the flight by 32 minutes. The Respondent averred that the Claimant did not have any plausible explanation for her actions and it is only after other officers intervened that the Cabinet Secretary was able to board his flight. The Respondent denied the Claimant's allegations that her actions were consistent with the Respondent's Aviation Security Programme. It averred that the Claimant's actions of ignoring the Cabinet Secretary and later lying that she did not see him violated clause N. 4 (b) and (u) of the Human Resource Manual. The Respondent averred that it followed due process as laid down in Section 41 of the Employment Act as the Claimant was given an opportunity to defend herself but failed to exonerate herself as she kept lying that she did not see the Cabinet Secretary despite the CCTV footage. The Respondent averred that the Claimant was expected to attend to customers in a respectful and polite manner while displaying high etiquette and standards of professionalism and that she failed to do so leading to her summary dismissal. The Respondent denied having acted maliciously toward the Claimant and also denied that she had been assaulted previously by VIPs at the airport as alleged. The Respondent denied that the Claimant has had a clean record of employment that she was issued with a warning letter on 14th September 2014 for an unpleasant exchange with a Manager. The Respondent denied that the Claimant is entitled to any of the reliefs sought since her dismissal was lawful and fair and she had not proved that the Respondent caused her any loss of career prospects as alleged. The Respondent prayed that the decision to summarily dismiss the Claimant be upheld and the suit be dismissed for lack of merit with costs.

3. The Claimant and 2 witnesses for the Respondent testified. The Claimant testified that she was at the glass door on 5th April 2017 at around 0525hrs and it was chaotic outside as there were so many passengers and it was raining. She said that all of a sudden some passengers appeared before her and they wanted to gain access to the terminal area and the passengers were not in the queue. She stated that she asked for their travel documents but they did not have those documents and she then asked them to go to the airline desk to get those documents and she continued with her work as the queue was long. She stated that she later moved to the secondary screening point when some passengers came towards her complaining that she had mishandled them at the point of entry. She testified that she diplomatically apologized to them and asked them how she could be of help. She stated that they totally ignored her and they said that they had called the Cabinet Secretary for Transport. She said that she was issued with a notice to show cause letter dated 6th April 2017 and which had indicated that she had mistreated a Cabinet Secretary by making him to queue. She said that in her response she indicated that it was not an offence for a Cabinet Secretary to queue since it was a requirement under international regulations and the airport manual that is provided for security personnel to use. She testified that she was called to a disciplinary hearing on 19th April 2017 but there was no person from security or any line manager in the meeting. She explained in the meeting that the Cabinet Secretary was not given any special treatment as there were no special exceptions unless there was prior communication from the Foreign Affairs to Managers and sent to the duty officer who would then inform the supervisor on duty to make such provisions as indicated in the airport manual. She stated that she did her job diligently and she did not do anything wrong to make the Cabinet Secretary to queue. She confirmed that she saw the Cabinet Secretary but she did not know him as he did not introduce himself at the time and she only knew him after she was shown the CCTV footage. She testified that the law did not exempt him from the screens. She however indicated that her job description denotes that she can undertake VIP security facilitation but she must have prior knowledge that a VIP will be travelling; in this case she did not have prior knowledge. She testified that terminal D is used by normal travelers and that in identifying travelers, airport security personnel are guided by clause 8:15:1 of the Security Operation Programme which provides for production of authentic and valid travel documents together with any necessary visa. She testified that the person she later came to know as the Cabinet Secretary had neither travel nor identification documents.

4. The Respondent's first witness was Simon Mwiruti a security supervisor attached to Jomo Kenyatta International Airport. He testified that he was on duty on the material day but he did not see the Cabinet Secretary at the glass door. He testified that he was stationed in front of the walk through metal detector when the Cabinet Secretary approached him and inquired about the lady who was stationed at the first security door. In cross-examination he confirmed that they are guided by the airport manual and no one is supposed to go against what the document states. He stated that the document provides that the ministers must be processed like any other passengers. He testified that it is not an offence to require a Cabinet Secretary to line up. He confirmed that the Claimant did not have disciplinary issues. He stated that VIPs can be facilitated if they had called the protocol office and the supervisor is made aware, alternatively the VIP can introduce themselves and produce documents and the supervisor would know how to facilitate them. The Respondent's second witness was Jacinta Wafubwa the Human Resource officer of the Respondent. She testified that after the incident investigations were carried out, the Claimant was issued with a notice to show cause and was invited to a disciplinary meeting. She stated that the Claimant was informed of her right to bring a fellow employee and was given a chance to defend herself. She testified that the Claimant maintained that she never saw the CS as the queue was long. She stated that they saw the clip and from the clip it was noted that the Claimant saw the Cabinet Secretary. She stated the disciplinary committee recommended for dismissal after hearing the witnesses and her defence. She testified that the dismissal was for gross misconduct as provided for under the HR manual. She stated that the Claimant was paid one month's salary in lieu of notice and leave days. She was cross-examined and she stated that the Claimant was accused of mistreating and humiliating the Cabinet Secretary. She stated that employees must be guided by documents and must adhere to the Security Operations Manual plus the job description given. She stated that from the Security Operations Manual ministers and senior government officers are to be processed in normal manner like the rest of the passengers. She stated that it is not an offence to require a CS to line up. That marked the end of oral testimony and the parties were to file submissions. Of note is that the CCTV footage of the material morning covering the hours 0500hrs and 0549hrs was played with the critical parts slowed down and replayed with questions and comments being invited as to who was in the frames.

5. The Claimant submitted that the main issues for determination in this case were whether the Respondent had proved the validity of the reasons for the summary dismissal; whether the dismissal by the Respondent was fair, just and in compliance with the Employment Act; is the Claimant entitled to the prayers sought; and who should bear the costs of this suit. The Claimant submitted that under Section 45(2) of the Employment Act a termination of employment is unfair if the employer fails to prove that the reason for the termination is a fair reason, related to the employees conduct, capacity or compatibility, or based on the operational requirements of the employer, and that the employment was terminated in accordance with fair procedure. The Claimant submitted that no fair or valid reason was relied on by the Respondent in dismissing her with due regard to the law and the Respondent's policies, operational requirements and the rules of natural justice. The Claimant submitted that the sole reason relied on was not only unfair but invalid to warrant a dismissal. The Claimant submitted that the dismissal was thus inequitable, unjust, discriminatory and unfair under the circumstances. The Claimant submitted that during cross-examination even the Respondent's witnesses confirmed that requiring a Cabinet Secretary to line up for security check-up was not an

offence as the same is provided for under the Aviation Security Programme Manual. The Claimant submitted that she was able to prove that she had no prior information about the presence or anticipation of a VIP on that fateful day. The Claimant submitted that the same was verified by the Respondent's first witness, a security supervisor who was working with the Claimant when the incident occurred. The Claimant submitted that the Respondent did not produce before the court any application for exemption made to the Kenya Civil Aviation Authority in liaison with protocol Division of Ministry of Foreign Affairs pursuant to Regulation 66 of the Civil Aviation (Security) Regulations, 2008 to show that the Cabinet Secretary at time had been exempted and was being expected at the airport as a VIP. The Claimant submitted further that by requesting for identification documents for the two unidentified persons who showed up at the security door from nowhere was procedural and within the guidelines of the Aviation Security Programme Manual. The Claimant submitted that the Respondent failed to prove that the reason for the dismissal as valid and fair as it was evident during the hearing that the Claimant was at no fault as she followed the Aviation Security Programme Manual in executing her mandate and she was therefore not allowed to deviate from it. She cited the case of **Muthaiga Country Club v Kudheha Workers [2017] eKLR** and submitted that she proved that she was wrongfully dismissed from employment as required by Section 47(5) of the Employment Act. The Claimant submitted that the Respondent on the other hand could not prove or justify the alleged grounds relied on in dismissing her. The Claimant submitted that the administrative procedure undertaken by the Respondent was flawed, unlawful, unreasonable and procedurally unfair contrary to Article 47(1) of the Constitution. The Claimant submitted that the Respondent also violated Article 28 and 41 of the Constitution. She submitted that relying on the case of **Parliamentary Service Commission v Christine Mwambua [2018] eKLR** the dismissal having been effected without proof of the allegations in the most inhumane manner and in total disregard of the Claimant's right to fair labour practices as enshrined under Article 41 of the Constitution, she is entitled to be reinstated. The Claimant submitted that the Respondent will not be prejudiced in any manner if she is reinstated since it is in control of all the Airports in Kenya and the Claimant can work anywhere within Kenya in airports managed by the Respondent. The Claimant submitted that the Respondent came up with a breach of a non-existent provision of the Aviation Security Manual to effect the dismissal. The Claimant relied on the case of **Mohammed Khamis Hemed v Almasi Beverages Limited [2019] eKLR** where the court awarded Kshs. 5,000,000/- for the unlawful dismissal of the claimant. The case of **Joseph Njoroge Mugenda v Kenya Bureau of Standards [2018] eKLR** was cited wherein the court awarded the claimant lost earnings and the Claimant submitted that she has proved her case on a balance of probability and urged the court to award her all the reliefs sought in her claim.

6. The Respondent submitted that the Claimant relied on an undated and unapproved policy handbook and in the absence of such approval through the Director-General's signature on the policy document, the same is not binding. The Respondent submitted that it would demonstrate that this policy document was superseded by other VIP standard operating procedures which were in the Claimant's knowledge. The Respondent submitted that the Claimant recorded an incident/witness statement the same day and in the last paragraph she stated that she did not see the CS among the passengers since he is known to her. She wrote that if she had seen him, being a VIP she would have facilitated him accordingly as per the security procedures. The Respondent submitted that the said statement is testament to the fact that the Claimant knew the CS beforehand, she knew he was a VIP and that there were security procedures in place on how to handle VIPs. The Respondent submitted that the Claimant did not at any point allege that the Cabinet Secretary was not a VIP as per the policy handbook she conveniently seeks to rely on. The Respondent submitted that the Claimant did not at point during the disciplinary process produce the said handbook in her defense and that reliance on the policy handbook after termination is an afterthought. The Respondent submitted that the Claimant's termination was based on a genuine belief that the Claimant was not truthful on her account of events that had transpired. The Respondent submitted that the Claimant was aware about VIP management procedures and she was also aware that VIPs could access the first screening on priority without queuing. The Respondent submitted that the Claimant's admission in her incident report that there were VIP security procedures corroborates the investigations report that she had violated standard operating procedures relating to VIPs and her own job description. The Respondent submitted that there were valid reasons for termination and that the termination was substantively and procedurally fair. The Respondent submitted that the Claimant was not truthful all through the disciplinary process and cannot now seek equity. It submitted that he who seeks equity must do equity. The Respondent submitted that the suit lacks merit and ought to be dismissed with costs.

7. At the center of the dispute is the allegation that the Claimant mistreated the Cabinet Secretary for Education Dr. Fred Matiang'i when he presented himself for travel in April 2017. It was the Claimant's case that her dismissal was unlawful and unfair as she had not committed any error in requiring the Cabinet Secretary to queue. The Respondent disputes this and argues that there is a protocol in place for the handling of VIPs such as the CS. In the Civil Aviation Security Programme manual, provision is made that government officials shall be screened like every other passenger except where prior arrangements have been made. In this case, it was not improper to require the Cabinet Secretary Dr. Fred Matiang'i to undergo screening like other passengers. However, the Claimant was required to treat all clients and customers with courtesy and decorum. The CCTV footage that was captured that early morning was played back in court. It showed the Claimant interacting with the Cabinet Secretary. She is seen disregarding the CS and beckoning other passengers at the glass door. Whereas the verbal exchanges were not available it is clear there was some disregard for the passenger who turned out to be the Cabinet Secretary for Education at the time. It mattered not his station in life as such treatment was not in keeping with the Respondent's policies in handling its clients. Whereas the Cabinet Secretary was not cleared for preferential treatment on that material date, the Respondent was right that the Claimant mistreated him thus breaching the contract of employment she had. As provided for under Section 43 of the Employment Act as read with Section 45, it was upon the Claimant to show that an unfair termination took place while the Respondent had the duty to demonstrate there were valid and genuine reasons for the dismissal. The improper handling of the passenger was sufficient basis for the Respondent to initiate disciplinary action against the Claimant. She was heard in terms of Section 41 and her rights under Article 41(1) safeguarded. Since there was cause for the dismissal and basis for a summary dismissal on account of gross misconduct, the suit is only fit for dismissal. As to the costs of the suit, it at times is not fit to order costs in employment matters especially where the muscle and mettle of the parties is on a different plane. In this case, the suit was filed in Nyeri taking the Respondent's counsel and witnesses far from the place the incidents relevant to the suit occurred which is JKIA which is geographically identified as being in Nairobi. As the suit was filed here in Nyeri bypassing the Employment Court at Nairobi, the Claimant will be liable in costs for the suit.

It is so ordered.

Dated and delivered at Nyeri this 13th day of February 2020

Nzioki wa Makau

JUDGE