



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 2353 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**EMILY MUHADIA SAKALI.....CLAIMANT**

**VERSUS**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

Vide her Memorandum of claim dated and filed in Court on 27<sup>th</sup> November, 2017, the claimant herein avers that her employment was wrongfully and unfairly terminated by the Respondents.

Her case is that she was employed by the 2<sup>nd</sup> respondent, in the Ministry of Interior and Co-ordination of National Government (Director of Immigration and Registration of Persons) on or about 25<sup>th</sup> October 2007 in the position of Immigration Officer 2.

The Claimant contended that during the subsistence of her employment contract with the Respondents she performed her duties diligently a result of which she rose through the ranks from Immigration officer 2 to Immigration Officer 1 effective 11<sup>th</sup> December, 2010 and finally to Senior Immigration Officer. Her last gross salary was Kshs.65,710 inclusive of house allowance.

The Claimant averred that on or about 18<sup>th</sup> December, 2014 while performing her duties she received a letter suspending her from services on account of gross misconduct for her alleged involvement in human trafficking and issuance of travel documents to aliens of Ethiopian and Somali Origin while serving at the Namanga Control Border Point.

The Claimant further averred that her suspension lasted for a period of 19 months from 18<sup>th</sup> December 2014 to 1<sup>st</sup> July 2016 during which period she was entitled to payment of Kshs.20,000 per month, which was not paid and now claims for the same from the Respondents herein.

The Claimant denied the allegations levelled against her vide her letter dated 24<sup>th</sup> December, 2014 and requested to be furnished with particulars of the allegations. She further contended that despite her request no particulars were furnished by the Respondents herein.

The Claimant averred that she was later issued with a letter dated 1<sup>st</sup> July 2016 by the 1<sup>st</sup> Respondent informing her of her dismissal on account of human trafficking effective 17<sup>th</sup> December, 2014. The Claimant further averred that she did prefer an appeal to her dismissal on 1<sup>st</sup> August; 2016 which \* remains pending.

The Claimant maintained that her termination was unlawful, unfair and violated the provisions of Articles 41, 47 and 50 of the Constitution of Kenya, 2010, the Fair Administrative of Actions Act, the Employment Act, 2007 and the Public Service Disciplinary Manual (May) 2016.

In her Memorandum of Claim the Claimant seeks the following reliefs:

- a) A declaration that show cause/suspension letter dated 18<sup>th</sup> December 2014 and dismissal letter dated 1<sup>st</sup> July 2016 on account of human trafficking be declared illegal, irregular, null and void and unconstitutional.

b) The Claimant be reinstated into service or in the alternative be paid the sum of Kshs.4,406,280 comprising of the following:

- i. Unpaid house allowance for 19 months... Kshs.380,000
- ii. Uniform allowance from 2014-2016..... Kshs.12,000
- iii. One month's pay in lieu of notice..... Kshs.65,710
- iv. 12 months' compensation..... Kshs.788,520
- v. Service pay for 8 years..... Kshs.3,154,050
- vi. Unpaid leave allowance..... Kshs.6,000

**Total                    Kshs.4,406,280**

Plus 12% interest at Court rates from the date of filing suit until payment in full

c) Any other/further reliefs that the Court may deem fit to grant in the interest of justice.

d) Costs of this suit.

The Respondent in its Reply to the Memorandum dated 2nd July 2018 and filed in Court on 3rd July, 2018 admits having engaged the Claimant as pleaded in her Memorandum of Claim. The Respondent however denied wrongfully and unfairly terminating her services and contended that the same was done with due regard to the law and procedure.

The Respondent contended that it was forced to terminate the Claimant's services summarily for exposing the Country to serious threats by engaging in Human Trafficking and assisting in acquisition of travel documents by illegal persons which actions the Respondent avers amounted to gross misconduct.

It is on this basis that the Respondent contends that the Claimant was terminated procedurally and is therefore not entitled to the reliefs as sought in her Memorandum of Claim.

The Respondent further avers that the Claim herein is prematurely brought before this Court as the Claimant has not exhausted all the internal mechanisms for Appeal and Review as her Appeal is still being considered by the 2nd Respondent.

In conclusion the Respondent urged the Court to dismiss the instant Claim with costs to the Respondent.

### **Evidence**

The matter proceeded for hearing on 25<sup>th</sup> February 2019 and 23<sup>rd</sup> July 2019 with the Claimant testifying on her own behalf while the Respondent called one witness to testify on its behalf.

### **Claimant's Case**

At the hearing the claimant testified on her behalf and expounded on the issues set out in the Memorandum of claim and her witness statement filed therewith.

The claimant testified that on 18<sup>th</sup> November 2014 while at her duty post at the Namanga Border Point she received a call directing her to report to the Director's Office. On her arrival at the Director's Office, she was informed of an NIS report on her alleged involvement in Human Trafficking and issuance of travel documents to foreigners.

The claimant maintained her innocence. She further testified that

she was subsequently issued with a suspension letter dated 18th December 2014. She testified that as per the suspension letter she was entitled to payment of house allowance during suspension and was required to report weekly to her supervisor. She testified that she did not receive any payment during the period of her suspension.

The claimant confirmed that she was allowed 21 days to respond to the allegations which response she did despite the fact that she was not supplied with all relevant documents which she had requested for.

The claimant further testified that no disciplinary hearing was conducted by the Respondents and that the minutes produced by the Respondents were made in her absence. She testified that she was not invited for any disciplinary hearing prior to the termination.

The claimant testified that she received a dismissal letter on 18<sup>th</sup> July 2016. She urged the Court to allow her Claim as prayed.

On cross examination the claimant testified that she was only served with a letter of suspension which she responded to. The claimant maintained that she was not accorded a fair hearing as she requested to be furnished with details of the allegation levelled against her but none were forthcoming. The claimant further testified that it was only in her dismissal letter that she learnt of the details of the foreigners who she was alleged to have issued documents to irregularly.

### **Respondent's Case**

The Respondents called one witness MWENDE MUTUKU, a Senior Clerical Officer - Discipline Section at the Directorate of Immigration and Registration of Persons. RW1 also largely expounded on the issues set out in the reply to the Memorandum of Claim and her witness statement filed in Court on 18<sup>th</sup> July 2019.

RW1 testified that the Claimant was dismissed from service on 17<sup>th</sup> December 2014 on grounds of gross misconduct in particular Human Trafficking.

RW1 further confirmed that the Claimant did appeal the decision to terminate her services, which appeal was dismissed.

RW1 maintained that the Claimant's dismissal was for a valid reason and that fair process was followed. It is on this basis that she maintained that the Claimant is not entitled to the reliefs sought in her Claim urging the Court to dismiss the same Claim in its entirety with costs to the Respondents.

### **Submissions by the Parties**

The Claimant submitted that the allegations levelled against her by the Respondents that lead to her dismissal were unfounded and malicious and that the same were only meant to remove her from office.

The Claimant further submitted that her dismissal was unlawful and unfair having been judged unheard contrary to the provisions of Article 50 of the Fair administration action act and the Constitution of Kenya, 2010.

It is on this basis that the Claimant maintained that she is entitled to the reliefs sought in her Memorandum of Claim and therefore urged the Court to allow her Claim as prayed. The Claimant relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR**.

The Claimant further relied on the case of **Cause No. 464B of 2014: Benard Ndungu Mbugua v Nairobi Water and Sewerage Company Limited** where the Court proceeded to reduce the Claimant's summary dismissal to a normal termination of employment and ordered the Respondent to pay his terminal dues in accordance with the terms of service.

The Claimant further submitted that the fact that she was not arrested and charged with any criminal liability is a clear indication that she did not commit any offence and that her termination was malicious and unfair.

She further submitted that the Respondents failure to accord her a fair hearing through her participation in the process prior to her dismissal and failing to determine her appeal within a period of 6 months violated its own Human Resource Disciplinary Manual (May 2016), the Public Service Regulations 2005, Employment Act, 2007 and the Constitution of Kenya, 2010.

She therefore submitted that she is entitled to the reliefs sought in her Memorandum of Claim and therefore urged the Court to allow the same as prayed.

### **Respondent's Submissions**

The Respondent on the other hand submitted that it had reasonable cause to commence disciplinary proceedings against the Claimant after it was discovered by the National Intelligence Service that she was involved in Human Trafficking with some Eritreans, Ethiopians and Somalis at the Namanga border point.

The Respondent further maintained that the Claimant was also facilitating the acquisition of travel documents at a fee to illegal persons who could be involved in terrorism. The Respondents contended that these actions by the Claimant not only cast doubt to her integrity but also were threats to National Security which amounted to gross misconduct.

The Respondents further submitted that the Claimant's contract of employment was validly terminated for lawful and justifiable reasons and that due process was followed as she was accorded a chance to make her representations to the allegations levelled against her. The Respondents relied on the provisions of Section 41 and 45 of the Employment Act, 2007 and the case of **Walter Ogal Anuoro v Teachers Service Commission (2013) eKLR** where the Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. The Respondents submitted that due process having been followed the Claimant is not entitled to the reliefs she seeks in her Memorandum of Claim.

In conclusion the Respondents submitted that having followed the law, the instant Claim is devoid of merit and urged the Court to dismiss the same with costs to the Respondent.

### **Analysis and Determination**

There is no dispute that the Claimant was employed by the 2nd Respondent in the position of Immigration Officer 2 effective 25<sup>th</sup> October 2007. There is further no dispute that the Claimant was suspended on 18<sup>th</sup> December 2014 and later dismissed on 1<sup>st</sup> July 2016. The issues for determination are:

1. Whether the Claimants' termination was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

### **Reason for Termination**

The reason for the claimant's dismissal is captured in the letter of dismissal dated 1<sup>st</sup> July, 2017. The letter is reproduced below—

*“Ref No. 2007136635 (35)*

*Ms. Emily Muhadia Sakali,*

*Senior Immigration Officer, JG “L”*

*Thro’*

*The Director,*

*Department of Immigration Services*

*Nairobi*

**RE: DISMISSAL FROM THE SERVICE ON ACCOUNT OF**

**GROSS MISCONDUCT INVOLVING HUMAN TRAFFICKING**

*This is to inform you that the Authorized officer has approved the recommendations of the Ministerial Human Resource Management Advisory Committee meeting of 17<sup>th</sup> March, 2016 and decided that you be dismissed from service with effect from 17<sup>th</sup> December, 2014 on account of gross misconduct involving human trafficking.*

*However, in accordance with Section 31 (3) of the Public Service Commission Regulations, you are at liberty to appeal against this decision to the Secretary Public Service Commission through this Ministry within a period of Forty Two (42) days from the date of this letter.*

*Enclosed herewith, find declaration form for officers leaving the services and declaration of income, assets, and liabilities which should be returned to this office dully signed and witnessed together with the Civil Service identity card for cancellation as soon as possible.*

**SIGNED**

*Jascath K. Kaunda (MRS)*

*For: Principal Secretary/Interior”*

This Court has further perused the minutes of the Ministerial meeting held on 17<sup>th</sup> March 2016. It is clear that the committee considered the Claimants response to her letter of suspension dated 24<sup>th</sup> December 2014 prior to arriving at the decision to dismiss her.

According to the documents filed by the respondent, the disciplinary case of the claimant was first considered at the Ministerial Human Resource Management Advisory Committee (MHRMAC) at the meeting held on 25<sup>th</sup> March 2015 and deferred by the Committee citing lack of specific recommendations to enable the Committee make a decision on the same. The Director of Immigration Services was thus requested by the memo dated 18<sup>th</sup> June 2015 to submit specific recommendations so that the case of the claimant could be resubmitted to the Committee for appropriate action. In the response of the Director of Immigration Services dated 18<sup>th</sup> January 2016, he stated as follows –

*Ref. No. CONF/2007136632/(IQ) 13<sup>th</sup> January 2016*

*The Director/HRM&D*

*Directorate of Immigration and Registration of Persons Ministry of Interior and Coordination of National Government*

**NAIROBI**

(P/NO. 20070136632)

Please refer to your Memo Ref. No. 2007.136632/61 of 18<sup>th</sup> June 2015 communicating the decision of Ministerial Human Resource Management Advisory Committee's (MHRMAC) to seek for specific recommendations from the Department on the above mentioned subject.

The Government's intelligence agencies had linked Ms Sakali to human trafficking and assisting in acquisition of travel documents to illegal persons at a fee. This is a matter the National Intelligence Service (NIS) has been following keenly, and even placed the officer on its radar. From the Intelligence Agency's investigations, including monitoring the officer's movement and contact persons, the NIS is still convinced that Ms Sakali has maintained contact with persons whose activities are a threat to National Security. On its part as one of the security agencies, Department of Immigration Services has been in constant touch with NIS at the constant touch with NIS as the fight to eliminate cases of human trafficking and illegal acquisition of travel documents is heightened. We also have been receiving updates on the officer's illegal activities which she continued to engage in even after she was placed on suspension.

The information with NIS paints a picture of a government

employee in one of the security agencies who has little or no regard for national security, and continues to indulge in activities the department she is deployed in fights to eradicate. Information in the possession of these agencies is intricate, and due to the nature of information gathering machinery and investigative structures involved, circumstantial evidence in the hands of NIS may not be released for public consumption, or even be adduced as evidence. As indicated in my letter Ref. No. 2007136632/5 of 16<sup>th</sup> December 2014, the activities by the officer not only cast doubt on her integrity, but they are also a threat to National Security.

Consequently, it is our considered opinion that the officer be dismissed from the service on account of being a threat to National Security for engaging in human tracking and assisting in acquisition of travel documents to illegal persons.

SIGNED

Maj. Gen. (Rtd) Gordon O. Kihalangwa, CBS

[Emphasis added]

It is clear from the letter above that the MHRMAC had no evidence to prove the allegations against the claimant as the letter clearly states that the evidence could not be adduced. Further, the claimant was not supplied with information she sought by her letter dated 24<sup>th</sup> December 2014 in response to her letter of suspension.

She was also not informed of the date her case was being considered by the Committee or asked if she wished to be present at the hearing. The respondent thus failed to comply with procedure as set out in Section 41 of the Employment Act or to prove grounds for dismissal as required by Section 43 of the Act. The termination of the claimant's employment was thus unfair both procedurally and substantively by virtue of Section 45(7) of the Act. I thus declare the termination of the claimant's employment unfair.

#### Remedies

Having found the termination unfair, the claimant is entitled to pay in lieu of notice which I award her being one month's salary in lieu of notice in the sum of **Kshs.65,710**.

The claimant is also entitled to house allowance withheld during her suspension in the sum of **Kshs.380,000 for 19 months** which I award her. I do not find the prayer for uniform allowance valid as the claimant was not reporting for duty during the suspension. The same is declined.

The claimant is entitled to compensation which I award her at 12 months' salary taking into account the circumstances under which she was terminated, the long suspension without salary, the service of 8 years and the prospects lost of working to retirement, taking into account that there was no valid reasons for the termination of her employment. I thus award her **Kshs.788,520**.

The prayer for service pay for 8 years is declined as it seeks payment for future earnings which is neither contractual nor provided for by law.

The prayer for leave allowance for 2014 is granted at **Kshs.6,000**.

The total award is as follows –

- 1.- One month's salary in lieu of notice----- Kshs.65,710
- 2.- Withheld house allowance during suspension-- Kshs.380,000
- 3.- 12 months' salary as compensation----- Kshs.788,520

4.- Leave allowance for 2014----- Kshs.6,000

**Total** **Kshs.1,240,230**

The claimant is entitled to costs but because she was not presented by Counsel, the court awards her **Kshs.30,000** as reasonable expense and disbursements incurred in the prosecution of her case.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**