



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 32 OF 2018

IN THE MATTER OF ARTICLE 21 AND 23 OF THE CONSTITUTION

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,
28, 41 AND 47 OF THE CONSTITUTION**

BETWEEN

ROSEMARY AKINYI KIJANAPETITIONER

v

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. Rosemary Akinyi Kijana (Petitioner) was offered employment as Director, Human Resource & Administration through a letter dated 1 July 2012 by Nairobi City Water & Sewerage Company Ltd (Respondent).
2. The contract was to last for 3 years. The Petitioner accepted the offer on 23 July 2012 and commenced work on 3 September 2012.
3. However, on 13 February 2013, the Petitioner and Respondent signed a contract amending the tenure of employment to be served by the Petitioner to a 5-year fixed-term contract, backdated to 3 September 2012.
4. Around 27 February 2017, the Petitioner wrote to the Respondent's Managing Director requesting to be given an early exit from employment on health grounds.
5. In a response dated 30 March 2017, the Managing Director informed the Petitioner that the Board had rejected the early exit request and instructed that she serve the full term of the contract (up to 3 September 2017).
6. In a turnaround, the Petitioner wrote to the Respondent's Managing Director on 31 May 2017 seeking for the renewal of the contract, a request which was declined through a letter dated 23 June 2017, ostensibly because the Petitioner had previously requested for an early exit.
7. The letter also instructed the Petitioner to proceed on terminal leave. The Petitioner was advised that she could seek a review of the decision.
8. On the same day, the Managing Director appointed an acting Director, Human Resource & Administrative Services.
9. The Petitioner, upon receipt of the letter declining the renewal of contract applied to the Respondent's Board to review its decision.
10. The Board, through a letter dated 12 July 2017 informed the Petitioner that her contract would be renewed for 6 months effective 3 September 2017.
11. A month later, on 17 August 2017, the Chair of the Respondent's Board wrote to the Petitioner to notify her of the *discontinuation* of her services effective immediately, but on payment of 3-months' salary in lieu of notice.
12. The decision prompted the Petitioner to move this Court through a Petition on 18 April 2018 alleging discrimination, violation of human dignity and unfair labour practices.

13. The Respondent filed a replying affidavit sworn by its Human Resources Manager in opposition to the Petition on 8 October 2018 and this prompted the Petitioner to seek leave on 28 November 2018, to file a further affidavit.

14. The Court directed the parties to file and exchange any further affidavits within 14 days.

15. Despite the clear directive from the Court, the Petitioner only filed a Supplementary Affidavit sworn by a colleague who had served as Director of Finance on 23 October 2019, more than 1 year after leave was granted. Since the Petitioner did not seek further leave to have the affidavit admitted, the Court will disregard it.

16. The Petition was heard on 2 March 2020. The Petitioner gave sworn testimony.

17. Although served with a hearing notice which was acknowledged by its advocate on record, Kinyanjui Njuguna & Co. Advocates on 17 January 2020, the Respondent and its advocate failed to attend the hearing.

18. The Petitioner filed her submissions on 3 April 2020 (it was explained in a letter to Court that it could not be filed by 27 March 2020 as directed due to declaration of the public health pandemic).

19. The Court has considered the Petition, evidence and submissions (an application by the Respondent to arrest this judgment and re-open the hearing was declined by the Court).

20. The Court has adopted the Issues for determination as identified by the Petitioner in her submissions.

Discrimination against Petitioner

21. In alleging discrimination, the Petitioner asserted that the Respondent's Managing Director and Human Resources Manager subjected her to discrimination on account of her ethnic origin (Luo) and also because of her disability (ill health).

22. The conduct of the 2, the Petitioner contended violated her rights to equality and freedom from discrimination as enshrined in Article 27 of the Constitution and the inherent right to dignity as guaranteed by Article 28 as read with the particular provisions of the Employment Act, 2007, Persons with Disability Act and the United Nations Convention on Rights of Persons with Disability and Optional Protocol.

23. To lay a legal and/or evidential foundation to the discrimination assertions, the Petitioner made several assertions.

24. The assertions included an allegation that the Respondent's Managing Director had irregularly recruited a Human Resources Manager on or around 30 July 2012.

25. The Petitioner, however, did not present any evidence that the recruitment of the named person was irregular or did not meet the Respondent's recruitment procedures.

26. The Petitioner also alleged that the Managing Director showed an open ethnic bias towards her by treating the Human Resources Manager as the *de facto* head of human resource department and conversing in Kikuyu language during official meetings.

27. Since these meetings were said to have been held in the Managing Director's office and in the presence of only the 3 of them, and without any other evidence, it would be legally unwise of the Court to give much weight to the allegation(s).

28. The Petitioner also sought to rely on a recruitment audit report which established that recruitment process for drivers which she was excluded from the was flawed, and did not follow the policies in place and which audit lay blame on the Managing Director and the then Human Resources Manager.

29. In the view of the Court, the mere fact that the Petitioner was bypassed in the recruitment process would not be sufficient to demonstrate harassment or discrimination.

30. The Managing Director and the Human Resources Manager may have been involved in an irregular enterprise, but without more, that would not meet the test for discrimination.

31. It is true that the Human Resources Manager addressed the Managing Director directly in seeking a salary review, bypassing the Petitioner. Such conduct may pass as insubordination by the Human Resources Manager but in the view of the Court would not meet the legal threshold for discrimination.

32. Equally, although alleging that the Managing Director forced her to withdraw a show-cause notice issued to the Human Resources Manager, there was no disclosure what form the instruction took, verbal, written, formal or informal.

33. All in all, the Respondent had an elaborate Human Resources Policy and Procedures Manual.

34. The Policy had detailed provisions (informal and formal) in dealing with and/or addressing grievances in the workplace and these would include discrimination and harassment.

35. The Petitioner was in a sense the custodian of the Policy as she held the highest human resource office.

36. Although alleging discrimination, the Petitioner despite her high position in the Respondent did not demonstrate that she ever brought the alleged discrimination to the attention of the Respondent's Board either informally or formally.

37. The Petitioner further alleged that the harassment from the Managing Director and Human Resources Manager led to her medical condition. However, she did not present any medical expert evidence to link her illness with the alleged acts of the Respondent's Managing Director and/or the then Human Resources Manager.

38. The Managing Director and the then Human Resources Manager who allegedly discriminated and harassed the Petitioner were not made parties to the litigation. The Court notes that the Respondent's Board refused to renew the Managing Director's contract and sent him on terminal leave on the same day it discontinued the Petitioner's employment.

39. It would have been legally prudent to make them parties as some of the alleged conduct were not in public.

40. The Court finds the allegation of violation of rights to equality and freedom from discrimination and human dignity were not proved to the requisite standard.

Unfair termination of employment

41. The Petitioner's contract did not run its agreed course as the Respondent brought it to an end prematurely. She contended that in December 2016, after she had developed an illness, 2 Board members approached her with a proposal to tender a resignation in order for handsome payment and continued medical treatment support and this made her feel her dignity was under attack.

42. On the state of the record, the Court can't determine whether the 2 named Board members were acting on behalf of the Respondent or in light of their relationships with the Petitioner.

43. But what cannot be challenged is that the Respondent terminated the Petitioner's employment on or around 17 August 2017 by offering pay in lieu of notice, when it had about a month to run. The contract, though time-bound, had not lapsed by effluxion of time.

44. The Respondent, in supporting the lawfulness and validity of the decision asserted in the replying affidavit that it was open to it to terminate the contract on notice without assigning any reasons.

45. The position taken by the Respondent is not legally tenable under the current legal framework.

46. An employer, intent on discontinuing an employment contract on the grounds of *poor performance, misconduct and/or physical incapacity* ought to afford the employee an opportunity to make representations, for that is the tenor of section 41, 43 and 45 of the Employment Act, 2007.

47. Previously, an employer could terminate a contract without cause, for a bad cause or no cause provided notice or pay in lieu of notice was offered. The law is now radically different.

48. The Petitioner was not afforded an opportunity to be heard nor given reasons.

49. It, therefore, would not be illogical to conclude that it is probable that the Petitioner's ill-health may have been a factor as she has contended.

50. Regrettably, the Petitioner did not prove that she was a person with a disability within the context of the Persons with Disability Act. The mere production of a medical report outlining a medical condition, and without calling the author or production of a certificate from the entity empowered to issue certificates of disability, in the view of the Court, is not sufficient to prove disability within the context of the Act.

51. The decision by the Respondent to discontinue the Petitioner's employment was not only invalid as no reasons were given, but unfair in terms of the statutory requirements and also amounted to unfair labour practice.

Compensation

52. The Petitioner had served the Respondent for about 5 years and had been assured of renewal for 6 months and in consideration of these factors, the Court is of the view that the equivalent of 10 months' gross salary as compensation would be fair (Petitioner filed copy of August 2017 payslip which suggests gross salary exclusive of gratuity was Kshs 696,360/-).

Breach of contract

Lost income

53. The Petitioner sought Kshs 40,050,000/- being income she would have earned had the contract been renewed for a further 5 years.

54. The Respondent had indicated the intention to renew the contract for a further 6 months.

55. In terms of clauses 8, 9 and 10 of the employment contract, the Petitioner was entitled to 6 months' salary being compensation for premature loss of employment (subject to statutory deductions).

56. Consequently, the Court will allow Kshs 4,178,160/- (monthly salary was Kshs 551,026/-).

Gratuity

57. Clause 5(B) of the employment contract provided that the Petitioner would be paid the equivalent of 31% of basic monthly salary for each completed year of service.

58. The Petitioner claimed Kshs 10,249,083/- on account of anticipated gratuity for the 5 years she would have served under the renewed contract.

59. The Petitioner did not serve under the contract and relief is declined.

Conclusion and Orders

60. From the foregoing, the Court finds and declares

- i. Petitioner did not prove violation(s) of rights to equality and freedom from discrimination or human dignity.
- ii. The discontinuation of the Petitioner's employment was unfair.
- iii. The Respondent was in breach of contract.

61. The Petitioner is awarded

- i. Compensation Kshs 6,963,600/-
- ii. Lost income Kshs 4,178,160/-

TOTAL Kshs 11,141,760/-

62. Petitioner to have costs.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Obura instructed by Obura Mbeche & Co. Advocates

For Respondent Kinyanjui Njuguna & Co. Advocates/Limo & Njoroge

Court Assistant Judy Maina