



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1317 OF 2010

(Before Hon. Lady Justice Maureen Onyango)

GRACE MWENDA MUNJURI.....CLAIMANT

VERSUS

TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

JUDGMENT

The Claimant herein filed a Memorandum of Claim on 26th October 2010 alleging her unlawful suspension leading to a backdated termination and that the Respondent had withheld her salary. The Claimant therefore prays for the following reliefs:

- a) Special damages of Kshs.1,165,996
- b) Aggravated and exemplary damages
- c) Costs of this suit
- d) Interest on (a) and (b) above.

The Respondent in its Memorandum of Claim filed on 1st December 2010 denies the allegations in the Memorandum of Claim. It avers that the Claimant breached the Respondent's Code of regulations and terms of her employment.

Claimant's Case

The Claimant testified that she is a Communications consultant and was employed by the Respondent between 2005 and 2007 vide a letter dated 30th June 2005. She testified that her last monthly gross salary was Kshs.182,375.

That in April 2007 she was sent on compulsory leave and her employment was subsequently terminated in August 2007. That she protested being sent on compulsory leave as she had not applied for leave and should there have been any reason for being sent on leave the same ought to have been discussed with her.

She testified that she was invited for a disciplinary hearing and on 8th May 2007 she was sent on suspension. She testified that the letter inviting her for disciplinary hearing gave reasons for her suspension but there was no proof in the allegations. She testified that it is not true that she called a press conference when asked to go on leave and she did not use any abusive language. She testified that she was never convicted of any criminal offence and it was not proper for the Society to invoke paragraph 6.1.(b)(ii) of the Respondent's Code of Regulations.

She testified that she was not paid from May to October and that her termination was backdated to May 2007. It is the Claimant's case that at the time of termination it was during a political season and being second in command someone wanted her to exit.

She testified that money had to be authorised by the C.E.O and that she never received the money as alleged by the Respondent and the issue was never raised in the suspension letter.

During cross-examination the Claimant testified that she did not recall the letter from Batram Muthoka dated 8th December 2006 and the

letter dated 14th December 2006 addressed to her with the subject “*Press Entertainment Kshs.70,000*”. She testified that she was invited to a special Staff and finance Committee meeting on 30th April 2007, chaired by the National Chairman, which discussed her attempt to do business with the ASK. She testified that she could not remember if the issue of Kshs.70,000 was discussed during the meeting.

She testified that there was a press release on 6th April 2007 where she was authorised to address the media though it was the C.E.O’s mandate to address the media. She testified that she did not address the press on the issue in the article published in The People Daily. With respect to her terminal benefits she testified that she received payment in lieu of notice but was only claiming payment from May to October.

In re-examination the Claimant testified that she had nothing to do with the article that was published in The People Daily. She testified that she had a grievance with the C.E.O and the grievance procedure required her to report to her supervisor the C.E.O who showed no interest in the grievance.

Respondent’s Case

RW1, **Anne Wangumo Ngugi**, the Human Resource Manager, at the Respondent, testified on behalf of the Respondent. She testified that the Claimant was terminated according to the Code of Regulations for various reasons. She testified that amongst the reasons were the Claimant’s use of abusive and disrespectful language before an officer in front of a subordinate, failing to comply with a lawful order and failing to keep the organisations secrets, conducting a press conference without authority of the C.E.O or council and committing acts that embarrassed the Respondent.

She testified that the Claimant was paid her terminal benefits which included Gratuity of Kshs.235,025.95 and 3 months’ salary in lieu of notice being Kshs.532,569 before deductions were made.

In cross-examination she testified that the Claimant was paid between May and October 2007 when the Claimant was on suspension but did not have any evidence to confirm the same. She testified that she had no proof that the Claimant called a press conference or that she had used abusive language or disrespected the C.E.O. She testified that the letter from Skyweb was proof that the Claimant intended to do business with the Respondent without the necessary approval.

She testified that the publication in the People Daily was not by the Claimant but was information that was given by a person who had access to that information. She concerned that the employee should be given benefit of doubt when there is no proof. She testified that there was no proof that the Claimant received the letter dated 14th December 2006 and that given her role as Marketing and Publication Manager it was a very high amount received as a press entertainment amount.

She testified that it was wrong for the Respondent to send the Claimant on suspension as it ought to have interdicted her .She further testified that the Claimant is not entitled to allowances for the months she was on suspension but for the months since she was not on duty.

In re-examination, RW1 testified that the Claimant was not paid salary between May and September 2007 and that they have no records for payment.

Claimant’s Submissions

The Claimant submitted that the provisions of at Clause 6.1(b)(ii) of the Respondent’s Code of Regulations suggests that for one to be suspended he or she must have been convicted of a criminal offence while the Claimant had not been charged with a criminal offence. The Claimant therefore submitted that the Respondent was not justified in suspending the Claimant. She relied on the case of *Imenje v Kenya National Co. Ltd (1986) KLR 350*.

The Claimant submitted that the Respondent’s action of backdating the Claimant’s suspension and termination is neither supported in the Employment Act Cap 226 (Repealed) nor the Respondent’s Code of regulations. The Claimant relied on the decision in *Naaman Iniu v Trustees of the Agricultural Society of Kenya [2013] eKLR* where the Court held:

“The Court finds that on the basis of the principle in the reported case of Imenje v Kenya National Co. Ltd (1986) KLR 350 there is no basis for the retroactive dismissal. The months between 1st March 2007 and October 2007 are months during which the Claimant is entitled to pay. The terms of his contract did not offer him any provisions for termination by way of retroactive application. If this was allowed he could as well have stated that he was backdating, say, a resignation to a date in 2007 during this suspension or before. That is untenable.”

The Claimant submitted that she is entitled to her salary for the period she had been suspended as she was deemed to still be in employment. She further submitted that she is entitled to her provident fund contribution which the Respondent failed to remit, her 28 untaken leave days, medical and travelling expenses and aggravated damages being 12 months’ compensation.

Respondent’s Submissions

The Respondent submitted that its code of regulations at Sections E and F entitles the Respondent to the summarily dismiss an employee who is guilty of a misconduct or neglect of duty. The Respondent further submitted that the Claimant was invited to the Special Staff and Finance Committee Meeting which established that the Claimant was in gross violation of the code of regulations leading to her dismissal. The Respondent relied on the decision in *Johnson B. Wairoma v Securicor Kenya Limited [2001] eKLR*.

The Respondent submitted that the Claimant was subjected to the relevant procedures taking into consideration that the events happened

prior to the enactment of the Employment Act 2007. The respondent relied on the case of **Rift Valley Textiles Limited v Edward Onyango Ogenda No. 2 of 1992** which was cited in **Peter Baiye Gichohi & another v Attorney General [2012] eKLR**.

The Respondent submitted that pursuant to the contract of employment the Claimant is only entitled to half month salary and that the Respondent had the option to either suspend, interdict or terminate the Claimant. The Respondent submitted that the Claimant's claims that are above her normal salary do not apply as the same are benefits which were extinguished once she was terminated.

The Respondent submitted that the Claimant did not adduce any evidence to prove the allegation of malice by the Respondent and that it would be in the just for the Court to dismiss her claim.

Determination

Issues for determination

- i. Whether the Claimant's Suspension and termination were unlawful.
- ii. Whether the Claimant is entitled to the reliefs sought

i. Whether the Claimant's Suspension and termination were unlawful

The Claimant was terminated for various reasons as listed in her termination letter dated 29th October 2007. In the letter the Respondent stated that it had decided to terminate the Claimant's services from the date of her suspension. Prior to the termination the Claimant had been suspended and thereafter invited to a disciplinary hearing. In the suspension letter dated 8th May 2007 the Respondent listed the offences which the Staff & Finance Committee had noted that the Claimant had committed to be:

"...You called a press conference when you were asked to proceed on your annual leave and full particulars of which are well within your knowledge

You deliberately used abusive and disrespectful language against the Chief Executive in front of other subordinate staff and facts are well known to you.

You involved yourself in unethical issue of conflict of interest by trying to do business with the Society thus contravening the society rules and regulations.

You committed the Society to the tune of Kshs. 148,900 without approval by authorising Skyweb to go ahead and network stations that were unnecessary..."

The Claimant testified that though she was invited for a disciplinary hearing the allegations levelled against her were never proved. Indeed RW1 in cross examination testified that there was no evidence to prove that the Claimant had used any abusive words or that she had called for an unauthorised press briefing. In the absence of any evidence supporting the allegation that the Claimant committed these offences it is justified to find that there was no reason for the Claimant's termination.

In respect of the article published in the People Daily titled "ASK official under KACC probe", the Claimant testified that she had nothing to do with the Article while RW1 testified that the article was not done by the Claimant but was given by a person who had access to this information. Despite stating that the information had been made available by a person who had access to the information the Respondent did not provide any link of the access and "leaking" of the information to the Claimant.

It is worth appreciating that the Claimant's termination took place prior to the enactment of the Employment Act 2007 during which period an employer was under no obligation to give reason for termination, except in redundancy situations. There was also no requirement to give the employee an opportunity to be heard.

In the Claimant's letter of appointment Clause 15 required either party to give three months' notice or payment in lieu of notice. As was stated in the case of **Naaman Iniu v Trustees of the Agricultural Society of Kenya [2013] eKLR** it is unjustifiable to backdate a termination letter.

The Claimant avers that her suspension contravened Clause 6.1(b)(ii) of the Respondent's Procedural Manual as she had not committed a criminal offence. It was also the testimony of RW1 that the Respondent erred in suspending the Claimant and that it ought to have interdicted her. Both parties are in consensus that the suspension was in contravention of the respondent's Code of Regulation which provides:

"An employee shall at any time neglect, refuse or become unable to reason of negligence or indiscretion to perform any duties of his employment or to comply with any order or if he shall improperly disclose any information affecting the affairs of the Society to any unauthorised person or shall in any other manner misconduct himself, the Society may at its discretion dismiss him forthwith and without any notice and on such dismissal all the employee's rights and benefits hereunder shall forthwith cease and determine provided however that:

***Interdiction:** On the occurrence or suspected occurrence of any of the aforesaid, the Society may interdict the employee from duty while it makes such enquiries as it thinks fit into the circumstances. During the period of such interdiction, and until the decision of*

the Society is communicated to the employee, he shall be entitled to receive only half of his salary.

If the employee is reinstated, she shall receive the balance of his salary to which he would otherwise have been entitled but upon dismissal, he shall not be entitled to receive any payment in excess of the one half of his salary.

Suspension: In the event of the employee being convicted of a criminal offence, for which punishment by way of imprisonment (other than in default or payment of a fine) may be imposed, the Society may suspend the employee from duty while it makes such enquiries it thinks fit into the circumstance. During the period of suspension and until the decision of the Society is communicated to the employee, he shall not be entitled to receive any salary PROVIDED that the Society may if deems fit, pay the employee an alimentary allowance for such period in such amount and such terms as it may determine.

If the employee is reinstated, he shall receive the balance of the salary to which he would otherwise have been entitled to receive in excess of the said alimentary allowance”

The Respondent was expected to comply with the procedure set out in its Code of Regulations. The Claimant was never charged or convicted of any criminal offence. Therefore, the Claimant’s suspension was unjustified. It is therefore the court’s finding that the suspension and subsequent termination of employment were wrongful and unjustified.

ii. Whether the Claimant is entitled to the reliefs sought

The Claimant is entitled to her salary during suspension from May to October 2007 as the suspension was unlawful having been in contravention of the respondent’s Code of Conduct.

The Claimant is also entitled to her provident fund contribution for the period she was under suspension from May to October 2007.

In respect of the Transport allowance for the month of March 2007 and leave travelling allowance for the month of April 2007. The Claimant’s letter of appointment at Clause 4 provide that the Claimant was entitled transport and to a society car which if not provided she would be paid Kshs.40,000. The fringe benefits which the Claimant is entitled to under Section M of the Code of Regulations do not include leave travelling allowance and neither does her contract.

On the prayer for medical expenses up to October 2007 the Claimant was entitled to the same under Clause 12 of her Letter of appointment and under Section M of the Code of Regulations. The Claimant is therefore entitled to these expenses.

The Claimant is also entitled to the 26 leave days earned but not taken.

Underpayment on final working this claim should fail as it was not proved.

Conclusion

From the foregoing, I award the claimant the following –

1... Salary withheld from May to October 2007 at Kshs.187,581 per month.....	Kshs.1,125,486
2... Provident fund contributions from May to October 2007 at Kshs.13,519.5.....	Kshs.81,117
3... Medical expenses.....	Kshs.16,682
4... Transport to Eldoret show.....	Kshs.10,000
5... Leave travelling allowance for March 2007.....	Kshs.23,000
6... Annual leave 26 days.....	Kshs159,195
Total	Kshs.1,415,480

The claim for underpayments was not proved and is declined.

The claimant has not proved that she is entitled to aggravated or exemplary damages and the prayer is declined.

I therefore enter judgment for the claimant against the respondent in the total sum of **Kshs.1,415,480.00/=**

The respondent shall also pay the claimant's costs.

Interest shall accrue from date of filing suit as the claimant was kept out of her money without justification. These were payments that were due from the date of termination.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE