



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2124 OF 2014

ELIZABETH WAMBUI MBURU.....CLAIMANT

VERSUS

BOARD OF DIRECTORS,

KENYA PLANT HEALTH INSPECTORATE SERVICE..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 27.11.2014 through R.W.Chege & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a) Reinstatement to work.
- b) Amount due in the way of unpaid salary of Kshs.23, 193.35 from 25.06.2008 to date.
- c) General damages.
- d) Costs of the suit.
- e) Interest on a, b, c above.
- f) Any other relief the Court may grant.

The claimant changed her advocates severally and as at the time of final submissions R.M. Njiraini & Company Advocates was on record for the claimant.

The respondent filed the reply to the memorandum of claim on 13.03.2015 through Ojiambo & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. At paragraph 5.1 the respondent stated that it will raise a preliminary objection that the suit is time barred under the provisions of section 90 of the Employment Act, 2007.

There is no dispute that the parties were in a contract of employment. The respondent employed the claimant by a letter dated 02.11.1999 to the position of a receptionist and telephone operator. In September 2004 the claimant fell ill with the consequence that her vision was impaired.

By the letter dated 25.06.2008 the respondent retired the claimant on medical grounds effective 17.04.2007 taking into account that she had been absent from duty effective September 2004 on medical grounds.

The letter dated 08.09.2008 by Romano M. Kiome the Permanent Secretary in the Ministry of Agriculture addressed to the respondent's Managing Director stated as follows:

“RE: MS. ELIZABETH W. MBURU

Reference is made to your letter Ref. PF/1335 (C) dated 3rd December, 2008 in respect of the above mentioned employee of Kenya Plant Health Inspectorate Service (KEPHIS).

We are in receipt of a letter from the Kenya Society for the Blind indicating that despite having lost a significant amount of her vision, Ms. Elizabeth Wambui Mburu has received training on how she can perform her duties as Switch Board/ Telephone Operator using the same equipment available at KEPHIS (copy attached).

After consideration of this matter and in view of the changed circumstances which are beneficial to both the institution and the officer, you are required to reinstate Ms. Wambui to KEPHIS as a switchboard telephone operator on or before 22nd December, 2008.

Yours

ROMANO M. KIOME, PhD (CBS)

PERMANENT SECRETARY

Cc. Ms. Elizabeth Wambui Mburu – (To report to KEPHIS for duty on 22nd December, 2008)”

By the letter dated 28.11.2008, Philip Ngali, Rehabilitation Officer at the Kenya Society for the Blind wrote to confirm that the claimant had been rehabilitated and was ready to go back to active employment and further, **“She before lost a significant amount of her vision she used to work as a switch board / telephone operator for Kenya Plant Health Inspectorate Service (KEPHIS). She worked using a PABX machine to receive and make calls. She has received training on how to use a PABX machine and it does not need any modification for her to work with. So any opportunity accorded to her to use her skills will be highly appreciated.”**

The claimant has exhibited the certificate on adaptive technology dated July to September 2006 by the Kenya Society for the Blind and the relevant rehabilitation report.

At paragraph 13 (h) of the memorandum of claim the claimant states that the respondent disregarded the Permanent Secretary’s directive that she be reinstated.

To answer the **1st issue** for determination, the Court returns that the claimant’s cause of action was not time barred as founded upon a continuing injury, namely the respondent’s failure to implement the directive by the Permanent Secretary reinstating the claimant into employment of the respondent. Under section 90 of the Employment Act, 2007 a suit for a cause of action for a continuing injury must be instituted within 12 months from the date of cessation of the injury. In the Court’s opinion, the continuing injury in the present case has not ceased because the reinstatement directive was effective 22.12.2008 and it has never ceased to date. The claimant says she is entitled to the reinstatement as directed by the Permanent Secretary and her claim is alive and is properly before the Court as a continuing injury which has never ceased to run.

In any event, the Court considers that the claimant’s case (as per the facts in the memorandum of claim) is largely founded upon her statutory rights as a person with disability as provided under the Persons with Disabilities Act, 2003 as well as section 5 of the Employment Act, 2007. In such circumstances, the cause of action is as well founded upon statutory provisions and it is a continuing injury arising from the employment relationship between the parties and it is not time barred under section 90 of the Employment Act, 2007. The claimant’s case is that as a person with disability, her statutory right to continue in employment and to have a fair and equal opportunity to work continues to be infringed. The Court finds as much and her claim is not stale on account of becoming time barred.

The **2nd issue** for determination is whether the claimant is entitled to the reinstatement effective 22.12.2008 as per the directive by the Permanent Secretary. Section 11 of the Persons with Disabilities Act, 2003 provides that the Government shall take steps to the maximum of its available resources with a view to achieving the full realization of the rights of persons with disabilities set out in the Act. Section 12(1) provides that no person shall deny a person with a disability access to opportunities for suitable employment. Section 15(1) of the Act prohibits employers from discriminating a person on account of disability in undertaking human resource functions as listed under the section. The Court finds that the claimant has established that she acquired a disability while in the respondent’s employment and the respondent acted without an opinion of a medical board or medical practitioner in finding that the claimant was due for retirement on account of ill health. The Court has considered that the claimant took appropriate steps towards rehabilitation and there was no good reason for the respondent to act in the manner it was done to retire the claimant upon fictitious allegations of ill health.

In this case of the continuing injury, the Court has considered that the Public Service Commission Code of Practice on Mainstreaming Disability had been issued on 10.03.2010. At Paragraph 6(5) the respondent as an employer in the public service was guided and therefore required to institute a workplace level policy on promoting a safe and healthy workplace including for early intervention and referrals to treatment and rehabilitation of those who acquire disabilities. Paragraph 16 of the Code on job retention specifically provides that where a public officer acquires disability while in employment the concerned public service entity shall take steps to enable the officer retain employment including-

- a) early intervention, referral to appropriate services and rehabilitation;
- b) measures for a gradual resumption of work;
- c) opportunities for the officer to test work or obtain experience in an alternative job if the officer is unable to resume the previous job;
- d) the use of support and technical advice to identify any opportunities and adjustments which might be required;

- e) mitigating measures so as not to exacerbate the existing conditions of the officer;
- f) any necessary training or retraining of the officer;
- g) any reasonable modification or adaptations of the job, work station or work environment;
- h) any changes in procedures needed to perform the job accompanied with information to co-workers; and
- i) the provision of assistive or support devices and assistive services for the officer.

The Court returns that the Court's upholding of the directive by the Permanent Secretary that the claimant be reinstated was consistent with the Code. Even if the Code had not been issued but the injury being a continuing one, the provisions of the Code will guide the Court accordingly. While taking that view, the Court reckons that Article 54 (2) of the Constitution, 2010 provides that the state shall ensure the progressive implementation of the principle that at least 5% of the members of the public in elective and appointive bodies are persons with disabilities and applying the Code in this case, in the opinion of the Court, is within the progressive implementation of that constitutional principle. Further, the Court considers that the respondent having not instituted a workplace level policy on promoting a safe and healthy workplace as per paragraph 6(5) of the Public Service Commission Code of Practice on Mainstreaming Disability, the respondent shall institute the policy, file it in Court and publish it accordingly, not later than 01.02.2020.

The respondent has not disputed that the Permanent Secretary in the respondent's parent Government Ministry acted lawfully in making the directive that the claimant is reinstated effective 22.12.2008. The Permanent Secretary did not set aside the reinstatement directive except the letter for the Permanent Secretary which advised the claimant to liaise with the respondent for further necessary action. The Court returns that the Permanent Secretary's letter directing the claimant's reinstatement must be understood as the State's efforts and decision to implement the rights of persons with disabilities as was enjoyed by the claimant under the statutory provisions as cited earlier in this judgment. Further, the Court returns that in absence of a dispute about the authority of the Permanent Secretary to issue the reinstatement directive, the Court returns that the directive must have been within the Permanent Secretary's supervisory functions as was conferred under section 22 (3) of the former Constitution of Kenya. Accordingly, the claimant having established her rehabilitation to continue in employment in the position she held and being entitled as per the statutory provisions already cited in this judgment, the Court returns that she was entitled to the reinstatement as directed by the Permanent Secretary.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The claimant has prayed for reinstatement to work. The Court returns that the claimant is entitled as prayed and as per the directive by the Permanent Secretary. She is entitled to reinstatement effective 22.12.2008 as per the directive and not effective 25.06.2008, the effective date of the challenged retirement on account of ill health. The Court has considered that the reinstatement gives effect to the Permanent Secretary's directive and in that sense, section 12 (3) (vii) of the Employment and Labour Relations Court Act will not operate as a bar because the order to be given operationally gives effect to the directive as was already done and the claimant's entitlement evolves from that directive. The Court has considered the claimant's efforts towards early rehabilitation and her right to continue in employment on equal footing with others as protected in the statutory provisions as earlier referred to in this judgment. The Court returns that it would be difficult for the claimant to seek and obtain alternative employment and ends of justice shall be served by giving effect to the directive by the Permanent Secretary. While making that finding the Court returns that the period from the effective date of the retirement 25.06.2008 to 22.12.2008 shall be treated as leave without pay as there shall be no break in service for purposes of the claimant's continued service. The claimant should report to the respondent's Chief Executive Officer and Managing Director not later than 22.05.2019 at 9.00am for appropriate deployment and to continue in employment at prevailing remuneration and attached full benefits.
- b) The claimant has prayed for the amount due in the way of unpaid salary of Kshs.23, 193.35 from 25.06.2008 to date. The Court returns that the payment will be effective the date of the reinstatement directive being 22.12.2008 making 136 months as at 22.05.2019 thus **Kshs. 3, 154, 295.60** is awarded at the rate of Kshs. 23, 193.35 per month.
- c) The claimant prayed for general damages. No submissions were made in that regard and the prayer is deemed abandoned.

The claimant having succeeded, the respondent shall pay costs of the suit.

While making the award, the Court considers that the claimant's predicament flew from the acquired disability and the only reason she lost the employment was because the respondent misconstrued the disability for ill health. Further, the Permanent Secretary at the parent Ministry considered the claimant's case within his prevailing authority under the former Constitution and in view of the claimant's rehabilitation, the Permanent Secretary directed a reinstatement. The directive remained alive and there is no established good cause why the ministerial directive that was consistent with the statutory rights and protections for persons with disabilities should not be given effect to by the Court. The Court has revisited Article 54 (2) of the Constitution of Kenya 2010 thus, **"The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities."** The provision was not in place as at the time of the Permanent Secretary's directive but the Court considers that the directive was at a time the Persons with Disabilities Act, 2003 had already provided thus, **"13. The Council shall endeavour to secure the reservation of five percent of all casual, emergency, and contractual positions in employment in the public and private sectors for persons with disabilities."** The directive by the Permanent Secretary is therefore found to have been consistent with the law and will therefore be upheld accordingly. Further, the Court returns that the respondent's internal human resource policies could not override the express statutory provisions on the rights of persons with disabilities and the retirement on grounds of ill health is found to have been unlawful, misconceived and unreasonable in the circumstances of the claimant's case.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) The reinstatement of the claimant in the employment of the respondent in the position held prior to the retirement on grounds of ill health and effective 22.12.2008 as per the directive by the Permanent Secretary; and the period from the effective date of the retirement 25.06.2008 to 22.12.2008 shall be treated as leave without pay as there shall be no break in the claimant's service for purposes of the claimant's service pay or retirement benefits in that regard.

b) The claimant to report to the respondent's Chief Executive Officer and Managing Director not later than 22.05.2019 at 9.00am for appropriate deployment and to continue in employment of the respondent at the prevailing remuneration and attached full benefits as well as applicable law.

c) The respondent to pay the claimant a sum of **Kshs. 3, 154, 295.60** by 15.08.2019 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.

d) The respondent to institute a workplace level policy on promoting a safe and healthy workplace as per paragraph 6(5) of the Public Service Commission Code of Practice on Mainstreaming Disability and file it in Court and publish it accordingly not later than 01.02.2020.

e) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 3rd May, 2019**.

BYRAM ONGAYA

JUDGE