



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1892 OF 2016**

**ALICE NYANDUKO OMWANCHA.....CLAIMANT**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the Respondent as a Field Officer in July 1993 and rose the ranks to become the Regional Manager Coast Province, earning Kshs.109,925/= per month. She worked until 27.4.2012 when she was interdicted for corruption allegation which also saw her arrested and charged in Anti-corruption case No.11 of 2012. On 3.9.2013 she was summarily dismissed for gross misconduct related to the said corruption. The claimant was thereafter acquitted of the corruption charges on 19/03/2015 and filed this suit on 23.10.2015 accusing the respondent of unfair and wrongful dismissal from employment and praying for:

- a) A declaration that the Claimant's dismissal from her employment was unfair and wrongful and should thus be reinstated to her office.
- b) Payment of monies as set out in paragraph 9 being compensation for the illegalities all totalling Kshs.23,490,490.
- c) Such other orders/directions as the court may deem just and expedient.
- d) Costs of this claim.
- e) General damages.
- f) Interest on above sums at court rates.
- g) Certificate of Service.

2. The Respondent filed Statement of Defence on 12.4.2016 denying all the allegations in the Statement of Claim and averring that the dismissal was fair and justified because there was a valid reason, namely soliciting and receiving a bribe by the claimant, and that the disciplinary procedure set out in her HR Policy Manual was followed before the dismissal. She further averred that the acquittal of the claimant in the criminal case cannot invalidate the action she took against her since the facts relied on in terminating her services never changed. Finally, she averred that as at the time of the dismissal, she had paid the claimant all dues except 23 leave days worthy Kshs.43,374.07 which awaits completion of clearance by the claimant. That the remedy of reinstatement prayed for by the Claimant is untenable and she prays that this case is dismissed with costs.

3. The main issues for determination arising from the pleadings filed are whether the dismissal of the claimant was justified by a valid and fair reason; whether a fair procedure was followed before the dismissal; and whether the claimant is entitled to the reliefs she has sought.

### **Claimant's evidence**

4. The Claimant adopted her Statement of Claim together with the filed supporting documents in support of her claim. She testified that she was summarily dismissed while the criminal case was pending and without being accorded a fair hearing before a disciplinary committee. She contended that she was called to the respondents Head office on 12.7.2013 where she was given a letter dated the same date and inviting her to attend a hearing on the same day. That she attended the hearing and found a panel ready to hear her but the meeting never lasted for 10 minutes and she was told to go and wait for one month to be given another interdiction letter but instead she received a dismissal letter.

5. In cross-examination, she admitted that she was the senior most officer of the respondent in Mombasa while the Grace Mwaka was a casual serving as the acting Administrative Assistant in the office earning Kshs.9,000 per month. She stated that she sought a soft loan from Grace Mwaka because she had a sick relative but the loan was not documented. She further stated that she never asked for any particular amount of money. She admitted that during the said time there, was a vacancy of Administrative Secretary in Mombasa office which had been advertised by pinning a notice on office door. She further admitted that Grace had applied and the interviewing panel picked her for the job. She also admitted that Grace gave her Kshs.30,000 on 23.4.2012 which was after the interview but before the appointment letter was issued to her. She admitted that after Grace gave her the money, Anti-corruption officers came to her office to record a statement. She denied that the money was bribe money to facilitate her appointment. She however acknowledged that being a close friend, she did not expect Grace would frame her for anything.

6. The claimant further admitted that on 26.4.2012, the respondent's HR manager served her with a letter asking her to explain the bribery allegation on 23.4.2012 and she responded. She further admitted that she was given a letter inviting her to a disciplinary hearing but the letter never cited any charges. She also admitted that she attended the hearing before a panel where she was given a chair to sit on and told that her bribery case in Mombasa had taken forever. That thereafter she received the dismissal letter dated 3.9.2013 with almost similar contents to those in the suspension letter.

7. The claimant admitted that while on the suspension she was paid half basic salary until August 2013. She further admitted that she was a member of a Pension Scheme and after the termination, she was paid her pension. She also admitted that her appointment letter did not provide for payment of gratuity. She contended that she is entitled to transport allowance because she was reporting to work once per week during the suspension period. She further contended that as at the time of dismissal she had 30 days leave outstanding and prayed for cash value. She however admitted that despite being given Form for clearance, she could not fill the same until her dues were paid in full.

### **Respondent's evidence**

8. Grace Mwaka testified as RW1. She adopted her written Witness Statement as her evidence herein. She stated that the claimant demanded from her Kshs.100,000 as a bribe in order secure a permanent appointment in the position she was acting. That due to her pay she could not afford the said sum and as such, she bargained the bribe money to Kshs.30,000/=. Thereafter she reported to the Anti-corruption Agency and an officer gave her treated money to give the claimant which she did and shortly after the claimant put it in her bag, she was arrested by the Anti-corruption officers. Rw1 further stated that she only reported the matter to the HR manager after the arrest because the claimant was a friend of the respondent's Managing Director. She however admitted that she was called to testify against the claimant during the disciplinary hearing but contended that she testified against her in the Anti-corruption case. She stated that the evidence in the criminal case is similar to what she had given in this case.

9. Matilda Mwachia testified as Rw2 and she also adopted her written witness statement as her evidence

herein. She stated that the claimant was the respondent's Regional Manager Coast until she was dismissed for soliciting for a bribe. That before the dismissal, the claimant was first suspended on half salary in accordance with the respondent's HR Policy Manual and contended that she was not entitled to any allowance transport, telephone and entertainment because she was not on duty. She further contended that the claimant was summoned to a disciplinary hearing on 12.7.2013 before the respondent's Staff Committee of Management where she was informed of her charges, heard on her defence and then told to wait for the decision. That the decision was finally communicated by the letter dated 3.9.2013 which dismissed her for gross misconduct of soliciting and receiving a bribe from Grace Mwaka. Rw1 contended that the acquittal of the claimant from the said criminal case did not invalidate the disciplinary action taken against her since the fact that the claimant solicited for and received a bribe was not changed by the acquittal.

10. Rw2 further testified that after the dismissal the claimant was paid all her pension and other terminal dues save for 23 days leave valued at Kshs.43,374.70, which will be paid after the clearance by the claimant. She contended that the claimant was not entitled to gratuity.

11. In cross examination, Rw2 admitted that she did participate in the disciplinary hearing. She contended that the claimant was served with the show cause letter dated 26.4.2012 after a report of corruption was received from the Rw1 and the Anti-corruption Agency. She concluded by stating that the proceedings here are not the same as the criminal proceedings.

### **Claimant's Submissions**

12. The Claimant submitted that **Article 41 of the Constitution** provides for the right to fair labour practices while **Section 41(1) of the Employment Act** provides for procedural fairness before employment is terminated for misconduct or poor performance. She further submitted that she has demonstrated that the respondent never complied with section 41 of the Act before dismissing her from employment. That it was incumbent upon the respondent to prove that she gave her documentation explaining the charges levelled against her or gave her explanation of the same as required under **Section 41 of the Employment Act**. In the claimant's view, the wording of the summary dismissal letter, is also prima facie that the Respondent did not subject her to a disciplinary process and as such the termination was unfair. She contended that it was incumbent upon the Respondent to provide the minutes of the alleged proceedings to prove that, in deed a fair hearing took place.

13. She urged that this Honourable Court follow *Mary Chemwono Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR* where the employee was first interdicted and later summarily dismissed before being heard and the Court held that an employee must be taken through the mandatory process as outlined under section 41 in a case for termination as well as in summary dismissal.

14. In addition to the issue of procedure, the claimant submitted that the dismissal was without a valid reason. She drew this Court's attention to *page 79 of their bundle of documents (page 72 of the judgment of the Anti-corruption court)* where the court while acquitting her questioned the credibility and reliability of Grace Mwaka's testimony, the RW1 herein. She contended that under **Section 45(2) of the Employment Act** termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason. She poked holes on the evidence adduced by the Respondent contending that it was inconsistent with the contents of the summary dismissal letter and that it did not rebut her case. She therefore urged this Court to find that the Respondent terminated her employment unfairly and unlawfully.

15. As regards the reliefs sought, the Claimant submitted that she is entitled to payment in lieu of notice as per **Section 35(1) (c) of the Employment Act** because he was not given any notice as stipulated under her contract. That she is also entitled to full compensation for wrongful termination of employment equivalent to 12 months' salary according to **Section 49(c) of the Employment Act** and urged the court to consider her age being 50 years and the fact that she has failed to get another job since the date of her dismissal.

16. She further submitted that she is entitled to her half pay which was withheld during her 16 months' period of suspension from 27.4.2012 to 3.9.2013 when she was finally dismissed. She also submitted that according to **Section 62(2) of the Anti-Corruption & Economic Crimes Act**, a suspended/interdicted public officer who is on half-pay shall continue to receive the full amount of any allowances and consequently she contended that she is entitled to transport allowance, telephone allowance, medical allowance and entertainment allowance for the said 16 months she was on suspension/interdiction. She also submitted that she is entitled to leave for 2012 and for January-September 2013 to a total of Kshs.192,369/=. Finally, she submitted that she is entitled to Certificate of Service, costs and interest.

### **Respondent's Submissions**

17. The Respondent submitted that **Section 11(1) of the Public Officers Ethics Act, 2003** prohibits public officers from using their office to improperly enrich themselves and further requires public officers to refrain from accepting favours or gifts from a person who may be affected by the discharge of their duty. That **Section 44(g) of the Employment Act** empowers an employer to summarily dismiss an employee who commits, or is suspected on reasonable and sufficient grounds to have committed a criminal offence to the detriment of the employer. That the said power is echoed in the respondent's Human Resources Policy and Procedures Manual. That **Chapter Six of the Constitution of Kenya on Leadership and Integrity** prohibits a public officer from engaging in wrongful conduct in furtherance of personal benefit.

18. She further submitted that the Claimant has failed to prove that the dismissal was unlawful and that her testimony was riding on her acquittal from the criminal charges instead of attempting to discount the facts forming the reasons for her dismissal. That the burden of proof under **Section 107 of the Evidence Act** requires that the Claimant first proves that the reason for which she was dismissed was invalid or non-existent before the burden can shift to the Respondent to disprove that fact. That the facts presented and evidence adduced in proof confirms that the Claimant was lawfully and fairly terminated and that dismissal of employment being a matter of management discretion, the court must be reluctant to intervene unless for breach of Statute or contract of employment or both.

19. She further submitted that an acquittal from criminal offence is not a barrier to an employer in deciding whether to terminate the services of such employee on the same facts as was held in the case of *Mbagga Wetangula –v- Co-operative Bank of Kenya, Cause 325 of 2015*. She maintained that she had a valid reason to dismiss the Claimant premised on matters it genuinely believed to exist as a fact to justify its putting in motion **Section 44(4) (g) of the Employment Act**. She therefore urged this Court to dismiss the Claimant's case with costs.

### **Analysis and determination**

20. After carefully considering the evidence tendered by the parties herein and upon perusing and considering the submissions filed by counsel after the hearing, I have found to be a fact that the claimant was employed by the respondent as a senior manager and that she dismissed her on 3.9.2013. The issues for determination are:

- a) Whether the Claimant's dismissal was unfair and wrongful.
- b) Whether the Claimant is entitled to the reliefs sought.

#### **(a) Whether the Claimant's dismissal was unfair and wrongful.**

21. Termination of employment is unfair and unlawful if the employer fails to prove that it was substantively justified and procedurally fair as required by Section 45 of the Employment Act. Under the said provision, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) related to the employee's conduct, capacity and compatibility or based on the employer's operational requirement; and that a fair procedure was followed by according the employee a fair hearing in accordance with section 41 of the Act, and issued him with

Certificate of Service under section 51 of the Act.

### **Reason for the termination**

22. In this case the reason cited for the dismissal of the claimant in the letter dated 3.9.2013 was gross misconduct. The letter is partly duplicated hereunder:

**“Dear Madam,**

**RE: SUMMARY DISMISSAL – GROSS MISCONDUCT** On 23rd April 2012, it was reported to this office that you were involved in corruption related activities which led to your arrest by the Kenya Anti-Corruption Commission (KACC), Mombasa. A report from KACC, Mombasa was later presented to the management, and it formed the basis of your interdiction vide a letter dated 27th April 2013.

It was reported to this office that :-

(i) You demanded for a bribe from one of our Casual Administrative Assistants, Ms Grace Mwaka, engaged in our KIE Mombasa office in the pretext of getting her permanent employment in the organization;

(ii) The same has been reported to the Kenya Anti-Corruption Commission who issued the casual with ‘treated’ money which you willingly accepted as part of the bribe on 23/4/2012 in your office;

(iii) You were ambushed by the KACC officers, taken for questioning where it was established that you have a case to answer hence the ongoing criminal case CRIMINAL CASE NO CR021/58/2012.

The matter was later escalated to the Board of Directors in line with the Company’s internal policies. The Board noted that bribery was an issue that raised serious integrity issues, which damaged your character as a public officer due to the foregoing matters that amount to gross misconduct. This has not only brought your office into disrepute but also the company great embarrassment and loss of good public image. Consequently, the Board noted that your conduct was in breach of the following laws and company policies:

1. The Public Officer’s Ethics Act, 2003; which states in part “that a public officer should not use his or her office to improperly enrich him or herself...”

2. The Anti-Corruption and Economic Crimes Act, 2003(5); which states in part “that bribing, receiving rewards or inducement in order to show favouritism or discrimination and accepting to receive a bribe among others, constitutes corruption”

3. Our KIE Human Resources Policy on Discipline which provides for offences that warrant summary dismissal in line with the Employment Act, 2007.

4. The Employment Act, 2007 section 44 which states in part that “an employee who commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property is liable for summary dismissal”

5. Chapter six of the constitution on leadership and integrity

... part 75 1(a,b,c) which states in part “that a Public Officer shall behave in a manner that avoids – any conflict between personal interest and public or official duties; compromising any public or official interest in favour of a personal interest or demeaning the office the officer holds.”

The Board thus resolved to summarily dismiss you from employment. The dismissal takes effect immediately.

MANAGING DIRECTOR

23. The claimant admitted that she asked Grace Mwaka for money and she indeed received from her Kshs.30,000 on 23.4.2012; that at that time there was a vacancy in the position of Administrative Assistant, of which Grace was serving in acting capacity; that Grace had been interviewed for the post and qualified but the appointment letter had not been given to her; and that the said money was given to her by Grace after the interview but before the appointment letter was issued. The claimant denied that the money she received from Grace was a bribe to induce her to secure a permanent appointment in the said vacancy and contended that it was a friendly loan. She blamed her predicament on her opponents who wanted her out so that they could take her position.

24. After careful consideration of the evidence and submissions presented by both parties, this court finds that the respondent has proved on a balance of probability that the claimant solicited for a bribe from Grace Mwaka on diverse dates in April 2012 and that on 23.4.2012, she indeed received from Grace Mwaka, Kshs.30,000 as a bribe to induce her to secure permanent appointment in the position of Administrative Assistant. The said offence amounted to gross misconduct under the Employment Act section 44 (4) (g) and the respondent's HR Policy on Discipline and as clearly explained in the dismissal letter above. Consequently, I return that the respondent has proved that she had a valid and fair reason that justified the summary dismissal of the claimant as required by section 43 and 45 (2) (a) and (b) of the Act.

25. In reaching the foregoing holding, I have dismissed the claimants evidence which seemed to suggest that her acquittal from the criminal case would bind this court to make a finding that her dismissal from employment was grounded on an invalid reason. It is now trite that criminal process is a parallel process from the internal disciplinary mechanism and the burden of proof in the latter is much lower than in the former. This view was taken by this court in Mbagga Wetangula -v- Co-operative Bank of Kenya [2017]eKLR where Onyango J held that :

***“The claimant testified that he was acquitted ... The court is however cognisant that an acquittal on a criminal charge is not an automatic release from civil liability as the test for criminal convictions is much higher, beyond any reasonable doubt, while that in civil cases is on a balance of probabilities which present a much lower threshold.”***

**Procedure followed**

26. The Claimant contended that she was unfairly terminated from her employment because she was not accorded a hearing while the Respondent contended that she followed the due procedure as set out in her HR Policy on discipline. In Samsung Electronics East Africa Ltd -v- K M [2017] eKLR the Court of Appeal held that:

***“34. The essence of a right to a hearing as aforesaid, gives an employee an opportunity to dispute the employer's allegations, even where the employer believes that the employee is entitled to summary dismissal. It is not the employer who alone should determine what constitutes gross misconduct; an employee must be given an opportunity to respond to the allegations.”***

27. In this case, the claimant admitted that she was invited to a disciplinary hearing on 12.7.2013 and found a panel ready to hear her. That although she was given a chair to sit, the meeting lasted for about ten minutes and that she was told that her criminal case in Mombasa had taken forever, and then she was told to go and wait for another interdiction letter which turned out to be a dismissal letter. The respondent has however contended that the claimant was first served with a suspension/show cause letter dated 27.4.2012 and thereafter invited to a disciplinary hearing on 12.7.2013 before the Staff Committee of Management where the charges were read to her after which she was given an opportunity to defend herself. That after the hearing the decision was communicated vide the dismissal letter dated 3.9.2013.

28. After considering the evidence and the submissions by both parties, I find that the respondent has proved on a balance of probability that she followed a fair procedure before dismissing the claimant from

employment. First the claimant was served with the suspension letter dated 27.4.2012, stating the charges for which disciplinary action was being considered and she was given an opportunity to defend herself in writing. That thereafter she was invited to an oral hearing before the Staff Committee where she attended and raised no objection whatsoever. It is therefore not meritorious for her to turn round after her subsequent acquittal from the criminal charges to deny that she was accorded a fair hearing before the dismissal.

### **Reliefs.**

29. In view of the finding herein above that the respondent has proved on a balance of probability that the summary dismissal of the claimant was grounded on a valid and fair reason and that a fair procedure was followed, I decline to make declaration that the dismissal was unfair and wrongful.

30. Flowing from the foregoing, I dismiss the reliefs founded on section 49 of the Employment Act including salary in lieu of notice, compensation and reinstatement. More specifically, I decline to order the reinstatement of the claimant to her former employment because the 3 years' limitation period set by section 12 of the ELRC Act, within which reinstatement can be ordered after separation, has since lapsed; and further, the reinstatement is now impossible because the claimant indicated in her evidence that, after her dismissal, the position was given to another person who she described as the person behind her predicament.

31. The claim for service gratuity is also dismissed because it is not founded on the contract of service and also because the claimant admitted that she was a member of the respondent's pension scheme and she was paid her pension. Likewise, the claim for salary after the dismissal is declined for lack of legal basis and for being contrary to the public policy that only recognizes payment of salary only for work done. The claim for pay in lieu of service/retirement is declined because it is not known to law and it was not prosecuted.

32. The Claimant is however granted her prayer for a certificate of service which is her right under section 51 of the Employment Act.

33. She is also entitled to leave for her last year of service 2012/2013 because the respondent admitted the same. However, the respondent's allegation that the leave due is 23 days is dismissed for lack of documentary evidence. The contract of service provided her annual leave was 30 working days and that is what she is awarded herein based on her basic salary. The contract of service provided that her working days as Mondays to Fridays equalling to 22 days per month. Hence, **Kshs.46,341 x 30/22= 63,192.30.**

34. The claimant further prayed for medical, transport, telephone and entertainment allowances for the period she was suspended/interdicted from 27.4.2012 to 3.9.2013. The claimant's suspension was also affected by section 62(2) of the Anti-Corruption and Economic Crimes Act which provides that an officer charged with corruption is entitled to half salary plus full allowances. Considering the circumstances of this case, I hold the view that the claimant is only entitled to her medical allowances for the said period and not the other allowances sought. Clause 6.3.3 of the Respondent's HR Policy Manual provided that:

***“An employee who is on suspension shall be entitled to be paid house, medical and other allowances as may be applicable.”***

35. I agree with the respondent's case that transport, telephone and entertainment allowances are only applicable where the employee is attending work. They are meant to help the employee to perform her duties for the benefit of the employer. Consequently, I award her medical allowance being **Kshs.3,750 x 16 = Kshs.60,000.**

36. Finally, I award the claimant the half basic salary withheld during the said 16 months' period of suspension/interdiction from 27.4.2012 to 3.9.2013 when she was dismissed. The reason for the award being that there was no basis in law or contract for denying the said pay; and also because no evidence was adduced to prove that the salary arrears were paid. Based on the payslip for October 2012 produced

as exhibit 7(b), the claimant's half basic salary was Kshs.25,487.50. Consequently, I award her **Kshs.25,487.50 x 16 =407,800.**

### **Conclusion and disposition**

37. I have found that the summary dismissal of the claimant was fair and justified and declined to declare it unfair and wrongful as prayed by the claimant. I have further declined the reinstatement of the claimant to her former employment or to award her damages under section 49 of the Employment Act. I have however found that she is entitled to some terminal benefits accruing from her contract of service. Consequently, I enter judgment for her against the respondent as follows:

**a) 30 days' leave Kshs. 63,192.30**

**b) Medical allowance Kshs. 60,000.00**

**c) Withheld half basic salary Kshs.407,800.00**

**Total Kshs.531,792.30**

38. The award is less statutory deductions but in addition to costs and interest at court rate from the date of filing the suit. The claimant will also get a Certificate of Service.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July 2019**

**ONESMUS N. MAKAU**

**JUDGE**