



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 359 OF 2016**

*(Before Hon. Justice Mathews N. Nduma)*

**EDITH KATHURE MUNYUA.....CLAIMANT**

**VERSUS**

**MOI TEACHING AND REFERRAL HOSPITAL.....1<sup>ST</sup> RESPONDENT**

**DR. WILSON ARUASA.....2<sup>ND</sup> RESPONDENT**

**ANNE CHEMWORSIO.....3<sup>RD</sup> RESPONDENT**

**THOMAS NG'ETICH.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The suit was filed on 6<sup>th</sup> December 2016 seeking the following reliefs:

- (a) One month salary in lieu of notice Kshs. 18,403.
- (b) Arrear salaries not paid during suspension from 10<sup>th</sup> August 2012 to July 2016 Kshs. 1,264,441.60.
- (c) Maximum compensation for unlawful dismissal.
- (d) Loss earnings due to non-promotion
- (e) Unpaid leave days
- (f) Severance pay for 9 years served.
- (g) Loss earnings to date of retirement.

2. The suit is defended vide a response to claim filed on 22<sup>nd</sup> December 2017 in which the claims made by the claimant are denied and the claimant put to strict proof thereof.

3. CW1 the claimant testified under oath and adopted her witness statement dated 1<sup>st</sup> November 2016 as her evidence in chief. CW1 testified that she was employed by the 1<sup>st</sup> respondent on 4<sup>th</sup> June 2007 in the position of Accounts clerk.

4. That by a letter dated 10<sup>th</sup> August 2012, she was suspended from duty and asked to show cause why her employment ought not to be terminated for:

- i. Behaving in a manner that is considered indecent.
- ii. Using abusive language to persons placed in authority over her.

iii. Being suspected of having committed a criminal offence.

5. The suspension was without pay. The respondent reported a criminal case against the claimant to the police. The claimant was charged in criminal case No. 31 of 2017 Republic vs Edith Kathure Munyua for sending an offensive sms on 23<sup>rd</sup> July 2012 to Ann Chworsio and Thomas Kibiwot Ngetich. The 3<sup>rd</sup> and 4<sup>th</sup> respondents respectfully. The claimant was convicted by the magistrate court. The claimant appealed to the High Court which set aside the conviction and sentence. The claimant was unable to repay her loan during the period of suspension and referred to Credit Bureau. The claimant also lost her husband due to financial constraints during the period. The claimant incurred legal fees in the criminal trial in the sum of Kshs. 450,000.

6. Upon acquittal by the High Court, the claimant was called to a disciplinary hearing on 16<sup>th</sup> May 2016 which found her guilty of the offences communicated to her in the notice to show cause dated 10<sup>th</sup> August 2012. The claimant's employment was terminated on 20<sup>th</sup> July 2016. Claimant was advised that her terminal dues would be paid upon clearance and could Appeal the dismissal within 14 days.

7. The claimant states that she was employed in job group M12 instead of M10 being a diploma holder. That she served for more than 5 years without promotion to job group M9 and whilst she was under suspension promotion happened thrice and she ought to be in job group 8. She seeks to be deemed to have been duly promoted and paid arrear salary in respect thereof.

8. The respondent called RW1 Felix Kosgei, the senior human resource manager of the 1<sup>st</sup> respondent between 16<sup>th</sup> May 2007 to 20<sup>th</sup> July 2012. RW1 testified that the claimant was dismissed for gross misconduct in that on various dates between 9<sup>th</sup> and 11<sup>th</sup> July 2012, she sent insolent and offensive text messages to the 3<sup>rd</sup> and 4<sup>th</sup> respondents who were senior officers place above her. They held the positions of Director, Human Resource and Training and Finance manager respectively.

9. That the offensive messages were sent by the claimant following her redeployment from billing department to housekeeping which the claimant interpreted to be a demotion owing to perceived diminished status. That due process was followed with regard to her suspension and termination. That the termination was lawful and fair. That the claimant was in breach of *Section 44(4) of the Employment Act* and Sections 16.5.1 (m) and 16.5.3 (d) and (e) of the Hospitals terms and conditions of service.

10. The claimant was granted a fair hearing in accordance with *Section 41 of the Employment Act 2012* in that she was given show cause letter to which she responded through her advocate. She was called to a disciplinary hearing to which she attended. That the suit be dismissed with costs.

#### **Determination**

11. The issues for determination are:

- (a) Whether the respondent followed a fair procedure in terminating the employment of the claimant.
- (b) Whether the termination of the employment of the claimant was for a valid reason.
- (c) Whether the claimant is entitled to the reliefs sought.

#### **Issue (a)**

12. The claimant was suspended on 10<sup>th</sup> August 2013 without pay. She was to show cause why her employment ought not to be terminated for the three stated offences in the letter. The claimant responded to the notice to show cause on 16<sup>th</sup> August 2012 denying the charges and seeking the suspension to be lifted. The reply was by E.K. Melly advocate.

13. It was not until 21<sup>st</sup> July 2015 when the claimant was invited to a disciplinary hearing about three (3) years from the date she was placed under suspension without pay. As a matter of fact, the disciplinary hearing eventually took place on 16<sup>th</sup> May 2016 about four (4) years from the date the claimant was placed under suspension without pay.

14. Meanwhile, the respondents had reported a criminal case for sending abusive email to the police. The claimant was charged before a magistrate court in Eldoret Case Number 31 of 2012. The claimant was convicted. The claimant appealed to the High Court and the Appeal was upheld in a judgment delivered on 30<sup>th</sup> November 2015 by Judge C.W. Githue.

15. It is now trite law that an employer is not obliged to await conclusion of a criminal trial before commencing disciplinary proceedings against an employee who has been charged with a criminal offence arising from the same facts. The rationale behind this principle is that the determination of a criminal trial is on the basis of proof beyond reasonable doubt whereas disciplinary hearing are determined on the basis of proof on a balance of probabilities.

16. On the other hand, it is well established that disciplinary process should be concluded within a reasonable time especially where an employee has been placed on suspension with or without pay. This principle is on the basis that an employee ought not to be subjected to unfair labour practice in violation of *Article 41 of the constitution* and that any administrative action taken against an employee should be expeditious, efficient, lawful, reasonable and procedurally fair in terms of *Section 47(1) of the constitution as read with Section 4 of Fair Administrative Action Act, 2015*.

17. The conduct by the respondent of placing the claimant on suspension without pay from 16<sup>th</sup> August 2012 to the date of termination on

20<sup>th</sup> July 2016 about four (4) years, is conduct that is not reasonable, expeditious, efficient, lawful and procedurally fair. This is the position regardless of the eventual outcome of the process.

18. Placing the claimant on a four (4) year suspension without pay negated the entire disciplinary process. Was oppressive to the claimant to the extreme. The claimant has testified that she could not get alternative employment during that period. She lost her loan entitlement; she could not sustain repayment during this prolonged period; she was cited by Credit Bureau as a bad debtor; lost her husband due to her inability to support the family at the time and has suffered immense loss and damage.

19. The court finds that the claimant is entitled to full salary during the entire period of suspension between 16<sup>th</sup> August 2012 and 20<sup>th</sup> July 2016 in the sum of Kshs. 1,264,441. There is no evidence however that the claimant would have been entitled to salary increment during the period and the claim for increased arrear payment is dismissed.

20. With regard to the issue whether the termination of the employment of the claimant was for a valid reason the court finds that the respondent was not obliged to await the outcome of the criminal process before disciplining the claimant. The disciplinary process ought to have been concluded timeously and within a reasonable period from the date notice to show cause was issued.

21. The respondent however chose to await the outcome of the criminal process including an Appeal to the High Court. The High Court specifically held that *“the prosecution had not produced any evidence whatsoever linking the appellant to the sending of the offending text messages”*

22. This is a substantive finding by a High Court Judge. The respondent proceeded thereafter to terminate the employment of the claimant on the basis that there was evidence that the claimant had sent the offensive text messages to her superiors.

23. RW1 did not provide any evidence before this court to prove on a balance of probabilities that the claimant had sent the alleged offensive text messages to her two seniors. The respondent had in the circumstances not proved that it had valid reason in terms of *Section 43 of the Employment Act*, to terminate the employment of the claimant.

24. To the contrary, the claimant has proved in terms of *Section 47(5)* that the termination was wrongful, unlawful and procedurally unfair. The respondent had violated *Sections 41, 43, 45 and 46 of the Employment Act*.

25. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*.

26. In this regard, the claimant had served the respondent diligently for over 9 years. The claimant was kept on suspension and without pay for about four (4) years. This was unfair labour practice and a violation of the claimant to fair administrative action. The claimant has to date not been paid any terminal benefits including arrear salary, notice pay or any pension benefits.

27. The claimant wished to continue working and would have served the respondent to date of retirement 22 years down the line. The claimant has clearly suffered loss of earnings, diminished reputation; her credit worthiness; her husband due to the unlawful conduct by the respondent.

28. We have considered the case of ***George Wakweika Munyile and 4 others vs The Principal Friends School Kamusinga and another, Bungoma ELRC Cause NO. 181 of 2014*** in which court awarded 12 months salary in compensation for unlawful dismissal and the factors above to determine this a proper case to award maximum compensation of the equivalent of 12 month salary in compensation for the unlawful and unfair termination in the sum of Kshs. 220,836.

29. The claimant is also entitled to one month salary in lieu of notice in the sum of Kshs. 18,403.

30. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

(a) Arrear salary from 10<sup>th</sup> August 2012 to 20<sup>th</sup> July 2016 in the sum of Kshs. 1,264,441.

(b) One month salary in lieu of notice Kshs. 18,403.

(c) Twelve months salary in compensation – Kshs. 220,836.

Total award Kshs. 1,503,680.

(d) Interest at court rates from date the amount was due and payable in respect of (a) above and from date of judgment with respect to (b) and (c) above till payment in full.

(e) Costs of the suit.

**Judgment Dated, Signed and delivered this 18<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Isiaho for claimant

Mr. Yogo for Respondent

Chrispo – Court Clerk