



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2019 OF 2017

EDITH MUMBI KAMAU.....CLAIMANT

VERSUS

THE PRINCIPAL SECRETARY, THE MINISTRY OF

INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th August, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 10.10.2017 in person. The claimant appointed Onyony & Company Advocates to act in the case effective 18.02.2019. She prayed for judgment against the respondents for:

- a) A declaration that show cause or interdiction letter dated 06.09.2013 and dismissal letter dated 29.04.2016 on account of dishonesty be declared illegal, irregular, null and void and unconstitutional.
- b) The claimant be reinstated into service forthwith.
- c) The claimant be paid all her salaries and allowances that she would have earned from the time of acquittal on 29.05.2015 in Makadara Cr. Case No. 4130 of 2013.
- d) Any other or further reliefs that the Honourable Court may deem fit to grant in the interest of justice.
- e) Costs of the suit.

The respondent filed the reply to the memorandum of claim on 18.05.2018 through Wangeci Gichangi, State Counsel, for the Hon. Attorney General. The respondent prayed that the claimant's suit be dismissed with costs.

The parties' agreed and recorded issues for determination are whether the claimant was accorded due process prior to the dismissal; whether the reasons for dismissal were genuine or valid; and the remedies due, if any.

There is no dispute that the respondents employed the claimant as an Immigration Officer II effective 19.11.2007. On 31.07.2013 the claimant was served on a night shift at the Jomo Kenyatta International Airport (JKIA). The interdiction letter dated 06.09.2013 states that on 01.08.2013 at 0900 hours the claimant was arrested by the Kenya Airport Authority Security officials at the end of her night shift duties. The letter states that the arrest took place during the routine security checks on personnel at the exit gate and the claimant was found in possession of a single journey visa sticker book serial No. SAA 4180651 to 4180700, partially used from serial No. 4180651 to 4180692; a receipt book; and 12 bottles of Carlsberg beer in 2 six packs.

The interdiction letter further states that on the same date 01.08.2013 at noon the claimant recorded a statement before the Manager of Airport Security Services and admitted being in possession of the stated items. The letter stated that for the visa sticker book, the claimant had stated, that she had serious financial problems which she wanted to sought out and then surrender the books later to the cash office. Further, the letter stated that the preliminary investigations had shown that the visa book had been received at the strong room but there were no records showing when they left the strong room and where they were issued; the booklet was one of other 19 booklets that had not been

accounted for; and no station had been issued with any of the missing 20 booklets.

The interdiction letter further stated that the allegations amounted to gross misconduct because the claimant had fundamentally breached her contractual obligations and was reasonably suspected of committing a crime to the detriment of the employer as per section 44 (3) and (4) (g) of the Employment Act, 2007. It was contemplated to dismiss the claimant and the letter invited her written representations within 21 days failing, dismissal proceedings would follow without any further reference to the claimant. The letter further interdicted the claimant from duty effective 05.09.2013 on half salary and to report to her supervisor on weekly basis until completion of the case.

The claimant replied by her letter dated 18.09.2013 titled, “**Appeal against interdiction**”. The reply was as follows:

- a) The interdiction letter dated 06.09.2013 had been received on 12.09.2013.
- b) She had worked at the passports section until 01.12.2013 when she was moved to the Aliens Section.
- c) In February 2013 she was posted to the JKIA and commenced duty on 08.03.2013.
- d) She executed her duties with professionalism, diligence, and integrity.
- e) On 31.07.2013 she was on night shift and checked out in the morning of 01.08.2013.
- f) During that night shift she was allocated 3 visa sticker booklets; and 3 receipt books. At end of the shift she surrendered the visa sticker booklets to her supervisor and the receipt books to the cashier.
- g) She had purchased 12 cans of Carlsberg beer in 2 six packs from the duty free shop believing such purchase was open to staff and she had seen staff make such purchases.
- h) She had been arrested by the KAA staff and confined in a room while her bag had been taken away and upon return, the KAA staff alleged they had found the visa booklet, receipt book and Kshs.6, 000.00 in her bags.
- i) Her request to peruse the visa booklet and receipt book was denied by the KAA staff. They also declined the claimant’s request to verify the booklet and receipt book with the claimant’s supervisor and in presence of the claimant. They retained the visa booklet, the receipt book and cans but let the claimant to go away.
- j) The claimant denied being in possession of the visa booklet and the receipt book.
- k) The alleged incriminating statement was written by a KAA staff one Bethwel Kiplangat and not the claimant.
- l) The KAA and CID officers investigating the case had refused to show her the alleged visa booklet and the receipt book and she was unable to answer allegations about the alleged items and which had not been shown to her. The claimant was subsequently charged in criminal case No. 4130 of 2013 with the offence of allegedly stealing the visa booklet – and the claimant wondered why the alleged receipt book had been omitted in the criminal charge.

In a ruling delivered on 29.05.2015 by Hon. T. Okello, Senior Principal Magistrate, in Criminal Case No. 4130 of 2013, the trial Court found that the prosecution had failed to establish a prima facie case and the claimant was acquitted under section 210 of the Criminal Procedure Code. The trial Court found that there was no evidence that the visa booklet had been recovered from the claimant, and, the 12 cans of beer and the receipt book were missing. Further, there was no inventory of items allegedly recovered from the claimant, and the claimant’s supervisor had confirmed that the claimant had returned the visa booklet issued to her during the night shift and the receipt books and the visa booklets were in safe custody away from access by the claimant.

The Court has considered the trial Court’s findings and the evidence given for the respondents. As urged for the claimant, there was no evidence that the visa booklet and the alleged receipt book were recovered from the claimant. To that extent, the Court finds that the matters contained in the interdiction letter have been found not to have been genuine or valid as at the time of interdiction except that the claimant was in possession of the 12 cans of beer but whether it was irregular for her to have purchased the same from the duty free shop is a matter which the Court finds to remain in dispute.

The claimant was dismissed from service by the letter dated 29.04.2016 upon grounds stated as follows, “**This is to inform you that the Authorised Officer has approved the recommendations of the Ministerial Human Resource Management Advisory Committee of 16.02.2016 and decided that you be dismissed from the service with effect from 5th September, 2013 on account of dishonesty by giving conflicting information in your two letters dated 1st August, 2012 and 18th September, 2013 respectively regarding your representations involving being illegally in possession of Single Journey Sticker, a receipt book and 12 bottles of beer which is in contravention of section 8 of the Public Officer Ethics Act, 2003 that states “ a public officer shall, to the best of his or her ability, carry out his / her duties and ensure that the services he / she provides are provided efficiently and honestly.”**

To answer the **1st issue** for determination the Court returns that the reason for termination has not been shown to have been valid or genuine as at the time of termination as envisaged in section 43 of the Employment Act, 2007. The evidence was that the letter dated 01.08.2012 referred to in the dismissal letter did not exist and the alleged letter was long before the alleged misconduct on 01.08.2013. Further, the claimant’s evidence that she was never shown the receipt book or the visa booklet in issue as at the time of arrest or any other time during the disciplinary process was not rebutted at all. Further, as at the time of dismissal, the respondents had the benefit of the ruling in the criminal case the claimant had been acquitted but the respondents have not shown how the findings in the ruling had guided the respondents towards

justifying the dismissal. The Court returns that the dismissal was upon a ground for which the claimant had not been given a notice and a hearing as per section 41 of the Act and it cannot therefore be said that the dismissal was based upon a valid reason as envisaged in section 43 of the Act.

To answer the **2nd issue** for determination the Court returns that the procedure leading to termination was unfair because the claimant was not accorded a hearing as per section 41 of the Act. The respondent's witness No. 1(RW1) testified that the written response was relied on to dismiss the claimant without giving her a hearing and that, **"....She was never heard."** The Court has considered that the reason for dismissal as stated in the dismissal letter was substantially different from the allegations in the interdiction letter and which the claimant had replied to in writing. In any event, the claimant was entitled to a hearing as per section 41 of the Employment Act, 2007 and to be heard by the senior investigating officer as per the Public Service Commission Regulations, 2005. The claimant appealed against the dismissal by his letter received on 31.05.2016 but which was disallowed by the 2nd respondent in view of the alleged misconduct. The Court finds that the appeal proceedings did not cure the procedural unfairness because no further investigations had been carried out or the claimant heard towards establishing the validity of the reason for termination.

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 Court has found that the dismissal was unfair and the claimant is entitled to the declaration accordingly.
- b) The claimant prays for reinstatement. As submitted for the claimant, under section 49 of the Employment Act, 2007 applies to cases of reinstatement and re-engagement. The claimant prays for reinstatement or other just remedy. The claimant was terminated by the letter served on 29.04.2016 and effective 05.09.2019. The claimant earned half salaries from the date of interdiction till the date of termination on 29.04.2016. The Court returns that prior to 29.04.2016 the claimant remained in employment so that the effective date of the cause of action was on 29.04.2016 because prior to that date, the claimant had no reason to file suit on account of unfair termination or dismissal. Under section 12 of the Employment and Labour Relations Court Act, 2011 reinstatement as a remedy would be available prior to lapsing of 3 years from the effective date of dismissal. The 3 years lapsed on or about 29.04.2019. In the circumstances, the Court considers that reinstatement with full payment of salaries and allowances effective the date of dismissal would not be justified as is statute barred. However, the Court returns that re-engagement would be a justified remedy especially that the claimant was dismissed without due process as provided for in Article 236 of the Constitution of Kenya 2010. The Court has considered the material on record and there is no established bar to re-engagement and the claimant is able and willing to continue in public service. In that consideration, the period between 29.04.2016 and the date the claimant reports on duty consequential to the re-engagement will be treated as leave without pay so that the claimant will not suffer any break in service for pension purposes.
- c) The Court has found that the interdiction and the ensuing dismissal were unfair. Thus the Court returns that the claimant is entitled to withheld half salaries from the date of interdiction to the date of dismissal 29.04.2016. The court follows the holding in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **"The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."**
- d) The Court finds that the claimant has succeeded and the respondents will pay the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondents for:

- a) The declaration that show-cause or interdiction letter dated 06.09.2013 and dismissal letter dated 29.04.2016 on account of dishonesty were illegal, irregular, null, void and unconstitutional as they are hereby set aside.
- b) The claimant is hereby re-engaged in the service of the respondents at the prevailing remuneration and benefits in the position of Immigration Officer I effective the date the claimant reports for assignment of duty being not later than 15.09.2019; and the period between the date of the letter of dismissal 29.04.2016 and the date of reporting be treated as leave without pay so that the claimant suffers no break in service for purposes of pension.
- c) The respondents to pay the claimant the withheld half salaries from the date of interdiction 06.09.2013 to the date of dismissal 29.04.2016 by 01.11.2019 failing interest to be payable thereon at Court rates from the date of filing the suit until the date of full payment.
- d) The respondents to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 30th August, 2019**.

BYRAM ONGAYA

JUDGE