



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1580 OF 2015

BEATRICE KEMUNTO KAMANDA.....CLAIMANT

VERSUS

BOARD OF TRUSTEES AGRICULTURAL SOCIETY OF KENYA....RESPONDENT

JUDGMENT

1. Beatrice Kemunto Kamanda (Claimant) commenced legal proceedings against the Board of Trustees, Agricultural Society of Kenya (Respondent) and she stated the Issues in Dispute as

1. Unfair, unlawful dismissal.
2. Non-payment of outstanding terminal dues.

2. In its *Memorandum of Defence*, the Respondent contended that the termination of the Claimant's employment was lawful and fair.

3. The Cause was heard on 11 March 2019 when the Claimant testified and closed her case, and on 17 June 2019 when the Respondent's Human Resources Manager testified.

4. The Claimant filed her submissions on 17 July 2019 while the Respondent filed its submissions on 24 July 2019.

5. The Court has considered the pleadings, evidence and submissions, and identified the Issues in dispute as examined hereunder.

Unfair termination of employment

Procedural fairness

6. The Claimant was employed by the Respondent as a Typist on 4 May 2005.

7. On 19 May 2015, the Respondent's Chief Executive Officer notified the Claimant that she had been transferred from Nairobi to Migori Branch satellite office/show.

8. Upon receipt of the letter, the Claimant wrote to the Chief Executive Officer on 20 May 2015, declining the transfer. The letter set out the reasons for declining the transfer and appealed that the transfer be withdrawn.

9. On 2 June 2015, the Chief Executive Officer invited the Claimant to appear before an *Appeals Committee* to deliberate on the appeal against transfer among other agendas.

10. The *Appeals Committee* met on 3 June 2015.

11. The Chief Executive Officer followed up the meeting with a letter to the Claimant on 9 June 2015 advising that the appeal against the transfer had failed, and directing that she report to Migori immediately.

12. The Claimant declined the transfer again and informed the Respondent as much through a letter dated 10 June 2015.

13. The Respondent wrote another letter to the Claimant on 18 June 2015 directing that she report to Migori latest by 25 June 2015, a directive the Claimant yet again declined through a letter dated 20 June 2015.
14. The Respondent reached its tether, and it issued a *show cause* letter to the Claimant on 22 June 2015 requesting the Claimant to respond within 7 days.
15. The Claimant responded to the *show cause* on 26 June 2015 and on 1 July 2015, the Claimant was invited to appear before the *Disciplinary Committee* on 7 July 2015 for a hearing.
16. Through an email dated 4 July 2015, the Claimant sought for a copy of the Respondent's *Code of Conduct* and *Zoning Criteria*, and also indicated that she would not be accompanied by a colleague during the hearing. The Claimant requested to be allowed instead to bring along a human resource management expert.
17. On 6 July 2015, the Respondent furnished the Claimant with a copy of the *Code of Conduct*. She was informed that there was no document called *Zoning Criteria*, and that she could not be accompanied by a human resource expert as the same was not in line with the law/contract.
18. The disciplinary hearing proceeded as scheduled and the *Disciplinary Committee* recommended that the Claimant be dismissed from employment. A dismissal letter followed on 8 July 2015.
19. Section 35(1)(c) of the Employment Act, 2007 requires *written notice of termination of employment* while section 41 of the Act contemplates affording an employee an opportunity to be heard (accompanied by a colleague) before a decision is taken.
20. The Claimant contended that the procedure followed before her dismissal was not fair, and that she was not afforded an opportunity to be heard.
21. The Claimant was issued with a *show cause* and was requested to respond which she did. She was also invited to an oral hearing and was informed of the right to be accompanied by a colleague.
22. The Claimant attended the oral hearing but was not accompanied despite being informed of the right by a colleague.
23. The Claimant did not draw the attention of the Court to any contractual, common law or statutory law provision which would allow the admission of a non-employee to a disciplinary process.
24. The Court is satisfied that the process as conducted by the Respondent met the procedural fairness requirements as envisaged by the contract and the law.

Substantive fairness

25. In terms of sections 43 and 45 of the Employment Act, 2007, it is the burden of the employer to prove, and prove as valid and fair, the reasons for the dismissal of an employee.
26. The primary reason which led to the dismissal of the Claimant was her decision of declining to take up a transfer to Migori Branch.
27. It was the contention of the Claimant that the transfer was motivated by her declining sexual advances from the Respondent's Chief Executive Officer and differences with the Branch Manager, Nairobi.
28. According to the Claimant, the Branch Manager was hell-bent in frustrating her because of the complaints she had raised against her (Branch Manager). She considered the transfer a disciplinary measure.
29. Clause 1.6 of the Respondent's *Code of Regulations* empowered the Chief Executive Officer in consultation with the *Staff and Finance Committee* to transfer or redeploy any employee to any part of the country as the needs of the Respondent necessitated.
30. The Claimant did not demonstrate that the Chief Executive Officer did not consult with the *Staff and Finance Committee* before notifying her of the transfer to Migori.
31. The Branch Manager was not part of the *Disciplinary Committee*. There was no evidence at all that she had or attempted to exercise any type of influence over the members of the *Disciplinary Committee*.
32. It is therefore difficult for the Court to fault the findings and recommendations of the *Disciplinary Committee* as the first trier of the facts as were before it.
33. It is not unusual to find *personality conflicts* or differences in the workplace. If indeed there were personal differences between the Claimant and the Branch Manager, and the Court does not doubt that there were differences, based on the evidence on the record, was it unreasonable for the Respondent to seek to transfer or redeploy one of the parties?
34. To the Court, that was a decision better left to the managerial prerogative of the Respondent after weighing up the competing or

inconsistent interests.

35. It is a decision which the Court would not lightly think of reviewing.

36. On the sexual harassment allegations, the Court finds that the Claimant did not demonstrate to the required standard that the Chief Executive had made any untoward sexual advances against her. She did not even disclose or explain whether she made any reports of such sexual advances to the Board of Trustees.

37. On the face of it, the Claimant in declining the transfer was breaching a fundamental obligation arising under the contract of service. She was refusing to obey a lawful and proper command. The failure could as well have amounted to insubordination.

38. To the Court, the Respondent has demonstrated that there were valid and fair reasons to dismiss the Claimant in terms of sections 43 and 45 of the Employment Act, 2007.

39. However, the Court is also enjoined to consider whether the decision of the Respondent to terminate the services of the Claimant was in accord with justice and equity as demanded by section 45(4) of the Employment Act, 2007.

40. By the time of the Claimant's transfer, the complaint from the Claimant against the Branch Manager (dated 12 March 2015) was still actively under consideration.

41. For this reason, the Court is of the view that summary dismissal of the Claimant was not in accord with justice and equity. A normal termination would have met the ends of justice.

42. The Court would therefore convert the summary dismissal into normal termination.

Appropriate remedies

Reinstatement

43. The Claimant abandoned the remedy of reinstatement in lieu of an award of compensation.

Compensation

44. Compensation is a discretionary remedy. The factors the Court should consider are set out in section 49(4) of the Employment Act, 2007.

45. The Respondent offered the Claimant terminal benefits normally not payable in cases of summary dismissal.

46. Considering the Claimant's length of service and offer of terminal benefits made by the Respondent, the Court is of the view that the equivalent of 3 months gross wages as compensation would be fair and appropriate.

Terminal dues

47. The Court notes that the Respondent offered the Claimant the terminal dues ordinarily payable on normal termination including gratuity.

48. The Respondent should process the dues and pay the Claimant.

Conclusion and Orders

49. The Court finds and declares the summary dismissal of the Claimant was not in accord with justice and awards her

(a) Compensation **Kshs 253,356/-**

(b) Terminal dues in terms of the Memo dated 10 July 2015.

50. Claimant to have costs on half scale as the Respondent demonstrated procedural and substantive validity in the dismissal of the Claimant.

Delivered, dated and signed in Nairobi on this 20th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Bosire instructed by Mangerere Bosire & Associates Advocates

For Respondent Mr. Wafula instructed by Millimo, Muthomi & Co. Advocates

Court Assistant Lindsey