



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1501 OF 2015

JOYCE GESARE MAINYE..... CLAIMANT

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

JUDGMENT

The claimant filed the statement of claim on 25.08.2015 through Onyanja Bw'Omote & Company Advocates. The claimant changed advocates, acted in person and as at the hearing of the suit had appointed Matundura & Wamalwa Advocates to represent her. The claimant filed the amended memorandum of claim on 06.06.2018 and prayed for:

- a) A declaration that the cause of action against the claimant as communicated by the 1st respondent vide a letter dated 19.08.2014 dismissing the claimant from civil service is irregular, unlawful, un-procedural and was issued contrary to sections 41, 43, 44, 45 and 46 of the Employment Act, 2007.
- b) A declaration that the cause of action contained in the notice dated 19.08.2014 was issued without jurisdiction; hence the action as was communicated is frivolous, irregular, unlawful, un-procedural, and null and void *ab initio* and without legal consequence.
- c) A declaration that the processes undertaken by the 1st respondent which resulted in dismissal of the claimant from employment from the civil service lacks fairness and procedural integrity, hence the product of such process was a sham.
- d) A declaration that the letter dated 19.08.2014 grossly violated the claimant's fundamental constitutional right to employment.
- e) Reinstatement without any loss of all employment benefits.

In the alternative the claimant prayed for:

- a) Six months salaries in lieu of notice Kshs.233, 148.00.
- b) Withheld claimant's salaries between the months of February – August 2014 during the suspension period and prior to the purported dismissal equivalent of Kshs.38, 858.00 x 7 months = Kshs.272, 006.00.
- c) 12 months compensation for wrongful dismissal Kshs.462, 696.00.
- d) Service gratuity for 34 years served $15 \times 12 \times 34/30 \times 38, 558.00 = 7, 865, 832.00$.
- e) Special damages comprising loss of future earnings Kshs.3, 264, 072.00
- f) Kshs.10, 000, 000.00 for gross violation for violation of the claimant's fundamental rights.
- g) Interest at Court rates from the date of dismissal 19.08.2014.
- h) Such other relief as may seem fair and just to the Honourable Court.

i) An order that the respondent to retire the claimant normally, issue a certificate of service and to access her pension benefits.

j) Costs of the suit.

The respondents filed the statement of defence on 15.10.2015 through the learned Litigation Counsel A J Chesiyana, for Attorney General. The respondents prayed that the claimant's suit be dismissed with costs. The claimant filed a reply to the defence on 01.09.2016.

To answer the **1st issue** for determination the Court returns that there is no dispute that the claimant joined the civil service as a copy typist in 1984 and rose through the ranks to the position of personal secretary I Job Group L, by 01.04.2010. It is her case, and there is no rebutting evidence, that she served diligently with a clean record and never received any reprimand in her long service.

To answer the **2nd issue** for determination, the Court returns that there is no dispute that by the 1st respondent's letter dated 06.08.2014 the claimant was dismissed from civil service on account of gross misconduct thus:

a) An undercover officer from Ethics and Anti-Corruption Commission posing as a person in need of a Kenyan passport visited her office and made enquiries on how to acquire a passport.

b) She requested him to present application forms and supporting documents and Kshs.4, 000.00 for facilitation fee – further the undercover officer bargained and they settled for Kshs.3, 000.00 which was paid and the passport was processed within three days.

c) There is a report from the EACC on the same.

The dismissal was conveyed to the claimant by the letter dated 19.08.2014 signed for the secretary, Ministry of Interior and Co-ordination of National Government (Directorate of Immigration and Registration of Persons). The claimant applied for review of the dismissal decision but the 1st respondent disallowed the application as per its letter dated 25.03.2015.

The **3rd issue** for determination is whether the dismissal was unfair. The case against the claimant begun with the letter by the Ethics and Anti-Corruption Commission dated 21.11.2013 addressed to the Principal Secretary, Ministry of Energy & Petroleum. The letter stated as follows:

“Dear Sir,

RE: INTEGRITY TEST – NYAYO HOUSE PASSPORT ISSUANCE

On diverse dates between 13th and 18th November, 2013 the Public Service Integrity Testing Task Force undertook an integrity on passport issuance processes at the Immigration Offices at Nyayo House.

The tests were prompted by complaints that persons other than immigration officers were engaged in issuance of passports to applicants at a fee.

Amongst those identified were one Joyce alias Margaret, a former staff at the Immigration Department now deployed at your Ministry, 23rd Floor Room 30, Nyayo House – Secretary to Assistant Director I.C.T. The lady in cahoots with some staff at Immigration engages in issuance of passports at a “facilitation” fee of between Kshs. 4, 500.00 and Kshs.6, 000.00.

Be informed to take administrative action on the identified staff from your department and inform this Commission, narrative of the events is enclosed to this letter. The Audio/video recordings and other relevant evidence will be presented on request.

We appreciate your support in enhancing accountability and transparency in delivery of public service.

Yours faithfully,

Signed

H. MAHIVA

FOR: SECRETARY / CHIEF EXECUTIVE OFFICER”

The attached narration was that on 13.11.2013 at around 0947 Hrs an undercover posing as a person in need of a passport visited Ministry of Energy Offices on 23rd floor room 30, Nyayo House where he met a lady identified as Joyce who was the Secretary to the Assistant Director I.C.T. at the Ministry. Upon enquiry, the lady asked the undercover, “**the client**” to present to her his passport application forms. Joyce then asked the undercover to accompany her to the lifts and at around 1011hrs they went downstairs and Joyce explained to the client the process which normally took 7 days. On 14.11.2013 at 0944hrs the client presented to Joyce all the requirements and Joyce assisted him to file the forms at official fee of Kshs.4, 500.00 and thereafter asked the client for inducement of Kshs.4,000.00 and after a bargain they settled for Kshs.3, 000.00. Joyce then telephoned an Immigration Officer one Tonui before escorting the client to counter No.9 with dully filled passport application forms. At 0953 hrs Joyce submitted the forms by jumping the queue and paid official fee at counter No.3 cash office at 1004hrs and directed the client to go at the studio. At the studio Joyce jumped the queue by submitting the documents directly to the

photographer and promised the client that the passport would be ready the following day. By telephone on 18.11.2013 at 1000hrs the client confirmed with Joyce that the passport was ready and on 19.11.2013 at 1005hrs Joyce escorted the client to counter No.14 for issuance of passport details of which, the narration states, were withheld. The narration states that all the activities were recorded on audio/video.

The show-cause notice and interdiction letter was dated 23.10.2014 and issued by the Ministry of Interior and Co-ordination of National Government (Immigration and Registration of Persons). The claimant replied by her letter dated 27.01.2014 to the following effect:

- a) She took the opportunity to absolve herself from the accusations which were defamatory as she was a law abiding citizen full of integrity.
- b) As at 13th to 14th November 2013 she worked at the Ministry of Energy until 22.11.2013 when she was deployed posted to Immigration Department and actually reported on 29.11.2013.
- c) At the time of the accusations she was a stranger at the Immigration Department. It was unreasonable and not conceivable that someone needing a passport would have gone to the Ministry of Energy.
- d) It was astonishing that the undercover failed to take action against the said Joyce at the time of the alleged accusations and lodge a complaint 2 months later. If the investigation was carried out in good faith to unearth corruption and unethical behaviour on the claimant's and other civil servants' part, the undercover should have apprehended the claimant immediately it is alleged she demanded a bribe and allegedly received the bribe.
- e) The claimant concluded that the accusations were baseless, false and malicious as they were being brought at the time she had been deployed to Immigration Department. She urged that the complaint be dismissed and she be allowed to continue in civil service.

The Ministerial Human Resource Management and Advisory Committee at the Ministry of Interior and Co-ordination of National Government considered the claimant's case on 12.03.2014. The record of the meeting's proceedings reproduced the history of the case and that the Director of Immigration had reviewed the case and found the claimant had merely denied her complicity in the illegal activities which are criminal in nature and actionable in a Court of Law. Further that the claimant had provided no evidence to support her denial of accusations in a bid to exonerate her-self from the charges. The Director for Immigration further noted that the Ethics and Anti-Corruption Commission forwarded to the Ministry audio/video recordings of the incident which doubtless confirmed the charges.

The Committee concluded that the claimant's integrity could not be trusted to perform public duty especially in security department. The Committee recommended that the claimant be dismissed from the service on account of gross misconduct. The claimant was not invited at the Committee hearing and she was subsequently dismissed from civil service by the 1st respondent.

In her evidence before the Court the claimant stated that she was employed in civil service on 20.06.1984 and worked until her dismissal on 14.01.2014. She had served for about 30 years. Her case was that after replying to the show-cause letter she was never given a hearing and she was not given the audio/video evidence or other evidence relied upon to make the dismissal decision. She was also not supplied with reports about the allegations. Thus, it was her case that she was dismissed without due process, the allegations being established and, in circumstances whereby she denied the accusations. She lamented that she was not given an opportunity to cross-examine her accusers or to view and listen to the audio/video that was alleged to form basis for her dismissal.

The respondent's witness (RW) was Avisia Kiguhi Harold. His evidence was that in civil service, if misconduct involves alleged crime, the criminal matter is investigated separately and the 1st respondent as the employer takes administrative action separately. In cross-examination he stated that the claimant was dismissed on the basis of the report by the Ethics and Anti-Corruption Commission and not any other evidence – that the audio/video or other evidence implicating the claimant was not availed to the 1st respondent. Further, the claimant never attended the disciplinary hearing. He confirmed that he had never seen the audio/video in issue and it had not been filed in Court. He testified that the main reason for dismissal was assisting the undercover to get a passport and that undercover was never interrogated by the Ministry or the 1st respondent or the claimant. RW confirmed that the claimant was dismissed without her being given record of evidence leading to her termination. RW confirmed that he had never seen the statement by the undercover and such statement had never been filed in Court. RW confirmed that the claimant's dismissal was effective 04.01.2014 whereas she was interdicted on 23.01.2014.

The Court has considered the evidence and the submissions and returns that the termination was unfair for want of due process and a genuine reason for the dismissal. Article 236 of the Constitution of Kenya required that the claimant is accorded due process prior to the dismissal. Section 41 of the Employment Act, 2007 provided that the claimant be accorded a notice and a hearing. In the present case it is clear that the allegations against the claimant were serious and criminal in nature as was reckoned by the Director of Immigration. Nevertheless, the matter was treated casually and no criminal investigations and proceedings were undertaken in that regard. The claimant denied the allegations and the Court finds the denial to have been her complete defence so that it was not her burden to provide evidence to establish her denial as the Ministerial Committee misdirected itself in the matter. All that was presented to the Ministerial Committee, the 1st respondent and subsequently to the Court were the allegations against the claimant. Throughout the processes, the 1st respondent failed to establish the allegation by way of evidence. It cannot be that because the Ethics and Anti-Corruption Commission made allegations against the claimant as per an alleged undercover, then the claimant was culpable accordingly. The Court finds that the claimant was entitled to establishing of the allegations by way of relevant evidence failing which, and which is the case, her denial of accusations must be upheld. The Court finds that no explanation was offered to cure the claimant's lamentation that if it was true, why is it that the undercover failed to cause her arrest at the time of the alleged soliciting and taking of the alleged bribe? In this matter where the allegations involved an alleged serious crime, the Court finds that criminal investigations and action was necessary and even if the criminal process is separate from the administrative disciplinary process, the administrative process had to comply with due process of a hearing to establish the serious allegations but which was not done.

Accordingly the Court returns that the termination was unfair both in procedure and merits or substance.

While making that finding the Court returns that the burden to prove the reason for termination was placed upon the 1st respondent under sections 43 (1) and 47(5) of the Employment Act, 2007 and the 1st respondent as the employer has failed to discharge that burden as no evidence was placed before the Court to prove that as at the time of dismissal, the claimant had indeed engaged in the gross misconduct as had been alleged against her.

The **4th issue** for determination is whether the claimant is entitled to remedies as prayed for. The Court makes the following findings.

First the claimant has established that she was unfairly and unlawfully terminated and she is entitled to a declaration accordingly.

Second the Court has considered the claimant's age and the more than 3 years which have lapsed since her dismissal and returns that reinstatement would not be a practicable and convenient remedy in the circumstances of the case.

Third, the claimant had served for over 30 years and she had desired to continue in employment. Except for the unfair allegations leading to the unfair dismissal, the claimant had a clean record of service. The evidence was that the claimant did not contribute to her dismissal in any manner. The aggravating factor was the reported admission by the Director of Immigration that the allegations amounted to serious criminal accusations but no criminal investigation was commenced thereby invariably rapturing the claimant's reputation in an unjustified manner. The Court has considered these factors within the provisions of section 49 of the Employment Act, 2007 and awards the claimant **Kshs.466, 260.00** being 12 months' pay for compensation for the unfair termination at Kshs.38, 855.00 per month.

Fourth the claimant has not offered justification for the 6 months' pay in lieu of termination notice and is instead awarded one month under section 35 of the Employment Act, 2007 making **Kshs. 38, 855.00**.

Fifth, during the interdiction period of 7 months the claimant confirmed that she was paid half salary but she earned zero as the half pay was applied to pay outstanding SACCO loans. In the circumstances and the dismissal being unfair she is entitled to the withheld half pay for the 7 months at Kshs.38, 855.00 /2 x 7 making **Kshs.135, 992.50**. The court follows the holding in Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, 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.”

Sixth the claimant has not established violation of her fundamental freedoms and rights beyond the unfair dismissal. Thus the prayer for Kshs. 10, 000, 000.00 in that regard and in reliance upon the cited case namely Mohammed Khamis Hemed –Versus- Almasi Beverages Limited [2019]eKLR, will fail.

Seventh, the claimant is not entitled to Kshs.3, 264, 072 for loss of future earnings because there is no established reason attributable to the respondents that has been shown to have diminished the claimant's capacity to mitigate her position by engaging in alternative gainful activities or employment. The prayer will fail.

Eighth, the claimant has prayed for service gratuity of Kshs. 7, 865, 832.00. The prayer would hold in absence of agreed alternative pension arrangements as per section 35 of the Employment Act, 2007. The claimant has also prayed for normal retirement with pension. The termination was unfair and under her terms of service, the claimant says she was pensionable. It is not disputed for the respondents that the claimant was pensionable. The payslip does not indicate alternative pension contributions to NSSF or other scheme so that the Pensions Act applied to the claimant's service. The dismissal letter does not say that it was a dismissal with loss of pension benefits. Thus the Court returns that the claimant is entitled to a declaration that she is deemed to have retired normally (having attained the age of over 50 years) and with effect from 06.08.2014 when the 1st respondent made the dismissal decision and she is awarded full pension benefits under the Pensions Act and Regulations.

While making that finding the Court follows its opinion in Henry Kamau Ngare –Versus- Teachers Service Commission & Another [2016]eKLR, thus,

“Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee's right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35 (5) and section 40 (1) (g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41 (1) and 41(2) (b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee's crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee. In the opinion of the court, to do so would amount to unjust enrichment on the part of the employer where the service pay or pension benefits are payable directly out of the employer's resources as such pay is meant to compensate the service the employer would have already enjoyed from the employee. The court has further considered and persuaded itself that every person is entitled to social security under Article 43 (1) (c) of the Constitution of Kenya, 2010 and provisions that deny eligible employees from receiving their service pay or pensions benefits would undermine that right to social security. While that provision was not in force at the time of the cause of action in the present

case, the court holds that in event of established poor performance, misconduct, gross misconduct or other adverse ground that would justify the dismissal of the employee, it is sufficient that the employer terminates the employment relationship and, where the grounds bear a criminal element, like it appears to have been the allegation in the present case, the matter should be remedied under the criminal justice system without depriving the employee the accrued pension benefits or service pay. The court therefore holds that contractual or statutory provisions that attach disciplinary action to depriving the employee pension benefits or service pay the employee has become eligible to be paid are unconstitutional because it amounts to unfair deprivation of the employee's property and is unfair labour practice."

As the claimant has substantially succeeded in her claims, she is awarded costs of the suit.

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

- 1) The declaration that the dismissal was unfair and unlawful.
- 2) The respondents to pay the claimant a sum of **Kshs.641, 107.00**.
- 3) The declaration that the claimant is deemed to have retired normally (having attained the age of over 50 years) and with effect from 06.08.2014 when the 1st respondent made the unfair dismissal decision and the retirement is with full pension benefits under the Pensions Act and Regulations accordingly.
- 4) The respondents to pay the judgment sum by 15.01.2020 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 5) The respondents to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 25th October, 2019.

BYRAM ONGAYA

JUDGE