



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 468 OF 2014
FARIDA ALI KIBWANA.....CLAIMANT
V
NAIROBI CITY COUNTY.....RESPONDENT

JUDGMENT

1. On 2 March 2011, the City Council of Nairobi issued a show cause/suspension letter to Farida Ali Kibwana (Claimant).
2. The reason for the show cause/suspension was that the Claimant had presented a forged Kenya Certificate of Education certificate during a forensic audit of staff conducted by PriceWaterHouseCoopers.
3. The Claimant had also been arraigned in Court because of the forgery.
4. The show cause requested the Claimant to make written representations within 14 days, and the Claimant responded through a letter dated 10 March 2011.
5. On 12 July 2012, the City Council of Nairobi wrote to the Claimant to inform her that her employment had been terminated on account of presentation of a forged certificate (the letter indicated that the decision had been reached at a meeting of the Council held on 27 June 2012 which had approved a recommendation by the Staff Committee on 11 November 2011 and one by the Finance Committee of 17 February 2012).
6. The letter also advised the Claimant of her right to appeal to the *Public Service Commission* within 42 days and the Claimant appealed on 5 November 2012.
7. On 21 December 2012, the Claimant was acquitted of the criminal charges and on 9 January 2013, the Claimant's advocate wrote to the City Council of Nairobi seeking her reinstatement. On 22 March 2013, the Claimant made a second appeal to the *Public Service Commission*.
8. Appearing to have reached the end of the road, the Claimant instituted legal proceedings against the Nairobi City County (Respondent) on 24 March 2014 and she stated the Issue in Dispute as *wrongful and unfair termination of Farida Ali Kibwana*.
9. The Claimant sought reinstatement and in the alternative compensation, salaries during suspension up to date of rejection of appeal, severance pay and a certificate of service.
10. The Respondent filed a Reply to the Memorandum of Claim and documents on 21 May 2014.
11. When the Cause was called out for hearing on 11 June 2018, both the Claimant and Respondent indicated that they were ready for the hearing.
12. The Claimant testified and closed her case at which point the Respondent sought an adjournment despite having indicated that it was ready with 1 witness.
13. For reasons which are on record, the Court declined to grant the adjournment and the Respondent closed its case without leading any evidence.

14. The Claimant filed her submissions on 19 June 2018 while the Respondent filed its submissions on 6 July 2018.
15. The Court has considered the pleadings, evidence and submissions.
16. The Claimant identified 4 Issues as arising for determination and the Court will adopt them albeit with some change of language.
17. But first the question of jurisdiction/limitation raised by the Respondent.

Limitation

18. The Respondent informed the Claimant through a letter dated 12 July 2012 that her employment had been terminated effective 2 March 2011.
19. The Respondent therefore contended that time started running from 2 March 2011 and because the Cause was instituted on 24 March 2013, it was statute barred.
20. In the view of the Court, time for purposes of limitation cannot start running before an employee is informed of the terminating of the contract of employment.
21. The Court finds no merit in the limitation/jurisdiction objection.

Whether Claimant was entitled to salary during suspension

22. This was the first issue identified by the Claimant in the submissions.
23. However, the Claimant made absolutely no reference to the issue in the body of the submissions.
24. In the Memorandum of Claim, the Claimant made reference to the Anti-Corruption and Economic Crimes Act and the case of *Thuita Mwangi & 2 Ors v Ethics & Anti-Corruption Commission & 2 Ors* (2013) eKLR and *Paul Ngeno v Pyrethrum Board of Kenya* (2013) eKLR to advance the position that a public officer on suspension is entitled to half salary.
25. In the view of the Court, the *Thuita* case is of no assistance to the Claimant for it was addressing the case of public officers on suspension pursuant to arraignment for offences under the Anti-Corruption and Economic Crimes Act.
26. The Claimant was not charged under the Anti-Corruption and Economic Crimes Act.
27. The *Ngeno* case also does not advance the position taken by the Claimant because it hinged on an admission by Pyrethrum Board of Kenya that *Ngeno* was entitled to half salary during interdiction (in some cases within the public service, *interdiction* and *suspension* are distinct).
28. If the Claimant's contract and/or Procedures and Policies governing the Respondent's employees provided for suspension on half pay or not, the Claimant did not demonstrate such provision or allude to the same during testimony or submissions.
29. The Court's attention was also not drawn to any particular Regulations applicable to the Claimant's case.
30. The Court finds that this head of claim was not proved to the required standard.

Unfair termination of employment

Procedural fairness

31. The Employment Act, 2007 applied to the Claimant's employment.
32. The Claimant was issued with a show cause letter outlining the allegations to respond to. She responded to the allegations after which a decision to terminate was made.
33. In the view of the Court, the process followed by the Respondent met the minimum statutory requirements as envisaged by section 41 of the Employment Act, 2007.
34. If there were other protections/Regulations which were not followed, the Claimant failed to draw the attention of the Court to the same.

Substantive fairness

35. It is incumbent upon an employer to prove the reasons for terminating the employment of an employee, and that the reasons are valid and fair. That is the prescription of sections 43 and 45 of the Employment Act, 2007.

36. The Respondent did not lead any evidence to discharge that burden.

37. Even the Reply to Memorandum of Claim did not attempt to set out a factual foundation to the fairness and/or validity of the reasons.

38. The Court concludes that the termination of the Claimant's contract lacked substantive fairness.

Appropriate remedies

Reinstatement

39. In the view of the Court, this is not an appropriate case to order reinstatement as more than 3 years have elapsed since separation.

Salary during suspension

40. The Claimant sought Kshs 1,937,520/- under this head, but because she did not prove the head of claim, the relief is declined.

Compensation

41. Considering the Claimant's length of service, the Court is of the view that the equivalent of 10 months gross wages would be appropriate (gross salary proved in Court was Kshs 57,145/- per month).

Certificate of service

42. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

43. The Court finds and holds that because the Respondent did not discharge the burden expected of it by sections 43 and 45 of the Employment Act, 2007, termination of the Claimant's employment was unfair and awards her

(a) Compensation **Kshs 571,450/-**

44. Respondent to issue certificate of service within 15 days.

45. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 20th day of July 2018.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Ms. Inimah instructed by Kamau Kinga & Co. Advocates

For Respondent Mr. Mokuia instructed by Musyoki Mogaka & Co. Advocates

Court Assistant Lindsey