



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2483 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

PERIS AKOTCH OKAL.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

By a memorandum of claim dated 7th December 2012 the claimant avers that she was unfairly dismissed from employment by the respondent. She prays for declaration that the termination of her employment was irregular and unlawful and an order that she be paid her dues and compensation in the sum of Kshs.2,736,432 costs and interest.

The respondent filed a reply to the memorandum of claim denying the averments therein. In an answer to reply to memorandum of claim dated and filed on 27th November 2013 the claimant joins issues with the respondent.

The case was heard on 21st February 2018 when the claimant testified on her behalf and the respondent called AVISA KIGUHI HAROLD, a Human Resource Management Officer at Public Service Commission.

Facts

The claimant was appointed into public service as a support staff II Job Group 'A' on 11th February 1980. She was dismissed from service by letter dated 16th April 2010 but the letter stated that her dismissal was with effect from 1st April 2009. At the time of dismissal the claimant was working at the Ministry of Foreign Affairs.

The circumstances leading to her dismissal was that on 19th February 2009 she was reported to have been given urgent invitation letters to deliver but returned the delivery book unsigned. When asked why she did not deliver the letters she responded that she was unwell and had gone for treatment.

The claimant was issued with a notice to show cause dated 25th February 2009. The letter also interdicted her from performing the duties of her office with effect from 26th February 2009 in accordance with Public Service Commission Regulations No. 23 and she was placed on half salary. The claimant responded to the show cause letter on 2nd March 2009. In her response she stated that she delivered all the letters except two; one for Commissioner General KRA and the other for Kenya Southern Sudan Liaison Office (KESULO) which were delivered the following day as she was unwell. She stated that she sought permission to see a doctor in the afternoon and left the doctor's clinic too late to deliver the two letters. KESULO signed the delivery book but KRA did not. She stated that on 19th February 2009 she had only one letter to deliver to the Permanent Secretary, Ministry of State which she left with the Assistant Office Superintendent Mr. Makeo as she was going to see the doctor for review. She attached a photocopy of the delivery book and the sick sheet to her response to the notice to show cause. She apologised and begged for leniency.

The claimant's case was deliberated upon by the Ministerial Human Resource Management Advisory Committee (MHRMAC) held on 1st April 2009 which after looking at her employment record with six previous disciplinary cases, decided that she should be dismissed from service for gross misconduct.

Her case was referred to the public Service Commission with recommendations for dismissal by letter dated 31st July 2009 but the Commission referred the matter back to the Ministry by letter dated 13th October 2009 for action under the Ministry's delegated powers. At a

meeting of the Ministry's MHRMAC held on 17th November 2009 a decision was made to dismiss the claimant for gross misconduct with effect from 1st April 2009. A letter of dismissal dated 29th April 2009 was thereafter issued to the claimant.

The claimant appealed against the dismissal by letter dated 29th April 2010 but the appeal was dismissed and the decision communicated to her by letter dated 28th September 2010. She applied for review of her case but the same was also rejected.

At the hearing the claimant reiterated the facts of the case as stated herein above. She testified that she was never called for disciplinary hearing. She was also never issued with a warning letter. She stated that the warning letters in her personnel record were issued to her in 1984 and that between 1984 and 2010 she had a clean record. She testified that her last salary was shs.14,000 referring to her payslip produced as appendix C. She also produced a copy of a medical report at appendix 1 of her supplementary list of documents. She stated that her supervisor was aware that she was sick.

The claimant prayed for reinstatement and payment of damages as prayed in her memorandum of claim.

Under cross-examination, she stated that she was given permission to see a doctor by Mr. Makeo who also delivered the letters that she was unable to deliver on 17th and 19th February 2009. She stated that she was 49 years old at the time of dismissal.

For the respondent, AVISA KIGUHI HAROLD adopted his witness statement dated 19th July 2017 which reiterates the facts as summarised above. Under cross-examination, he testified that he was not working at Public Service Commission in February 2009 and what was contained in his witness statement was gathered from records in the claimant's personnel file and the proceedings at the Public Service Commission. He stated that Public Service Commission did not participate in the disciplinary process of the claimant but dealt with the claimant's appeal. He testified that Public Service Commission delegates its authority to authorised officers. He stated that the respondent did not attach a statement of Mr. Makeo who was the claimant's immediate Supervisor. He stated that the termination of the claimant's employment was neither unprocedural nor in excess of its authority and was in compliance with applicable regulations.

In the written submissions filed on behalf of the claimant it is argued that no official of the Foreign Affairs Ministry where the claimant was working was called to testify either during the disciplinary hearing or in court and therefore the claimant's evidence was not rebutted.

For the respondent it is submitted that the claimant's termination was on grounds of gross misconduct and also based on previous warning letters.

Determination

I have considered the pleadings and evidence on record. The issues for determination are whether the dismissal of the claimant was fair and whether she is entitled to the prayers sought.

Fair Termination

Section 41 of the Employment Act provides for the procedure for fair termination while Section 43 provides for valid reason.

It is not disputed that the claimant was issued with a letter of interdiction which also required her to show cause why disciplinary action should not be taken against her. After her response to the letter she was never given any audience to defend herself against the accusations against her. She was never even presented with any evidence against her or rebutting the explanation she gave in her response to the show cause. In the minutes of the disciplinary hearing held on 1st April 2009 the claimant's response to the show cause letter is aptly captured. The minutes show that the only reason for dismissal were the comments of her supervisor who had stated that deploying the officer to any other division would not adequately address her shortcomings since he had in the past done exactly that and no change had been realised. No evidence was produced to prove that the claimant had previously been deployed to other divisions on grounds of misconduct or shortcomings but had not changed.

According to the claimant's record in her service from February 1980 to February 2009, a period of 29 years, she had only six incidents of discipline. These are listed in the proceedings as –

1. On 31/01/1983, she was reported to have refused to perform her duties and disappeared from office the whole day.
2. On 21/03/1983, she refused to carry out duties in office as required and disappeared from office the whole day. She was reported not to be punctual, being rude and disobeyed instructions whenever given to her.
3. On 09/04/1984, she was reported not to have cleaned offices assigned to her because of coming late and could not carry out work when officers are working. On 06/04/1984, she refused to collect letters from GPO and became rude to Registry Supervisor who used to allocate mail duties to sub staff.
4. On 01/08/1984, Okal refused to deliver mail to GPO and collect incoming mail and even disappeared from office leaving the post office bag behind.
5. On 16/04/1986, Okal was arrested by KTDC House Security officials fighting in office. The KTDC Security Officer recommended appropriate disciplinary action.

It means that from 16th April 1986 to 17th February 2009, there had been no incident of indiscipline against the claimant. She had thus had a clean record for more than 23 years.

Further the claimant in her response to the show cause letter stated that she was unwell on 17th and 19th February 2009 and attached a sick sheet. She further stated she had sought permission from her immediate supervisor Mr. Makeo to seek medical attention.

Furthermore Mr. W. M. Musau, the Assistant Director, Human Resource Management who was the Secretary to both the MHRMAC which handled the claimant's disciplinary case and the MHRMAC which considered her appeal admitted in a letter dated 18th May 2011 that the claimant was unwell and that this was not considered by the disciplinary committee. The letter is reproduced below –

“MINISTRY OF FOREIGN AFFAIRS

MFA.80012299A(23)

18th May 2011

The Secretary

Public Service Commission

P O Box 30095

NAIROBI

REVIEW OF DISCIPLINARY CASE:

MS. PERIS ORAL P/NO.1980012299

This has reference to your letter D/OK/255 of 1st September 2010.

Following the disciplinary process which resulted into Ms. Okal's dismissal from the Service with effect from 1st April 2009 on account of gross misconduct, it has since come to our attention that the officer was suffering from a medical condition which made her leave in denial. Therefore, she often sought for medical attention discreetly and the health discomfort experienced during the entire working hours was never openly disclosed to her supervisors. Subsequently, her performance was affected resulting into what the office perceived to be gross misconduct.

In this regard, I request that you review her disciplinary case with an aim of reconsidering your earlier decision on medical grounds and allow her back in the public service. I have attached a copy of medical report and her three (3) personal files for your perusal.

SIGNED

W. M. Musau

FOR: PERMANENT SECRETARY”

All these facts are documented in records produced by the respondent in its list and bundle of documents filed on 18th July 2017.

From the foregoing it is evident that the claimant was never given a hearing as envisaged under Section 41 of the Employment Act and there was no valid reason for her dismissal. Her dismissal was therefore unfair both procedurally and substantively and I declare accordingly.

Remedies

The claimant prayed for compensation and her dues amounting to Kshs.2,736,432. Taking into account her long service of 29 years and the manner in which, she lost her employment, I award the claimant 12 months' compensation for unfair termination based on her last salary of Kshs.14,712 at Kshs.176,544.00. The claimant is entitled to one month's salary in lieu of notice which I award her at Kshs.14,712. She is further entitled to all the salary withheld from the date of interdiction to the date she received her letter of summary dismissal being 29th April 2010 being Kshs.7,356 x 10 at Kshs.102,984.

The claimant prayed for compensation for loss of future earnings. This is not provided for in law and she did not prove that she is entitled to the same under her terms of contract. However the claimant's terms provided that she was permanent and pensionable. Having found that she was unfairly terminated and taking into account her long service of 29 years she is also entitled to her pension but not gratuity as prayed.

Having found her terminating unfair and taking into account her service of more than 29 years, I reduce the termination to an early retirement so that the claimant can benefit from her long pensionable service.

Orders

In conclusion I declare the dismissal of the claimant unfair and award her the following –

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|--------------------|---------------------|
| 1. Compensation | Kshs.176,544 |
| 2. Notice | Kshs.14,712 |
| 3. Withheld salary | Kshs.102,984 |
| Total | Kshs.294,240 |
| 4. Pension | |

The respondents shall bear the costs of the case

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE