



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2299 OF 2012

JUDITH AKINYI ACHAR..... CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the statement of claim on 14.11.2013 through Odero Osiemo & Company Advocates. She prayed for:

- a) Kshs.20, 223, 000.00 gross salary for the 16 years remaining in her contract.
- b) Interest thereon.
- c) Costs of the suit.
- d) Any other relief the Court deems fit to grant.

The respondent filed the statement of response on 11.01.2013 through Ochieng' Onyango, Kibet & Ohaga Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The evidence is that at all material times the claimant was employed by the respondent as the Principal Public Relations Officer by the letter dated 25.10.2006. The claimant had previously been employed by the Kenya Railways Corporation (KRC) on 17.05.1997 as the secretary to the managing director and head of secretarial services. During her service with KRC, she had been promoted through the ranks and her last position was acting Public Relations Manager.

By the letter dated 27.08.2008 the respondent realigned the claimant's designation to Manager, Public Relations at payroll grading 5.

The former employees of KRC had sued KRC in a case identified as civil case no. 35 of 2007 (apparently filed in the High Court at Nairobi). In the process the claimant authored an internal memo dated 17.04.2007 addressed to all respondent's staff. The memo was on the respondent's letterhead and the claimant expressed her personal views urging the staff to work together in view of that important course that the staff had taken. She further stated that in that case filed through Rumba Kinuthia & Advocates, a technical problem had been detected in that KRC had not been given a 30 days' notice of intention to sue as is required by section 87 of the KRC Act Cap. 397. The memo further stated that opinions by 7 different lawyers had been obtained and the opinion was that the suit be withdrawn and a fresh one filed in compliance with section 87 of the Act. The Memo further stated that in a meeting between staff and the Advocate, Rumba Advocate had indicated that a 38 notice to KRC had been given. However, the memo continued, scrutiny of the notice of 27.11.2006 by the Advocate showed that it was a 14 day demand letter for payment of dues and not a notice to sue KRC. In such circumstances, the memo stated, it had been concluded that the case had a fifty-fifty chance of success. In the circumstances a judicial review application had been filed to run concurrently with the pending civil case so as to enhance the chances of success. The memo concluded that the staff had to remain patient as the two parties came together under a joint committee on the matter so as to reassure all involved. She signed the memo thus, "**Judith A. Achar, PRINCIPAL PUBLIC RELATIONS OFFICER**".

The respondent addressed to the claimant the disciplinary charge sheet dated 24.02.2012. The allegations levelled against the claimant were as follows:

- a) On 17.04.2007 she authored the memo titled update on civil case no. 35 of 2007 Ex KRC Employees VS KRC in expression of your personal views and opinion to certain individuals in the respondent company. The memo was an expression of the claimant's personal views but she had done it on the respondent's letterhead and signed in her official designation thus giving the impression

that she was acting at the behest of the respondent. Thus the act amounted to abuse of the office held and breach of clause 4(c) (xiv) and (xxvi) of the code of conduct.

b) The claimant lacked authority to make publications to the company and she had acted outside her scope of duty and mandate contrary to clause 9.3 (25) of the HR manual.

c) The impression created by the memo was that the respondent shared in the claimant's views as authored in the memo and which had occasioned the respondent continuing damage to the respondent's name and its finances contrary to clause 4 (c) 9xxiii), and (xxiv) of the code of conduct.

d) The claimant used the respondent's resources , facilities and premises without authority to circulate the memo contrary to clause 4.1(x) of the code of conduct.

e) The claimant had thereby deliberately and without just cause alleged and claimed that she was acting on the behest of the respondent thereby exhibiting traits of dishonesty contrary to clause 4 (c) (i) of the code of conduct.

The disciplinary charge sheet concluded that the claimant's actions amounted to gross misconduct and she had to make an explanation within 72 hours failing appropriate action would be taken. By the letter dated 27.02.2012 the claimant was interdicted effective 27.02.2012 to facilitate investigations into the matter. The letter directed that she vacates office, she receives half salary, to report to General Manager Marketing and Communications once a week, and she would continue to benefit from the medical privileges provided by the respondent. The claimant replied by her letter dated 02.03.2012 and denied the allegations stating that the disciplinary action and allegations be withdrawn and her 6 years of loyal service be considered.

By the letter dated 22.03.2012, the respondent informed the claimant about the disciplinary committee hearing on 26.03.2012 at 10.00a.m. The disciplinary hearing took place as was scheduled. The interdiction was lifted by the letter dated 27.03.2012 and effective the same date because the investigations had been concluded. The claimant's employment was terminated by the letter dated 02.04.2012 on account of the allegations in the disciplinary charge sheet. The claimant's case that she had management authority to issue the memo was found not established at all. She was terminated from the respondent's employment with immediate effect with payment of one month salary in lieu of notice.

To answer the **1st issue** for determination, the Court returns that as at the time of termination, the respondent had a valid reason for terminating the claimant's employment as envisaged in section 43 of the Employment Act, 2007. The material on record shows that prior to issuing the memo in the allegations as levelled, the claimant had no prior authority from the respondent and indeed, she signed the memo in her official capacity and she used the respondent's official letterhead without authority as was levelled. The Court further finds that the respondent complied with the notice and a hearing as provided for in section 41 of the Act. While imposing the termination with pay in lieu of notice, the Court returns that the respondent complied with the tenets of both procedural and substantive justice as well as being lenient by not instead dismissing the claimant. The Court further returns that in lifting the interdiction, the respondent was clear that the investigations had come to an end and not that the claimant had not been found culpable.

To answer the **2nd issue** for determination the Court returns that the claimant is not entitled to Kshs. 20, 223, 000.00 gross salaries for the 16 years remaining in her contract. It was submitted that the claimant was entitled on account of unfair termination but the Court has returned that the termination was not unfair. Further the Court considers that there was nothing attributable to the respondent barring the claimant from alternative gainful engagement after the termination in issue. The Court also returns that nothing in the contract of service entitled the claimant to retire 16 years later as was claimed. The prayer will fail accordingly.

To answer the **3rd and final issue** for determination, the Court returns that the respondent failed to comply with the Court's directions to file final submissions and each party will bear own costs of the suit.

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

- a) dismissal of the claimant's suit; and
- b) each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 26th October, 2018**.

BYRAM ONGAYA

JUDGE