



REPUBLIC OF KENYA



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Mbogho v National Water Conservation and Pipeline Corporation (Cause 878 of 2013) [2018] KEELRC 2604 (KLR) (26 October 2018) (Judgment)

Miriam Mbogho v National Water Conservation and Pipeline Corporation [2018] eKLR

Neutral citation: [2018] KEELRC 2604 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 878 OF 2013

MA ONYANGO, J

OCTOBER 26, 2018

BETWEEN

MIRIAM MBOGHO CLAIMANT

AND

**NATIONAL WATER CONSERVATION AND PIPELINE
CORPORATION RESPONDENT**

JUDGMENT

1. Suit is based on Amended Statement of Claim dated 21st October, 2015 seeking the following reliefs inter alia:-
 - a. An order reinstating the Claimant back to employment without loss of benefits and position.
 - b. An order directing the Respondent to pay the Claimants unpaid claims of Kshs.655,161 claimed by payment voucher No. 07875 of 16/2010/2011.
 - c. An order directing the Respondent to pay the Claimant Kshs.138,000 field allowances contained in imprest surrender from IAF No. 397 of 15/9/2010.
 - d. An order directing the Respondent to clear the Claimant of imprest amount of Kshs.712,484/-.
 - e. An order directing the Respondent to pay the Claimant's outstanding monthly salaries of Kshs.6,404,670 plus annual increments from May 2011 until determination of the suit.
 - f. An order directing the Respondent to pay the Claimant's unpaid leave allowance of Kshs.593,025.



- g. In the alternative to (a) above, an order for compensation of the Claimant for wrongful termination (Summary dismissal)
 - h. Any other order court deems fit to grant.
 - i. Costs of this suit.
2. The Respondent filed a reply to the Memorandum of Claim on 27th June, 2016 in which the particulars of Claim and the reliefs sought by the Claimant are denied and the Claimant put to strict proof thereof.
 3. The Claimant was employed by the Respondent National Water Conservation & Pipeline Corporation on 1st August, 1987 as an inspector, Water Supplies. The Claimant rose through the ranks and as at the time she was summarily dismissed from her employment on 30th April, 2013 she held the position of Senior Superintendent of Water earning a monthly salary of KShs.118,605.
 4. The Claimant served a total of 26 years. The Claimant was a committed employee and was entrusted with various projects that should have been undertaken by engineers among them the Njoro Kubwa Canal rehabilitation project between the year 2006 to 2010.
 5. The Claimant got positive appraisals due to her good work and was retained in Taveta District Projects.
 6. Whilst situated at Njoro Kubwa Project the Claimant accomplished her performance targets with annual financial year returns of 100% and above. Work progressed well in financial years 2006 to 2008 and in 2009, works were terminated prematurely when funds meant for the project were diverted to other projects.
 7. The Claimant avers that her immediate boss Engineer Mbugua was a constant thorn in her flesh in spite of her excellent performance. He denied her access to funds for 3 ½ months though the same had been approved. Instigated malicious claims against the Claimant; confiscated the Claimant's payment voucher No. 07875 of 16/2010/2011, thereby denying the Claimant payment of legitimate claim of KShs.655,161; confiscated the Claimant's imprest surrender form IAF No.397 of 15th September, 2010 hence denying the Claimant a legitimate claim of field allowance in the sum of KShs.138,000 and failed to credit the Claimant's imprest account with KShs.712,484 as surrender done vide document IAF No. 307 of 15th September, 2010.
 8. The Claimant responded to queries raised on her work by a letter dated 26th April, 2010. However, she was suspended and summarily dismissed by a letter dated 30th April, 2013.
 9. The Claimant prays the suit be allowed and she be granted the reliefs set out herein before.

Reply to Memorandum of Claim

10. In the Reply to the Memorandum of Claim, the Respondent denied all the particulars of Claim set out in the Memorandum of Claim and put the Claimant to strict proof thereof. The Respondent avers that the Claimant was dismissed from service on account of willful neglect of duty, siphoning of public funds and misappropriation of the Respondent's funds. That she was subjected to due process in line with the Respondent's code of Regulations, the *Employment Act*, 2007 and *State Corporations Act*.
11. The Respondent denies particulars of malice raised against Engineer Mbugua the immediate supervisor of the Claimant and states that it was within the supervisor's mandate to institute investigations against the Claimant. That Engineer Mbugua was not the overall supervisor because the buck stopped with the Corporation's General Manager who oversaw investigations and disciplinary process against the Claimant.



12. That the Claimant was given opportunity to be heard and appeared before two committees namely Risk and Audit Committee of the Board and the Internal Audit Committee of the Respondent Corporation where the immediate supervisor Engineer Mbugua was not a member. That the allegations of malice by Engineer Mbugua, were never mentioned in the Committee proceedings but are a mere after thought.
13. That the suit be dismissed with costs.

Testimony

14. The Claimant testified in support of the particulars of claim and the reliefs sought and the Respondent called RW 1 Simon Mbugua, the immediate supervisor, RW2 Mr. Sivi Musyoka, a Security Officer at the Respondent's premises and RW2 Joseph Ojiambo Ouma, Human Resource Officer of the Respondent. RW 1 and RW 2 relied on the witness statements, investigations/Audit Reports made and a brief report of the findings by RW 2 following a visit he made to the Njoro project on 16th December, 2012 in the company of the Risk and Audit Committee members. RW 1 & RW 2 were not involved in the Committee investigations. RW 1 told the court he reported the anomalies he had observed leading to investigations and the Audit Report that led to the dismissal of the Claimant. RW 2 in particular told the court that he noted certain equipments were missing at the site including wheel barrows; Government excavator had been vandalized and casuals who had not actually worked had been paid. He gave example of one casual who was in custody at the time he was paid for work done. The mixer machine had been removed from the project yard and hired out and some construction equipment had been sold to pay casuals without following the Government asset disposal procedures. The Claimant provided this information to RW 1, during the visit and admitted the above allegations now contained in the visit report by RW 1.
15. The Claimant admitted these facts in her statement dated 21st October, 2015. That it was illegal to do barter trade with Government equipment contrary to Public Disposal Act without involvement of Board of Survey.
16. RW 1 and RW 2 were closely cross examined by counsel for the Claimant. RW 2 reiterated that he was only involved in the site visit and making of a visit report but was not involved in the Committee proceedings. RW 1 stated that no criminal charges were preferred against the Claimant. RW 2 also stated that though he did not know who vandalized Government equipment, or hired out some, the Claimant was overall incharge of the project and was therefore responsible for whatever happened at the site. It was put to him that security was not adequately provided at the site especially after works had stopped. RW 2 stated that those issues ought to have been escalated to the head office.
17. RW 3 Joseph Ojiambo Ouma told the court that the Claimant was suspended for gross misconduct. That allegations were based on reports by internal audit and security Divisions had admitted that the reports before court were not signed and that the letter of suspension was issued by the General Manager and not by herself. That the Claimant responded to the allegations made against her in writing and also appeared before the Human Resource and General Purpose Committee of the Board on 12th July, 2011 and was found guilty and summarily dismissed. That her explanation was not satisfactory hence the dismissal.
18. RW 2 did not have details of how much had been misappropriated by the Claimant. RW 2, did not also have facts of the project. RW 2 also stated that he was not privy to the contents of the reports of investigations but added that the reports are before court for examination and that she wholly relied on the said reports as she was not involved in the investigations and in the disciplinary process that led to the Claimant's dismissals. RW 2 added she only testified as the custodian of records.



Determination

19. The issues for determination are as follows:-
 - i. Whether the summary dismissal of the Claimant was for a valid reason and in terms of a fair procedure?
 - ii. What reliefs the Claimant is entitled to if at all?
20. The court will deal with issue (i) and issue (ii) simultaneously. At the outset the court notes that the Claims by the Claimant with regard to –
 - i. Kshs.655,161 being unpaid claim by the Claimant supported by payment voucher No. 07875 of 16/2010/2011,
 - ii. Claim for Kshs.138,000 being field allowances contained in imprest surrender form IAF No. 397 of 15th September, 2010.

Both totaling Kshs.712,484 were not rebutted at all by the Respondent. The Claimant sufficiently proved the two claims on a balance of probabilities and the court awards her accordingly a sum of Kshs.712,484 being unpaid imprest claims duly owed by the Respondent to the Claimant.

Summary Dismissal

21. With regard to the issue as to whether the summary dismissal of the Claimant was for a valid reason and whether it was implemented in terms of a fair procedure, is a matter to be determined based on the pleadings by the parties, the documentary evidence before court and oral testimony by the Claimant and that by RW 1, RW 2 and RW 3.
22. The Claimant gave a candid testimony of her long and dedicated service to the Respondent for a period of 26 years without blemish. That issues which led to her dismissal were with regard to the last project she supervised, namely Njoro Kubwa Canal Rehabilitation Project in Raveta District, which lasted four (4) financial years between November 2006 and September 2010. That she worked under RW 1 Engineer Mbugua. That throughout the period of the project her appraisals were very positive and were either 100% or above. That she encountered problems due to obstructive behavior of engineer Mbugua, her immediate supervisor, who blocked funds transmission to the project leading to stagnation of the same in the year 2009, failure to pay casuals working in the project and therefore poor workmanship towards the end of the project. That she adequately answered all the allegations made against her and her dismissal was purely based on malice and desire to undermine her work. That the project in question in actual fact ought to have been under a qualified engineer, which she was not, but non the less the Respondent entrusted her with it due to her past record.
23. The court notes that none of the persons who were involved in the investigation of Njoro Kubwa Canal Rehabilitation Project and the alleged misconduct by the Claimant testified before court except RW 1 who states he made a report which led to the investigations and the disciplinary hearing. The alleged Audit reports leading to the disciplinary process were not properly produced before court because none of the authors were called to produce them nor was any explanation made as to their absence. Nobody who participated in the disciplinary process appeared before court to rebut the allegations made by the Claimant against the substance and process followed by the committees.
24. Engineer Mbugua the man who is mainly blamed for the misfortunes that be fell the Claimant was non committal regarding the investigations and the reports before court. He had only made a complaint.



25. The testimony by RW 2 a security officer who made a single visit to the project site that had lasted for over four (4) years was dismally inadequate to support the allegations of misconduct against a Senior officer who had served the Respondent and Government for over 26 years. This lengthy excellent service, which is not refuted by the Respondent ought to have sufficed in the least to commute the summary dismissal of the Claimant to a normal termination to allow the Claimant to access her pension. However, the particulars of misconduct were not proved against the Claimant in terms of section 43, of the Employment Act. The Claimant discharged the onus placed upon her in terms of section 47(5) of the Employment Act, as read with sections 106, 107, 108, and 109 of the Evidence Act, Cap 80 Laws of Kenya to prove on a balance of probabilities that her summary dismissal was wrongful, unlawful, and unfair. That it was not for a valid reason contrary to section 43 and 45 of the Employment Act, 2007.
26. The court makes a finding to the effect that the summary dismissal of the Claimant was unlawful and unfair.
27. The Claimant seeks various remedies, including reinstatement to her job; payment of outstanding monthly salaries plus annual increments from May 2011, until the suit is heard and determined; reimbursement of medical expenses for the period and in the alternative damages for the wrongful dismissals from employment, costs and interest of the suit.
28. The summary dismissal was on 30th April 2013. Five (5) years have elapsed since the date of the summary dismissal by a few months. That notwithstanding and given the entire circumstances of the dismissal, the court is of the view that, this is not an appropriate case for reinstatement. However the claimant suffered loss and damage following the wrongful and unlawful dismissal from employment.
29. By fact of the declaration that the summary dismissal was unlawful and unfair, the Claimant is firstly entitled to be paid full salary for the period she was under suspension until, the date of dismissal. Furthermore, the Claimant is entitled to any benefit that may have been forfeited or not applied by fact of the summary dismissal including pension if applicable.
30. Thirdly, the Claimant is entitled to compensation in terms of section 49(1)(c) as read with sub-section 49(4) of the Employment Act, 2007. In this regard, the Claimant had served diligently for over 26 years. The Claimant was unfairly condemned leading to loss of employment and income. The Claimant lost the benefit of salary increments and future salaries that resulted from the dismissal. The Claimant was not paid her rightful dues set out in the suit at the time of dismissal. The Claimant wished to be reinstated back to work which prayer has not been granted. This case, in the courts view is one deserving the maximum compensation of the equivalent of 12 months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs.1,423,260.
31. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-
 - i. Kshs.1,423,260 being equivalent of 12 months' salary in compensation.
 - ii. Ksh.712,484 being unpaid reimbursable claims.
 - iii. Grant of any benefits that was forfeited by the Claimant by fact of the unlawful summary dismissal including pension, or gratuity whichever is applicable.
 - iv. Costs of the Suit.
 - v. Interest on the award at court rates with effect from the date of filing suit for (ii) above and from date of judgment in respect of (i) & (iii) above till payment in full.



JUDGMENT DATED, SIGNED AND DELIVERED THIS 12TH DAY OF OCTOBER, 2018

MATHEWS N. NDUMA

JUDGE

DELIVERED AND SIGNED IN NAIROBI THIS 26TH DAY OF OCTOBER, 2018

MAUREEN ONYANGO

JUDGE

Appearances:-

Mr. Ogwe for Claimant

Mr. Nyamu for Respondent

Daniel Ngumbi : Court Clerk

