



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.317 OF 2016

JANE WAMBUI MACHARIA.....CLAIMANT

- VERSUS -

THE PRESBYTERIAN UNIVERSITY OF EAST AFRICA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 07.03.2016 through Sheikh & Company Advocates and prayed for judgment against the respondent for:

- a) A declaration that the compulsory leave and disciplinary hearing was unlawful, irregular and unfair.
- b) An order directing payment of acting allowance for the period May 2012 to May 2013; acting allowance for the period 04.02.2014 to 09.09.2014; acting allowance for September 2015 to October 2015; making Kshs.142, 360.00 and payment of all salary arrears.
- c) An order directing the respondent to allow the claimant back to her work station and assign her duties.
- d) An order that there be no disciplinary process taken or continued against the claimant based on the allegations herein.
- e) An order that the respondent to pay the claimant any other accrued salary.
- f) An order that the respondent pays all acting allowances.
- g) Costs of the suit.

The response to the claim was filed on 15.04.2016 through Muhuhu & Company Advocates. The respondent prayed that the suit be dismissed with costs.

It is not in dispute that the respondent employed the claimant as the Head Waiter on a 2 year contract from 25.02.2009 at Kshs.18, 000.00 per month. The contract lapsed and the respondent offered the claimant the position of Cateress on permanent and pensionable terms effective 01.09.2011 at Kshs.32, 800.00 plus other benefits.

It is the claimant's case that she was appointed to hold the position of Catering Manager from May 2012 to May 2013 which she held simultaneously as her position of cateress and that she was not paid acting allowance in that regard. Further from June 2013 to 04.04.2014 the claimant was a cateress and was appointed to position of Matron till 09.09.2014. Further the claimant resumed her duties as cateress from 09.09.2014 until 08.09.2015 when she was appointed to act as the Matron. The claimant's case is that she acted as Matron until 30.10.2015 when she was sent on compulsory leave for one month. On 11.11.2015 she was invited to attend a disciplinary hearing on the morning of 12.11.2015. On 01.12.2015 she received a letter stopping her from going to work as she awaited the decision of the disciplinary committee.

The respondent pleaded as follows:

- a) The claimant was never appointed in an acting capacity.
- b) The compulsory leave was for proper reasons, lawful and fair.

c) The disciplinary procedure was lawful but the full board was yet to meet to decide the case based on minutes of the disciplinary committee.

d) The claimant is entitled to half salary.

On 04.07.2018 the Court considered the parties' submissions and ordered that the parties' respective cases were thereby closed and the case be determined on the basis of pleadings and documents on record as well as the final submissions. Parties filed the final submissions.

The only issue for determination is whether the claimant is entitled to remedies as prayed for. The Court makes findings as follows:

a) The claimant prays for a declaration that the compulsory leave and disciplinary hearing was unlawful, irregular and unfair. It is not in dispute that on 30.10.2015 the respondent placed the claimant on compulsory leave up to 01.12.2015. The claimant resumed work on 01.12.2015 but was told to vacate the premises on 09.12.2015 as per the letter dated the same 09.12.2015 stating that the terms of the compulsory leave by the letter of 30.10.2015 remained in place. When the suit was filed on 11.03.2016 the claimant had been on leave for 3 months. The Court has considered all material on record and returns that there is no evidence or submissions on the statutory or contractual basis of the compulsory leave. Further there is no established contractual or statutory basis for initiating and continuing disciplinary process founded upon the compulsory leave and then juxtaposed with the suspension as imposed on 07.04.2016. As such, the Court returns that the compulsory leave and disciplinary hearing was unlawful, unfair and irregular and the declaration will issue as prayed for. In any event the respondent submits that the letter of appointment provided for suspension (such as one of 07.04.2016) but the Court returns that there was no such contractual clause in the exhibited letters of appointment. As submitted for the claimant section 12 of the Employment Act, 2007 provides that the written contract of employment ought to provide for a statement on the disciplinary rules applicable to the employee and in the present case the written contract does not provide for compulsory leave or suspension as was purportedly imposed against the claimant.

b) The claimant prays for an order directing payment of acting allowance for the period May 2012 to May 2013; acting allowance for the period 04.02.2014 to 09.09.2014; acting allowance for September 2015 to October 2015 and payment of all salary arrears including Kshs.142, 360.00 already accrued as pleaded. The claimant has filed the internal memorandum of 18.01.2013 attaching a list of employees showing the human resource department listed her as the acting catering manager. The claimant has also exhibited letters showing that she was appointed to act as claimed. The Court returns that the claimant has established, on a balance of probability, that she acted as pleaded in the memorandum of claim and is entitled to be paid acting allowance as prayed for and computed at the rate of the difference in basic pay of the substantive position held and position acted in – the formula having been established on a balance of probability as endorsed on the internal memorandum of 20.05.2011 attached on the claimant's supplementary list of documents filed on 25.04.2016. The acting allowances due will be tabulated and filed and served within 7 days from the date of this judgment for recording quantum on a convenient mention date. While making that finding the Court further finds that the respondent opposed acting allowance only upon the alleged account that the claimant never acted as claimed but the Court has found the contrary so that the claimant is entitled as prayed for.

c) There is no dispute that the claimant has not been dismissed. The claimant is willing to continue in employment. The suspension and compulsory leave have been found to lack contractual and statutory basis. Thus the Court returns that the claimant is entitled to an order directing the respondent to allow the claimant back to her work station and assign her duties; and the claimant to report to the respondent's Vice Chancellor for assignment of duty not later than 23.10.2018 at 8.00am.

d) The Court has found that the disciplinary process was commenced and continued contrary to the contract of service and applicable statutory provisions. The proceedings clearly amounted to abuse of the respondent's power of disciplinary control over the claimant. Thus the claimant is entitled to an order that there be no disciplinary process taken or continued against the claimant based on the allegations herein. While making that finding, the Court has considered that the disciplinary committee hearing and deliberations remain opaque as the relevant minutes were said to be confidential and they were not exhibited. Further no reasonable excuse was advanced for failure to conclude the purported disciplinary process. In such circumstances the Court finds that the process was whimsical, unreasonable and it amounted to unfair labour practice under Article 41 of the Constitution of Kenya, 2010 and is as good as a nullity.

e) The court has found that the compulsory leave and suspension were unfair, unlawful and irregular. The Court finds that the claimant is therefore entitled to an order that the respondent to pay the claimant all accrued and outstanding gross salary from the date of compulsory leave on 30.10.2015; and the tabulated amount to be filed and served in 7 days from the date of the judgment for recording quantum on a convenient mention date. While making that finding the Court follows the holding in **Joseph Otieno Aketch –Versus Rai Plywoods (K) Limited [2015]eKLR**, (Radido J) thus, **“A suspension should have a contractual or statutory foundation or backing. Generally, under the common law, a suspension of an employee should have a contractual basis. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see McKenzie V Smith (1976) IRLR 345), which holding I endorse as being appropriate in our jurisdiction.”**

f) The claimant has succeeded and is entitled to costs of the suit.

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

1) The declaration that the compulsory leave and disciplinary hearing was unlawful, unfair and irregular.

2) The respondent to pay the claimant acting allowance for the period May 2012 to May 2013; acting allowance for the period 04.02.2014 to 09.09.2014; acting allowance for September 2015 to October 2015.

3) The respondent to pay the claimant all accrued and outstanding gross salary from the date of compulsory leave on 30.10.2015 till date of resumption of duty on 23.10.2018 and to continue in service with full remuneration and benefits unless lawfully terminated

from employment.

4) The claimant to compute, file and serve the amount due in (2) and (3) above in 7 days from the date of this judgment for recording the quantum on a convenient mention date; and the amount to be fully paid by 15.12.2018 failing interest to be payable at Court rates from the date of this judgment till full payment.

5) The order directing the respondent to allow the claimant back to her work station and assign her duties with full prevailing remuneration and benefits until the date of lawful separation of the parties; and the claimant to report to the respondent's Vice Chancellor for assignment of duty not later than 23.10.2018 at 8.00am.

6) The order that there be no disciplinary process taken or continued against the claimant by the respondent based on the allegations herein.

7) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 19th October, 2018**.

BYRAM ONGAYA

JUDGE