



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 2142 OF 2012

MARGARET AYUMA KATUNGU.....CLAIMANT

VERSUS

THE HON. THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 23.10.2012 seeking the following reliefs:

(a) The unlawful interdiction be lifted and the claimant be reinstated to her duties as Accountant II

(b) That the claimant be paid the portion of her withheld salary at the rate of Kshs 35,855.50 per month from 1.12.2010 upto the date of reinstatement and resumption of the payment of her full salary.

(c) The respondent be ordered to pay to the claimant the sum of US Dollars 1,300 being accommodation charges refundable to the claimant during her stay I Harare, Zimbabwe while waiting to handover her duties and U.S Dollars 2,340 being her unpaid 20 days foreign service allowance.

(d) That the respondent be ordered to pay to the claimant the sum of US Dollars 400 per month in respect of the storage of her belongings in Harare from 1/10/2010 until the respondent pays for the transportation of the said goods to Nairobi.

(e) That the respondent be ordered to pay for the transportation of the said goods from Harare Zimbabwe to Nairobi Kenya.

(f) General damages

(g) Costs of this suit and interest thereon and on (b) and

(c) at court rates from 1/11/2010 until payment and full and final satisfaction of the decree herein.

(h) Any other relief this honourable court may deem fit and just to grant.

2. The respondent filed defence on 5.12.2012 contending that the interdiction of the claimant was lawful and prayed for the suit to be dismissed. The respondent averred that the claimant was interdicted on half salary pending investigation into an alleged unauthorized withdrawal of USD 10,000 from Kenya's Embassy account in Harare Zimbabwe.

3. On 27.6.2013 reinstatement was ordered for the claimant pending the hearing and determination of this suit. The order was not complied with and contempt proceedings were instituted against the Principal Secretary in charge of Foreign Affairs Ministry where the claimant was employed. The PS was convicted and sentenced to pay a fine of Kshs.200,000 which again was never paid. On 17.1.2014, the claimant was reinstated and Kshs.500,000 deposited in her bank account. However, she was arrested and charged in court in connection with the alleged misconduct she had been interdicted for since November 2010. As a result of the said criminal charges, the claimant was suspended without pay from 28.3.2014 pending the trial and determination of the said case. As fate would have it the claimant attained the mandatory retirement age of 60 years on 31.12.2015 and existed on 1.1.2016 before the criminal case was determined.

4. The suit was heard on 15.2.2018 and 2.5.2018 when the claimant testified as CW1 and Mr John Kimani Njorio and M/s Mary Ngurima

testified for the respondent as RW1 and RW2 respectively. Thereafter both parties filed written submissions which have herein carefully considered alongside the evidence tendered.

Claimants case

5. CW1 testified that she was employed under the Ministry of Culture in 1979. Thereafter she worked in various ministries until 1992 when she went to the Ministry of Foreign Affairs. In September 2005, she was posted to the Kenyan Embassy at Harare Zimbabwe as Finance Attache and worked until October 2010 when she was recalled to Nairobi. She left Harare on 28.10.2010 and reported to Nairobi office on 1.11.2010 only to be served with a show cause letter dated 18.10.2010 by the HR Officer on 3.11.2010.

6. The letter accused her of gross misconduct mainly withdrawal of USD 10,000 through forgery of Ms Weche's signature. She denied the alleged misconduct and requested for the signature to be verified by a document examiner. However, in 6.12.2010 she was served with an interdiction letter dated 30.11.2010 for the alleged gross misconduct. The letter placed her on half salary and barred from leaving her work station without permission.

7. On 8.3.2011 she wrote an appeal against the interdiction and requested for transportation of her goods from Harare to Nairobi. She also requested for other accrued benefits including per diem for the days she delayed in Harare doing handing over which ended on 25.10.2010. She explained that she had been paid upto 11.10.2010 but she was kicked out of the Embassy House on 15.10.2010. Her hotel accommodation charges was USD 100 per day until 30.10.2010 when she flew back to Nairobi. She also organized for storage of her household goods worth USD 50,000 at cost of USD 400 per day pending shipment by the government but that was never done and they were auctioned.

8. CW1 further testified that the said appeal was never responded to. She served demand letter through her lawyer but again it was not responded to. Thereafter she served Notice of intention to sue the respondent and after filing the suit she obtained an order for reinstatement pending trial of the suit. That the order was disobeyed but on 17.1.2014 interdiction was lifted and she reported to work on 20.1.2014 and Kshs 500,000 was deposited in her account. However, on the same day she was arrested by police and charged in court with theft by servant at Harare. Thereafter the claimant was suspended without pay on 28.3.2014.

9. CW1 further testified that on 2.6.2015 she received a notice of retirement on grounds of age effective 1.1.2016. The letter confirmed her right to pension and directed her to fill the necessary forms for retiring civil servants and do clearance. She contended that until her retirement she was never put through any disciplinary hearing by the employer over the alleged misconduct. She further contended that the delay in concluding her case was unfair and unlawful and contrary to the circular by the Head of Civil Service dated 13.2.2007 which directed that disciplinary cases for civil servants be concluded within 3 months.

10. CW1 abandoned the claim for reinstatement and only prayed for damages as prayed in the suit including damages for unlawful interdiction without disciplinary process and the agony suffered.

11. On cross-examination, CW1 stated that she was suspended under Regulation C34 and 32 of the Code of Regulations 2006 after being charged with a criminal case. She however contended that she was paid Kshs 5000 as house allowance during her interdiction but not every month. She further contended that as financial attache, she was in charge of revenue retainer at the Embassy and also in charge of all payments to service providers. That the authority to pay came from the Ambassador and the budget. That she was a mandatory signatory with no alternative. That any department in need of funds was required to fill a requisition form for approval by the Ambassador as the AIE Holder and Accounting Officer after which the form was forwarded to her for payment.

12. She admitted that she came to Nairobi in September 2010 for an interview and carried the cash book but returned to complete her handing over in October 2010. She denied that she altered figures in the cashbook. She admitted that there was a staff medical cover with the authority of the Ambassador. That the payment went through the cash book and no anomaly was raised then.

13. She admitted that she received a letter telling her to leave Harare by 10.10.2010 and a ticket to fly home. However the handing over was delayed until 25.10.2010 after the exercise was interrupted in September 2010 when she was called for an interview in Nairobi and then went back to continue with the same. She further explained that only 10 days foreign allowance was paid despite the handing over having been extended. In addition CW1 contended that she could not carry her goods from Harare because her baggage allowance was not fully paid as the Ambassador withheld USD 10,000 allegedly to recover money allegedly stolen by her. She denied the alleged theft and contended that the Ambassador had no right to withhold her baggage allowance. She denied ever being summoned to any disciplinary hearing and contended any disciplinary process ought to have been concluded within 3 months.

Defence Case

14. RW1 is the Assistant Director HR in the Ministry of Foreign Affairs dealing with discipline cases. He only learnt about this case a week before giving his evidence and as such his evidence was derived from the office records. He testified that the claimant was served with show cause letter as required in preliminary investigation and after her reply was found unsatisfactory the matter was referred to the Public Service Commission because the offence involved theft by servant and was not within delegated authority given to the Cabinet Secretary Foreign Affairs. That the ministry recommended for the dismissal of the claimant but the PSC did not do so because this court gave an order for her reinstatement. He however confirmed that the reinstatement was never done by the Cabinet Secretary who was the Authorized Officer to do so.

15. On cross-examination RW1 explained that after the claimant's responded to the show cause letter, the matter was deliberated upon by the Ministerial HR Advisory Committee who recommended for the dismissal of the claimant by the PSC. That the said dismissal could only be done after the hearing of the claimant by the PSC. That the claimant was never heard by the Ministerial HR Committee or the PSC and her reinstatement was never done until 2014. He explained that the claimant's disciplinary case could not end within the required 3 months because it involved investigations by the police both in Kenya and abroad. That all what the ministry did was an audit while the rest of the

investigations was done by the police. He concluded by stating that under the 2006 PSC Regulations did not require that an accused officer be accorded an oral hearing and as such in his view, it was enough to conduct a hearing through correspondences.

16. RW2 is the Principal HR Officer, Ministry of Foreign Affairs. She testified that the claimant was posted to Zimbabwe as the financial attache in 2005 and she was to return to Kenya in 2010. That her duties involved financial and procurement. She testified that in September 2010, the Ambassador realized from financial statement that there was missing money and wrote a complaint to the ministry. Thereafter the matter went to the Ministerial HR Advisory Committee and the claimant was interdicted for gross misconduct being withdrawal or money using a forged signature for the Ambassador. That the matter was investigated by auditors and the police who were dispatched to Harare. That after considering the claimant's case, the Ministerial HR Advisory Committee recommended for his dismissal by the PSC.

17. RW1 further testified that the process of withdrawing money required presentation of a letter to the bank signed by the claimant and the Ambassador. That the auditors discovered a loss of 22,217,368.60 made up of the following:

- a) *Kshs 105,554.50 missing from revenue collection.*
- b) *Kshs 4,522,796.10 misappropriated through overstatement of cash payment.*
- c) *Kshs 2,492,800 lost through alteration of cash book entries.*
- d) *Kshs 5,096,218 paid to Masca Harare Insurance for services not rendered.*
- e) *USD 10,000 equal to Kshs 1,000,000 withdrawn using forged signature.*

18. RW2 contended that the disciplinary case for the claimant was delayed because the investigations required diplomatic clearance from the two countries involved. That by the time the investigations were completed the court had granted an order for reinstatement which led to the lifting of the suspension in January 2014 and payment to the claimant of all her salary arrears. However, after 3 days the claimant was arrested and charged with criminal case leading to her suspension without pay under the Code of Regulation.

19. RW2 further testified that the loss of the USD 10,000 occurred around the time the claimant was about to return to Kenya and as such it was recovered from her entitlement to USD 15,000 baggage allowance and the claimant was therefore paid USD 5000 for baggage plus air ticket back home. She explained that after notice to return is served, the officer is entitled to 3 days per diem in the foreign country while shipping his goods and 3 days per diem plus storage of goods while settling down in the country.

20. RW2 concluded by stating that the claimant was given retirement letter while the criminal case was still going on and as such she was not cleared. She however maintained that the criminal proceedings were not under the control of the Ministry but the police

21. On cross-examination, RW2 stated that the claimant was interdicted on 30.11.2010 and maintained that the delay in finalizing the case was due to lack of a bilateral agreement between the 2 countries. She however did not produce any evidence to prove that the delay was due to lack of clearance from Zimbabwe. She further maintained that after reinstatement, the claimant was paid her salary arrears. She explained that the USD 10,000 was withheld from the claimant's baggage allowance because in government, an officer cannot be paid all her dues when she has debts to the government. She denied knowledge that the claimant's goods were never shipped from Harare and that they were later auctioned. She however admitted that under the Regulations an interdiction was for 6 months but in this case it went on for 3 years due to geographical and diplomatic reasons.

Analysis and determination

22. There is no dispute that the claimant was employed by the Ministry of Foreign Affairs. There is further no dispute that she was a financial attaché in Harare from 2005 to 2010 when she returned to Kenya after her assignment ended. There is further no dispute that she was interdicted on half salary from November 2010 on allegation that she had grossly misconducted herself during the course of her duty abroad. There is also no dispute that in October, 2012 she brought this suit and obtained interlocutory order of reinstatement but the order was not complied with until January 2014 when she was reinstated and paid Kshs 500,000. Finally, there is no dispute that the claimant was arrested and charged 3 days after the reinstatement, and later suspended without pay until her retirement on account of age on 1.1.2016. The claimant never amended the statement of claim after the interdiction was lifted and as such this suit is confined to the cause of action pleaded in the claimant and no more. The issues for determination herein are therefore:

- a) Whether the interdiction of the claimant from October 2010 to January 2014 was unlawful
- b) Whether the claimant is entitled to the reliefs sought.

Whether interdiction was unlawful

23. The claimant submitted that the respondent's officers breached all the requirements of natural justice, due process and fair administrative action and acted with unbridled impunity by disobeying a court order. She blamed the respondent for the unreasonable delay in finalizing her disciplinary case by over 3 years as opposed to the 3 months prescribed by the Head of Public Service vide the circular dated 13.2.2007.

24. The respondent however denied the alleged unlawful interdiction and contended that it was done within the provisions of the public service Regulations 2005. She cited Regulation 23(1) which mandates an authorized officer to interdict a public officer on half pay if proceedings which may lead to dismissal are being taken or about to be taken or criminal proceedings are being instituted against him. She therefore submitted that the interdiction of the claimant was lawful and within the disciplinary powers granted to her by the said PSC

regulations. She relied on *Simon N. Mwaniki & 25 Others Vs Permanent Secretary Ministry of Defence & 3 Others [2018] eKLR* and *Patrick Oyugi Wakire & 2 Others Vs County Assembly of Migori County & 3 Others [2017] eKLR* to fortify her submissions that interdiction is lawful pending investigations on alleged misconduct by an employee.

25. I agree with the cited precedents that an employer has authority to interdict or suspend his employee pending investigations into misconduct allegedly committed by him or her. In this case, the respondent was authorized by Regulation 23 of PSC Regulations (2005) to interdict the claimant pending investigations into alleged gross misconduct committed by her while on her tour of duty in Harare Zimbabwe. The said regulation provided:

“23(1) If in any case an authorized officer is satisfied that the public interest require that a public officer should cease forthwith to exercise the powers and functions of his office, he may interdict the public officer from exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or criminal proceedings are being instituted against him.

(2) A public officer who is interdicted shall be paid not less than half his salary as the authorized officer shall think fit”.

26. The foregoing notwithstanding the court finds that the otherwise lawful interdiction of the claimant was rendered unlawful by the delay in concluding the case forcing her to file this suit and by the subsequent disobedience with this court’s order which lifted the said extended interdiction. The claimant produced the circular by the Head of the Public Service dated 13.2.2007 which limited the period for finalizing disciplinary cases for interdicted officers to 3 months. The circular stated:

“It is noted that disciplinary cases take too long in the ministries before they are submitted to the public service commission of Kenya for determination. Consequently, officers are retained on the payroll for a long time without rendering service to the Government until their cases are finalized. Further the position held by such officers cannot be filled before disciplinary cases are concluded. This imparts negatively on service delivery especially when interdictions and suspensions are lifted and officers have to be paid the resultant arrears. This further demoralizes other officers who are made to shoulder the responsibilities of the interdicted/suspended officers.

In order to address the above anomaly, it has been decided that authorized officers should promptly deal with and finalize all disciplinary cases within a period of three (3) months unless the case has been referred to the Public Service Commission for a decision. If the cases are not finalized within the three (3) months, the officer under discipline should be reinstated into the payroll and disciplinary action taken against the officer(s) who delayed the finalization of the cases”.

27. There is no dispute that the claimant was interdicted by the letter dated 18.10.2010 and despite her appeal and notice of intention to sue for the continued interdiction the respondent ignored her forcing her to file this suit in 2012. The respondent attempted to hide under the diplomatic hurdles, but in my view that is neither here nor there because the employer was still able to carry on with her disciplinary proceedings against the claimant without any police investigations. That even if the police was necessary, no evidence was adduced to prove that there was indeed some diplomatic hurdles which caused the delay in finalizing the disciplinary case.

28. As regards the contempt of court, there is no dispute that the court gave order dated 27.6.2013 lifting the interdiction of the claimant but the order was disobeyed. That thereafter contempt proceedings were instituted against the Principal Secretary for respondent Ministry and he was convicted and such the contempt of court orders sealed the illegality in the unlawful interdiction of the claimant.

Reliefs

29. The prayer for lifting of the interdiction and reinstatement of the claimant to her position as Accountant II is over taken by events because the interdiction was done in January 2014. In addition, the claimant has since retired from service due to her age.

30. The claim for withheld salary from 1.12.2010 till the date of her reinstatement has been considered. The claimant stated that her salary was Kshs 46,000 but during her interdiction she was only paid Kshs 10,144.50 per month instead of the half pay for Kshs 23,000. Regulation 23(3) of the PSC Regulation 2005 cited above, provided that:

“23(3) where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such officer is neither dismissed nor otherwise punished under these regulations, the whole of the salary withheld under paragraph (2) shall be restored to him upon termination of such proceedings”.

31. In this case, the interdiction of the claimant was lifted by the letter dated 17.1.2014. The letter lifted the interdiction effective from the date of the interdiction, that is, 30.11.2010 without any form of punishment against the claimant. I therefore award her the withheld salary arrears in line with the said Regulation 23(3) being (Kshs 46,000-10,144.50) x 26 months = 1,362,509 less Kshs.500,000 paid after reinstatement leaving a net of Kshs 862,509. The claimant submitted for the salary arrears upto 1.1.2016 when the claimant retired but that is not supported pleading.

32. The claim for USD 10,000 being withheld baggage allowance is allowed as prayed because it was a right to the claimant under her contract of employment contained in the employers Policies and Regulations. Failure to pay the claimant the said allowance to enable her transport her belonging to Kenya was not only a breach of her employment contract but also inhuman treatment and unfair labour practice by the employer. In my view it amounted to the employer abandoning her own employee abroad in breach of the same contract under which she used to post the employee to work abroad. Even if money was embezzled, which was not proved by hearsay evidence adduced herein by the defence, the employee was not exiting her employment at the time she finished her assignment in Harare. She was still to continue with her services until her retirement years thereafter. It is therefore my view that deducting USD 10,000 from the claimant’s baggage allowance and

giving her only USD 5000 was not only unfair labour practice but also premature recovery of the said money from the wrong benefits. Interestingly, the same amount has not been counterclaimed for by the respondent in this suit and as such I awarded the claimant the USD 10,000 as prayed.

33. The claimant has further prayed for accommodation for the days spent in Harare after 10.10.2010 to complete the handing over exercise. There is no dispute that the handing over was concluded on 22.10.2010 and the claimant delayed in Harare due to lack of baggage allowance till end of October 2010 when she flew back to Kenya. In view of the said delay in leaving Harare caused by delayed handing over and withholding of her baggage allowance, I return that the claimant was entitled to additional allowances (per diem) for the days the 20 extra days starting 11.10.2010 till the day she left Harare. The court was only treated with hearsay evidence from the defence witnesses that the delay was due to the claimant's own fault. However, the solid evidence by the claimant is that the delay was due to delayed completion of handing over and also due to withholding of her baggage allowance. Consequently, I award the claimant the sum USD 1300 per diem plus USD 2340 foreign service allowance for 20 days as prayed.

34. The claim for storage charges was abandoned and the claimant asked that the said claim and the subsequent auctioning of her goods be considered while awarding the claim for general damages for inhuman treatment through her interdiction.

35. The claim for general damages is based on the claimant's allegations that for 7 years she has undergone inhuman treatment and suffered mental torture and agony. She contended that she missed her salary and promotion until her retirement. That her goods were auctioned in Harare to recover storage charges after the baggage allowance was withheld. She prayed for Kshs. 6 million for general charges plus a further Kshs. 2 million as aggravated and exemplary damages she relied on *Dr Ezekiel Nyangoya Okemwa Vs Kenya marine & Fisheries Research Institute [2016] eKLR* where Rika J awarded Kshs 20 million as coalesced damages for unfair and unlawful termination, diminished employability and compensation for other violations including breach of statute, rules of natural justice, terms and conditions of service, service regulations and breach of the contract of employment in its entirety.

36. After careful consideration of the evidence and submissions I have no doubt that the claimant's disciplinary case was not acted upon with the same speed as the one used to interdict her in October 2010. That, despite her appeals and demands through her counsel, the respondent remained unmoved. The employer acted with unbridled contempt to the express guidelines given by the Head of Public Service in the circular dated 13.2.2005 and also the court order dated 27.6.2013 which lifted the interdiction of the claimant. The natural consequence was that the claimant had her goods auctioned abroad and went without her salary for years leading to obvious mental torture and agony to the claimant. The foregoing state of affairs point to breach of the claimant right to fair administrative action as guaranteed by Article 47 of the constitution. The said Article provides:

“47(1) Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

37. The said action by the respondent was also a breach of the right to fair labour practices guaranteed under Article 41 of the Constitution. It was also an affront to the protection afforded to every public officer by Article 236 (b) of the constitution from unfair disciplinary action. The Article provides:

“236 A public officer shall not be –

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action

without due process of the law”.

38. In view of the said violations to claimant's rights under the contract of service, constitution and the PSC Regulations, I award her Kshs.4,000,000 as general damages. In awarding the said compensation I have considered that the suffering inflicted on the claimant in *Dr Ezekiel Okemwa case* was more serious than in this case.

Conclusion and Disposition

39. I have found that the prolonged interdiction of the claimant and the disobedience of the reinstatement order by the court rendered the

interdiction of the claimant from October 2010 to January 2014 unlawful. I have further found that the claimant is entitled to the reliefs sought in her claim as analyzed herein above. Consequently, I enter judgement for her as follows:

a) Salary arrears Kshs 862,509

b) Baggage allowance of USD 10000 at

Kshs 100 per USD Kshs 1,000,000

c) Accommodation allowance of USD 3640

at Kshs 100 per USD Kshs 364,000

d) General damages for violations Kshs 4,000,000

Kshs 6,226,509

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40. The claimant is further awarded costs and interest from the date of filing the suit at court rates. The award will be subjected to statutory deductions.

41. Finally, the fine imposed on the Principal Secretary Ministry of Foreign Affairs Dr Engineer Karanja Kibicho shall remain a debt and enforceable against him personally until it is paid as directed by the court in an earlier ruling. In order to uphold the dignity of the court and public confidence in the court I hereby summon Dr. Engineer Karanja Kibicho to attend court on 29.11.2018 to show cause why he should not pay the fine imposed on him personally for contempt of court order dated 27.6.2013. The summons is to be served by the court bailiff forthwith.

Dated, Signed and Delivered in Open Court at Nairobi

this 16th day of November, 2018

ONESMUS N. MAKAU

JUDGE