



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2119 OF 2012

LIZA KIPRONO JEBOR.....CLAIMANT

VERSUS

NATIONAL WATER CONSERVATION

AND PIPELINE CORPORATION.....RESPONDENT

JUDGMENT

1. Liza Kiprono Jebor (Claimant) was offered employment as a Clerical Officer by the National Water Conservation & Pipeline Corporation (Respondent) through a letter dated 4 October 1994.
2. On 13 October 2008, the Respondent appointed the Claimant as acting Head of Procurement (acted for about 2 months) and on 15 February 2010, the Claimant was suspended on account of gross misconduct (*allegedly writing local purchase orders (LPOS) for fraudulent payments to Ms. Elburgon Stores contrary to the provisions of COR 11.22(iii),(viii),(xvii) and 11.24.5*).
3. The suspension letter also called upon the Claimant to show cause within 7 days why disciplinary action should not be taken against her.
4. On 8 July 2010, the Respondent's Managing Director wrote to the Claimant to inform her of her summary dismissal and being aggrieved, the Claimant instituted legal proceedings against the Respondent stating the Issue in Dispute as Unfair, wrongful and unlawful termination of employment.
5. The Respondent filed a Response on 13 December 2012.
6. On 23 September 2016, the Claimant filed an *Amended Memorandum of Claim* in which she sought a total of Kshs 31,534,930/- for the breaches of contract/statute.
7. The Cause was set for hearing on several occasions but the hearings aborted for different reasons until 5 February 2018 when the Court took the Claimant's evidence.
8. The hearing was adjourned because the Respondent sought to introduce documents which had not been filed and the Claimant continued with her testimony on 23 June 2018 when she closed her case.
9. The Court scheduled the Respondent's case for hearing on 13 November 2018, but when the Cause was called out at 9.14 am, none of the parties were in Court.
10. The Court, in consideration of the absence of the parties closed the hearing and reserved judgment today.
11. The Court has considered the pleadings and evidence and identified the Issues for determination as, *whether the dismissal of the Claimant from employment was unfair, whether there was breach of contract and appropriate remedies/orders*.

Unfair termination of employment

Procedural fairness

12. Sections 35 and 41 of the Employment Act, 2007 prescribe the processes that should precede a termination of employment.
13. The Claimant was suspended through a letter dated 15 February 2010. The letter called upon the Claimant to show cause why

disciplinary action should not be taken against her and set out the allegations for the contemplated action.

14. The Claimant was given 7 days to make written representations and she responded on 22 February 2010.

15. After the response, the Claimant appeared before the Respondent's Board on 26 May 2010. The Board found the Claimant's responses unsatisfactory, hence the dismissal through the letter dated 8 July 2010.

16. In the Court's view, the steps and processes taken by the Respondent complied with the statutory requirements of procedural fairness as contemplated by sections 35 and 41 of the Employment Act, 2007.

Substantive fairness

17. In terms of sections 43, 45 and 47(5) of the Employment Act, 2007, the Respondent had the statutory burden of proving the reasons for the dismissal of the Claimant from employment and that the reasons were valid and fair to merit a dismissal.

18. On 23 July 2018, the Court directed the Respondent to file and serve the witness statement(s) it intended to rely on before 27 July 2018. There is nothing on file to suggest that the Respondent complied with the order.

19. Earlier on 7 September 2016, the Court had directed the parties to file and exchange witness statements and documents to be relied on before scheduling hearing dates, but the Respondent did not take advantage of the directive to file witness statements.

20. When the Cause came up for hearing on 18 July 2017, the Claimant drew the attention of the Court to the failure by the Respondent to file/serve witness statements, but again the Respondent did not comply.

21. From the above narration, it is apparent that the Respondent has not taken seriously the Court directives and orders which were meant to facilitate an expeditious and proportionate determination of this old Cause.

22. In other words, the Respondent was afforded more than ample opportunity to prepare the presentation of its case but it opted to go to slumber.

23. And having failed to discharge the burden expected of it by the aforesaid provisions of the law, the Court can conclude that there were no valid and or fair reasons to dismiss the Claimant from employment.

Breach of contract

Wages during suspension

24. Among the claims presented by the Claimant was the sum of Kshs 145,337/- being half salary balances during the period of suspension.

25. An extract of the Respondent's Code of Regulations was filed in Court.

26. Clause 11.24.4 thereof provides for *suspension* only in cases where an employee has been convicted by a court of law of a criminal offence. The Claimant herein was never convicted of a criminal offence.

27. The Claimant herein ought not to have been *suspended* but *interdicted* in terms of clause 11.24.3, and considering that provision and the finding that the dismissal was unfair, the Court will further find that the Claimant is entitled to the withheld salary as computed.

Leave

28. An employee is entitled to at least 21 days annual leave with full pay.

29. Apart from stating in passing that she had not taken leave and that she could not recall the exact dates by time of dismissal, the Claimant did not lay an evidential basis as to the periods or years she had not taken leave.

30. Without that foundation and even in light of section 10(3)(a) of the Employment Act, 2007, the Court will decline to find in favour of the Claimant.

Appropriate remedies/orders

Salary in lieu of notice

31. The Claimant did not disclose any contractual or legal basis for 3 months' pay in lieu of notice and the Court, relying on the default statutory provision in section 35(1) of the Employment Act, 2007 will allow 1 month pay in lieu of notice (basic salary was Kshs 58,135/- according to January 2010 pay slip).

Compensation

32. The Claimant served the Respondent for about 16 years and in consideration of the length of service, the Court is of the view that maximum compensation equivalent to 12 months gross wages would be appropriate (gross wages according to January 2010 pay slip was Kshs 94,135/-).

Genera damages for malicious and gross violation of right to work

33. No evidential, contractual and/or legal anchor to this head of claim and/or relief was laid and the relief is declined.

Lost prospective income

34. Litigants keep on pleading for lost prospective income but never lay a proper foundation for the claim or relief. This is yet another case where a foundation for the relief was not placed before the Court. The amount was computed as Kshs 25,981,260/-.

35. The Court can therefore only echo the words of the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Conclusion and Orders

36. The Court finds and holds that the dismissal of the Claimant from employment was unfair and awards her

(i) Pay in lieu of notice	Kshs 58,135/-
(ii) Compensation	Kshs 1,129,620/-
(iii) Wages during suspension	Kshs 145,337/50
TOTAL	Kshs 1,333,092/50

37. Claimant to have cost on half scale.

Delivered, dated and signed in Nairobi on this 15th day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Rutto instructed by T.K. Rutto & Co. Advocates
For Respondent	Ms. Guserwa instructed by J.A. Guserwa & Co. Advocates
Court Assistant	Lindsey