



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT KERICHO
CAUSE NO. 13 OF 2016
(Before D. K. N. Marete)

LINAH CHEBET NGENY.....CLAIMANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

This matter was brought to court vide a Memorandum of Claim dated 4th February, 2016. The issues in dispute are therein cited as;

1. *Constructive termination of employment.*
2. *Unfair termination of employment.*
3. *Termination based on marital status discrimination.*
4. *Failure to pay terminal dues to the claimants.*
5. *Proof and remedies in employment discrimination.*

The respondent in a Replying Affidavit sworn on 25th February, 2016 denies the claim and prays that the same be dismissed with costs.

It is the claimant's case that at all material times to this cause, she was an employee of the respondent having been employed as a constituency clerk at Emurua Dikirr in April, 2014. She earned a gross salary of Kshs. 81,686.00 per month.

The claimant's further case is that she served in this office from April, 2014 to September, 2015 when the respondent constructively terminated her services by giving her a resignation acceptance on 7th October, 2015. At this time, she had requested for an off duty for two weeks with a view to settling an issue with the Constituency Election Coordinator – Emurua Dikirr Constituency, one, John Taiswa.

The claimant's other case is that on or about 9th May, 2015, she and her husband, both of whom worked together for the respondent were called by the respondent's Director, Human Resource and

Administration and were asked why they were both serving the commission contrary to Article 4.6.2 of the IEBC Human Resources and Procedure Manual of October, 2010. The Director then advised them to decide who of them would resign or they would both lose their jobs.

The claimant's other case is that based on the coercion by the director aforesaid, she did a letter dated 9th May, 2015 informing the respondent that she had chosen to step aside trusting that the respondent would initiate the necessary formalities of resignation including computation of her terminal dues. She further sent an email to the said Director requesting for reconsideration of the resignation with reference to section 4.5 and 4.6.1.2 of the human resource and procedure manual as well as chapter 4 of Bill of Rights of our Constitution. This was never responded to.

The claimant on 19th August, 2015 received an employment of couples show cause letter asking her why disciplinary action should not be taken against her on account of undeclared conflict of interest. She responded by indicating that she had sent a resignation letter as this was the only option bearing in mind the advice of the Director, Human Resource and Administration. She further reiterated her quest for clarification on the provisions of Human Resource and Procedures Manual as read with chapter 4 of the Constitution. She also indicated that there was no cause for disciplinary action against her.

The claimant again avers that she was on several other occasions requested to tender her resignation letter but declined on grounds that she had not been offered clarification on the subject. She thereafter preferred an appeal seeking reconsideration of her resignation but this was ignored. She was not paid for September and October, 2015, times of which she worked yet the appeal had not been determined.

The claimant's other case is that the termination of her employment was unfair, discriminative on marital status, the dismissal was constructive, unreasonable and without any lawful justification whatsoever as no proper explanations were offered to the claimant, against the principles of natural justice and further that the provisions of Human Resources and Procedures Manual contradicts the spirit of the constitution of Kenya as well as Employment Act, 2007 which prohibits discrimination on marital status on which the respondent considered while termination the services of the claimant.

She cites the following as particulars of the respondent's illegality and unfairness;

- 1. Acting contrary to the requirements of natural justice which require that a person should not be condemned unheard.*
- 2. Unilaterally terminating the services of the claimant without following the laid down procedures which require proper notice as required under the contract of employment.*
- 3. Constructively dismissing the claimant on the basis of discrimination on marital status.*
- 4. Failing to recognize the claimant's previous conduct and capability and reward her accordingly.*
- 5. Failing to pay the claimant the salary for September and October 2015 yet she was at work.*
- 6. Failing to give notice or salary in lieu of notice to the claimant before dismissal.*
- 7. Failing to pay hardship allowance to the claimant when she was at work.*
- 8. Advertising the position of the claimant while the appeal had not yet been determined.*

She prays as follows;

A declaration that the claimant was a permanent employee and entitled to benefits as such and the dismissal amounted to illegal, unfair and constructive dismissal.

- a) A declaration that Section 4.6.2 of the Respondent's Human Resources and Administration*

Policy and Procedures Manual is discriminative hence unconstitutional and null and void.

b) A declaration that Section 4.6.2 of the Respondent's Human Resources and Administration Policy and Procedures Manual is discriminative hence unconstitutional and null and void.

c) The claimant to be paid one month salary in lieu of notice.

d) The respondent be condemned to pay a 12 month's salary in compensation for unfair termination.

e) Five months salary in damages for unfair constructive dismissal.

f) An order that the claimant is entitled to payment of unpaid salaries for September and October 2015, hardship allowances and benefits and statutory entitlements or terminal benefits under the law.

g) Payment for annual leave which was earned but not taken.

h) An order for payment of actual pecuniary loss suffered as a result of termination from the date of termination, to the date of payment;

i) General damages for discrimination.

j) In the alternative, an order directing the respondent to reinstate the claimant on enhanced terms.

k) Costs and interests of this suit at court's rate.

l) Any other relief that this Honourable court deems fit and just to grant.

The respondent's case, as agreed by the parties during a mention on 14th February, 2017 is set out in their Replying Affidavit sworn and filed on 25th February, 2016.

It is their case that the claim has no merits and raises no conceivable cause of action against herself for being based on half truths. She admits the claimant was employed as a Constituency Office Clerk at Emurua Dikirr in April, 2014.

It is the respondent's further case that before employment, the claimant was given an offer of employment contract which stipulated the terms and conditions of the said employment. Of these, there was a term on conflict of interest and confidentiality and especially clause 14 (b) which required the claimant to disclose to the Commission all interest in any ventures, contracts or arrangements which may conflict with those of the Commission or with the performance of her duties and such disclosure was to be in writing to the Chairman. This was to be acknowledged in writing and indeed the claimant did so acknowledge.

The respondent's other case is that during induction of new employees, they are provided with Human Resource and Administrative Policy and Procedures Manual for their consumption and familiarization. The claimant was not only provided with this manual but was also drawn to the attention of clause 4.6.2 which provides as follows;

"It is the goal of the commission to avoid creating or perpetuating circumstances in which the possibility of favouritism, conflicts of interest or impairment of efficient operations may occur. Therefore, the commission will not hire the immediate relatives of employees in any capacity including as temporary employees. For the purposes of this policy, relatives are defined as: parents, spouse, child, grandparent or individual who has acquired such a relationship through marriage"

The claimant, being aware of the requirement for disclosure at clause 14 (b) above failed to disclose that

she was a spouse to Wesley Kipyegon Rutto, also an employee of the respondent. The respondent avers that employment is based on trust and confidence that requires an employee to act honestly. This was breached by the non disclosure of the claimant's relationship with Wesley.

The respondent's further case is that she was able to know of the claimants relationship through other means prompting their summon by the Directorate of Human Resource and Administration for breach of the terms as set out in the employment contract and the respondent's Human Resource and Administrative Policy and Procedures Manual. At the meeting, the couple acknowledged their position and also knowledge of the provisions of the manual and its implications on them and therefore undertook to communicate their decision on the issue to the Directorate.

The respondent's further avers that following the said directions, the claimant tendered a resignation letter dated 9th May, 2015 also agreeing that this was necessitated by her relationship to a fellow employee. She requested for her final dues and stated that she was available for any discussions besides thanking the commission for the time she had worked and further expressed her willingness to serve in any other capacity where there was no perceived conflict of interest. This was followed by an email from the claimant acknowledging willingness to resign.

The respondent again avers that the claimant's allegation that the decision on resignation was based coercion is baseless and would require proof on her part. The respondent submits that the burden of proof of wrong on her part shifts on to the claimant as the party alleging coercion or other facts relating to her resignation. Further, it was within her rights as employer to take disciplinary action for breach of the employment contract as follows;

- i. She was inducted by the commission before assuming duty;*
- ii. Acknowledged having been provided with a copy of the HR Manual during induction;*
- iii. Acknowledged that Mr. Wesley Kipyegon Rotich is her spouse*

The respondent on acknowledgment of the couple's relationship and with a view to attaining its policy on conflict of interest *et al* requested the two to remedy the situation leading to the voluntary resignation by the claimant. She is therefore not entitled to the relief sought.

This matter came to court variously until the 2nd December, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant wrongful, unfair and unlawful.
2. Whether the claimant entitled to the relief sought.
3. Who bears the costs of this cause.

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this. The claimant in her written submissions dated 13th December, 2016 reiterates a case of unlawful termination of employment whereas the respondent firmly opposes the same. It is her case and submission that out of fear of both of them losing their jobs, she offered a tentative and conditional resignation from employment. This was vide a letter dated 9th May, 2015. This was followed up with an email on 12th may, 2015 to the respondents Director of Human Resource and Administration seeking a clarification of their positions with reference to clauses 4.5 and 4.6.1.2 of the manual as read with chapter 4 of the Constitution of Kenya, 2010 on the Bill of Rights. This was not responded to, or at all.

The claimant's further submission is that on 19th August, 2015, she received a show cause letter

requesting her to show cause as to why disciplinary action should not be taken against her for her undeclared conflict of interest. She responded to this by a letter dated 27th August, 2015 which reiterated her position as enunciated in her email of 12th May, 2015. Despite there being no disciplinary action taken against her, the respondent duly pressurized her to tender an official letter of resignation.

The claimant further submits that having failed to receive her salary for September 2015, she appealed for a reconsideration of the matter but this was ignored. Ultimately, she was issued with an acceptance of resignation letter dated 4th September, 2014 thereby effectively terminating her services.

The claimant again submits a case of a contradiction of clauses 4.5, 4.6.2 and 4.6.1.2 in that whereas clause 4.6.2 presents a case of avoidance of conflict of interest by non employment of relatives, clause 4.6.1.2 accommodates related staff members but excludes them from certain decision making processes. Clause 4.5 restates the principal of equal employment opportunity for all. Overall, the claimant submits that clause 4.6.2 is in contravention of Article 27 (4) of the Constitution of Kenya, 2010 which provides as follows;

“(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.” (Emphasis added.)

The claimant further submits as follows;

Besides contravening the Constitution, Clause 4.6.2 of the said Manual has no legal basis. There is no provision in the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 or any other legislation that allows or supports such a policy. A policy that contravenes the Constitution and has no legal backing can only be termed illegal and unconstitutional. It is unreasonable, unjustifiable and has no place in an open and democratic society based on human dignity, equality and freedom. It is the duty of this Honourable Court to realign the Respondent’s policies in conformity with the Constitution.

The claimant relies on authority of **Rebecca Ann Maina & 2 Others V Jomo Kenyatta University of Agriculture and Technology, Nairobi ELRC Cause No. 1789 of 2013** at page 4, where Nduma, J. held that this court undoubtedly has the jurisdiction to interpret the Constitution and to enforce the Bill of Rights in labour and employment matters.

Again, in the authority of **Rebecca Ann Maina & 2 Others V Jomo Kenyatta University of Agriculture and Technology, (supra)** at page 4, Nduma, J. quoting Mbaru, J. in the case of **Emmanuel Mutisya Solomon v Agility Logistics (ELRC NO. 1448 OF 2011)**, defined constructive dismissal as follows:

“A situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option but to resign”

She further relies on the authority of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited, Nairobi ELRC Cause No. 339 of 2011**, page 10 where Rika, J. further defined constructive dismissal as follows:

“...constructive dismissal occurs when an employee is forced to leave his job against his will, because of his employer’s conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are:-

- a. The employer must be in breach of the contract of employment;*
- b. The breach must be fundamental as to be considered a repudiatory breach;*

c. The employee must resign in response to that breach; and

d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”

The claimant therefore foments a case of constructive dismissal of her employment by the respondent.

The claimant again sought to rely on the authority of section 45 (3) of the Employment Act, 2007 which provides that an employee who has been in continuous employment for a period of not less than thirteen months before termination has the right to complain that he has been unfairly terminated. This is the legal justification for this claim. She also relies on section 45 (2) of the aforesaid Act as follows;

“A termination of employment by an employer is unfair if the employer fails to prove-

a. that the reason for the termination is valid;

b. that the reason for termination is a fair reason –

i. Related to the employee’s conduct, capacity or compatibility; or

ii. Based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.”

The claimant *in toto* and conclusion submits a case of unfair and unlawful termination of her employment for the foregoing reasons;

The respondent reiterates her case in her written submissions dated 15th December, 2016. She recites the contents of the Replying Affidavit of Peter Mulele aforesaid as follows:

a. The claimant was given an offer of employment contract which stipulated the terms and conditions of the said employment.

b. The Respondent at the time of including its new employees, always provides the Human Resource and Administration Policy and Procedures Manual to each and every employee for the purposes of their appraisal on the administrative policies governing the Respondent.

c. Clauses 4.6.2 provide that; the commission will not hire the immediate relatives of employees in any capacity including as temporary employees.

d. Having gone through the said manual and further having in mind clause 14(b) of the letter of offer, the Claimant failed to disclose that she was the spouse to one Wesley Kipyegon Ruttoh who is an employee of the Commission.

e. It is the duty of an employee to act honestly which trust and confidence the Claimant breached for non-disclosure of the relationship between herself and Wesley Kipyegon Ruttoh.

f. The relationship came to the knowledge of the Commission via other means other than disclosure by the Claimant prompting their summons by the Directorate of Human Resource and Administration for breach of the terms as set out under their contract of employment and the Commissions Human Resource and Administration Policies and Procedures Manual.

g. The claimant with her spouse acknowledged they were indeed a couple and were aware of the provision of the said manual.

h. The Claimant tendered her resignation letter dated 9th May, 2015 stating that the same was as a

result of herself having entered into a relationship with a current serving officer of the Commission.

A scrutiny of the respective cases of the parties brings out a case in favour of the claimant. The claimant in her case and written submissions brings out a case of constructive termination of employment resulting from a bungled resignation by herself. She ably presents a case of duress and coercion on the part of the respondent that forced her to tender a resignation from employment. The circumstances of the meeting of the couple (read claimant) with the Director – Human Resource and the deliberations thereof left the couple with no choice but to concede to the respondent's offer of resignation instead of facing massive dismissal. This indeed was a devil's choice for them. From the tone and direction of the deliberations in this meeting, the couple was left with no choice but to separate employment wise. It was no choice at all. It cannot therefore be argued that the resignation from employment by the claimant was optional or voluntarily.

The claimant further submits that her resignation was tentative and pending a resolution of the issues in dispute with the respondent. The resignation was only rushed when it was known that she wished to take leave to pursue the matter with her seniors. This dents the respondent's case of submission of a voluntary resignation from employment by the claimant.

The claimant further submits a contradiction and flaw of the respondent's policy manual on conflict of interest and debarring of employment for relatives and like in her case, spouses. It is her submission that this is also a contravention of Article 27 (4) of the Constitution which authoritatively provides against discrimination. It is also her submission that this policy has no legal basis as it is not backed by the Independent Electoral and Boundaries Commission Act and is therefore not only illegal but unconstitutional. This is recited as follows, at the risk of repetition;

Besides contravening the Constitution, Clause 4.6.2 of the said Manual has no legal basis. There is no provision in the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 or any other legislation that allows or supports such a policy. A policy that contravenes the Constitution and has no legal backing can only be termed illegal and unconstitutional. It is unreasonable, unjustifiable and has no place in an open and democratic society based on human dignity, equality and freedom. It is the duty of this Honourable Court to realign the Respondent's policies in conformity with the Constitution.

The respondent does not come out in defence of this case and submission by the claimant. Her (respondent's) only defence is that the claimant was always aware of the policy against discrimination having been warned of the same during induction and also having been issued with Human Resource and Administrative Policy and Procedures Manual. It was therefore incumbent upon the claimant to comply with this policy or be deemed a bad employee. I disagree. The respondent was duty bound to answer to such serious allegations of discrimination and unconstitutionality of policy and action. The absence of this seriously dements her case. In the absence of any exonerating circumstances to warrant marital discrimination at the work place, I am forced to agree with the claimant. This is a case of undue discrimination. I also agree with the claimant's case and submission that their relative positions as a couple did and would not pose any threat of conflict of interest to the respondent whatsoever. And if this a rose, which is doubtful, the respondent would resort to any other management tools to cure the defect.

I agree with the claimant's case as presented. This is more so with the tyrannical and discriminative yet and due policy and action of the respondent in the circumstances. I would therefore not feel shy to find a case of wrongful, unfair and unlawful constructive termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant entitled to the relief sought. She is. Having worn a case for unlawful termination of employment, she becomes entitled to relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. That a declaration be and is hereby issued that termination of the employment of the claimant by the respondent amounted to wrongful, unfair and unlawful constructive dismissal

ii. That a declaration be and is hereby issued that clause 4.6.2 of the respondent's Human Resource and Administrative Policy and Procedures Manual is discriminative and therefore unconstitutional, unlawful, null and void.

iii. One (1) month's salary in lieu of notice Kshs.81,686.00

iv. Salaries for September 2015 Kshs.81,686.00

v. Salaries for seven days of October 2015 Kshs.18,445.00

vi. Annual leave due but not taken Kshs.57,180.20

vii. Twelve (12) months compensation for unlawful termination of employment

Kshs.980,232.00

viii. TOTAL OF CLAIM **Ksh.1,219,229.20**

ix. The respondent be and is hereby ordered to issue a certificate of service to the claimant in thirty (30) days.

x. The costs of this claim shall be borne by the respondent

Delivered, dated and signed this 21st day of February 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Langat instructed by Mr. Kipkorir Tele & Korir Advocates for the Claimant.

2. Mr. Karanja instructed by Mirugi Kariuki & Company Advocates for the Respondent.