



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 36 OF 2016**

**LILIAN WANYANGA NJAGI.....CLAIMANT**

**-VERSUS-**

**EMBU UNIVERSITY COLLEGE.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 17th March, 2017)**

**JUDGMENT**

The claimant filed the memorandum of claim on 16.02.2016 through Waweru Macharia & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Kshs.67,087.00 being unpaid dues.
- b) Kshs.805,044.00 being 12 months' compensation for unfair or unlawful dismissal.
- c) Reinstatement to her former position without loss of benefits.
- d) General damages plus interest.
- e) Certificate of service.
- f) Costs of the suit.
- g) Any other or further relief as the court may deem fit to grant.

The respondent's statement of response and counterclaim was filed on 12.04.2016 through Nungo, Oduor & Waigwa Advocates. The respondent prayed for judgment against the claimant for:

- a) A declaration that the claimant obtained her employment with the respondent through falsification.
- b) Special damages for Kshs.2,302,321.70 being gross pay from March 2013 to July 2015 Kshs.2,079,912.00; pension employer contribution Kshs.150,666.00; NSSF employer contribution Kshs.1,080.00; and medical expenditure Kshs.70,663.70.
- c) Costs of the suit.
- d) Interest on (b) and (c) at court rates.

The claimant filed the reply to response and response to counterclaim on 04.05.2016 and prayed that the claim be allowed with costs and the counterclaim be dismissed with costs.

The respondent advertised in the print media on 19.12.2012 an invitation for applications for Secretary Grade E/F and Secretary Grade C/D. Amongst the prescribed qualifications was that a successful candidate had to hold a minimum of Kenya Certificate of Secondary Education (KCSE) mean grade C or equivalent. The applicant applied for the post of Secretary Grade E/F by her letter dated 29.12.2012 and attached her curriculum vitae. The respondent's case is that the claimant exhibited documents showing that she possessed KCSE mean grade C and she was shortlisted for the interview. On 08.02.2013 the respondent's Council held interviews and candidates, including the claimant, were interviewed. By the letter dated 14.02.2013 the claimant was offered appointment to the position of secretary and she took up the employment effective 22.02.2013. The claimant successfully completed the probationary service and was confirmed in appointment as per the letter dated 23.04.2014.

By the letter dated 15.02.2013 the claimant had requested for adjustment of her salary and allowances to reflect the job she was interviewed being Secretary Grade E/F which had not been stated clearly in her letter of appointment. She stated that she had not been paid Kshs.3,000.00 per month in salary, Kshs.7,000.00 per month in extraneous allowance, and Kshs.13,000.00 per month being commuter allowance. The respondent replied by the letter dated 18.02.2013 stating that the claimant did not qualify for Grade E/F, the appointment moved the claimant from Grade B to D, the respondent did not pay extraneous allowance, commuter allowance paid to all staff who own vehicles was Kshs.10,000.00, the basic salary and not gross pay was the important bargaining tool, and responsibility and telephone allowance would be paid once the offer was accepted.

By the letter dated 22.07.2015 the claimant was suspended from duty on account of alleged acts of misconduct and to facilitate investigations that would pave way for disciplinary action against the claimant. Particulars of the alleged serious misconduct were not stated in the letter. By the letter dated 04.08.2015, the claimant was invited to attend the respondent's staff disciplinary committee on 19.08.2015 at 9.00am to answer undisclosed allegations of misconduct. The minutes on record show that the meeting convened as scheduled. The recorded allegations levelled against the claimant were as follows:

- a) That the claimant knowingly gave false information in her application for employment and during the interview for the post of secretary thereby influencing the outcome and getting the job by false pretences.
- b) That the claimant presented a forged KCSE certificate showing that she sat for the examination at Magundu Secondary School in 1999 under index number 308104/043 and obtained mean grade of C+.

The minutes show that the claimant attended the meeting and requested to be given the particulars of the alleged acts of misconduct in writing so as to enable her to prepare her defence - and in such circumstances she declined to answer questions by the Committee. The minutes show that the Committee proceeded to recommend that the claimant be summarily dismissed from the respondent's employment for presenting forged KCSE certificate and thereby getting employed at the institution by false pretences; the respondent to demand all monies expended on the claimant as an employee because she got the job by false pretences; and that the forgery of documents being a criminal offence, it should be reported to the office of the Criminal Investigations Department for necessary action. The letter of summary dismissal dated 19.08.2015 followed. The claimant was dismissed from employment with effect from 19.08.2015. The grounds for dismissal were as follows:

- a) The claimant knowingly giving false information in her application for employment and during the interview for the post of secretary on 08.02.2013.
- b) Presenting a forged KCSE certificate.

The letter informed the claimant about her right of appeal to the respondent's Council within 14 days. The claimant appealed and was invited by the letter dated 08.09.2015 to appear before the respondent's staff disciplinary appeals board on 18.09.2015 at 2.30pm. The meeting convened as scheduled on 08.09.2015 and the record shows that the claimant having been invited to attend, she failed to do so. Accordingly, the board upheld the summary dismissal. The claimant's evidence was that she did not attend the appeal hearing because she received the invitation letter belatedly long after the scheduled date.

For the **1<sup>st</sup> issue** for determination, the court returns that there is no dispute between the parties that they were in a contract of employment at all material times.

The **2<sup>nd</sup> issue** for determination is whether the respondent had a valid and genuine reason to dismiss the claimant from employment. The claimant testified that when she applied for the job she attached on the application a copy of her certificate showing she obtained a mean grade of D+ in KCSE and that the copy of the curriculum vitae as filed in court by the respondent was not the one she attached on her application for the job so that the respondent's alleged misleading information on her experience as reflected in the curriculum vitae is unfounded. It was the claimant's evidence that the CV and the KCSE certificates and a form from Mt. Kenya showing she obtained C+ in KCSE were not her documents and she did not know the source of the documents as filed in court for the respondent. The claimant's witnesses CW2 and CW3 testified that the respondent's principal had summoned the claimant, CW2 and CW3 sometime on 06.01.2015. At that meeting the principal had alleged that the claimant who was the principal's personal secretary had authored an alleged letter of 13 pages designing to remove him as principal. The witnesses testified that the principal had then threatened to sack all employees who he alleged had authored the letter obviously including the claimant. The claimant's case was that it was that emotional and unfounded allegation by the principal that had led to her sacking.

The court finds that in the application for employment the claimant never mentioned KCSE mean grade C+ and as testified by RW, she never signed on the CV that was filed in court. Thus, the court finds that there was no evidence by the respondent to show that the claimant indeed presented misleading information at the application and interview or throughout the recruitment process. The court has carefully considered the letter dated 15.02.2013 by which the claimant had requested for adjustment of her salary and allowances to reflect the job she was interviewed being Secretary Grade E/F which had not been stated clearly in her letter of appointment. The court has further considered the respondent's replying letter dated 18.02.2013 stating that the claimant did not qualify for Grade E/F, that the appointment moved the claimant from Grade B to D, that the respondent did not pay extraneous allowance, that commuter allowance paid to all staff who own vehicles was Kshs.10,000.00, that the basic salary and not gross pay was the important bargaining tool, and that responsibility and telephone allowance would be paid once the offer was accepted. The court has read the letters together and returns that very early in the employment process and relationship the issue of the claimant's qualifications came up and the respondent confirmed that the claimant lacked the necessary qualifications to hold the position of secretary Grade E/F and experience had been considered in moving the claimant from Grade B to D. The court is persuaded that in such circumstances it is improbable that the claimant had tendered misleading KCSE certificate and other information at the application and interview stages. The court further finds it highly suspect that the investigations to establish the alleged forged certificate and other misleading information came about long after the dismissal. Needless to state, the court finds that the reason for termination as recommended by the staff disciplinary committee is at substantial variance with the reason as stated in the dismissal letter. All these findings show that the reason for termination was not genuine as at the time of the termination and as envisaged in section 43 of the Employment Act, 2007.

Taking all the findings into consideration, the court returns that the respondent did not have a genuine reason to dismiss the claimant as envisaged in section 43 of the Employment Act, 2007. The court finds that in absence of evidence that the copies of the offending CV and KCSE certificate filed for the respondent were indeed provided or presented by the claimant at the recruitment stage, there is no basis for a finding that the claimant misled the respondent on the KCSE mean grade or her experience or that the claimant forged her KCSE certificate.

The court has considered that the respondent's principal at all material times failed to testify to dispel the

claimant's case that she was sacked because the principal unfairly alleged that she had authored the 13 page letter bearing some evil designs for removal of the principal; and on a balance of probabilities, there was no ground for the court to doubt the claimant's account of those circumstances leading to her summary dismissal.

While making that finding the court has considered the exhibited documents from the Kenya National Examination Council and the other institutions the claimant served or attended learning. The court finds that as long as the respondent has not established that the claimant presented the KCSE certificate that is alleged to have been forged and the misleading CV, the respondent has thereby failed to show the stated reasons for the summary dismissal. The court has further considered that throughout the disciplinary hearing, the claimant was not given an opportunity to know the basis of the allegations and an opportunity to interrogate the documentary evidence the respondent relied upon to make out the case for the summary dismissal; and RW stated that the documents had been obtained long after the dismissal.

The **3<sup>rd</sup> issue** for determination is whether the disciplinary procedure was fair. The claimant lamented that at the disciplinary hearing she had no prior knowledge of the particulars of the alleged misconduct. She requested for written particulars to enable her effectively respond but the same was not considered favourably. The claimant's evidence and which was not rebutted was that the invitation to attend the appeal hearing was received belatedly after the date of the hearing. Taking the clear procedural shortcomings into account, the court returns that the dismissal was unfair because the termination was not in accordance with a fair procedure as envisaged in section 45(2) (c) of the Employment Act, 2007.

To answer the **4<sup>th</sup> issue** for determination, the court returns that the summary dismissal was unfair for want of a genuine reason and for want of fair disciplinary procedure.

The **5<sup>th</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The claimant prayed for **Kshs.67,087.00** being unpaid dues at half salaries for July and August withheld by the respondent. The court finds that the unfair dismissal was on 19.08.2015 with a right to appeal in 14 days. She appealed and the summary dismissal has been found to have been unfair. The court finds that she is entitled to the pay as prayed for.
- b) The claimant prayed for Kshs.805,044.00 being 12 months' compensation for unfair or unlawful dismissal. The court has considered that the claimant served for slightly over 2 years and she wished to remain in employment. Balancing justice in this case and in particular considering the period served by the claimant and all the circumstances of the case including the pending criminal case, the claimant is awarded 5 months for unfair dismissal under section 49(1) of the Employment Act, 2007 being Kshs.67,087.00 per month making **Kshs.335,435.00**.
- c) The claimant prayed for reinstatement to her former position without loss of benefits. There was no dispute between the parties that there was a pending criminal case flowing from the circumstances of the claimant's employment by the respondent. Thus, the court returns that the relationship between the parties is strained and reinstatement would be inconvenient as is inappropriate.
- d) The claimant is entitled to the certificate of service.

The **6<sup>th</sup> issue** for determination is whether the respondent is entitled to the remedies as prayed for in the counterclaim. The court makes findings as follows:

- a) The respondent prayed for a declaration that the claimant obtained her employment with the respondent through falsification. The court has found that the respondent failed to show that the certificate said to show that the claimant scored C+ in KCSE and the CV alleged to have misleading experience were indeed submitted by the claimant to the respondent during the

application, interview and the recruitment process. Thus, the court returns that the prayer will fail.

b) The respondent prayed for special damages for Kshs.2,302,321.70 being gross pay from March 2013 to July 2015 Kshs.2,079, 912.00; pension employer contribution Kshs.150,666.00; NSSF employer contribution Kshs.1,080.00; and medical expenditure Kshs.70,663.70. It was not disputed that the claimant rendered service throughout the period in issue and RW confirmed that the claimant was not incompetent or a poor performer. The monies claimed were properly paid under the prevailing contract of service and a ground to justify recovery of the payments from the claimant has not been established. The prayer will fail.

Accordingly, the counterclaim would be dismissed with costs.

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

- a) Dismissal of the counterclaim.
- b) The respondent to pay the claimant **Kshs.402,522.00** by 01.05.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c) The respondent to deliver to the claimant a certificate of service forthwith.
- d) The respondent to pay the claimant's costs of the suit including the costs of the counterclaim.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 17<sup>th</sup> March, 2017**.

**BYRAM ONGAYA**

**JUDGE**