



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND
LABOUR RELATIONS COURT AT MOMBASA
CAUSE NUMBER 402 OF 2015
BETWEEN
SALOME LILIAN ETENYI CLAIMANT
VERSUS
KENYA PORTS AUTHORITYRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Akanga Alera & Associates, Advocates for the Claimant

Addraya Dena, Advocate for the Respondent

JUDGMENT

1. The Claimant filed an Amended Statement of Claim, on 28th September 2016. She states she was employed by the Respondent State Corporation [KPA] as a Clerical Assistant in April 1988. She was promoted to the position of Senior Clerical Assistant on 13th May 2003.
2. She was interdicted by the Respondent on 30th June 2005, on the allegation that she was, together with other Employees, involved in fraudulent removal of 8 containers, aboard MV WordStar docked at the Port.
3. She was suspended on 22nd June 2006, and summarily dismissed on 9th November 2006. She was suspended while still on interdiction, on the ground that she had been charged alongside Co-Employees, in Mombasa Chief Magistrate's Court Criminal Case Number 1198 of 2006.
4. She was acquitted with the other Employees on 7th October 2008. She appealed through her Trade Union, the Dock Workers' Union, to be reinstated after acquittal. 11 other Officers implicated in the removal of the containers were reinstated. The Respondent discriminated against the Claimant, by its refusal to reinstate the Claimant. On 8th July 2014, the Respondent wrote to the Dock Workers Union advising it would reinstate the Claimant. She was not reinstated making the filing of this Claim necessary. She seeks the following orders against the Respondent:-

- a. Reinstatement.
- b. Half salary withheld during interdiction at Kshs. 193, 228.
- c. Salary for the period of suspension at Kshs. 131,702.
- d. Salary from the date of dismissal to the date of filing the Claim at Kshs. 6,930,252.
- e. Interest.
- f. Any other relief.

Alternatively,

- g) Half salary for the period of interdiction at Kshs.193,228.
- h) Salary for the period of suspension at Kshs.131,702.
- i) Salary from the date of dismissal to the date of filing the Claim at Kshs. 6,930, 252
- j) Notice pay of 3 months, at Kshs. 86,520.
- k) General Damages the equivalent of 12 months'

salary at Kshs. 346,080

Total.....Kshs. 8,025,210

l) Interest

m) Any other suitable relief.

5. The Respondent filed its Statement of Response on 22nd July 2015. Its position is that the Claimant was its Employee as stated in the Statement of Claim. She was dismissed following a fair administrative process. The Respondent was not bound by the criminal process. There was enough material against the Claimant to justify interdiction, suspension and dismissal. She appealed and her appeal was dismissed. There was nothing discriminatory about the decision to reinstate some of her Co-Employees. Acquittal does not entitle the Claimant to automatic reinstatement. The Claim is time-barred. The disciplinary committee was properly constituted and dealt with the Claimant fairly.

6. Parties agreed in Court on 13th July 2016 to have their documents and witness statements on record, admitted as their evidence. They agreed further to have the Report of the Joint Industrial Council [JIC] of the Respondent and the Dock Workers' Union, dated 13th March 2013, filed in Court and admitted as evidence alongside other documents. Finally there was a consent order that Parties file Closing Submissions, and the dispute is considered on the strength of the entire record. The Report of the Joint Industrial Council was received in Court on 28th November 2016. Parties confirmed the filing of their Submissions at the last mention in Court on the 16th December 2016 when Judgment was scheduled for delivery.

The Court Finds:-

7. The Joint Industrial Council of the KPA and the Dock Workers' Union constituted a joint Appeals Committee, in their meeting of 28th to 30th October 2009.

8. The Committee would review all appeals lodged by the Union on behalf of former Employees, who

included the Claimant herein. The Committee would give a report on its findings and recommendations to Management for further action.

9. The Committee did its works. It upheld the decision of the Management to dismiss 31 Employees. Dismissal in the case of 3 other Employees was commuted to regular termination.

10. The Committee recommended 15 Employees, including the Claimant are reinstated. 11 of the 15 Employees were reinstated and posted to various departments as shown in the letter of Head of Human Resources, Amani Yuda Komora, to various departmental Heads, dated 13th May 2014.

11. Komora wrote an advisory opinion to the Managing Director on 2nd April 2014. He advised that Employees who had gone through the criminal trial, and were acquitted, and who had been recommended for reinstatement by the Appeals Committee, should be re-evaluated individually.

12. The Court has not found any material on record showing if the Claimant's case was reevaluated individually on merit. There is nothing showing why the recommendation of the JIC, to have the Claimant reinstated was not acceptable to Management, while it was acceptable and fully implemented with respect to other 11 Employees similarly situated.

13. The Respondent would have to demonstrate clear grounds justifying application of different standards to the Claimant, in relation to her Co-Employees, for its refusal to reinstate the Claimant to be sustained. Dissimilar treatment, after the joint and painstaking work of the JIC, cannot be justified. The JIC report indicates the Committee went about its business fairly, and objectively, upholding Management's decision to dismiss certain Employee; commuting dismissal to regular termination in other cases; and recommending reinstatement in the case of the Claimant. It is a serious and objective report. It was guided by Respondent's Human Resources Manual, Labour Laws, Industrial Relations Machinery and Disciplinary Handbook 2008. It ought to have been implemented, and if not, clear reasons given by Management why it could not. It was unnecessary for the Respondent to seek further advice, from such sources as the Federation of Kenya Employers, after the JIC had presented its report. The Committee comprised professionals well-versed in Labour Law. The Management was represented by Head of Human Resources Yuda Komora, Principal Industrial Relations Officer Richard Kenduiwo, Senior Human Resources Officer Irene Mbogho and Human Resources Officer Marco Ngolia. The Union had its own top brass led by General Secretary Simon Sang. The JIC process was steered by industrial relations gurus, conversant with the law and the respective case histories. Why would Komora shift from the joint position of the Committee, and advise the Managing Director differently? The Court has not found any clear reasons why the report was not implemented with regard to the Claimant. The JIC faulted the decision to summarily dismiss the Claimant, and recommended she is reinstated.

14. Parties must take alternative dispute resolution mechanisms available to them seriously, and avoid escalating disputes to the judiciary un-necessarily. Article 159 of the Constitution of Kenya has given strong anchorage to such mechanisms. These mechanisms should result in quick, effective and binding remedies. The drift taken by Komora after the JIC report, had the effect of prolonging a dispute, and was discriminatory. The Court does not think the Claim is in any way time-barred. It was filed within 3 years after the recommendation of the JIC, and after the Claimant's Co-Employees were reinstated.

15. The dates when the 15 Officers were dismissed varied, but were mostly in 2006. Some Officers were dismissed as early as the year 2000. But Management acted on the report of the JIC, and reinstated them, as shown in the letter from Komora to departmental Heads, dated 13th May 2014. The Court does not therefore see the date when the Claimant was dismissed, as being too distant, as to hinder her reunification with the KPA. Arguments about practicability and reasonableness of reinstatement would not hold, in view of the fact that 11 Employees similarly placed as the Claimant, were reinstated. The Claimant, as far as the record shows, pleads reinstatement as her preferred remedy. The Court has taken into account the law on practicability, reasonableness and wish of the Employee with respect to reinstatement, and concluded this is an ideal case where the recommendation of the JIC must be given effect.

IT IS ORDERED: -

[a] Termination was unfair.

[b] The Respondent shall reinstate the Claimant from the date of this Judgment, and treat the Claimant, in all respects, as if the Claimant's employment had not been terminated.

[c] In effect the Respondent shall in addition to reinstating the Claimant to the payroll, and assigning her duties, pay the Claimant back-salaries and allowances from the date of dismissal to the date of reinstatement.

[d] No order on the costs and interest.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge