



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.408 OF 2017

ANNE WAIRIMU KIMANICLAIMANT

VERSUS

KENYA AGRICULTURAL LIVESTOCK RESEARCH

ORGANISATION (KALRO)RESPONDENT

RULING

1. The claimant, through application and Notice of Motion filed under the provisions of articles 24, 41, 47, 50 and 236 of the constitution and section 5 and 46 of the Employment Act, 2007 is seeking for orders that;

a) The letter dated 23rd January 2017 commencing the claimant's disciplinary process on the grounds of insubordination and absence from duty be suspended.

b) The claimant's salary which is withheld vide the letter dated 23rd January, 2017 be ordered to be paid to the claimant

c) Costs be in the course [cause].

2. The application is supported by the claimant's affidavit and on the grounds that on 19th September, 2016 the claimant was issued with letter of transfer to KALRO non Ruminant Research Institute – Kakamega from her current station KALRO– Kandara Thika. On 29th September, 2016 the claimant appealed for a review on medical grounds and supported the same with two submissions dated 12th and 17th October, 2016.

3. The decision to transfer the claimant to Kakamega was rescinded but instead was replaced with a decision to transfer her to Ruiru Coffee Research. The decision of transfer remained where the claimant petitioned the respondent on 21st October, 2016 to allow her to remain in her current station. A further petition was made on 5th December, 2016.

4. On 23rd January, 2017 the claimant was put on disciplinary notice with allegations of insubordination and absenteeism from duty. The claimant has never or at all absented herself from duty and has diligently been attending to her duties at KALRO – Kandara.

5. The letter of 23rd January, 2017 also directed that the claimant's salary be withheld without a hearing. This is a disciplinary measure and amount to double jeopardy. This will occasion constructive dismissal

unless reversed and the orders sought are issued. The decision of the respondent is illegal and unfair as it amounts to trial and disciplinary process based on the claimant's health condition which is prohibited under section 46 of the Employment Act, 2007.

6. In the claimant's Supporting Affidavit and Replying Affidavit filed on 7th June, 2016 she avers that she has been working for the respondent at Thika since 1988 in various capacities. She has undertaken initiatives for personal development by training for the benefit of the respondent. The claimant has been working at the Horticultural Research Institute (HRI) headquarters and heading the HRI Knowledge Management programme, heading information management and communication technology, and designing communication materials.

7. In 2002, two months after the claimant was delivered her last child her right leg started swelling. Several visits to the doctor revealed she had primary lymphedema, a chronic condition in which excess fluids collect in the leg and causing swelling. The doctor advised against that travel should be with precaution. The claimant has now employed measures to ease her transport and movement by air a private vehicle, wearing pressure garment, taking medication and draining fluids and use of appropriate footwear. The doctor has also advised against long travel or standing.

8. In 2011 the claimant was diagnosed with hypertension and occupational depression.

9. On 19th September, 2016 the claimant was issued with letter of transfer to Kakamega. On 29th September, 2016 the claimant applied for a review of the transfer so as to be retained at her current station in Thika and in reply, the respondent directed the claimant to report to the Ruiru Coffee Research Institute. This Institute lacks reliable public transport and the staff are forced to walk for about 3 kilometres or use motor cycles to get to work. The claimant petitioned the respondent for a review of the transfer. The change of environment to less conducive place would make the claimant's condition worse.

10. On 24th November, 2016 the claimant received communication that she had only submitted her medical documents after her transfer. The claimant petitioned on the transfer again but there was no response.

11. On 23rd January, 2017 the claimant received letter that her failure to report to work amounted to insubordination and disciplinary action would be taken against her. Her salary would also be withheld as failure to report as directed amounted to absenteeism. That punishment for making an appeal on a transfer on medical grounds is unfair and withholding of salary amounts to double punishment and the orders sought should issue.

12. In reply, the respondent filed Replying Affidavit sworn by Sammy Ndei the respondent's human resource manager and avers that upon the employment of the claimant by the respondent she was bound by her terms and conditions of employment which included abiding with instructions given by the respondent. Among other employees, the claimant was listed for transfer in conformity with the respondent human resource policy.

13. On 19th September, 2016 the respondent in exercising its prerogative issued the claimant with a transfer letter to Kakamega. On 29th September, 2016 3 days past the reporting date the claimant made an appeal to the transfer the appeal was considered and there was a change to Ruiru Coffee Research Institute and the claimant was supposed to report on 24th October, 2016. The new station is within the same county where the claimant is based.

14. Mr Ndei also avers that at its Ruiru station, the respondent provide staff with transport every morning and evening and in the event that the staff bus has broken down, alternative means are provided. The claimant is also paid a commuter allowance by the respondent.

15. On 21st October, 2016 the claimant made an appeal on her transfer to Ruiru station which was considered and rejected and the claimant was issued with the decision and reasons thereof. The claimant's

duties in her former station were also allocated to another employee.

16. The claimant failed to report to her new station at Ruiru station having been released by the Thika station. This amounted to being absent from work contrary to her employment terms and conditions. The claimant was issued with a show cause letter for being absent from work and insubordination. The appeals made by the claimant had been considered and a decision taken to transfer her to Ruiru station. The issues now raised by the claimant only arose after her transfer and she has never complained about travel before. The claimant has been travelling long distances on official duty of the respondent and welfare matters.

17. The claimant applied for her Master's degree at Kabete Campus in Nairobi and has been attending evening classes. The claimant thus travels from Thika to Nairobi to attend her classes.

18. The claimant has not acted in good faith in making her application. By her conduct, the claimant is in breach of her employment contract contrary to the law. The transfer of an employee is the prerogative of the employer and not the choice of an employee to choose where to work. The respondent followed its policy to transfer the claimant and failure to attend is insubordination and being absent from work.

19. Both parties made oral submissions in court.

20. The claimant submits that no disciplinary process can be commenced against an employee on the grounds of disability as required under section 46 of the Employment Act, 2007. Where the respondent has the right to discipline its employee, the same can only be undertaken within the law. Any request made by an employee on a transfer must be evaluated on its merits. The claimant has a disability and he question of mobility is not challenged. He claimant made several appeals and such were not considered on merit. This is unfair labour practice and prohibited in law.

21. The claimant in submissions relied on the case of **Geoffrey Mworira versus Water Resources Management Authority & 2 others [2015] eKLR and Henry Ochido versus NGO Co-ordination Board [2015] eKLR.**

22. The respondent submits that following interim orders of the court, the respondent has paid he claimant due salaries. The employer has the right to transfer its employee base don business need. Where the claimant was not at work as directed she should not be paid. The application is made as an abuse of court process. The alleged disability is an excuse by the claimant to challenge the merits of the disciplinary process against the claimant and the claimant should not be allowed to use the same as reason for not attending work.

23. The respondent in submissions rely on the cases of **Carolyn Nkirote Nyaroro versus Beryl Odinga & 8 others, Cause No.357 of 2012 and Mary Saru Mwandawiro versus Kenya Ports Authority [2016] eKLR.** Determination

24. On 1st march, 2017 the claimant moved the court for interim orders on her application dated 28th February, 2017. The respondent has confirmed that the claimant has been paid her salaries as due and has abided the court orders.

25. The compliance of the respondent with the interim orders shall therefore be put into account in the analysis of the claimant's application.

26. On the orders sought by the claimant that the letter dated 23rd January, 2017 commencing the disciplinary process on the grounds of insubordination and absence from duty be suspended, the basis that the claimant was transferred from Thika station to Kakamega and when she appealed, she was transferred to Ruiru station of the respondent. That the appeal and petition for review of the claimant on the transfer is on the grounds on her medical condition and mobility challenges. That to move to the Kakamega or Ruiru stations would have grave impact to the claimant's medical condition.

27. The employer has the right to discipline its employees but where the employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right as held in **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**.

28. In this case the claimant does not challenge the show cause issued to her save that she appealed against her transfer on medical grounds and the same was not allowed. That had her reasons in her petition been considered, her transfer should have been changed so that she can remain at her station of Thika instead of Kakamega or Ruiru.

29. Ordinarily, an employer is free to allocate or organise work as it deems prudent to achieve optimum results. A transfer of an employee from one station to the other should thus be seen from this perspective as the employer is at liberty to organise its business. This principle should be seen within the context of sections 10(2) (h), 17 and 18 of the Employment Act, 2007. See **Joseph Makau Munyao & 4 others v Kenya Ports Authority & another [2016] eKLR**.

30. Where an employer has on good reason made a decision to transfer an employee and notice is issued to this effect, the employee should readily oblige. Such can only be petitioned on good grounds such as that the decision is made in an arbitrary manner, there is no notice or even where notice is issued the same is not sufficient or reasonable. See **Henry Ochido versus NGO Co-ordination Board [2015] eKLR**.

31. Vide letter dated 19th September, 2016 the respondent transferred the claimant to KALRO Non-Ruminant Research Institute, Kakamega with immediate effect. The claimant was directed to hand over and to proceed to the new station not later than 26th September, 2016. The claimant applied for review on 29th September, 2016 on the grounds of family, health, work and education and noting that the transfer would seriously destabilise her financially and disturb her immediate family and her aged and sickly parents.

32. Vide letter dated 18th October, 2016 the respondent reviewed the transfer and made a change and directed the claimant to move to Coffee Research Institute, Ruiru with immediate effect and to report to the new station on 24th October, 2016.

33. On 21st October, 2016 the claimant lodged a petition against the transfer to Ruiru station on the grounds that it was common knowledge that access to the Ruiru station was unreliable and that staff at the station are forced to walk long distances and that her family needed her and that there was no justification for the movement from a conducive work environment to a station where she would be subjected to a torturous environment. The claimant also note din her petition that she had reports from several doctors requiring her not to move for long distances.

34. I have gone through the claimants records as filed, all the medical letters submitted in support of her appeals and petition on her transfer arise after the transfer letter of 19th September, 2016. The claimant does not challenge the fact that in her employment contract she agreed to work for the respondent and be allocated work at any station. It is also not challenged that the respondent offers transport for staff stationed at the Ruiru station and where the staff bus has broken down, alternative arrangements are made. It is also a fact that the claimant in her monthly salary is paid a commuter allowance of kshs.8, 000.00 per month. Such commuter allowance is paid over and above the basic salary. This is to ensure that the claimant is at her work station as and when required.

35. Further to the above, section 34 of the Employment Act, 2007 requires that where an employee is unable to attend work due to illness, sickness or any medical condition, such should be brought to the attention of the employer within a reasonable time. The law gives the condition that the employee should also submit a medical certificate from a medical practitioner. See **Dorothy Ndungu versus Machakos University & others [2016] eKLR**.

36. As such, where the claimant suffered a medical condition, such should as a matter of course been brought to the attention of the employer and not wait to be submitted after the fact of her transfer. Work relations demands that the employer be informed of any matter facing the employee as soon as practically possible so as to allow the employer allocate work with such knowledge. It cannot therefore be appropriate that the claimant sat on information crucial and essential in the performance of her duties and up and until her transfer to Kakamega station sought to use the same to appeal against her transfer. Such a move only compromised the claimant's rights to challenge her transfer to a new station.

37. This is crucial as without the knowledge of the claimant's medical condition, the respondent by use of its policy effected a decision to transfer the claimant as this is the respondent's prerogative to organise the business as appropriate. In the process therefore, the duties the claimant was undertaking at the Thika station were allocated to other employees of the respondent. What was the claimant therefore left to do at Thika? Effectively, the claimant had no role in such station. Her new duties was allocated at a new station. Failure to move as directed by the respondent thus compromised the business of the respondent.

38. The claimant can therefore not be found to seek to stop the disciplinary process initiated against her for failure to attend work. Once the roles in the Thika station were allocated to other staff, the claimant ought to have obliged lawful orders of the respondent and moved to her new station and lodge her appeal and petition based on factual matters faced in such station.

39. In the petition made by the claimant on 21st October, 2016 she states that;

... It is common knowledge that accessing Coffee Research Institute is an uphill task due to unreliable means of public transportation. I understand that CRI staff are at times forced to walk for long distances or resort to using motorbikes as alternative means of communication. ...

40. Such I find to be extraneous matters any employee faces while at work and should not be at the expense of the employer. In any case, the respondent has factored commuter costs for the claimant. Where the claimant is to use other means of transport to work other than public transportation, such is taken into account. What the employees based at the Ruiru station go through is a matter addressed by the respondent and with confirmation that there is a staff bus in the morning and evenings, and the fact of payment of a commuter allowance, I find the matters addressed by the claimant are adequately or reasonably addressed by the respondent.

41. The claimant in submission has relied on section 46 of the Employment Act, 2007 and applied the ground of disability as the reason why her transfer should be reviewed. The question of disability is well addressed in the constitution under article

54. and section 5 and 46 of the Employment Act, 2007. No person should be treated unfairly due to disability or be discriminated against on the grounds of disability or terminated from employment or treated unfairly at work due to disability.

42. In this regard, there is a fundamental difference between illness, sickness or general malaise and disability. *Disability* is defined under the United Nations Convention on the Rights of Persons with Disabilities and which definition is reiterated under the Persons with Disabilities Act, 2003. Sickness or illness is not equivalent to having a disability. Measures required to reasonably accommodate a person with a disability at the workplace are not similar to measures to be taken and addressed with regard to an employee who is sick, ill or suffering from a condition that requires medical attention.

43. The claimant is clear to the extent that she suffers from mobility problems following a chronic condition affecting her leg, hypertension and occupational depression. Such are not matters and or conditions defined as *disability* in law or under the international convention on disability.

44. However, disability is a matter well defined and addressed under the persons with Disabilities Act, 2003 and the law requires that where one has a disability, there are procedural requirements on how the National Council for Persons with Disabilities should receive such information, assess the person and

ensure registration.

45. Due regard must therefore be taken by a party seeking to rely on the provisions of section 46 of the Employment Act, 20077 on a claim of disability, a violation or abuse of such rights. It is not an automatic application at will. There must exist reasonable grounds to justify such a claim.

46. The claimant does not address this aspect of the legal requirements in her assertion that she has a disability and ought to be treated as such by her employer. Without the requisite compliance on the part of the claimant, the respondent as the employer has no mandate in fact or in law to assign a disability upon the claimant and thus use the same to allocate work or give her preferential treatment as the claimant seeks to infer that her transfer should be reviewed on the grounds of her disability.

47. In the view on the letter of transfer issued to the claimant and dated 19th September, 2016 and the same having been reviewed vide letter dated 18th October, 2016 and noting that the respondent has since assigned other employees to duties that the claimant was undertaking at Thika station, the failure by the claimant to oblige is found unreasonable and contrary to her employment terms and conditions. The demands made as an appeal or petition are without merit. The orders sought are not justified.

48. As noted above, the respondent has since complied with the orders of the court issued in the interim. That takes the claimant back to the notice issued against her to show cause as to why she should not be disciplined for insubordination and being absent from work.

49. I have gone through the Memorandum of Claim. The orders sought the Notice of Motion are replicated. To thus sustain the claim would be academic. It is thus dealt.

Accordingly, application dated 28th February, 2017 is hereby found without merit. The letter dated 23rd January, 2017 shall take effect from this date. Each party to bear own costs.

Dated and delivered in open court at Nairobi this 27th day of July, 2017.

M. MBARU JUDGE

In the presence of:

Lillian Njenga and David Muturi – Court Assistants

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