



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 183 OF 2016

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

SMALL AND MACRO ENTERPRISE PROGRAMME (SMEP).....RESPONDENT

AND

NICERA NJOKI MUGO (MS).....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 06.09.2016 alleging the unfair and unlawful termination of the services of Nicera Njoki Mugo, a member of the claimant union and named interested party or the grievant.

By the letter dated 24.09.2007 the respondent employed the grievant as a credit officer III at the Nakuru East Branch and effective 01.10.2007. The employment was on probationary service and the claimant was confirmed in employment and emplaced on pensionable service by the letter dated 05.08.2008. The grievant was promoted to Marketing Unit Manager and deployed at the respondent's Embu Unit Office. In July 2015 the Head of Retail Banking ordered for an investigation or audit about the grievant's integrity and a report was issued on 01.08.2015. The claimant's case is that the report returned no adverse findings or recommendations against the grievant.

The grievant forwarded a copy to the respondent's chairperson by email on 04.08.2015 and as requested by the chairperson who, as per the grievant, was keen to know the findings. On 15.09.2015 the grievant attended a meeting convened by the Head of Retail Banking and whose expected agenda was to discuss enhancement of the grievant's emoluments. Instead, the head of banking presented to the grievant a copy of the email the grievant had issued forwarding the audit report to the respondent's chairperson. The Head of Retail Banking reprimanded the grievant for having forwarded the report to the chairperson and ordered her back to her Embu Branch.

On 17.09.2015 the grievant received an email asking her to attend a meeting at head office on 21.09.2015 at 10am to discuss pertinent issues raised during her visit on 15.09.2015. The grievant attended as scheduled and she was informed about intended disciplinary action for:

- a. Failing to report a fraud matter by a former employee one Stanley Munene before he left the respondent's employment. The same had been brought to light when audit was done through the request by the Head of Retail Banking.

- b. Disclosure of the Audit report to the respondent's chairperson without knowledge or consent of her superiors including the chief executive officer and contrary to the human resource policy.
- c. That her actions bordered insubordination and may lead to discord between the management and the respondent's board.
- d. To give a list of staff claimed to have been treated or suffered in presumed similar manner.
- e. Why disciplinary action should not be taken against the grievant.

The grievant was given a paper and a pen to respond to the accusations. The written reply stated several issues to following effect:

- a. She had taken action to recover monies in the fraud Stanley was involved in and she had recovered Kshs.120, 000.00 and Stanley had promised to pay the balance. She had not reported the fraud because she was gathering all facts per previous advice but having received the policy on the issue, she promised to act swiftly in future cases.
- b. The policy prohibited sharing information with outsiders and the chairperson was not such an outsider. She had shared the information with the chairperson directly as she had issues with her supervisor.
- c. She did not intend to engage in insubordination and in that regard she apologised.
- d. She had been a faithful employee for 8 years and was ranked best in Mt.Kenya Region and she committed to work to her best towards the respondent's vision

The grievant's services were terminated by the letter dated 28.09.2015 and 29.09.2015 being her last day at work. The termination was on account of admitting the allegations as were levelled.

The grievant appealed against the dismissal by her undated letter but the same was rejected. The matter was submitted for conciliation but there was no amicable resolution.

The claimant filed the present suit for judgment against the respondent for reinstatement unconditionally without loss of benefits and in alternative for:

- a. An order separation commenced on judgment date.
- b. Payment of salary arrears up to judgment date.
- c. Three months' notice pay Kshs.237, 000.00.
- d. Payment of leave accrued to date of judgement.
- e. One month's leave when recalled from maternity leave amounting to Kshs. 79, 000.00.
- f. Wrongful loss of employment pursuant to section 49(1) of the Employment Act, 2007.
- g. Loss of future earnings.
- h. Interest on (a) to (g) above at 15% with effect from the date of judgment.
- i. Costs of the suit.
- j. Any other or further relief the honourable court shall deem fit and just to grant in the circumstances.

The response to the claim was filed on 07.10.2013 through Karanu Kanai & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The **1st issue** for determination is whether the termination was unfair. The court has considered the material on record. The evidence is that the grievant was informed the allegations that confronted her and she was given a hearing in that regard. The court finds that she was substantially accorded a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The record shows that she admitted forwarding by email the audit report to the respondent's chairperson without the knowledge or consent of her supervisor or her chief executive officer. The grievant's written reply to the allegations shows that she knew about the fraud that one Stanley was said to have been involved in and despite steps towards the refund of Kshs.120, 000.00, the grievant did not report the same to her superiors. The reply shows the grievant apologised for her admitted shortcomings and promised to rededicate her commitment to work. The court has considered that evidence and returns that at the time of the termination the respondent has showed that there existed valid and established reasons for the termination as envisaged in section 43 of the Employment Act, 2007. Thus, the court returns that the termination was not unfair.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. As the termination is found not to have been unfair, the grievant is not entitled to the reinstatement or compensation for unfair termination as prayed for. Similarly, the other prayers will crumble as unjustified and not established at all.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 14th July, 2017**.

BYRAM ONGAYA

JUDGE