



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1684 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 8<sup>th</sup> March, 2016)**

**ANN WAMBUI KAMUIRU ..... CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED .....RESPONDENT**

**RULING**

1. The Application before Court is one dated 22.9.2015. The Application was brought by the Claimant/Applicant under Certificate of Urgency. The Application was filed under Sections 12 and 20 of the Employment and Labour Relations Court Act Cap 234B, Rules 16 of the Industrial Court Rules and all other enabling provisions of the law. The Applicant sought the following orders:
  1. *That this Application be certified as urgent and be heard ex-parte at the first instance.*
  2. *That pending the hearing and determination of this Application and the suit generally the Respondent be and is hereby restrained from taking any disciplinary action against the Claimant on the basis of disciplinary process commenced by the notice to show cause dated 23/7/2015 and the panel hearing held on 18/9/2015.*
  3. *That pending the hearing and determination of this Application and the suit generally the Respondent be and is hereby restrained from terminating the Claimant's employment or summarily dismissing or demoting or stopping the annual increment of the Claimant or to take any other adverse action against the Claimant on the basis of the disciplinary process commenced by the notice to show cause dated 23/7/2015 and the panel hearing held on 18/9/2015.*
  4. *That pending the hearing and determination of this Application and the suit generally the Respondent be and is hereby restrained from harassing, intimidating, bullying, frustrating or interfering with the Claimant's rendering of her services or labour to the Respondent.*
  5. *That this Honourable Court be pleased to issue any other orders as it may deem fit.*
  6. *That costs be in the cause.*
2. The Application is supported by the affidavit of Ann Wambui Kamuiru the Applicant herein and on the following grounds:

- a. *The Claimant is an employee of the Respondent currently serving as the Marketing Manager East Africa and JV.*
  - b. *On 23/7/2015, the Claimant was served with a notice to show cause why disciplinary action should not be taken against her.*
  - c. *Despite the notice being based on several grounds and facts, the Claimant was not been supplied with all the evidence against her. This is breach of rules of fair hearing.*
  - d. *The Respondent set up a disciplinary panel and hearing was held on 18/9/2015. During the hearing, the Claimant was not accorded conducive environment to present her case.*
  - e. *The disciplinary panel was constituted of members that the Claimant had complained against and in particular her immediate boss one Jackline Muhati. The panel members were biased during the entire hearing process.*
  - f. *Unless restrained by this Hon. Court, the Respondent may impose severe disciplinary action such as termination of employment, summary dismissal, demotion or stop Claimant's annual increment having held the panel hearing.*
  - g. *The notice to show cause was issued in total disregard of the law and the Respondent's staff rules and regulations and in particular clause 17 of the Respondent's Human Resources Policies and Manual. The Respondent has not conducted investigations and prepared a report as required under this clause.*
  - h. *The Respondent has instituted formal disciplinary procedures without exhausting the informal disciplinary procedures.*
  - i. *The Respondent has instituted formal disciplinary procedures while the Claimant has not committed a gross misconduct or and offence as stipulated in the said manual.*
  - j. *The Respondent has instituted formal disciplinary procedure on account of matters that are the domain of informal procedures.*
  - k. *The panel hearing was conducted in breach of the rule of natural justice.*
  - *The Claimant was ambushed with evidence during the panel hearing.*
3. The Applicant has deponed that she was employed by the Respondent vide a contract of employed dated 16/9/2013 (**Appendix AW-1**) with effect from 8/10/2013 as Marketing Manager Cargo. She avers that on 27/11/2014 she was promoted to the position of Marketing Manager in charge of East Africa and JV, the position she is currently holding (**Appendix AW-2**). She held the position for 5 months.
  4. She depones that on 23/7/2015, she was issued with a notice to show cause why disciplinary action should not be taken against her by one Jackline Muhati – her boss and Marketing Manager Africa (**Appendix AW-3**). She states that the show cause letter stated that the Respondent had received written and verbal reports that on various dates between May and July 2015, she had acted against the values of the company; she had acted in disrespectful manner to undisclosed staff members and was not reporting to her managerial duties properly.
  5. She avers that the details were not supplied to her or facts given to enable her respond appropriately except for a letter dated 17/7/2015 written by one Pauline Okubasu which was not one of the issues in the show cause letter.
  6. The Applicant avers that on 5/8/2015, she visited the office of Jackline to report acts of insubordination by Pauline but was mistreated and chased away and that the said Jackline vowed

- to make sure that her employment was terminated. On 6/8/2015 she wrote a letter of complaint against the said Jackline which letter has never been addressed to date (**Appendix AW-5**). She wrote another letter of complaint (**Appendix AW-6**) where no action was again taken.
7. The Applicant avers that on 8/8/2015 she responded to the grievance letter and explained her relationship with the said Pauline (**Appendix 7**). The Applicant avers that on 3.9.2015, she was summoned to appear before a panel for disciplinary hearing scheduled for 7.9.2015. This was later postponed to 11.9.2015 and finally held on 18.9.2015.
  8. She avers that before the panel hearing on 18/9/2015, she was not furnished with all the evidence alleged to form the basis of the notice to show cause. That during the panel hearing, Jackline Muhati was a member of the panel and Pauline Okubasu was accorded more time than herself and she was not given ample time to respond. That also new evidence and in particular minutes dated 24/8/2014 were introduced (**Appendix AW-9**). No evidence to support all the grounds in the notice to show cause was given.
  9. She avers that she was treated in a biased manner, harassed, intimidated, bullied and not accorded a conducive environment to present her side of the story. That only Pauline Okubasu was called as a witness and her complaints against Pauline Okubasu and Jackline Muhati were not addressed.
  10. The Applicant depones that the show cause letter was issued against Clause 17 of the said Manual which states that formal disciplinary procedure cannot be initiated unless there is an investigation and a report. That it also provides that formal disciplinary procedure is intended for gross misconduct or in case an employee commits an offence yet she has no criminal case. She produced **Appendix AW-10** as the extract of the Manual.
  11. The Applicant contends that the disciplinary action being taken against her may result in her being terminated, summary dismissed, demotion or stoppage of annual salary unless stopped by this Court as it is unfair, unlawful and contrary to labour practices. She seeks this Court's protection during the life of these proceedings.
  12. The Respondents opposed this application through the Replying Affidavit deponed to on 9.10.2015 by one David Rimberia – the Respondent's Manager Employee Relations.
  13. The Respondents have deponed that the Claimant was issued with a show cause letter on 23.7.2015 after two separate complaints were made by the Respondent's employees. They aver that it is not true that the Claimant was not supplied with details or facts to support the grounds of the show cause letter and that paragraph 9 of her supporting affidavit attests to this.
  14. The Respondent further depones that in issuing the show cause letter, the Respondent was following the disciplinary procedure as required by the Respondents Disciplinary Procedures as per **Appendix DR-1** – a copy of their extract of Disciplinary Procedures from the HR Policy Manual – 2015. That further on 15.9.2015, the Claimant was supplied with all the information she had requested before the panel hearing as per **Annex DR2**.
  15. The deponent depones that the show cause letter was not in itself a disciplinary action as it was only calling for information and explanation from the Claimant and the inquiry may have been closed without taking any disciplinary action if the Claimant's explanation was satisfactory to the Respondents.
  16. In response to the Claimant's claim that she made a report of insubordination, that it is not true that any such report was even made and neither was she mistreated by her immediate boss. They deny that the Applicant was not accorded enough time to make her presentation and no new evidence was introduced as alleged and neither was the Claimant treated in a biased manner.
  17. Their position is that the Applicant submitted herself to the panel hearing which was held in a fair and conducive environment and that she didn't raise any objection before, during and/or after the

hearing with regard to the proceedings themselves.

18. They state that the Applicant was asked to be accompanied by two of her colleagues at the workplace and at the hearing was accompanied by Melissa Makokha a Legal Counsel and Jane Kavore, Sales Manager in Nairobi. The two did not raise any objection as to the manner the proceedings were being done.
19. In relation to the composition of the panel, the Respondents aver that it was in compliance with the Respondents Disciplinary Procedures which provide who members of the panel shall be and there shall comprise of a neutral chairperson from a different Department from the Claimant's Controlling Manager, HR Representative and the Claimant.
20. They aver that at the hearing, Jackline Muhati as Claimant's Controlling Manager had to be present to lay down facts in support of the charges.
21. The Respondents aver that an investigation report need not to precede a formal disciplinary procedure but what needs to be in place is a report of certain facts that reveal commission of an offence by the staff.
22. It is the Respondents position that the Claimant has not demonstrated how they breached rules of natural justice as alleged in her affidavit and that there was no element of bias, malice, bad faith, harassment or victimization as alleged. They urge this Court to dismiss this application as being premature and unwarranted and ask the Claimant to submit to internal disciplinary process until it is exhausted.

23. Having considered the averments of both parties, the issues for determination are:-

1. ***Whether the disciplinary process initiated by the Respondent is in breach of the law and Respondents own rules and regulations.***
2. ***What order this Court can grant in the circumstances and whether this Court has power to intervene in a disciplinary procedure instituted by an employer before its conclusion.***

24. On the issue of disciplinary process, the Respondents HR Policies Manual has 2 forms of disciplinary handling procedure and states as follows:

**Section 17.1 to 17.2.3:**

**17.1 – Informal Procedure**

- a. ***Informal disciplinary procedure will be conducted in cases of minor misconduct e.g. late reporting to work where such lateness does not have a very big negative impact to the business/operations.***
- b. ***This procedure will entail the Manager calling the Staff member for a discussion on the misconduct. During the discussion, the manager will point out to the staff member the area that needs improvement. Such discussion/counseling will not be reflected in the employee's Human Resources personal file. However, the manager should make a note of the discussion held with the staff and the agreement reached in the matter with the staff. This can be by way of a follow up message to the staff via email or an actual written record in the manager's office which the staff signs in acknowledgement of the discussion held or any other form that the manager may deem appropriate.***
- c. ***The Controlling Manager will resort to the formal procedure if the Staff fails to improve on the identified areas of weakness after the discussion/counseling sessions.***

**17.2 Formal Procedures**

*This formal procedure will be exercised in instances such as, but not limited to, the following:*

- a. An employee failing to improve in conduct or work performance after being taken through the informal procedure by his/her Manager.*
- b. In cases of gross misconduct, such as failure to report to work without authority, unauthorized use of Company equipment, rudeness to customers and theft among others.*
- c. In cases of gross misconduct/negligence revealed by a KQ Security report, safety report or any other report recognized by the company.*

*The formal procedure will entail the following stages:*

#### *17.2.1: Preparation of a report*

- a. The report may be from KQ Security, Safety office, Internal audit, the Controlling Manager or any other report deemed acceptable by the Company on a certain conduct of the Staff.*
- b. An employee may be suspended from employment to allow for investigations and preparation of the report. Suspensions will be issued only where an employee:*
  - i. Is suspected of having committed a serious offence warranting investigations or*
  - ii. Is likely to interfere with investigations, evidence of witness(es) or*
  - iii. Where severe disciplinary action is likely to be taken against the staff if the offence is proved after a panel hearing.*

#### *17.2.2: Issuance of a show cause letter to the staff*

- a. If the investigation report/facts in a matter reveal the commission of an offence by a staff, the Controlling Manager of the Staff, in consultation with Human Resources Department will issue a show cause letter to the Staff.*
- b. The show cause letter is an important document as it lays down the offence which the Staff has committed. It must therefore be clear and include all the elements of the offence. It controls the type of evidence that may be adduced against the Staff. Thus, what is not mentioned in the show cause letter should not be a basis for any disciplinary action that may be taken against the Staff. A draft of the show cause letter should be sent to Human Resources Department for approval before it is dispatched to the Staff member.*
- c. The show cause letter should give the time within which the reply should be submitted to the Manager by the Staff member.*
- d. The Manager will consider the reply to show cause and discuss his/her opinion in the matter with his/her immediate Supervisor. The Manager will communicate their decision in the matter to Human Resources Department who will consider the same. If a decision is made to discipline the Staff, appropriate disciplinary action will be taken.*
- e. If the Staff's explanation is acceptable, then the case will be closed and the Staff will be informed of the case closure in writing.*
- f. A show cause letter will not be issued where investigations for a Staff on suspension reveal an offence likely to lead to severe disciplinary action. In this event, the letter informing the Staff of the outcome of the investigations shall suffice. It shall bring out the charges which the Staff will respond to during the hearing.*

#### *17.2.3: composition of the panel to hear the case*

- a. *This will be done if the response to the show cause letter is found to be unacceptable and if server disciplinary action is envisaged. Such disciplinary action may include:*
  - i. *Termination from employment*
  - ii. *Summary dismissal*
  - iii. *Demotion*
  - iv. *Stoppage in annual increment*
- b. **The Manager Employee Relations or may other authorized person will constitute the panel to hear the case. The panel shall consist of the following:**
  - i. **The Controlling Manager of the Staff member concerned or any other Manager from the functional areas of the Staff who is well versed with the duties of the Staff if the Controlling Manager was actively involved in the investigations in the case of the extent that he/she cannot reasonably be expected to be impartial if he is to sit in the panel, or if the Controlling Manager for any reason disqualifies him/herself from sitting in the panel or is unable to attend the hearing; a Staff in management position from any other division who will act as the chairperson of the disciplinary hearing (the Chair should be a person of at least two ranks above that of the Staff facing the disciplinary hearing) and a Staff in a Management position from Human Resources Department of;**
  - ii. **Depending on the nature of the case the Controlling Manager of the Staff member concerned and a Staff in a Management position from Human Resources Department who will act as the Chairperson in the disciplinary hearing.**

25. In terms of composition of the Panel to hear the case Section 17.2.3(b) states as follows:

**“The Manager Employee Relations or any other authorized person will constitute the panel to hear the case. The panel shall consist of the following:**

- i. **The Controlling Manager of the Staff member concerned or any other Manager from the functional areas of the Staff who is well versed with the duties of the Staff if the Controlling Manager was actively involved in the investigations in the case of the extent that he/she cannot reasonably be expected to be impartial if he is to sit in the panel, or if the Controlling Manager for any reason disqualifies him/herself from sitting in the panel or is unable to attend the hearing; a Staff in management position from any other division who will act as the chairperson of the disciplinary hearing (the Chair should be a person of at least two ranks above that of the Staff facing the disciplinary hearing) and a Staff in a Management position from Human Resources Department of;**
- ii. **Depending on the nature of the case the Controlling Manager of the Staff member concerned and a Staff in a Management position from Human Resources Department who will act as the Chairperson in the disciplinary hearing.**

26. Section 17.3 provides the procedure for the actual disciplinary hearing which states that before the hearing, the HR Department shall ensure that the staff is informed of the offence he/she is said to have committed and the date and venue of the hearing and also ensure that the staff is informed of their right to nominate another staff or a member of the union, where applicable to appear with him at the hearing.

27. The roles of each member in the panel is explained and in particular that of the Controlling Manager who is to clarify any technical issues that may arise in the course of the proceedings, inform the panel in the presence of the staff of any issues relevant in the case and give the management final submissions in the case.

28. The Applicant has submitted that the Respondent failed to follow the above procedure and

breached his right to natural justice. The Applicant was served with a show cause letter on 23.7.2015 and what she had done or omitted to do was explained in the letter.

29. The Applicant was informed that her actions had been contrary to Kenya Airways (S.C.R.I.P.T) and in breach of Staff Code of Conduct and Ethics Clause 6 on discrimination and harassment and HR Policy Manual Clause 7.43 professionalism and courtesy.
30. The Applicant responded to the show cause letter explaining herself and was later invited to a disciplinary meeting. The Applicant contends that the Respondent rushed to the formal disciplinary process without exhausting the informal process. It is true that there is no evidence that the informal disciplinary process ever took place. That in itself shows that the disciplinary process that is ongoing is flawed in one way or another.
31. In the circumstances, can this Court intervene in a disciplinary procedure instituted by an employer before its conclusion?. This matter has already been discussed in many cases by this Court and other Courts.
32. There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.
33. The Court will interfere not to stop the process altogether but to put the correct process on course. This position was held in Industrial Cause **No. 1789/2013 Rebecca Ann Maina & 2 Others vs. JKUAT** where Hon. J. Ndolo made similar findings. See also **Cause 324/2012 Aviation & Allied Workers Union vs. Kenya Airways Limited.**
34. It is my finding then that the process initiated against the Applicant hurried and marred with irregularities and I direct the same be corrected by the Respondents by initiating proper processes as per the law and their HR Manual within 30 days.

Each party is at liberty to apply.

Read in open Court this 8<sup>th</sup> day of March, 2016

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Kinara holding brief for Mugendi for Respondent- Present

Thuku holding brief for Mabachi for Claimant Applicant – Present