



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NUMBER 6 OF 2015

PERPETUA MPONJIWA.....PETITIONER

VERSUS

KENYA AIRWAYS LTD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. By a petition dated 16th January 2015 and filed on 19th January, 2015 the petitioner alleged inter alia as follows:-

(a) The petitioner alleged that she was employed by the 1st respondent in 2007 and at the time of her dismissal she was earning a gross salary of Kshs.93,000/=.

(b) The petitioner alleged that she was dismissed on 20th January, 2012 by a notice delivered to her house at 10.00 p.m in the night while she was also not informed or notified on the date when the panel was sitting.

(c) The petitioner alleged that Kenya is a state party of the International Labour Organizations (ILO) a member of the Universal Declaration on Human Rights and also a member of the charter for Africa on Human Rights. She alleged that under ILO Convention, her rights as a worker was violated by the 1st respondent when she was unlawfully and unfairly dismissed from the employment on 20th January, 2012.

(d) The petitioner claims that, while in the lawful employment of the 1st respondent until January, 2012 she was also the registered official (National Chairperson of the Aviation and Airport Services Workers Union) and on 25th November, 2011, the 1st respondent issued to her a show cause notice, in respect of her lawful activity as official and a member of the union and thereby infringing her rights to the extent that she should be immuned and protected as a member or official of the union when discharging lawful activities of the union as provided under section 4 and 8 of the of the Labour Relations Act, 2007, ILO Convention No. 87 and Article 41 of the Constitution of Kenya, 2010.

(e) The petitioner further alleges that when she referred the matter of her discipline to the Honourable Court, in cause no. 20148/2011 where she alleged fundamental breach of her rights and

persuaded the Court to consider the circumstances under which the Courts have upheld the reasons when it can issue the order of injunction against a disciplinary process. This Honourable Court issued an order on 6th December, 2011 restraining the 1st respondent from proceedings with its disciplinary process, pursuant to Article 23 of the Constitution of Kenya, 2010.

(f) The 1st respondent, found that the Court process, initiated by the petitioner in cause no. 2048 of 2011, would take unnecessarily too long and it was determined to terminate the services of the petitioner herein, through processes vitiated with procedural improprieties in contravention of section 45 (2) of the Employment Act, 2007.

(g) The petitioner alleged that to fortify her position as stated at paragraph 12 and 13 above, the 1st respondent issued another notice of show cause dated 17th January, 2012 alleging that the petitioner had deserted her place of work. The period covers 31st October, 2011 to 6th January, 2012. The disciplinary matters initiated on 25th November 2011 is about the activity of 18th November, 2011. The 1st Respondent has not explained or it is mind boggling why the 1st respondent initiated a later disciplinary action before the first one. The petitioner alleged that by rule of an event follows another, the 1st respondent when it initiated the later event forfeited the right to pursue the earlier event.

(h) The petitioner alleged the haste in which the later show cause notice was executed. The show cause notice was issued on 17th January, 2012, response was required by 18th January, 2012 and summarily dismissed was issued on 20th January, 2012, hence the petitioner was denied a right of reply. The petitioner further alleged that the 1st respondent despite knowing her resident failed to serve her with a notice to appear before the panel and hence she was denied a right to appear and defend herself against allegations her. The petitioner further alleged that her right to the proceedings of the panel hearing has also been denied.

2. She therefore sought from the Court the following order and or declarations:-

(a) That a declaration that this Honourable Court is not bound with the provisions of section 49 of the Employment Act, 2007, in as far as it will only guide the Court to understand how a labour officer arrived at certain decisions.

(b) That a declaration that this Honourable Court is only bound by the provisions of section 3 and 12 of the Industrial Court Act 2011 which established this Court and shall decide on cases based on case by case.

(c) That a declaration that the dismissal of the petitioner was unlawful unprocedural and unconstitutional.

(d) That a declaration that the implementation of section 49 of the Employment Act, 2007 a recipe to unfair labour practice and the 2nd respondent to advise the Government to amend it to be in line with Article 2 of the Constitution of Kenya 2010, which declares employment as a fundamental right.

(e) That the 1st respondent be compelled to pay the petitioner a compensation equivalent to Kshs.33,480,000/= being a compensation for 30 years that the 1st respondent disturbed.

(f) That the 1st respondent be compelled to pay the petitioner a compensation of Kshs.1,500,000/= to defray the accrued loans in respect of the petitioner.

3. The petition was verified by the petitioner's affidavit sworn on 16th January, 2015 in which she deponed among others that:-

(a) That she was a former employee of the 1st respondent and a member of the Aviation and Airport, Services Workers Union (Formerly Aviation & Allied Workers Union). Where she was elected the National Chairperson on 13th February, 2014.

(b) That at the time of her dismissal her gross salary was Kshs.93,000/=.

(c) That in accordance with the terms and conditions of Employment, Collective Bargaining Agreement in force and Employment Act, 2007, she applied for a maternity leave in the month of June, 2011 and resumed duty on 31st October, 2011.

(d) That as an official of the Aviation and Airport Services Workers Union, she joined her colleagues in a press release at 680 Hotel in Nairobi on 18th November, 2011, where the union raised various issues relating to the operations, mismanagement, outsourcing and introduction of subsidiary airlines without any proper consultation by the 1st respondent which had the effect to render employees of the 1st respondent jobless and as officials of the union, we are mandated under the recognition agreement, Labour Relations Act, 2007 and ILO Conventions to persuade the employer not to engage on activities which are likely to render our members redundant. To achieve these, they could engage both at cross-purposes or mobilize and organize out members against certain policies.

(e) That arising from the decision of the 1st respondent to institute a disciplinary action against me on a matter of her activities both as a member and official of Aviation and Airport Services Workers Union (K), she proceeded to file a claim in this Honourable Court in Cause NO. 2048 of 2011, and dated 2nd December, 2011, where she complained of the violation of her rights as protected under the Labour Relations Act, 2007, Constitution of Kenya, 2010 and ILO Convention 87 and this Honourable Court issued a conservatory order, stopping any form of discipline until her application dated 2nd December, 2011 was heard and determined.

(f) That the 1st respondent seemed to have believed that its efforts were being frustrated by the Court processes, further proceeded to serve her with a further show cause notice. Dated 17th January, 2011 just one day after it had filled its defense before the Honourable Court and the allegations were based on desertion from 31st October, 2011 to 6th January, 2012.

4. The respondent opposed the application and filed a Replying Affidavit through one Lucy Muhu who deponed on the main that:-

(a) That the conduct of the 1st respondent had become that nothing would stop them from dismissing her. These could be shown:-

(i) The so show cause issued letter dated 17th January, 2012, clearly showed that she was supposed to report to duty on 31st October, 2011 and after deserting for a period of more than that stipulated under the CBA, the 1st respondent showed to pursue the later event that took place on 18th November, 2011 and thereby forfeiting the right to pursue an earlier issue/event. This follows the principle that the event follows and event and once the 1st respondent took action on the later event and in any case if such event could have succeeded he could have not have had an opportunity to pursue the earlier event.

(ii) The show cause letter dated 17th January, 2012, clearly shows that I was supposed to report on duty on 31st October, 2011 and after deserting for a period of more than that stipulated under the CBA, the 1st respondent shows to pursue the later event that took place on 18th November, 2011 and thereby forfeiting the right to pursue an earlier issue/event. This follows the principle that the event follows an event and once the 1st respondent took

action on the later event and in any case if such event could have succeeded he could have not have had an opportunity to pursue the earlier event.

(iii) The show cause notice covers between 31st October 2011 and 6th January, 2012 and does not explain as to whether she was absent between 6th January, 2012 and 17th January 2012, when the latest show cause notice was issued.

(b) That she responded to the show cause notice dated 17th January, 2012 on 18th January, 2012 and where she attached all documents related to the allegations made by the 1st respondent.

(c) That on 20th January, 2012 at 9.30 p.m. the 1st respondent sent a Mr. James Gakuri, an employee of the 1st respondent with personal no. 8026 to her house to deliver to her a letter of dismissal, which letter was received by her at 12.05 a.m.

(d) That the 1st respondent despite her filing her response with her and attaching all the necessary documents which still had remained un-rebutted and where she raised serious issues, the 1st respondent proceeded and terminated her employment unlawfully.

(e) That whereas the Employment Act, 2007 puts upon the employer not to terminate the service of an employee before according that employee a fair hearing, the 1st respondent contravened that statutory requirement and the constitution of Kenya, 2010 when she failed to give me a fair hearing.

(f) That arising from the decision of the 1st respondent made on 20th January, 2012 to terminate her service, she proceeded to file a further application dated 25th January, 2012 before this Court, where she further alleged the violation of her fundamental rights to a fair hearing and a proper administrative action by the 1st respondent. The honourable Court considered her application and the decision was declared null and void, a declaration which was later stayed by the 1st respondent.

(g) That absenteeism is a ground under which an employer under section 44(4) (a) of the Employment Act, 2007 may consider to summarily dismiss an employee, but the same must be subjected to the provisions of section 41 of the Employment Act, 2007. In the circumstances, the action to terminate her service without subjecting her to the provisions of section 41(1) and (2) of the Employment Act, 2007 is both substantive and procedurally unfair. The same was an action in a clear breach of the law and hence was unconstitutional.

(h) That she is a member of the Aviation and Airport Services Workers Union and it is mandatory requirement under the CBA and the Recognition Agreement that any action or decision that is likely to affect the terms and conditions of services of any unionizable employee the same must be brought to the attention of the union. The 1st respondent failed to adhere with this procedure and hence its decision was tainted procedural improprieties.

(i) That during her service with the 1st respondent, she applied for a loan which the same was guaranteed by her payslip. The unfair dismissal had placed her in a precarious situation where the bank has dues her at the Chief Magistrate's Court, case no. 2044 of 2014.

(j) That section 49 of the Employment Act 2007 tends to oust the jurisdiction of the Industrial Court Act, 2011 at section 3 and the capping of the compensation without considering loss and damage likely to be suffered by herself amount to unfair labour practice and section 49 of the Employment Act, 2007 is unconstitutional.

(k) That the 1st respondent should be compelled to compensate for loss of job and proceed to pay damage for violating her rights, as any proof for a violation of a right has the remedy of only damage.

5. In her final submissions in support of the petition, the petitioner submitted that the respondent selectively and discriminately settled on her and preferred disciplinary actions against her. She further submitted that as per the show cause letter dated 17th January, 2012 it was clear that the petitioner was supposed to resume duty on 31st October, 2011. There was evidence that she attended some training as shown in the documents annexed with the application dated 25th January, 2012. There was also evidence of communication between the petitioner and the management responsible for the assignment of duties.

6. According to the petitioner, she had no mandate to assign herself duties. Further regarding indication on the duty roaster that the petitioner was sick, this again was not her responsibility. She further contended that she was working under a supervisor hence it could not be possible that her absence from work could only be realized nearly three months later. According to her the respondent issued a show cause letter in respect of absence from work on 17th January, 2012 and which almost coincided with the date when the respondent filed its defense in cause number 2018 of 2011. According to her, her services were repudiated on account of her strong participation in the activities of her union which according to her was a threat to respondent's policies but to the union were intended to protect its members from the adverse effects of such policies.

7. Counsel for the respondent, Mr. Obura, submitted that the filing of a constitutional petition alleging violation of fundamental freedoms under the Bill of Rights was not necessary since the prayers sought could still be addressed through an ordinary suit for wrongful dismissal. According to Counsel, whereas article 22 gives every person the right to institute Court proceedings claiming violation of their rights, it does not state that such proceedings have to be instituted by way of petition. Mr. Obura therefore submitted that instituting proceedings by way of a Constitutional petition on matters which are otherwise covered by legislation and under circumstances where legislation remedies are available is an abuse of the Court process.

8. Mr. Obura further submitted that the petitioner's contention that as a trade union official she was immune from and protected when discharging her lawful activities was unsustainable since as a trade union official, she still remained an employee of the respondent and was subject to the respondent's disciplinary procedure if she was found to have violated her terms and conditions of service. According to Counsel, the petitioner has not disputed the fact that she made statements set out at paragraph 19 of Lucy Muhi's affidavit nor has the petitioner contended that the statements were factual. She merely contends that she made them as a union official.

9. According to counsel, it was the respondent's submission that the entire subject matter of the press conference on 18th November, 2011 had nothing to do with trade union activities and was perpetuated by the claimant with a view of injuring the respondent's reputation and sabotaging its operations.

10. Counsel further submitted that the issue as to whether the first show cause letter of 25th November 2011 violated the petitioner's constitutional rights had already been ruled on by Lady Justice Mbaru in cause no. 2048 of 2011. According to Mr. Obura, the contention that the show cause letter of 17th January, 2012 violated the petitioners' rights under article 41 is not correct since the show cause letter referred to commissions and omissions which were deemed to be gross misconduct and or insubordination. It was therefore the respondent's contention that the disciplinary process commenced by the letter dated 17th January, 2011 was commenced within the respondent's right to maintain discipline at work.

11. The respondent further submitted that it was the duty of the claimant to turn up at the panel hearing and explain her innocence to the allegations against her instead she chose not to attend the hearing leaving the respondent with no alternative but to summarily dismiss her.

12. Having reviewed and considered the averments, depositions and submissions for and against the petition herein only two questions stand to be decided. First, whether the petitioner's dismissal on 20th January 2012 was as a result of her involvement in union activities hence a violation of her constitutional rights. Second, if the court finds in favour of the petitioner should any compensation payable be

considered in the context of the Employment Act (section 49) or should the Court assess such compensation in accordance with precedents on assessment of damages for violation of constitutional rights.

13. Regarding the first issue, the petitioner was on 25th November, 2011 issued with a show cause letter over media conference she gave on 18th November, 2011 in which she was accused of making disparaging remarks against the respondent's management and business. She made a response to the show cause letter on 26th November, 2011 but the respondent felt the response was inadequate and summoned her to a panel hearing on 2nd December, 2011. This hearing was however stayed by a Court Order issued on 6th December, 2011. On 17th January, 2012, the petitioner was issued with another show cause letter which accused her of among other things:-

(a) She was rostered to attend trainings on various days but she did not attend trainings. She had not requested for or received permission not to attend the trainings from her manager or anyone else in authority before failing to attend the trainings. The classes were:-

i. Conversion on 14th and 15th November 2011.

ii. MBLS on 21st and 22nd November 2011 (attended only day 1).

iii. MBLS on 9th January 2012 (attended day 2).

(b) She did not report to her manager for allocation of alternative duty on 16th November 2011 after being aware that she was not in a position to obtain her KCAA crew member certificates which she was scheduled for on that day.

(c) On 17th November 2011. She was rostered for office duty (OFC) but she did not report to office as rostered.

(d) On 6th January 2011, she attended drills when the system was showing that she was on sick off.

(e) On 18th December, 2011, she reported sick to the Crew Tracking Staff. However, she had to date not provided any evidence of sickness to her manager and neither had she complied with the requirement of validation of the sick off by KQ |Clinic as required by the Cabin Crew Member Manual.

(f) The union requested for her to be allowed to attend a union training in Kisumu in December 2011. Permission was not granted to her as she could not be released for the training due to exigencies of duty. Nevertheless, she did not report for duty on the days in question.

14. The petitioner responded to the show cause letter via a letter dated 18th January, 2012 attaching correspondence between herself and the Human Resource Manager. The respondent once again found the petitioner's responses unacceptable and called her for a panel hearing on 20th January, 2012. The claimant did not attend the panel hearing and was therefore summarily dismissed on 20th January, 2012.

15. Extracts of the Respondent's Disciplinary Handling Procedure Manual were attached as exhibit LM2 to the affidavit of Lucy Muhi. Clause 1.2.1.3. provides for issuance of a show cause letter.

16. Under this clause, a show cause letter is regarded as an important document as it lays the offence which the staff has allegedly committed. It must therefore be clear and include all the elements of the offence. It controls the type of evidence that may be adduced. Therefore what is not mentioned in the show cause letter should not be a basis for any disciplinary action that may be taken against a staff. The show cause letter should give the time within which the reply should be submitted. If the staff's explanation is acceptable, then the case will be closed and the staff informed in writing. If the

explanation is found unacceptable and severe disciplinary action is envisioned a panel will be constituted to hear the case. The staff concerned would be notified in writing of the offence allegedly committed and the date and venue for the hearing.

17. In the case before me, the petitioner, was taken through these procedures she however failed to turn up for the panel hearing. The petitioner instead contended that the show cause letter of 17th January, 2012 was a continuation of the show cause letter of 26th November, 2011. She further contended that the events detailed in the show cause letter covered the period between 31st October, 2011 to 6th January, 2012 hence it was according to her, mind boggling why the 1st respondent could not initiate disciplinary action over them earlier than the first show cause letter. The petitioner further complained over the haste in which the events leading to her summary dismissal were executed. She therefore argued that she was denied a right to appear and defend herself against the allegations. She further denied being served with notice to appear before the panel.

18. The petitioner was at the material time an employee of the respondent. She was therefore supposed to be at work during working hours. She neither alleged she was away on leave or pursuant to a lawful strike which prevented her from presenting herself before the panel to defend herself against the accusations leveled against her by the respondent. There could be some plausibility in her contention that the second show cause letter which covered events prior to the first show cause letter demonstrated a consistent and deliberate effort by the respondent to dismiss her from its service due to her union activities, but in her position as a union official, nothing prevented her from presenting herself before the disciplinary panel and raising these questions.

19. By staying away from the panel hearing without a good cause, the petitioner ruined an otherwise sustainable accusation against the respondent. It is at the panel hearing where the petitioner could have demonstrated even unsuccessfully that her dismissal had to do with her union activities hence a violation of her constitutional rights. Another curious point is that the petitioner holding the view that her dismissal was a violation of her rights and fundamental freedoms, was dismissed on 20th January, 2012 but came to file this petition on 31st July, 2015 almost two and a half years later.

20. Whereas the suit was filed within time stipulated by statute, a dismissal from employment that smacks of violation of rights and fundamental freedoms and which has far reaching pecuniary implications could have been challenged almost immediately. To answer the first question framed therefore, the Court finds and holds that the petitioner's dismissal from respondent's service did not violate her rights and fundamental freedoms. That is to say the respondent followed a fair procedure in terminating the petitioner's services.

21. Regarding the second question, the Court having found that in dismissing the petitioner the respondent did not violate her rights and fundamental freedoms, the Court would not delve much into the issue save to state that whereas an employer has a right to terminate an employee's services, in carrying out the termination, due process as provided in the contract of employment, the statute and the Constitution must be followed. Further article 22(1) of the Constitution gives any person the right to institute Court proceedings claiming breach of a right or fundamental freedom. If the Court were to find that the termination of the petitioner's service was as a result of her involvement in union activities, that would have been a violation of her right and fundamental freedom for which the Court would award compensation under article 23(3) of the Constitution in addition to or in compoundment with section 49 of the Employment Act. That is to say section 49 of Act does not fetter the Court in assessing compensation where it is shown and proved that a termination of services violated rights and fundamental freedoms of an employee.

22. In conclusion the petition hereby fails and is hereby dismissed with no order as to costs.

23. It is so ordered.

Dated at Nairobi this 18th day of August 2016

Abuodha Jorum Nelson

Judge

Delivered this 18th day of August 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge