



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**OF KENYA AT NAIROBI**  
**CAUSE NO. 392 OF 2014**

(Before Hon. Lady Justice Hellen S. Wasilwa on 22<sup>nd</sup> September, 2016)

ROSE MUENI MUNGUTI.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

**JUDGMENT**

1. The Claimant herein filed her Memorandum of Claim on the 11<sup>th</sup> March 2014 through the firm of Kyalo & Associates, Advocates.

2. She sought the following the prayers:

*a) Salary dues of Kshs.1,895,160.00 with effect from September, 2006 to October, 2013.*

*b) Special damages of Kshs.3,043,800.00 with effect from September, 2006 to October 2013:*

*i. Salary dues of Kshs. 1,895,160.00 with effect from September, 2006 to October, 2013;*

*ii. House Allowance dues of Kshs. 541,000.00 at Kshs 6,300.00 per month with effect from September, 2006 to October 2013;*

*iii. Kshs. 154,640.00 being 210 leave days annually for a period of 7 years;*

*iv. Kshs. 453,000.00 being legal fees incurred in defence of Criminal Case No 1545 of 2006.*

*c) Payment at similar calculation rates for b(i) and b(ii) above to cover any period beyond October 2013 to the date of re-instatement.*

*d) General and aggravated, punitive and or exemplary damages for defamation.*

*e) Interest on the total amount at prevailing commercial rates until completion of payment.*

*f) Costs of this suit.*

3. The Claim is that she was a permanent and pensionable employee of the Respondent serving in its Estates Departments. She was promoted to the position of Estate Assistant Central Grade RB Senior Executive 'C' and carried out her duties diligently and dutifully until she was suspended from work on false, unfounded and defamatory allegations by the Respondent of having conspired with others to defraud the Respondent of its property. She was thereafter charged in Court as follows:-

***(i) Count No 1: Stealing by servant contrary to Section 281 of Penal Code;***

***(ii) Count No 2: Making a document without authority contrary to Section 347(a) of Penal Code;***

***(ii) Count No 3: Forgery Contrary to Section 349 of the Penal Code.***

4. The Claimant was acquitted of the charges in criminal case number 1545 of 2006 on the 22<sup>nd</sup> of March 2013 but was terminated from employment on the 7<sup>th</sup> of October 2013.

5. The Claimant states that it was illegal of the Respondent to terminate her employment as a competent Court has cleared her name of any charges. The Respondent purported to retire the Claimant under terms and conditions which were unacceptable.

6. The Claimant states that the Respondent ought to have known that she never handled titles as part of her duty and was sick on leave at the time of the incident, moreover, her reputation and character have been put in disrepute and she has lost her good standing with right thinking members of society.

7. The Claimant states that attempts to have her terminal benefits calculated by the Respondent on the basis of Regulation G9 of the Kenya Railways Personnel Regulations (1988) and the referred Pension Regulations have borne no fruit.

8. The Respondents filed a Memorandum of Response dated 16<sup>th</sup> of April 2014 via the firm of Mwaniki Gachoka & Co Advocates.

9. They admit that the Claimant was in their employment but deny that they suspended the Claimant on false unfounded and defamatory allegations of conspiracy to defraud the Respondent.

10. They state that the Claimant had a right and duty to report the fraudulent transfer of its property to the police and to supply the police with the necessary information in its possession leading to the police's decision to charge the Claimant.

11. The Respondent states that while the Claimant was acquitted, it did not falsely accuse the Claimant, and after her acquittal the Claimant made an application for reinstatement to her former position which after consideration it was determined that retrenchment was a viable option because:

***a. The Claimant had been on suspension since 2006.***

***b. During her suspension, a concession agreement between the Respondent and another party (Rift Valley Railways) had come into effect which saw the former structures phased out to give way to new establishment.***

***c. The Claimant position fell under Management Operations which was phased out after concession agreement and the officers who worked in that docket, among others were retrenched under the Phase IV programme in 2006.***

***d. Irrespective of the Claimant outstanding disciplinary issues, the Respondent offered to retrench the Claimant under terms similar to those of the other officers who left the Respondent in 2006 after the concession agreement with entitlements as provided for under the Kenya Railways Corporations (Pensions) Regulations.***

12. The Respondent states that the Claimant was not entitled to any salary or other benefits for the period she was under suspension in accordance with the Respondent's Personnel Regulation G.9.

13. In the reply to the Memorandum of Response, the Claimant reiterated that none of the allegations made by the Respondent were proven to be true in a competent Court of law. Further, that the right to report the fraudulent transfer does not extend a right to deliberately publish false baseless and defamatory allegations of fraud.

14. The Claimant states that the grounds of retrenchment set out in the response were never provided to her and the same have been tailored to hoodwink and deceive the Court.

15. The Claimant also states that the regulation G9 referred to is clear on her entitlements and as such she is entitled to her salary in full, and efforts to have her terminal benefits calculated properly by the Respondent in accordance with Regulation G9 and Pension Regulations have been in vain.

16. The Claimant in their submissions state that the Regulation G9 of the Personnel Regulation 1988 governs the disciplinary procedure of all employees under the Respondents employment. Such regulations provide that:

***“If in any case it is considered that public interest requires that an employee should cease forthwith to exercise the powers and functions of his office, such employee may be interdicted from the exercise of those powers and functions provided that proceedings are being taken or are about to be taken which might lead to his dismissal or that criminal proceedings are being instituted against him...”***

17. The Claimant states that had the above procedure been followed, she ought to have been informed in writing of the nature of the offence and given an opportunity to be heard, which was not done in this instance. She states that an internal investigation was never undertaken.

18. The Claimant further states that Regulation G9 states that salary is not issued only upon conviction of a criminal offence, specifically it states;

***“Where an employee has been convicted of a criminal offence he may be suspended from the exercise of his office, by the officer who would be empowered to interdict him under the terms of paragraph (a) pending consideration of the case. While an employee is thus under suspension he will not be entitled to any salary...”***

19. They rely on Mariko Oluoko Kanga vs. Kenya Railways Corporation [2014] eKLR where Lady Justice Ndolo observed that :

***“It is not in contention that at the time the Claimant was suspended, he had been charged in Court but not convicted. In fact the Claimant was never convicted. The Court was therefore unable to understand under which provisions of its regulations; the Respondent suspended the Claimant without pay.”***

20. Further, the Court stated that:

***“An employee in suspension remains innocent pending the outcome of the investigations upon which the employee must be given an opportunity to respond to any adverse findings against them. The Respondent's action in suspending the Claimant without pay was therefore not only unlawful but flew right in the face of the Respondent's regulations.”***

21. They also relied on the East African Corporation (App and Discp.) Regulations, 1974 appearing in page 94 of the Claimant's Bundle of documents provided as follows under paragraph 22 regarding Discipline of employee:

***“An officer acquitted of a criminal charge in any court shall not be dismissed or otherwise punished on any charge upon which he has been acquitted.”***

22. They state that immediately after her acquittal she ought to have been reinstated paid all her outstanding and more so unlawfully held terminal dues in full.

23. The Claimant states that her retrenchment was irregular and fatally flawed, she relies on **Aviation and Allied Workers Union vs. Kenya Airways Limited & 3 others [2012] eKLR** where the Honourable Justice Rika observed that:

***“..the terms redundancy, retrenchment and restructuring are related as in all such cases the result is the loss of employment by involuntary means through no fault of the employee. Since in such cases action is initiated by the employer, the law requires that adequate notice of an intended retrenchment, redundancy or restructuring be given to the employee, the employee’s union and the labour office...”***

24. **Mariko Oluko Kanga vs. Kenya Railways Corporation [2014] eKLR** the case stated that:

***“In my view, the nature of a restructuring or retrenchment programme cannot be used by an employer as an excuse to circumvent its obligations to employees who are affected by the restructuring or retrenchment. Employees who are affected by a restructuring or retrenchment programme are individuals and not some faceless statistics. Each employee who is to lose their employment through such a programme must therefore be notified by law. In the instant case, the Respondent sought to backdate the Claimant’s retrenchment by a period of over two years. I find no basis either in law or general human resource practice to support such a proposition. I therefore find that the Respondent’s action of back dating the Claimant’s retrenchment was unlawful and award the Claimant his full salary for the entire period he was under suspension.”***

25. They submit that the Respondent did not comply with Section 40 (1) (e) to (f) of the Employment Act 2007, with regard to termination on account of redundancy.

26. They further submit that they are aware of the concession of the Kenya Railways Corporation by virtue of the Collective Bargaining Agreement dated 24<sup>th</sup> December 2005, and reiterates that the right procedure outlined should be applied when retrenching her.

27. They state that she is entitled to special damages and refer to Regulation G9 of the Kenya Railways Personnel Regulation, 1988 page 93 which states that:

***“where the disciplinary or criminal proceedings have been taken or instituted against an employee under interdiction and such employee is not dismissed or otherwise punished under these regulations the whole of any salary withheld under paragraph (b) will be restored to him upon termination of such proceedings..”***

28. In their submissions, the Respondents states that according to the Personnel Regulations of 1974, no disciplinary or terminal proceedings would have been carried out against anyone governed by those regulations until after the conclusion of the criminal proceedings facing them.

29. The said provision states:

***“If criminal proceedings are instituted against an officer in any court no proceedings for dismissal of such officer upon grounds involved in the criminal charges shall be taken until the conclusion of criminal proceedings and determination of any appeal there from.”***

30. They submit that after acquittal and the Claimants’ demand for reinstatement, the Board of Directors met and decided that since the position the Claimant held no longer existed, reinstatement was not practical and that she should receive the retrenchment package offered to others and be allowed to draw

from her pension immediately. The decision was communicated to her which she rejected.

31. Her termination then is only because of redundancy at this stage and for no other reason. The Respondents rely on the case of **Aoraki Corporations Limited vs. Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278** the Court of Appeal of New Zealand where it was stated:

*“it is convenient in other termination cases, and essentially in redundancy cases, to consider it may be substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subjected to significant procedural irregularity as to cast doubt upon the outcome... Redundancy is a special situation. The employees have done no wrong. It is simply that the circumstances the employers face, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business. It cannot be mandatory for the employer to consult with all potentially affected employees in making redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer’s prima facie right to organise and run its business operations as it sees fit. And consultation would often be impracticable particularly where circumstances are seen to require mass redundancies. However, in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on genuineness of the alleged redundancy or its timing. So, too may a failure to consider any redeployment possibilities.”*

32. They further submit that it would be impractical to reinstate the Claimant and rely on the New Zealand case of **New Zealand Educational Institute vs. Board of Trustees of Auckland Normal Intermediate School** where the Court of Appeal stated that:

*“Practicability is the ability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences.”*

33. They urge the Court to endorse the determination of the Respondent that the Claimant qualified for redundancy and it thus entitled to the redundancy package under the terms and conditions set out in the CBA negotiated on her behalf, agreed and signed by her trade union, the Kenya Railways Workers’ Trade Union.

34. The Respondent submits that the prayer for full salary during the period of her suspension is naught as her position ceased to exist as at 01/01/2007 hence she is only legally entitled to payment between September 2006 and December 2006.

35. They further submit that the claim has no relationship with the Claimant’s employment as it is a claim in ordinary tort; the claimant ought to pursue their case elsewhere.

36. They rely on Section 12 of the Employment act stating that the claim does not meet the criteria as set out in that Section, and invite the court to decline jurisdiction.

37. They submit that no evidence was produced to support the claim for damages incurred as legal fees in the criminal matter.

38. They submit that the alleged defamation law is very clear that a person acquitted of the criminal charge does not necessarily connote malice on the part of the Prosecutor. In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR** the Court of Appeal held:

***“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor....”***

39. They further state that the Claimant has failed to prove defamation and without proof, the allegations remain mere allegations. Moreover, the claim for defamation arises when the Claimant was arraigned in Court on 22<sup>nd</sup> August 2006, and case filed 13<sup>th</sup> March 2013, 6 years and 7 months after the occurrence, which is past the limit set by the limitations of actions act as 12 months from such date and as such is time barred.

40. The Respondent also submits that claims of defamation also have to have the particulars articulated. The Claimant has failed to do so and leaves the Respondent without proper information. They rely on case of **Nkalubo vs. Kibirige [1973] EZ 102** where it was held:

***“..In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends on. This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that she can prepare his defence...”***

41. They submit that the Claimant has also failed to establish that the words complained of are defamatory and are malicious and as such must fail.

42. In view of the above, the Respondents ask that the claim for damages in defamation does not stand. They ask the Court to find in favour of the Respondent and compel the Claimant to take her retrenchment package which the Respondent is able and willing to give. They also pray for costs.

43. Having considered evidence of both parties, the issues for determination by this Court are as follows:

***1. Whether the claim for defamation by the Claimant is time barred.***

***2. Whether the Claimant can be declared redundant on the terms of the retrenchment package offered to employees in 2006.***

***3. What remedies if any are available to the Claimant.***

44. On the 1<sup>st</sup> issue, the Claimant avers that the Respondent defamed her in August 2006 when they caused her to be arrested and charged on trumped up charges of stealing thus causing her standing with right thinking men of society lowered.

45. The Respondents have submitted that this claim cannot stand because this Court lacks jurisdiction to entertain it by virtue of Section 12 of the Employment and Labour Relations Court and also that the claim is time barred by virtue of the Limitation of Action Act.

46. Under Section 4(2) of Cap 22:-

***“An action founded on tort may not be brought after the end of three years from the date on which the cause of action arose”.***

47. It is true that an action of defamation is an action in tort and must be brought within 3 years. The Claimant however filed this claim on 13.3.2014 which is more than 3 years since the cause of action arose. I do agree with the Respondents that the defamation claim is time barred and I dismiss it accordingly. I need not delve into issues of jurisdiction in this case.

48. On the issue of retrenchment, the Claimant was suspended from work on 24.8.2006. The suspension letter read as follows:

***“Following your arrest by Police on August 23, 2006 and subsequent arraignment in Court on August 24, 2006 in connection with the irregular sale and transfer of Kenya Railways Corporation’s property registered as LR3734 Mzima Springs, Lavington, Nairobi, you are hereby suspended from your duties with immediate effect, in line with the provisions of the Personnel Regulation G.9 (e), pending the outcome of the Court case.***

***Please note that, you will not be entitled to payment of salary during the period you are under suspension.....”***

49.Regulation G.9 (e) of the Respondents HR Regulation state as follows:

***“Where an employee has been convicted of a criminal offence, he may be suspended from the exercise of his office, by the officer who would be empowered to interdict him under the terms of paragraph (a) pending consideration of the case.***

***While an employee is thus under suspension he will not be entitled to any salary but the Managing Director may, if he thinks fit, direct that the suspended employee be granted an alimentary allowance in such an amount and on such terms as he may determine.....”.***

50. The reading of this section shows that an employee can only be suspended after conviction of a criminal offence. There is no indication that on 24.8.2006 or on any other occasion, the Claimant had been convicted of any criminal offence.

51. Under Clause G.9 of Respondents document:

***(a) If in any case, it is considered that public interest requires that an employee should cease forthwith to exercise the powers and functions of his office, such an employee may be interdicted from the exercise of those powers and functions provided that proceedings are being taken or about to be taken which might lead to his dismissal or that criminal proceedings are being instituted against him .....***

***(b) An employee who is interdicted will receive such salary not being less than half his salary or such amount as the Managing Director may decide.***

***(c) Where disciplinary or criminal proceedings have been taken or instituted against an employee under interdiction and such employee is not dismissed or otherwise punished under these regulations the whole of any salary withheld under paragraph (b) will be restored to him upon termination of such proceedings.“***

52. It is clear that the action taken by the Respondents of suspending the Claimant was against their own regulations. The Respondents should instead have interdicted the Claimant under Regulation G.9 (a) and dealt with her as provided under (b) or (c) above. The Respondents flouted their own regulations.

53. The Claimant went through the criminal proceedings while under suspension and was finally acquitted in March 2013. She wrote to the Respondents asking them to reinstate her and pay her all outstanding salary but they chose instead to declare her redundant vide their letter dated October 7<sup>th</sup> 2013.

54. I want to start from the premise that the Claimant remained as employee of the Respondent since 2006 when she was placed on suspension.

55. When the Respondents decided to declare other employees redundant in 2006 due to the restructuring programme they were to undertake, nothing prevented them from including the Claimant in that process.

56. It is therefore in bad faith for them to now decide to retrench her backdated to 2006. The

Respondents having kept mum about the retrenchment exercise from 2006 cannot deal with the Claimant in the same way they would have dealt with her in 2006. Their silence means she remained in employment and is therefore entitled to payment of all her withheld salaries since March 2006 to the day of the notification of the redundancy on 7.10.2013 vide their letter dated 7.10.2013 reference No. HR/EM/38717.

57. Having determined issue No. 1 and 2 above, the last issue is what other remedy the Claimant is entitled to. I find that going forward from 7<sup>th</sup> October 2013, the Claimant may be declared redundant on the same terms of 2006. This is as follows:

***(i) 1 months salary in lieu of notice.***

***(ii) Severance pay at 1 months salary for each completed year of service.***

***(iii) Golden handshake of 120,000/=.***

***(iv) Transport allowance of 10,000/=.***

***(v) Leave settlement for the number of days due as at the date of suspension.***

58. The Respondents will also pay costs of this suit.

Read in open Court this 22<sup>nd</sup> day of September, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gikonyo holding brief for Nyaanga for Respondent

Kyalo for Claimant