



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 50 OF 2016**

**ELIZABETH NJERI NDICHU.....CLAIMANT**

**VERSUS**

**ANN MWANGI.....1<sup>ST</sup> RESPONDENT**

**BOARD OF GOVERNORS, NYERI TECHNICAL TRAINING INSTITUTE...2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 28<sup>th</sup> October, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 15.03.2016 through Nderi & Kiingati Advocates. The claimant prayed for judgment against the respondents for:

- a) An injunction directed against the respondents from removing and or retiring the claimant per the letter dated 11.03.2016 and or at all pending the hearing and determination of the cause.
- b) A declaration that the claimant's suspension and the subsequent disciplinary proceedings were irregular, illegal, and contrary to N.T.T.I Scheme of Service and should thus be nullified.
- c) A declaration that the retirement in the public interest of the claimant is motivated by malice, whim, caprice, is unfounded, unjustified, biased, irregular, and illegal and should not be allowed to stand.
- d) An order for reinstatement of the claimant into her position without any reprisals and payment of all her outstanding salaries and dues for the period in issue.
- e) General damages for mental and emotional anguish from the 1<sup>st</sup> respondent's harassment, intimidation, threats and whimsical conduct.

In the alternative and without prejudice to the foregoing the claimant prayed for:

- a) General damages for mental and emotional anguish as well as unfair labour practices of the 1<sup>st</sup> respondent.
- b) A declaration that the dismissal or retirement was unfair and illegal and nullification of the same.
- c) Payment of salaries, leave and other dues prior to the dismissal.

- d) Damages stipulated under section 45 of the Employment Act to include 12 months' salaries for unfair dismissal.
- e) Payment of all emoluments as provided under the N.T.T.I Scheme of Service.
- f) Costs of the cause and interest thereon.

The respondents filed the defence to the memorandum of claim on 22.03.2006 through Muthui Kimani & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The claimant was employed by the respondent as accounts clerk effective 01.09.1999 and as at the time of termination the claimant had been promoted through the ranks and she held the position of Finance Officer. The 1<sup>st</sup> respondent worked with the 2<sup>nd</sup> respondent as a registrar up to sometimes in 2002 when she was deployed out of the 2<sup>nd</sup> respondent to serve elsewhere. On 31.12.2015 the 1<sup>st</sup> respondent was deployed to the 2<sup>nd</sup> respondent to take over from the outgoing principal. A handover was conducted on that day and the 1<sup>st</sup> respondent took over as the principal.

On 01.03.2016 the 1<sup>st</sup> respondent summoned the claimant and conveyed that there were certain irregular financial issues and that the claimant was likely to be held culpable. By the letter dated 20.01.2016, the claimant was suspended from duty for 30 days pending investigations into the 2<sup>nd</sup> respondent's finances. The suspension was effective 20.01.2016. By the letter dated 28.01.2016, the claimant was informed that audit findings had revealed a set of 20 issues about financial irregularities as were set out in the letter. The letter required the claimant to respond by 05.02.2016. She was also required to appear for a hearing on 12.02.2016 at 9.00am. The claimant responded by the letter dated 03.02.2016. Amongst other matters, the claimant stated as follows:

- a) She agreed that certain payment vouchers contradicted the cheque details and the cause was a mix up in the documents and typing errors but the authenticity of payments was not in doubt.
- b) She admitted that there were discrepancies in the creditors' list and further admitted that certain invoices had not been paid as at handover on 31.12.2015 but that it was due to mix up in documentation and that it was expected that harmonization would be done with individual creditors.
- c) As alleged staff had collected cheques on behalf of the suppliers but that had been an agreement between cash office and the suppliers.
- d) It was true that a supplier, one Multigen Suppliers had not signed the cheque register to acknowledge receipt of the cheque and that cheque had already been banked in that supplier's account.
- e) It was true that sometimes cash had been collected from students and spend without its banking but expenditure had been authorized by the then principal.
- f) The claimant admitted that it was true that imprest warrants were not issued as was alleged but attributed the same to lack of the relevant register sometimes held by the principal.
- g) The claimant admitted that advance payment had been made to a supplier one Nofra Echo Stores contrary to policy but it was because the 2<sup>nd</sup> respondent was in a gas crisis and the supplier had refused to supply without prior payment.
- h) It was true that the 2<sup>nd</sup> respondent maintained no cash book because the software that the 2<sup>nd</sup> respondent had installed did not provide for one.
- i) The claimant admitted that huge monies had been withdrawn during vacation and the same was

procedurally done with approval of the principal.

j) She admitted that fees arrears had been collected under current fees vote head and it had been a long practice.

k) She admitted that certain creditors for previous years had been made under current year and that was an error but to be corrected.

l) She admitted that some grants from the Ministry of Education had not been spent as per the approvals by the 2<sup>nd</sup> respondent as the principal prioritized and approved the expenditures.

m) During the transition around 31.12.2015 certain cheques had not been released to suppliers because the suppliers had not been reached on their telephone numbers.

n) The claimant concluded that the stated mistakes had occurred due to errors and omissions and were not intentional. The claimant stated that all payments had been approved, there were no losses and she was willing to accommodate corrections.

By the letter dated 22.02.2016 the 1<sup>st</sup> respondent informed the claimant that the 2<sup>nd</sup> respondent had extended the suspension by 30 days effective 19.02.2016. By the letter dated 11.03.2016, the claimant was informed that in view of the correspondence on the disciplinary case and the hearing, the 2<sup>nd</sup> respondent had found that the claimant's behavior amounted to gross misconduct and the claimant was liable to summary dismissal but on humanitarian grounds and considering the claimant's length of service, the 2<sup>nd</sup> respondent had decided to retire the claimant in public interest effective 11.03.2016. The claimant was dissatisfied and she filed the present suit.

The **1<sup>st</sup> issue** for determination is whether the retirement in public interest was unfair. The record shows that the claimant was given a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The record further shows that the claimant admitted the allegations of irregularities in the financial records and transactions as was alleged against her performance. The claimant offered explanations by way of excuses and causes of the irregularities. To the extent that the claimant substantially admitted the irregularities, the court returns that the reasons for the retirement in the public interest, and therefore the termination of the contract of employment, were valid as envisaged in section 43 of the Act. Accordingly the court returns that the retirement was not unfair as it was procedural and founded upon valid grounds.

The **2<sup>nd</sup> issue** is whether the claimant is entitled to the remedies as prayed for. As the termination was not unfair, the remedies would fail. The court has considered the claims that the 1<sup>st</sup> respondent intimidated, harassed and caused the claimant mental and emotional anguish. The court has considered the evidence and it is clear that it fell upon the 1<sup>st</sup> respondent as the principal to deal with the emerging irregularities in the 2<sup>nd</sup> respondent's financial management system. It could be that in the process there was tension and unsettling environment in the relationship between the claimant and the 1<sup>st</sup> respondent. However, taking into account the evidence and the circumstances of the case, the court finds that the 1<sup>st</sup> respondent did not do anything beyond the discharge of her formal duties as principal of the 2<sup>nd</sup> respondent and as the immediate supervisor of the claimant. The claimant has not established bad faith and the court finds that the 1<sup>st</sup> respondent acted in furtherance of the Institute's best interests. The claimant was accorded due process and she substantially admitted to the irregularities as was alleged. The proceedings were documented as per the minutes and correspondence on record and the court finds that the 1<sup>st</sup> respondent acted within authority as the 2<sup>nd</sup> respondent's accounting officer and secretary. The prayers made against the 1<sup>st</sup> respondent will therefore fail.

The court has considered that the evidence disclosed defects in the respondents' financial management systems such as installation of a software without provision for a cashbook. Further, it could be that the outgoing principal, the 2<sup>nd</sup> respondent and other relevant employees of the 2<sup>nd</sup> respondent had their share

of blame in view of that established defective financial management system so that the claimant was not solely liable. The court's opinion is that in such circumstances the retirement was appropriate as imposition of a dismissal would otherwise have been excessive punishment. The court finds that the respondents in imposing the retirement in public interest acted proportionately and within a reasonable measure in the circumstances of the case. To further balance justice, the court considers that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondents against the claimant with orders as follows:

- a) The claimant's suit is dismissed.
- b) The claimant's retirement in the public interest is hereby upheld and the claimant be paid full retirement benefits and terminal dues as per the prevailing law and terms of the contract of service.
- c) The parties to file and serve the computed dues in (b) in 7 days with a view to recording quantum on a convenient mention date.
- d) The respondent to pay the judgment sum by 01.12.2016 failing interest to be payable at court rates from the date of this judgment till full payment.
- e) Each party to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 28<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**