



**REPUBLIC OF KENYA**

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

**CAUSE NO.180 OF 2015**

**KENYA COUNTY GOVERNMENT WORKERS UNION..... CLAIMANT**

**VERSUS**

**COUNTY PUBLIC SERVICE BOARD, MERU COUNTY.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 7<sup>th</sup> October, 2016)**

**JUDGMENT**

The claimant filed the memorandum of claim on 08.10.2015 alleging the unfair dismissal of its member Mary Chemutai Koskei, the grievant. The claimant prayed for judgment against the respondent for:

- a) A declaration that the then Municipal Council of Meru violated and breached the contractual terms and obligations by dismissing the grievant without following the laid down procedures.
- b) A declaration that the dismissal letter given to the grievant was unlawful, illegal and null and void.
- c) The grievant be reinstated without loss of services and benefits.
- d) The grievant be paid all her salaries for the period the Council and the County Government of Meru kept her outside of her employment illegally.
- e) The court awards the grievant 12 months' salaries under prevailing terms as compensation for loss of earnings during the period of unlawful dismissal which is within section 12 of the Industrial Court Act, 2011 and section 15 (c) of the Labour Institutions Act, 2007.

The response to the memorandum of claim was filed on 15.03.2016 through Binyenya Thurairia & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The grievant was at all material times serving as a civil servant in the defunct local authorities. She was transferred sometimes in August 1995 from the Municipal Council of Eldoret to the Municipal Council of Meru in the capacity of a copy typist. The grievant applied for 25 days of annual leave running from 23.04.2007 to 28.05.2007. The application was approved and she took leave. By the letter dated 05.06.2007 the town clerk conveyed to the grievant that she had been absent from duty without permission. The letter stated that on 25.05.2007 the town clerk had received an anonymous call to the effect that the claimant had been involved in a road traffic accident near Kenyatta University and subsequently the grievant admitted at the Kenyatta Hospital. The letter stated that the town treasurer had received a similar call. The letter further stated that the respondent's driver, then on official duty in Nairobi, was instructed to visit the hospital and there were no details of the grievant having been

hospitalised at the Kenyatta National Hospital. The letter stated that on 30.05.2007 the Council had received the grievant's letter forwarding records of the grievant's hospitalisation at Kiambu District Hospital and later at Kenyatta National Hospital. The letter then alleged as follows:

- a) The grievant had deserted duty with effect from 23.04.2007 without permission.
- b) The grievant refused to reply to the Council's letter dated 15.05.2007 about the absence from duty without permission effective 23.04.2007 which amounted to gross misconduct.
- c) The grievant's whereabouts remained unknown to the Council as the employer until the anonymous calls of 25.05.2007.
- d) There were no details of the alleged accident provided to the Council by the grievant.
- e) The grievant had made no efforts to obtain official sick sheet in view of the alleged accident and sickness as required in the terms and conditions of service.

The letter concluded that the grievant was to defend her position in writing by 19.06.2007 as she was under consideration for dismissal from employment on account of absconding duty and gross insubordination amongst other acts of indiscipline.

The grievant replied by her letter dated 20.06.2007. The claimant explained as follows:

- a) On 5.05.2007 she was on leave so that she had not received the respondent's letter of 15.05.2007 alleging the grievant's absence from duty without permission effective 23.04.2007.
- b) On 25.04.2007 the grievant had been at the town clerk's office displaying medical records on her Arthritis ailment and seeking redeployment from the bus park to a place consistent with the ailment but the request had been declined.
- c) On 8.05.2007 the grievant had been admitted at Kenyatta Hospital and the town clerk was called by one Thomas Mathiu on 08.05.2007 and on 15.05.2007 about the processing of the grievant's medical card which was needed at the hospital.
- d) On 25.05.2007 the same Thomas had called the town clerk to report the grievant's involvement in the road traffic accident along Thika Road. The details of the motor vehicles involved were not immediately available. The claimant had been treated at Kiambu then Mbagathi District Hospitals and given by her doctor 13 days of bed rest.

By the letter of 27.06.2007 the grievant was suspended from duty effective the same date. In the meantime the grievant filed civil suit no. 537 of 2007 at Meru claiming compensation for the injuries sustained in the accident and the judgment was delivered in the grievant's favour on 28.08.2008.

On 12.09.2007 the Council's Special Finance, Staff and General Purposes Committee deliberated the grievant's case. Subsequently, the grievant was summarily dismissed from employment by the letter dated 24.09.2007 and effective 23.04.2007 on account of absconding duty. The letter advised the grievant to appeal to Public Service Commission within 42 days from the date the grievant was informed of the summary dismissal.

The grievant appealed by her letter dated 11.08.2009 and it appears the Commission allowed that appeal out of time. The Commission received the appeal on 20.01.2011 and requested the Ministry of Local Government to make comments on the case and to forward the grievant's files. By the letter dated 26.04.2012 the Commission disallowed the grievant's appeal and she was informed that she could seek a review by the Commission within 42 days. At the same time the union reported a trade dispute on 29.09.2011 under section 62 of the Labour Relations Act, 2007 and a certificate referring the matter to court was issued on 15.04.2015.

The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The court finds that the claimant was on annual leave from 23.04.2007 to 28.05.2007 and was subsequently involved in an accident on 25.05.2007. The court finds that the claimant immediately reported her predicament by way of telephone to the town clerk. The claimant was treated at Kiambu and Mbagathi District hospitals and put on 13 days of rest. The court returns that the summary dismissal was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.
- b) The court has considered the reorganisation of government under the Constitution of Kenya, 2010 and the period running from the effective date of the summary dismissal, 23.04.2007, to date. The court considers that reinstatement would not be an appropriate remedy in such circumstances of the case as parties will be subjected to cumbersome readjustment situation. Accordingly the reinstatement is declined.
- c) The grievant desired to continue in employment and she did not contribute to her termination and she is awarded 12 months' salaries in compensation at the rate of the gross monthly pay as at 23.04.2007, the date of termination.
- d) As the grievant has not been reinstated on account of the constitutional reorganisation of government, she is deemed to have retired on reorganisation of government effective 23.04.2007 with full retirement benefits per the collective agreement and other contractual terms of retirement as at 23.04.2007.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the then Municipal Council of Meru violated and breached the contractual terms and obligations by dismissing the grievant without a valid reason.
- b) The declaration that the dismissal letter given to the grievant was unlawful, illegal and null and void.
- c) The respondent to pay the grievant 12 months' salaries in compensation at the rate of the gross monthly pay as at 23.04.2007, the date of termination, being compensation for unfair termination.
- d) The grievant is deemed to have retired on reorganisation of government effective 23.04.2007 with full retirement benefits per the prevailing collective agreement and other contractual terms on retirement as at 23.04.2007.
- e) The claimant to compute the dues in (c) and (d) above and file and serve in 14 days for recording the quantum in court on a convenient mention date.
- f) The respondent to pay or cause the payment of the monies due under this judgment by 01.12.2016 failing interest to be payable at court rates from the date of this judgment till full payment.
- g) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 7<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**