



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 605 OF 2012

BEATRICE MOLA
.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....1ST
RESPONDENT

VICE-CHANCELLOR PROF. OLIVE M. MUGENDA.....2ND
RESPONDENT

DEPUTY VICE-CHANCELLOR (ADMINISTRATION) PROF. PAUL K. WAINAIN....3RD
RESPONDENT

REGISTRAR (ADMINISTRATION) PROF. GODFREY S. MSE.....4TH
RESPONDENT

JUDGMENT

1. The Claimant filed her suit on 13th April 2012. She also filed various interlocutory applications which the Court dispensed with and rendered Rulings. In her Memorandum of Claim she averred that she was employed by the 1st Respondent on 6th February 1997 as a Purchasing Officer and commenced her service with the 1st Respondent on 1st April 1997. She averred that she was transferred to various sections of the 1st Respondent which included Purchasing, Catering section, Bookshop, main Purchasing office and the Stores Section from 2003 to her termination in 2011. She was suspended from duty on 6th December 2011 under the hand of the 4th Respondent. She claimed the suspension was based unfounded allegations and without due process. She was summoned to a Senior Board of Discipline vide letter dated 3rd January 2012 and her termination letter was issued on 12th March 2012. The letter of termination was signed by the 3rd Respondent. At the time of termination she earned Kshs. 129,700/- a month. While on suspension she earned Kshs. 89,067.50 comprising of half salary plus her house allowance. She averred that she had served the 1st Respondent with dedication in her uninterrupted service for 14 years and that her suspension and later termination was actuated by malice and vendetta. She was not accorded

proper and sufficient opportunity by the Respondents to defend herself and was denied representation by her lawyer and union representative in total violation of the rules of justice. She averred that at the time she was accused of receiving the goods she was in crutches and her mobility severely reduced. She claimed that the Respondents acted in a highhanded manner and in contravention of the Employment Act, the Labour Relations Act and ILO Convention and ILO Declaration on the Fundamental Principles and Rights of Workers. She thus sought her terminal benefits in full – gratuity of one month salary for each year worked Kshs. 1,816,640/-, leave notice – 3 months salary in lieu of notice Kshs. 389,280/-, payment in lieu of leave (82 leave days) and unpaid leave allowance for 2011 Kshs. 397,280/-, leave and baggage allowance Kshs. 8,000/-, unpaid salary for the months of December 2011, January, February and March 2012 Kshs. 162,770/-. She also sought reasonable compensation for the illegal and unlawful termination of her services, costs and interest. The Claimant subsequently filed an Amended Memorandum of Claim seeking an additional prayer of reinstatement to employment in the alternative and the dues be calculated subject of the Collective Bargaining Agreement dated 20th September 2012.

2. The Respondents were opposed to the suit and filed an Amended Response on 7th January 2014. In the Response, the Respondents averred that the Claimant was suspended pursuant to the provisions of Clause 9.4(i) of her terms of service. The Respondents averred that in mid August 2011 the Claimant without authority received on behalf of the 1st Respondent 336 computers alleging they were as per specifications while in fact they did not comply with to specifications. The Claimant was as a result suspended from duty on 6th December 2011 pending appearance before the Senior Board of Discipline to answer charges leveled against her. She appeared before the Board on 12th January 2012 and was not denied the opportunity to be represented by counsel and the Board heard her and it was the Board's resolution that the Claimant's services with the 1st Respondent be terminated as provided for under clause 9.4(iii)(c) of her terms of service and Section 44(4) of the Employment Act 2007. Her services with the 1st Respondent were terminated by letter dated 12th March 2012. The Respondents averred that her claim for gratuity was unfounded as the Claimant was on permanent and pensionable terms of service. The Respondents asserted that the Claimant was suspended as provided by law, she was given an opportunity to defend herself and that generally due process was followed before her services with the 1st Respondent were terminated. The Respondents thus sought the suit be dismissed with costs.
3. The Claimant testified before me on 3rd June 2014 after a series of attempts to proceed to hearing. In between an intermeddler in the name of a third party attempted to join the fray but withdrew the application for joinder subsequently.
4. The Claimant testified that she was presently unemployed and was previously a purchasing officer working in the 1st Respondent's stores. She was employed on 1st April 1997 and at the time earned a salary of Kshs. 30,000/- at the start. She was in the purchasing office from July 2003 until her termination. She confirmed she was suspended from duty vide letter of 6th December 2011 on allegation that she received 336 computers that were not per specifications. She was shocked as the computers were received by Mr. Nganga based in the ICT Directors office. She said that when she went for the disciplinary meeting she said the same but no one listened. She stated that when purchases are brought they must be the right quantity, right quality, right price, from the right source and they must reach the user at the right time. She testified that at the stores they only received the common user items which are stationery and cleaning material. Computers are usually received by the ICT as they are the ones who give the specs and are experts. She stated that the 2nd Respondent wrote a letter to the Director General PPOA dated 8th November 2011 in respect of the computers which had been delivered earlier but were rejected because they were not in accordance with the requirements. She testified that this was in November and in December she was suspended and it was the second consignment that got her terminated. The computers were installed and are in use.
5. In cross examination she testified that that she filed the claim against the Respondent her employer

Kenyatta University. She said that the 2nd, 3rd and 4th Respondents are employees of Kenyatta University and were not the ones who employed her. When referred to her letter of termination she conceded that she was dismissed after she appeared before the disciplinary board of the 1st Respondent and the dismissal was on account of her acceptance of goods which did not correspond to specifications. She admitted signing the 'goods received note' but stated that the goods received note is just a forwarding the documents to payments. She went before the disciplinary board and was heard and appealed after the decision was made to terminate her services but her appeal was not heard. Her colleague who was terminated alongside her was reinstated after his appeal. Mr. Khasekhe for the Respondents put it to her that she had rushed to Court before her appeal was heard and she replied that she did not rush to court but sought to appeal and came to Court when she was told to leave the house. She knew her fate was sealed and said that if her appeal had been listened to, she would not have come to Court. She however had no document to show her appeal was sealed. She conceded that terminal dues are payable upon clearing with the University and she had yet to clear with the University.

6. In re-exam by her counsel Mr. Ashiruma, the Claimant testified that she has sued the 2nd, 3rd and 4th Respondents in their capacities. The 3rd Respondent is the one who signed the termination letter, the 2nd Respondent is the vice chancellor and the 4th Respondent is the Registrar administration and they are in charge of the administration of the 1st Respondent. She did not agree with the reasons as she did not receive the goods because Mr. Nganga the ICT man who is an expert received the goods. Mr. Nganga admitted this in his Internal Memo on the matter. Her appeal was dated 26th March 2012 and she filed the suit on 12th April 2012. Her appeal had not been heard at the time and there was no communication. She was asked to vacate her staff house and because she had been sick and on a wheelchair she sought intervention of the Court. She said her terms were at par with a lecturer and she was entitled to her benefits including leave and travelling allowance.
7. The Respondents called Mr. Nderitu Gikaria the HR Manager of the 1st Respondent. He testified that he has been at the 1st Respondent for 8½ years and knew why he was in Court. He stated that he knew the Claimant who was an employee of the 1st Respondent and a purchasing officer. She was suspended vide letter dated 6th December 2011 and the reason given was that she received 336 computers alleging they were as per specifications while in fact they did not comply with the specifications. After suspension she was invited to appear before the senior disciplinary board and there was a hearing on 12th January 2012. Her case was heard and she was given time to defend herself and the board listened and at the end of it she was found culpable. Her defence is captured in the minutes of the disciplinary meeting at page 15 and the decision of the board was that her services be terminated on account of her receipt of goods that did not comply with specifications. She was given a letter of termination. She was advised that after hearing her defence the committee found her guilty and in view of that the 1st Respondent found it fit to terminate her services. She was allowed to appeal if she was dissatisfied. The Chief Finance officer was instructed to pay her terminal benefits after clearing. Up till the time of his testimony he had not seen the clearance form from the Claimant. He was aware that the Claimant wrote a letter of appeal dated 25th March 2012 and the appeal was not determined because at the same time she had lodged this case in court. He stated that Mr. Nganga made his explanation contained in the memo the Claimant had referred to before the appeals board and was re-appointed. The 1st Respondent did everything as per the procedure set. He testified that the Claimant was on permanent and pensionable terms and gratuity does not arise. He stated that the University is not opposed to pay her terminal benefits once she clears. She has leave balance of 58 days less the days she took leave between 28th November 2011 to 6th December 2011. Regarding the half salary she was not paid he testified that if she had not been found guilty she would have received it but because she was found guilty she would not receive it. He testified that if there are increases due to her on account of the negotiated CBA she would be entitled to receipt of the same after she clears. On the compensation sought he testified that her case went through all the channels and it was done according to the law and there was nothing unlawful regarding her termination. He said that if she

had followed on her appeal she may have had a chance to be re-appointed. Mr. Nganga is one who appealed and was successful.

8. In cross-examination he testified that there are procedures to be followed and her case was taken through the process. He was in attendance at the disciplinary hearing. He testified that she signed documents receiving the computers. On being referred to Mr. Nganga's memo he confirmed that Nganga was called to receive the 336 computers. He testified that the Claimant signed the delivery note for purpose of payment. On the appeal he conceded it was filed before the Court case and appeals are not heard on the day they are filed. He testified that by the time the committee would have sat the case was in Court. The appeal is presided over by the Chairman of the Council. The Claimant had said in her appeal that she was not given a chance to present her case properly and was being sacrificed for mistakes of others. He stated that there is a committee to receive goods and she signed in place of that committee. Mr. Nganga was reinstated to duty but given a strong warning. The Claimant signed the goods acceptance certificate and that is why she was terminated. He did not know whether the 336 computers were returned to the supplier. He reiterated that the 1st Respondent has no problem paying the Claimant her dues if she clears as per the procedures of the 1st Respondent.
9. In re-examination he testified that the Claimant's appeal had not been heard by the time she filed suit which was barely 2 weeks after the appeal was lodged. Nganga's appeal was successful and he was re-appointed.
10. Parties filed written submissions. In her submissions filed on 20th February 2015, the Claimant submitted that her claim was for Kshs. 3,343,870/- comprising of gratuity for the years worked, payment in lieu of notice, payment of leave days not taken, luggage and baggage allowance, unpaid salary for months of December 2011, January, February and March 2012, arrears on the basic salary and house allowance as per the CBA of 20th September 2012. She also sought compensation for the illegal and unlawful termination of services. She prayed for costs as well as any other relief the Court may deem just and fit to grant. Regarding her suspension she submitted that the goods were received by the user department as the stores only receive items that are of general use. She submitted that she was terminated but Mr. Nganga was reinstated meaning she was terminated for a mistake made by Mr. Nganga. She submitted that the senior board of discipline meeting of 12th January 2012 was therefore a travesty of justice and thus null and void. She impugned the decision as the members were culpable yet they sat in the board of discipline. She submitted that the Vice Chancellor was bound by the terms of service to appoint a council to determine whether the Claimant was to be terminated. She stated the Respondent's acted in a high handed and oppressive manner. The Claimant thus submitted that she was entitled to the sums claimed plus the sums due for the remainder of her service as well as a certificate of service. The Claimant filed a list of authorities on 20th February 2015. In it were the cases of **Kenya Ports Authority v Silas Obengele [2008] eKLR**, **HCCC 635 of 2007 Beatta Anselmo Maali v Ethiopian Airlines Enterprises, Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** and **Patrick Njuguna Kariuki v Del Monte (K) Ltd [2012] eKLR**.
11. The Respondents filed their submissions on 16th March 2015. In the submissions the Respondents submitted that the Claimant had not discharged her burden of proving the termination was unfair in terms of section 47(5) of the Employment Act. The Respondents relied on the case of **George Onyango Akuti v G4S Security Services Kenya Limited [2013] eKLR** on what constitutes unfair termination. The Respondents submitted that the Claimant had not pleaded that her termination was unfair. It was stated that the case of **Evans Ochieng Nudih v Equity Bank Limited [2014] eKLR** the Court held that wrongful or unlawful termination is a distinct concept from unfair termination. The Respondents submitted that the requirement for procedural fairness under Section 41 of the Employment Act were satisfied by the Respondents and that the requirements of Section 43(2) of the Employment Act were also satisfied. Reliance was placed on the cases of **Mary Chepmweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, **Peter Lichungu v Kenya Power and Lighting Company [2014] eKLR**. The Respondents

submitted that the Claimant is not entitled to gratuity or service pay as held in the case of **Margaret A Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR**. The Respondents conceded that upon clearance the Claimant is entitled to 3 months salary payment in lieu of notice, 48 days leave, pension, luggage and baggage allowance, arrears for basic and house allowance as per the CBA for 20th September 2012. The Respondents asserted that the Claimant came to this Court prematurely even before clearing with the 1st Respondent and before her appeal had been heard and determined. The Respondents sought that the costs of the suit be awarded to them and relied on the case of **Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR**. The 2nd to 4th Respondents submitted that they were sued for their official actions on behalf of the 1st Respondent and the agent cannot be held liable for the authorised actions of the disclosed principal and reliance for this was placed on the case of **Nicholas Mwenda Mtwaruchiu & 7 Others v Ethics and Anti-Corruption Commission & 5 Others [2014] eKLR**.

12. I have considered the pleadings, the testimony of witnesses, the submissions of parties and authorities cited in coming to this decision. The Claimant sought various reliefs some of which were conceded by the Respondents. At the onset let me determine the correct parties to the suit. The Claimant filed the suit against 4 Respondents. She conceded in her cross examination that she sued the 2nd to 4th Respondents for actions taken in relation to her termination. In the case of **Morgan Air Cargo v Evrest Enterprises** above, Gikonyo J. held that an agent for a disclosed principal is not to be held liable for authorised actions. Under the Employment Act an employer is defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. In the strict sense of the word the 2nd to 4th Respondents could be considered employers for purposes of the Employment Act. I however do not see the need to name them specifically in the pleadings as Respondents. No personal liability is to attach to them for the actions they undertook on behalf of the 1st Respondent. Their inclusion in the suit was superfluous and of no import. They fortunately did appear through the firm representing the 1st Respondent and did not incur personal costs in defending themselves in the suit. I strike out the names of the 2nd, 3rd and 4th Respondent in this suit but make no order as to costs in that regard.

13. The Claimant, it is conceded is entitled to 3 months salary in lieu of notice, payment for 48 days of leave not taken, luggage and baggage allowance and the arrears on basic salary and house allowance in line with the CBA of 2012. In the mind of the Court the only issues that remain for determination are:

1. Whether the termination of the Claimant was unfair or unlawful
2. Whether the Claimant is entitled to gratuity or service pay
3. Who is to bear costs of the suit

14. The Claimant asserts she was terminated illegally and unlawfully. Unfair termination, it was submitted is quite distinct from unlawful termination. While I am in agreement with the authority cited, my fellow judge did not at any point suggest that a decision on unfair termination cannot be made where a party has not expressly pleaded unfair termination. The interplay between the terms is best brought out by a Section the Respondent has relied upon. Section 47(5) provides as follows:-

47.(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

15. It was her burden to show unfair or unlawful termination. From her testimony and the evidence adduced it is clear the goods were received by Mr. Nelson Nganga. He admitted that he received

the goods. If indeed the Claimant erred in issuing the Goods Received Note for goods that the ICT director approved then this was not sufficient cause for termination of services. A reprimand or even a severe reprimand by way of warning would have sufficed. The Claimant therefore was not terminated for just cause. Though she seeks reinstatement the period that has elapsed is a bit long and is not within the statutory limit of 3 years. In the premises an award of compensation under Section 49(1) would suffice. I will award her the maximum compensation of 12 months for the unlawful dismissal.

16. The Claimant was employed on permanent and pensionable terms. She is therefore not entitled to the relief claimed under the head service pay or gratuity. She is entitled to draw her pension. She was suspended for an unjust cause and the termination having been on a false premise she is entitled to receive the half salary withheld during her suspension.

17. Regarding costs, the Claimant came to Court before the internal mechanism was at an end. She may well have been re-instated to her service. I will therefore order that each party bears its own costs. In the final analysis I enter judgment for the Claimant against the sole Respondent Kenyatta University for:

1. Half salary withheld in December 2011, January 2012, February 2012 and March 2012
2. Payment for 48 days leave not taken
3. Payment of 3 months salary in lieu of notice
4. Arrears of basic pay and house allowance as per CBA for 20th September 2012.
5. 12 months salary as compensation.
6. Certificate of service in terms of Section 51 of Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of April 2015

Nzioki wa Makau

JUDGE