



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

CAUSE NO. 105 OF 2013

(Formerly Industrial Cause No.1946 of 2012 at Nairobi)

ESTHER WANGARI WAITHAKA..... CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF NYANDARUA..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th July, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 28.09.2012 through Kagundu & Mukunya advocates. The suit was filed against the County Council of Nyandarua. The claimant filed on 02.09.2014 the amended statement of claim through Gori, Ombongi & Company Advocates with the sole purpose of substituting the respondent with the County Government of Nyandarua as currently named. The notice of change of Advocates had been filed on 08.10.2013. The claimant prayed for judgment against the respondent for:

- a. The sum of Kshs. 429, 037.05 being the unpaid monthly salaries and allowances from September 1997 when the claimant was suspended to November 2006 when the claimant's employment was terminated.
- b. Interest on (a) above at court rates from the date of dismissal until payment in full.
- c. Costs of the suit plus interest.
- d. Such further or other relief as the honourable court may deem fit to grant.

Despite an opportunity to call a witness at the hearing the respondent opted not to avail the witness. The claimant testified to support her case. Both parties filed the final submissions.

The claimant was employed on 16.11.1984 as a cleaner at the County Council of Nyandarua. On 28.08.1985 she was promoted to the position of office messenger I. On 8.12.1985 the claimant was promoted to a market master.

On 14.11.1997 the claimant was suspended from duty on account of stealing from the employer. The claimant was charged in criminal case No. 3363 of 1997 at the Principal Magistrate's Court at Nyahururu, with the offence of stealing by servant. It was the prosecution's case that she stole Kshs. 28, 418.00 by reason of her employment. The trial court found the claimant guilty as charged and convicted her accordingly in the judgment that was delivered sometimes around but before 05.10.1998.

The claimant testified that after the conviction she served the sentence and she continued on the suspension until 15.11.2006 when she was dismissed by the council without payment of the salaries and

allowances withheld throughout the period of suspension. The claimant made the demand for payment by her advocates' letter dated 27.03.2012 but there was no positive response. The claimant decided to file the present suit.

The only issue for determination in the suit is whether the claimant is entitled to the salaries and allowances withheld from the date of the suspension to the date of the termination.

As submitted for the respondent the guiding principles were set out in the case of **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** where it was stated thus,

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”

In the present case, the claimant was suspended on account of theft and the trial court convicted the claimant on account of that charge of stealing by servant. The reason for the belated termination in 2006 was valid and the court finds that the claimant is not entitled to the prayers as set out in the amended statement of claim. The court has considered the respondent’s conduct in failing to reply the demand letter and the belated termination of the claimant in 2006 and the court is of the opinion that each party shall bear own costs of the suit.

In conclusion, the amended statement of claim is dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 17th July, 2015.**

BYRAM ONGAYA

JUDGE