



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1391 OF 2012
BETWEEN
ELIZABETH CHERONO KURGATCLAIMANT
VERSUS
KENYA LITERATURE BUREAURESPONDENT

Rika J

CC. Leah Muthaka

Mr. Ongicho instructed by Ongicho & Ongicho Advocates for the Claimant

Mr. Wambugu instructed by Lilan Koech & Associates, Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Elizabeth Cheron Kurgat filed her Statement of Claim on 15th August 2012. State Corporation, the Kenya Literature Bureau, filed its Statement of Response on 12th October 2012. The Claimant filed a Supplementary list of documents on 1st October 2012.
2. Cheron Kurgat testified, and closed her case on 17th May 2013. The Respondent called its Security Guard Patrick Nyabera Openda, Internal Auditor Daniel Chelanga and Assistant Human Resource Officer Roslyn Waudu Mugavana, who all testified on 19th June 2013 when the Respondent's case closed. The dispute was last mentioned on 16th July 2013, when the Parties confirmed the filing of their Submissions, and were advised by the Court the Award would be delivered on notice.
3. The Claimant states she was employed by the Respondent as Kitchen Assistant 1, on 1st October 1993. She gradually made her way up, and lastly held the position of Clerical Officer Stores, Scale 2. She was sent on compulsory leave by the Respondent on 14th November 2011, and asked to show cause within 3

days, why disciplinary action should not be taken against her on account of negligence of duty. She was summoned to a disciplinary hearing on 12th March 2012. Her contract was terminated in a letter dated 27th April 2012 on the ground that she was negligent in performance of her duty. She questions the decision of the Respondent and prays the Court to grant:-

- a. Unpaid salaries for January, February and March 2012 at Kshs. 137,895;
- b. Unpaid salary for the days worked in April 2012 at Kshs. 41,368;
- c. 12 months' salary in compensation for unfair termination at Kshs. 551,580;
- d. 12 months' salary in lieu of notice of termination at Kshs. 551,580;
- e. Unutilized 24 days of leave at Kshs. 36,772;
- f. Pro-rata leave of 6 months at Kshs. 40,219;
- g. Service at 15 days' salary for 19 years completed in service at Kshs. 436,667;
- h. Leave traveling allowance in accordance with the CBA at Kshs. 14,100

Total..... Kshs. 1,810,182.40

- i) Interest;
- j) Any other statutory entitlements;
- k) Certificate of service; and
- l) Costs

She also prays that:-

- i. The letter of compulsory leave dated 14th November 2011 be declared unlawful, hence null and void;
- ii. The termination of the Claimant's contract be declared unlawful hence null and void;
- iii. The Respondent do supply the Grievant with all investigation reports for the investigation conducted during the unlawful compulsory leave;
- iv. The Respondent do re-engage the Claimant in work comparable to that which she was employed prior to termination or other reasonably suitable work at the same salaries and allowances in arrears for both the period the Claimant has been working and out of work;
- v. Reinstate the Claimant and treat her in all aspects as if she had not been terminated.

The prayer for compensation is made in alternative to re-employment.

4. Cherono testified she earned Kshs. 45,915 at the time of termination. On 14th November 2011, the Corporate Manager called her, and asked her to surrender the keys to the main store. She was not the store-keeper, and her supervisor was not in. Auditors were brought in. They counted reams of paper. Her supervisor arrived later on, at around 1.00 p.m. Cherono and her supervisor then proceeded to the Managing Director's Office. She never met the Managing Director, but was served with the letter of compulsory leave. Police Officers were called in. Cherono and her Supervisor Tom Odhiambo were arrested and detained at the Embakasi Police Station. They were released on bond later in the night. It was alleged they stole Respondent's 50 reams of paper. The Claimant stated it was Odhiambo, not her, who received the reams of paper from the suppliers.

5. She denied that she was negligent. 250 reams were to be delivered. 200 were actually delivered, and 50 reams were to be delivered the following day. She did not know if they were delivered. The Goods Delivered Note dated 9th November 2011 indicates 250 were delivered. The goods were normally accompanied by an invoice. Information was keyed in the computer system using the fully certified delivery note. In this case K. Mutisya and Tom Odhiambo signed the Delivery Notes. There was a Procurement Procedure at the Respondent, with specific regulation of Goods Receiving under Clause 9 (c). The Storekeeper signed on delivery. Cherono was the Store Clerk; Odhiambo the Storekeeper.

Mutisya was a subordinate Employee. Cherono was under suspension for six months. She was paid her salary for November and December 2011, but was not paid for the period between January and April 2012.

6. The Claimant was called to a disciplinary hearing on 12th March 2012. She attended the meeting in the company of a Shop Steward from her trade union. She was asked why she received the incomplete reams. She produced the Delivery Note showing it was not her who received the papers. She did not have a warning, and received no notice of termination. She has tried to get alternative employment without success. She did not appeal because she did not feel she would get justice. She was 41 years at the time of her testimony, and prefers reinstatement above all else.

7. Cherono conceded on cross-examination that she was on duty on the material day, the 9th November 2011. She was on leave, but recalled. She was the Stores Clerk. There were four persons serving in the Store. Her duty was to issue receipts and enter details in the computer. She would input. Her input was not looked into when the Auditors took stock. The Storekeeper had responsibility to check the goods against the LPO. She would not approve the wrong entries from her supervisors. The Procurement Procedure of the Respondent emphasized that a Storekeeper must be honest.

8. This was not the first disciplinary issue to face the Claimant. There was another issue which arose in April 2008. The Respondent lost its Camera Films. She was sent on compulsory leave as the incident was investigated. She was warned and resumed her duty. She did not certify the quantity of the papers which were delivered. She did not input the particular delivery. She was arrested with Tom Odhiambo. She did not know that Tom had also sued the Respondent for unfair termination. She was asked to show reason why disciplinary action should not issue against her. She was accorded the opportunity to be heard. She defended herself. The Committee felt it was not satisfactory. She was aware the Respondent's Terms and Conditions of Service Regulation 6.5.2 gave her the right of appeal. She did not do so. She conceded in her letter of 17th November 2011 that she entered the details of the Delivery Note in the computer. She did not participate in any fraud. She received the cheque for terminal dues after she had filed this Claim. She worked for 19 years. She wishes to be reinstated. She was not able to say why she has not succeeded in securing alternative job. She stated on redirection that she was not in, on 9th November 2011 when the deliveries were made. The Delivery Note was not among those she keyed in her computer. The Respondent did not notify her of the defective entry on payment for the delivery. She prays the Court to uphold her Claim.

9. Patrick Nyabera Openda was on guard on 9th November 2011 at the Respondent's premises. A Canter Vehicle brought in paper delivery. Openda confirmed 200 reams were delivered. Elizabeth called him. The two Employees confirmed 200 reams were delivered. In the Delivery Note, it was indicated as 250 reams. Tom Odhiambo told the Witness that 50 reams would be delivered the following day. Openda stuck to his guns and said no. He called his Security Supervisor. The following day, the same Supplier brought 250 reams. 200 were recorded as delivered, and 50 accredited to the previous day. The shortfall of 50 reams was never delivered. Openda was asked to record a statement with the Police at Embakasi

10. The Guard testified further on cross-examination that he checked the delivery of 9th November 2011. It was less than the delivery given in the documents. He recorded a statement. Cherono was at work on 9th November 2011. She was not there on 10th November 2011. She was there when the papers were counted and found to fall short of the intended delivery of 250 reams. Tom signed the Delivery Note. Openda confirmed on redirection that he stated what he saw in his statement. He was not asked to lie. There were more than 50 Employees working for the Respondent.

11. Daniel Chelang'a the Internal Auditor oversaw compliance with procedures and regulations. The Claimant's role was to receive and issue stocks. The major stock at the Literature Bureau is paper. She was implicated in loss of Camera Films in 2008. Those who were found most responsible were dismissed, while those less so, including the Claimant were warned and retained. In the second case, she was implicated in theft of reams of paper. The arrangement was that the Supplier would deliver 250 reams of paper every day, until the LPO was exhausted.

12. 50 reams were not delivered. 200 were delivered. The Delivery Note stated 250 were delivered. Chelang'a obtained all documents. After the preliminary report, the Auditor went back to the store and found a variance of 722.14 reams. There were missing issue notices. After reconciliation the variance came down to 650 reams. ICT had adjusted some stocks. Stores had a role in keying in the details. ICT information originated from the stores. The Procurement Procedure stipulated what stores should have done on delivery. The cost of the lost reams was about Kshs. 1.5 million. There is a huge market for paper.

13. The total LPO was for 3000 reams, Chelang'a stated in cross-examination. They were to be supplied in different modes depending on the capacity of the suppliers. If there was additional demand, the Respondent would raise another LPO. The actual audit was on 11th November 2011 and 10th November 2011. The incident was reported on 10th November 2011. The author of the report died and Chelang'a was not able to vouchsafe every detail in it. It was largely reliable. The adjustments were issues which were explicable. Stores would key in, while ICT adjusted. ICT could not initiate adjustment. Chelang'a was not sure if the Claimant attended the stock-taking of 11th November 2011. He testified on redirection that ICT was found to have adjusted stocks irregularly after further investigations. The involved ICT Employees were surcharged. Adjustment of 750 reams made on 25th July 2011, was not related to 9th November 2011. Regardless of the variance, there was actual loss of 652 reams.

14. Roslyn Waudo Mugavana's duties included the implementation of the Respondent's Human Resource Policy. The Claimant was the Stores Clerk. She was to ensure records were kept correctly. On 9th November 2011, a delivery of reams of paper was made. There was variance between what was delivered and what was stated in the Delivery Note. An audit followed. Involved employees were placed on compulsory leave to allow for investigations. The Storekeepers were supposed to take physical count of the stocks upon delivery. The Claimant was sent on compulsory leave and asked to be reporting to Management every week, instructions which she did not comply with. She was asked to show cause why disciplinary action should not be instituted. She did so, and was heard on 12th March 2012. Her defence was considered, and a decision made to terminate her contract. The Respondent notified her of her right of appeal. The Terms and Conditions of Employment allowed her four weeks to appeal, which she did not utilize. She was paid her salary, including arrears due upon review of salaries, going up to 26th April 2012. She was paid even for the days she did not report to work. She received a total sum of Kshs. 99,675. She received her pension of Kshs. 414,873. This was paid in August 2012 in accordance with the law. It emerged in the course of the investigation that the Claimant may have acted in collusion with other Employees, and Police were called in to investigate. 50 reams of paper were recovered from the Store Manager's House at Mlolongo in Nairobi.

15. Roslyn testified on cross-examination that the Claimant was employed in 1993 as a Stores Clerk. She was Stores Clerk and Assistant to the Stores Manager, at the date of termination. She was not the Storekeeper. The storekeeper was there on 9th November 2011. The Claimant too was there. Her duty was to assist the Storekeeper and input the records. Compulsory leave is a term contained in the Respondent's Human Resource Policy. She conceded the terms used were suspension and interdiction. Cherono was accorded a disciplinary hearing. The Respondent lost 50 reams of paper. Further investigation uncovered loss of 650 reams. She was not victimized. Action was taken against Mr. Okore from ICT as well. He was surcharged, although he was not directly responsible for the loss. The Security Firm responsible was Secura. This Firm reported the matter to the Police, but pursued no criminal prosecution. Instead, Employees who were involved from Security were dismissed from employment. Her salary was paid in May after termination. It was the second case against the Claimant in four years. She was fairly treated.

16. The Witness closed her evidence with the explanation on redirection, that Secura was the Supplier of the paper, not the Security Firm. The Claimant conceded she did the input for the delivery. She was paid while on compulsory leave. 50 reams were lost and recovered. Recovery of the items would not absolve the Claimant. Under the Terms and Conditions of Employment, the Managing Director or the Board could summarily dismiss or impose a lesser penalty in cases where an Employee willfully neglects to perform any work which it was his/her duty to perform, or carelessly and improperly performs any work

which from its nature it was his duty to perform carefully and properly. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

17. The Claimant was employed by the Respondent State Corporation as a Kitchen Assistant on 1st October 1993. She worked for 19 years and last held the position of Clerical Officer Stores, Scale 2. She last earned a total monthly salary of Kshs. 45,915. Her contract was terminated on 27th April 2012.

18. The Respondent alleged to have lost reams of paper. The papers were lost from the stores. 200 reams, instead of the requisitioned 250, were delivered on 9th November 2011. The Delivery Note indicated 250 were delivered. 50 reams were recovered from the house of the Stores Manager in Mlolongo. Subsequent in-depth audit carried out by the Respondent revealed this was an on-going scam, where at least 650 reams could not be accounted for. The evidence of the Respondent is that this is a high demand commodity. The Respondent based its termination decision on this loss.

19. *Was the Claimant fairly treated? Did the Respondent have valid reason or reasons to terminate? Is the Claimant entitled to the prayers sought in her Statement of Claim?*

20. The Claimant does not appear to largely question the fairness of the procedure. The Court has not found any major departure in the procedure, from the minimum standards of fair procedure created under Section 41 and 45 of the Employment Act 2007. The Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment. Her contract was subject to the letter of employment dated 13th October 1993; the Terms and Conditions of Service of the Kenya Literature Bureau; the CBA concluded between the Respondent and the Claimant's Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers dated 15th August 2011; and the Employment Act 2007. The procedural protections accorded to the Claimant under these instruments were honoured. She was advised of her right to appeal within four weeks under the Terms and Conditions of Service. She did not exercise that option, holding without justification, that she would not get fair treatment from the Appellate Committee. Procedure was fair, and termination fair on this score.

21. Were there valid reasons shown by the Employer in termination of the contract? The CBA governing the Claimant's contract defined offences that constituted justifiable or lawful grounds for dismissal, under clause 25. Among them were where an Employee neglects to perform any work which it was his/her duty to have performed, or carelessly and improperly performs any work which from its nature was his/her duty to perform under his/her contract to perform carefully and properly. The other relevant offence under the clause is where an Employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his/her Employer or his/her Employer's property. These two offences are replicated in the Employment Act 2007 and Clause 6.4.1 of the Terms and Conditions of Service.

22. Cherono was the Clerical Officer Stores and deputized the Storekeeper/Manager Tom Odhiambo. She was regulated in the discharge of her role, by the Procurement Procedure KLB /PRO/001. Goods would either be collected from the Supplier, or delivered by the Supplier. The Storekeeper, which term the Court understands would include the Clerical Officer Stores, who served as the Assistant Storekeeper, would check the received goods against the LPO, and against the Delivery Note. He/She would receive the goods and sign the delivery. The details of receipt would be keyed in by the Claimant to the computer and dispersed to the other relevant departments. There was an elaborate procedure of delivery, receipt of

the goods, control and documentation in which the Claimant was a central component. She was regarded as a very important Member of Staff, and required by the Procurement Procedure to be intelligent, good at arithmetic and above all honest. It was her duty together with the Storekeeper to record movement of every item into and out of the stores.

23. On 9th November 2011, Secura Limited delivered white offset paper 52.5 x 75 cms to the Respondent. The Delivery Note Number 1497 showed 250 reams were delivered. This was part of a standing LPO for delivery of 3000 reams, which were, depending on the capacity of the Supplier, to be delivered in batches. Secura had been delivering in batches of 250 reams. The stocks were received by the Claimant and confirmed by the Storekeeper Tom Odhiambo who signed the Delivery Note. The evidence of the Security Guard Mr. Openda was that only 200 reams were delivered. Openda confirmed with the Claimant on 9th November 2011, that 50 reams were missing. On the following day, 10th November 2011, Secura delivered 250 reams. The Delivery Note was altered to show 200 delivered, in an attempt to cover the fraud of yesterday. 50 reams were recovered from Odhiambo in Mlolongo. Recovery just confirmed that theft did in fact, take place. It could not in any way absolve the Claimant from her guilt in the commission of this employment offence.

23. The Claimant's explanation was that it was Odhiambo who received the reams and prepared the documents. The Court is satisfied the exercise was carried out by Odhiambo and the Claimant, in collusion with other Employees of Secura. She was supposed to physically confirm 250 reams were brought to the store on 9th November 2011. She instead played a leading role in theft of her Employer's paper. She did the input, and defrauded her Employer. Audit carried out afterwards revealed the sleaze went beyond the 9th November 2011. Earlier on in 2008, she was implicated in loss of Camera Films, warned and pardoned. She was guilty of the two offences specified in the CBA, the Employment Act and the Terms and Conditions of Employment. There was in the view of the Court, valid reason for termination. The Respondent is a State Corporation, entrusted with public assets, which must be properly utilized and guarded. Termination was fair in both procedure and substantive justification. The Claimant was paid her with-held salary for the duration under suspension. She was paid pension under the Kenya Literature Bureau Benevolent Fund. She was also subscribed to the National Social Security Fund, and would be in a position to pursue pension from her 19 years of saving with that Fund. She was paid Kshs. 414, 873 under the Scheme operated by the Respondent, and Kshs. 99,675 in arrears of salary. Section 35 of the Employment Act 2007 was satisfied. The Court does not think she is entitled to additional payments. ***Termination was fair and the Claim is hereby dismissed with no order on the costs.***

Dated and delivered at Nairobi this 26th day of February 2014

James Rika

Judge

