



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 439 OF 2012

GRACE BOSIBORI NYAMONGO.....CLAIMANT

VERSUS

KENYA INSTITUTE OF ADMINISTRATION RESPONDENT

JUDGMENT

Grace Bosibori Nyamongo the Claimant filed the case herein against her former employer Kenya Institute of Administration the Respondent on 16th March 2012. In the Memorandum of Claim dated 6th March 2012, she prays for the following reliefs:

- a. A declaration that the refusal to grant the claimant paid study leave was unfair, unlawful and in contravention of the applicable Code of Regulations.
- b. A declaration that the termination of the Claimant's employment with the Respondent was unfair and unlawful.
- c. An order reinstating the Claimant in the Respondent's employment.
- d. Damages for lost income from September 2003 to February 2012 being the date of this claim, being Kshs.5,905,864.00 as per the attached schedule of analysis marked Document 39.
- e. Damages for lost income from the date of this claim February 2012 till the date of reinstatement of the Claimant in the Respondent's service.
- f. In the alternative to (d) and (e) above damages for lost income from September 2003 till her anticipated retirement age being November 2026 = Kshs.16,733,308.00 as per the attached schedule of analysis marked Document 40.
- g. General damages.
- h. Costs of and incidental to this claim.
- i. Interest on damages awarded from September 2003 till payment in full.

The Respondent denied the claim and averred that the Claimant absented herself from work without permission and the dismissal of the Claimant was in accordance to the terms of her employment which provided for her to be reinstated if she reported on duty subject to such disciplinary measures as may be taken against, and that the Claimant who was aware of this provision in the regulations did not present herself to explain the circumstances of her absence.

The case was heard on 18th October and 16th November 2012 and 25th July 2013. The Claimant filed her written submissions on 17th July and the Respondent on 19th August 2014.

The Claimant testified on her behalf. The Respondent called Nicholas Mutembei Iko, the Respondent Human Resource Manager.

The Claimant was represented by Mr. Ongoya instructed by Ongoya & Wambola Co. Advocates while the Respondent was represented by Mr. Nyaanga instructed by Mwaniki Gachola & Co. Advocates.

The Claimant's case is that she was employed by the Respondent in 1995 as a Lecturer. She worked until September 2003 when she proceeded for further studies through a Commonwealth Scholarship. She saw the advertisement for scholarship by the Ministry of Education in one of the daily newspapers and applied through the Human Resources Department. She attended an interview and was selected.

After she was awarded the scholarship the Respondent refused to release her on grounds that the application for scholarship did not go through the Director's office or the Staff Development Committee; she did not apply for study leave and the duration of the course which was for four years, was too long.

At the time of the Claimant's application the Respondent was a department under the Directorate of Personnel Management (DPM). After the rejection of her application the Claimant applied for redeployment to DPM which was done. She then applied for release to attend the course which was approved by DPM. The Respondent's Director however refused to release her again. The Claimant was eventually released by the Respondent after she applied for unpaid study leave which according to her, was the condition given by the Respondent's Director for her release. The study leave was for 2 years. Her study leave was extended to 31st September 2007, then again extended to 31st December 2008. The claimant was expected to resume duty in January 2009.

By letter dated 31st December 2008 the Claimant applied for further extension of duty leave through her supervisor Dr. Kathryn McPherson. The application was for extension by 4 months to end of April, 2009. The reason given was that there was a strike which disrupted the term causing the examining committee to reschedule the Claimant's dissertation defense. On 19th January 2009 the Respondent replied through the Head of Human Resources Mr. Joshua Ochuka by email to Dr. Kathryn informing her that the request for extension of study leave would be tabled at the next council meeting. The next communication received by the Claimant was her letter of termination of service dated 17th June 2009 which the claimant alleges was sent through an address that she had stopped using.

The Claimant applied for conversion of her unpaid study leave to paid study leave unsuccessfully. The Claimant first appealed for paid study leave by her letter dated 16th December 2003 to the Respondent. By letter dated 14th June 2004 she complained to the Chairman of Kenya National Commission on Human Rights about denial of paid study leave. She also made the same complaint to Kenya anti-corruption Commission, Hon. Moses Akaranga, Minister of State of Public Service and the Public Complaints Standing Committee.

The Claimant testified that the letter of instant dismissal was written while she was still in college. She graduated on 24th June 2009. She pursued her reinstatement and was told that she can only be re-instated if she applied for employment as a new employee and without asking for previous benefits.

The claimant prayed for lost income from 2002 to 2012, damages for financial and psychological stress and salary to the age of 60 years being upto 2026.

The Respondent's case is that the Claimant was employed as a Kiswahili Lecturer by the Respondent in 1995. At the time the Respondent was a department under DPM. In 1996 the Respondent became a State Corporation and the Claimant elected to be retained as an employee of the Respondent by her letter dated 9th January 2003. She was issued with terms and conditions of her new appointment by letter dated 3rd July 2003. In the same year the Claimant obtained a scholarship to study in York University to start in November 2003. The Claimant made the application for the scholarship to the Ministry and the Respondent was notified by the Ministry about the Claimant's selection.

The Respondent stated that the procedure for application for training is that employees submit their training to the Personnel Officer who forwards it to the Training Committee for approval. Direct applications are not permitted by the Respondent. In the Claimant's case her application did not pass

through the training committee. Her application for study leave was therefore rejected. She was only released when she applied for unpaid leave by letter dated 1st September 2003. Later the Claimant made an appeal for paid study leave which was not granted.

The Claimant complained about refusal to grant her paid study leave to Kenya Human Rights Commission, Kenya anti-corruption Commission, in charge of Public Service.

The claimant was initially granted study leave for 2 years which was extended for a further 2 years. The applications for extension were made on her behalf by her supervisor. She was given an extension upto April 2009. After the study leave the Claimant did not return. There was no communication after April, 2009 from the Claimant and she was treated as if she deserted employment. She was therefore terminated on grounds of vacation of office.

It was the Respondent's case that the termination of employment was fair as the Respondent did not know where the claimant was between May and June 2009. The Claimant was granted an opportunity to go back to work but she did not take up the offer. The offer was on condition that she did not pursue payment which on study leave.

RW1 testified that the claimant was not forced to go for study leave. The Respondent urged the court to dismiss the claim with costs.

I have considered the pleadings, the evidence adduced in court and the written submission.

The issues for determination are the following:

1. Whether the termination of employment of the Claimant was lawful,
2. Whether Claimant is entitled to the prayers sought.

1. Whether the termination of the claimant's employment was unfair

Section 41 of the employment Act provides for the procedure to be followed before an employee can terminate the employment of an employee as follows:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The reason given by the Respondent for termination of the Claimant's employment was vacation of office. The Respondent cited Paragraph 12.11 of an unidentified document which is at page 48 provides as follows:

12.11 Vacation of office

12.11.1 If any employee absents himself from duty without permission for a continuous period of seven (7) days, he may be regarded as having forfeited his appointment with effect from the date of such absence.

12.11.2 If such employee subsequently presents himself for duty, he may, if the circumstances warrant such a cause, be reinstated, subject to such disciplinary measures as

may be taken against him.

The Respondent was aware of the whereabouts of the Claimant. By virtue of the provisions of section 44 (4)(a) and paragraph 12.11.1 of Respondent's Appendix 25, an employee is only absent without permission if the Respondent is not aware of the whereabouts of the employee. The Respondent ought to have written to the employee to explain why she had not reported back for duty before deciding on the course of action to take. Section 44 (4) (a) clearly states that an employee is only liable to summary dismissal if the absence is without permission "**or other lawful cause**". The Respondent did not bother to find out if the Claimant had other lawful cause for her absence.

It is worth noting that the Respondent had upto that point not communicated to the Claimant whether her application for extension of study leave from 1st January 2009 to end of April 2009 had been approved.

For termination of employment to be valid the employer must prove both validity of reason and fair procedure. In the present case I find that the Respondent failed to prove that fair procedure was followed before termination of the Claimant's employment. For this reason the termination was unfair.

2. Whether the claimant is entitled to the prayers sought

- a. A declaration that the refusal to grant the claimant paid study leave was unfair, unlawful and in contravention of the applicable code of Regulations.

The Claimant has through the written submissions urged the court to find that the denial to grant her study leave was unfair. I however agree with the Respondent that it was not unfair as the claimant was informed of the reasons why she could not be granted study leave by Respondent's letter dated 28th July 2003. Subsequent to the rejection of her application for paid study leave, she applied for grant of unpaid study leave by her letter dated 1st September 2003. The letter reads as follows:

Grace B. Nyamongo,

Kenya Institute of Administration,

P.O. Box 23030,

NAIROBI.

1st September 2003

The Director,

Kenya Institute of Administration,

P.O. Box 23030,

NAIROBI.

Dear Sir,

REF: REQUEST FOR UNPAID STUDY LEAVE TO TAKE UP CANADIAN COMMONWEALTH SCHOLARSHIP

I wish to refer to your letter Ref: No. P 1/NYA/89147635/66 of 28th July 2003 and my discussion with you today 1st September 2003 on the above subject.

Sir, I kindly request you to grant me unpaid study leave following my admission at York University in Canada commencing 8th September 2003 to 31st August 2007. The programme duration is a maximum of four (4) years. At the University I will undertake PhD in Gender studies. Being a Senior Lecturer the course is relevant to my duties and it will help me to improve my efficiency and work performance. Further, it will enable me consolidate the gains in the previous training.

I hope this letter will enable you to make a favourable decision.

Yours faithfully,

Grace B. Nyamongo

The Response to that letter is at Appendix 11 of Respondent's Defence and reads as follows:

2 September, 2003.

Mrs. Grace Nyamongo,

Department of Communication,

Training & Personal Development,

Kenya Institute of Administration,

P.O. Lower Kabete.

REQUEST FOR UNPAID STUDY LEAVE

This has reference to your letter dated 1 September, 2003 on the above subject.

This is to inform you that after careful consideration, it has been agreed that you be granted unpaid leave for a period of two years upto but not later than 30 September, 2005 w.e.f. 8 September, 2003 to pursue Doctoral studies in Canada subject to the following conditions:

- i. That the leave period will neither be increment earning nor pension earning.*
- ii. That you will be expected to resume duties by 1 October, 2005 and reapply for an extension which will be subject to review, if it merits.*

On behalf of the KIA, I wish you success in pursuit of your higher studies and hope that you will find fulfillment and satisfaction in all your future endeavours.

In the meantime, please ensure that you clear in the normal manner before leaving the Institute.

TITUS J.K. GATEERE, MBS

DIRECTOR

The Claimant deliberately chose to apply for unpaid study leave after holding a discussion with the Respondent's Director. Study leave was not a matter of life and death. The Claimant had a choice to make, between abandoning the scholarship and taking the scholarship on unpaid leave. She deliberately chose the latter. The Respondent demonstrated in its letter dated 20th August 2004 in its response to one of the many complaints made against it about denial of paid study leave that the claimant's case was not unique as there were 3 other employees of the Respondent on unpaid study leave. These were Mr. Martin Marani, Mrs. Millicent Owuor and Teresa Atema.

I find that the grant of unpaid study leave to the claimant was not unfair but was based on her election to apply for the same rather than lose her scholarship.

b. An order re-instating the Claimant in the Respondent's employment

Reinstatement is provided for both in Section 49(3)(a) of Employment Act and Section 12 (3)(vii) of Industrial Court Act, 2011.

Under section 49(4)(c) and (d), the court is minded to take into account the practicability of ordering reinstatement and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

Section 12(3)(vii) of the Industrial Court Act however allows the court to grant the relief within 3 years of the date of termination. Due to the provisions of section 12(3)(vii) of the Industrial Court Act the Court cannot grant the order for reinstatement as the Claimant has been out of employment for more than 3 years.

The Respondent however indicated that it was willing to take back the Claimant as a new employee. The Employment Act provides for re-engagement in work comparable to that in which the employee was employed prior to dismissal, or other reasonably suitable work, at the same wage.

During her testimony the Claimant stated that she is not in regular work.

For the foregoing reasons I decline the prayer for reinstatement but order that the Respondent reopens the offer of re-engagement of the Claimant to a position commensurate with her current qualifications. The Claimant is granted 30 days to accept the offer failing which the offer would lapse.

c. Damages for lost income

Both the Employment Act and the Industrial Court Act do not provide for payment of damages for lost income. This principle was emphasized by the Court in the case of **D.K.N. Marete v. Teachers Service Commission (2013) eKLR** where the court applied the principle in Menginya case and stated as follows:

“A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.

In the High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v. Kenya Revenue Authority, Hon Justice Ojwang' stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The Claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability. The question whether he is likely to find occupational engagement outside the TSC Outfit, is spent. The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this Court in the case of Maria Kagai Ligaga, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances; and declined to award multiple damages. The rationale was that employees must not be encouraged to replicate injuries, and multiply remedies. To his credit, the Claimant prays for general damages as an alternative to statutory compensation”.

I agree with the stated principles and decline to grant the orders. The result is that the prayer for damages for lost income is dismissed.

d. Damages for lost income from February 2012 to date of reinstatement

Having ordered re-engagement of the Claimant, this prayer is no longer tenable. I further wish to emphasize the courts sentiments in the case of Menginya Salim and Marete as quoted in paragraph (c) above on damages for lost time.

For these reasons I dismiss the prayer for lost income from February 2012 to date of reinstatement.

e. Lost income from 2003 to November 2026 being Claimants retirement age

This claim is not tenable for the same reasons stated in (d) and (e) above.

f. General damages

The Employment Act and Industrial Court Act both permit this court to Award General Damages. In view of the fact that I have found that the termination of the Claimant's employment was unfair and ordered her re-engagement, I award her 12 months gross salary as compensation to cushion her for the loss of income between the time of termination of her employment and the date of reinstatement. The Claimant's last gross salary was Kshs.54,072/= . I therefore award her Kshs.648,863 as general damages.

g. Costs and interest

I award the Claimant costs of this case.

The decretal sum shall attract interest at court rates until payment in full.

It is so ordered.

Read in open Court this 15th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Lubano holding brief for Ongoya for Claimant

Mugisa for Respondent