



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 81 of 2011

MARGARET OMONDI

CLAIMANT

versus

KENYA REVENUE AUTHORITY

RESPONDENT

JUDGMENT

Background

1. Margaret Omondi (the Claimant) filed a Plaint in the High Court of Kenya at Nairobi against Kenya Revenue Authority (the Respondent) on 12 January 2009. The Claimant's cause of action was based on wrongful and unfair termination of employment and she is seeking a declaration that her dismissal was wrong and unfair, three months' salary in lieu of notice, retirement benefits, unpaid gross salary, leave, medical and transport allowances all amounting to Kshs 5,800,000/- and exemplary damages.
2. The Respondent filed a Statement of Defence on 3 February 2009 after which the case started going through the normal steps contemplated under the Civil Procedure Act and Rules. It appears like the original Court file disappeared at some point because on 14 July 2010, the parties recorded a consent order before the Deputy Registrar of the High Court to construct a skeleton file. On 16 November 2010 the file was placed before Justice Mwera in the presence of the parties and the Judge ordered that the file be transferred to the Industrial Court which had by then been set up and which had exclusive jurisdiction in this type of cases.
3. Consequent upon the order to transfer the case to the Industrial Court, the matter was placed before Justice Chemmutut of the Industrial Court on 17 March 2011 and a hearing was fixed for 16 August 2011. The hearing did not take off as scheduled but the parties was granted leave to file a Supplementary Memoranda of Claim and Response.
4. A new hearing was fixed for 22 February 2012 but on this date again the hearing did not take off. Hearing was therefore fixed for 19 September 2012. By this time, due to transition effected pursuant to the Constitution of Kenya 2010, new judges of the Industrial Court had been appointed and the matter was placed before me. I heard the parties on 19 September 2012, 3 October 2012, 19 November 2012 and 20 November 2012.

The evidence and parties contestations

5. The Claimant gave oral testimony in Court and also called two other witnesses.
6. It was the testimony of the Claimant that she was employed by the Respondent with effect from September 1996 as a Preventive Guard. Before joining the Respondent she had worked with the Customs & Excise Department of the Ministry of Finance from 1979 as a subordinate staff.
7. The Claimant's responsibilities /duties as a Preventive Guard included inspection and verification of

cargo and escort of the cargo consignments to the border posts. At the relevant time the Claimant was based in Kisumu and attached to Spectre International Ltd and would regularly perform these duties in relation to cargo destined to Uganda through Busia border.

8. The Claimant testified that on 31 May 2005 she was detailed to escort two trucks registration numbers KAS 192A/ZC 1071 and KAS 957/ZC 1405 ferrying neutral spirit to Uganda and that it was her responsibility to seal the trucks. In the course of carrying out routine check/verification while still in Kisumu, she noticed faulty entries which she brought to the attention of her senior a Mr. Ruto, an Examining/Excise Officer.. Corrections were made and seal numbers 623663-71 and 623684 were confirmed to be in place and entered into form C63 and the said Mr. Ruto stamped at the back of the C63s. She explained that she had no role in the preparation of C63 which had the faulty entries

9. After the corrections, the Claimant testified, she escorted the two trucks to Busia customs border and arrived there at about 9.00pm. The next day, 1 June 2005, in the morning she reported to the Busia customs and found a Ms. Helida Ouma who acknowledged receipt of the C63s and cargo receipt by stamping them. She then took the two forms to an Examination officer in the Customs long room, Ms. Praxides Omari. Ms. Omari verified the two documents and the two trucks with the assistance of a trainee who climbed up the trucks to verify that the seals were intact.

10. At this verification an anomaly was detected in that the same trailer number for KAS 192A/ZC 1071 had been entered in the documents relating to truck number KAS 957Z/ZC 1405. Because of this they consulted the Principal Revenue Officer, Mr. Kosgey who thereafter directed Ms. Omari to have the anomaly corrected by entering the correct trailer number for KAS 957Z/ZC 1405.

11. With the corrections done, appropriate entries were made in the relevant movement/barrier registers by Ms Helida Ouma and the Police and the Claimant stated she physically escorted the two trucks one after the other through the no-man's area into Uganda and handed over the appropriate documents to the Ugandan Revenue Officers who acknowledged by stamping her copies.

12. It was the testimony of the Claimant that there was a distance of about 100 metres between the barriers on the Kenyan and Ugandan side and that it was not possible for a truck to turn back once it had passed the Kenyan barrier. With her task complete, the Claimant took the two documents to Ms. Omari who signed the same to signify a successful export of the cargo and handed the same back to her after which she proceeded back to Kisumu. She surrendered to the Investigations branch the two documents.

13. After about four days, the Claimant stated that she received a call to go to Busia because queries had been raised about the events of 1 June 2005 and more specifically that truck registration number KAS 192A/ZC 1071 had not entered/exported its cargo to Uganda. Investigations ensued to unravel what had happened. In the meantime the Claimant was placed on suspension by the Senior Deputy Commissioner Western region through a Memo dated 18 July 2005 and exhibited at page 33 in the Claimants List of Documents.

14. As part of the investigations, a report, exhibited at page 31 in the Claimant's List of Documents noted that there was something sinister regarding truck number KAS 192A but the Claimant is stated as having *performed her duties as required*. A memo dated 1 August 2005 from the Officer in Charge RPS Kisumu to the Principal Revenue Officer, Investigation & Enforcement Western region also exonerated the Claimant as a result of which her suspension was revoked through memo dated 10 August 2005 and exhibited at page 36 in the Claimant's List of Documents. Another memo dated 11 August 2005 from the Senior Deputy Commissioner Western region to the Senior Deputy Commissioner, Human Resources and exhibited at page 37 of the Claimant's List of Documents, also reported that after investigations the Claimant had been exonerated and that any contemplated disciplinary action be *bunged*.

15. Despite the exoneration, the Respondent through the Senior Deputy Commissioner, Human Resources wrote a letter exhibited at page 39 in the Claimant's List of Documents to the Claimant on 18 December 2006 notifying her that the Respondent was contemplating taking disciplinary action against her in respect to the failure to perform her duties in relation to truck number KAS 192A/ZC 1071. The

Respondent replied to the show cause letter on 10 January 2007.

16. The Claimant was thereafter taken through the Respondents disciplinary process as provided for in its Code of Conduct.

17. On 17 July 2007, the Respondent wrote to the Claimant informing her that the Disciplinary Committee, after considering her written explanation and oral representations had found her guilty and therefore she would be dismissed from the date of the letter.

18. The dismissal letter informed the Claimant that she was entitled to be paid terminal dues as per the Respondents Pension Scheme Rules after clearing with the Respondent. She was also informed of her right to appeal.

19. The Claimant appealed through letter dated 30 July 2007 and exhibited at page 44 of the Claimant's List of Documents but the appeal was not successful hence the filing of a Plaint in the High Court on 12 January 2009. The proceedings were thereafter transferred to this Court because under the Constitution, it is now the competent and proper forum for employment and labour disputes.

20. The second person to testify on behalf of the claimant was one Mary Wekesa who testified that she was a colleague of the Claimant and that on 1 June 2005 she was manning the outward gate/barrier and that she received the documents in relation to KAS 192A/ZC1071 and physically confirmed the presence of the truck, made relevant entries by giving a rotation number 24259 and cleared the truck to move to the Ugandan side by opening the gate with the assistance of an unnamed police officer. She even booked the name of the driver of KAS 192A/ZC 1071 as George.

21. The last witness for the Claimant was one Charles Otema who was also an employee of the Respondent at Busia at the material time. He testified that on 2 June 2005 he was manning the inward gate/barrier for vehicles coming into Kenya from the Uganda side and confirmed that KAS 192A/ZC1071 came back from the Uganda side empty and lodged form C11 and he made the appropriate entries by giving the truck rotation number 19927 in the Inward Register.

22. The Respondent on its part called three witnesses. The case for the Respondent was to the effect that a mistake was noted in one of the entries for the two trucks which had been escorted by the Claimant but this was amended/rectified after the Busia Station Manager Mr. Kosgey was alerted. Otherwise the requisite paper work was in order and the two trucks were cleared to exit to Uganda under the escort of the Claimant but only one truck KAS 957Z/ZC 1405 was recorded on the Ugandan side as having exited and returned to Kenya. It was the Respondent's case that it carried out investigations and recorded statements from various people and the investigations revealed that the Uganda Revenue Authorities had disowned the documentation indicating that KAS 192A/ZC 1071 had entered Uganda. As part of the investigations the Respondents Witness 1 Praxides Omari was also suspended but later reinstated.

23. It was also the case of the Respondent that the initial investigations carried out were inconclusive and therefore fresh investigations were carried out in 2007 and the fresh investigations were part of the Disciplinary process. I will refer later on in some detail to the contents of the investigation reports and minutes of the Disciplinary Committee.

24. The Respondent also called a Ms Sally Lumadi Kiduke, an Assistant Commissioner, Human Resources who testified that the Claimant was implicated in a fraud case and that she was addressed in writing on 18 December 2006 to respond to the fraud allegations and that the Claimant did respond.

25. Apart from the written correspondence, it was the case of the Respondent that the Claimant was given an opportunity to appear before the Disciplinary Committee and that the Committee found the Claimant guilty and recommended her dismissal. Following the recommendations the Claimant was dismissed and she was entitled to certain terminal benefits which have not been paid because the Claimant has not cleared with the Respondent. Minutes of the Disciplinary Committee proceedings were exhibited in the Respondent's List of Documents.

Issues for determination

26. I have duly considered the pleadings, evidence, submissions and authorities placed before me by the parties.

27. The Claimant in her submissions has principally relied on the Employment Act, 2007.

28. The Claimant's cause of action being wrongful and unfair dismissal, the primary issue for determination is whether the summary dismissal was wrong/unjustified or unlawful. The Appropriate relief will become an issue if a finding is made in favour of the Claimant.

Whether the summary dismissal of the Claimant was wrong/unjustified or unlawful

29. Before discussing the merits of the respective parties' positions I need to state that at the time when the Claimant was dismissed on 17 July 2007 the relevant primary statute was the Employment Act, Cap. 226 (now repealed) and the Trade Disputes Act (repealed by the Labour Institutions Act). The latter Act established the then Industrial Court.

30. The repealed Employment Act made no provision for procedural fairness or unfair dismissal or termination but at section 17 allowed an employee to challenge or dispute whether his/her dismissal was justified or lawful.

31. Unlike the current Employment Act, 2007, the repealed Employment Act did not have the elaborate provisions on the right to a hearing before dismissal as is provided for in section 41 (what is generally referred to as procedural fairness in employment law and natural justice in administrative and public law) or the requirement on an employer to prove the validity/reasons for termination as provided for in sections 43 and 45 of the Act.

32. Procedural fairness has its antecedents in the rules of natural justice. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing. The Respondents Code of Conduct Rules and Regulations Governing Discipline and Grievances incorporated the rules of natural justice in its relationship with its employees and therefore I will examine both the procedural process and the lawfulness of the dismissal.

33. As I have already alluded to the rules of natural justice or procedural fairness has not always been part of the employment or contractual relationship in Kenya or of the common law if I may say so. For example in *Rift Valley Textiles Limited v Edward Onyango Oganda, Civil Appeal No. 27 of 1992* and cited in *Kenya Ports Authority v Silas Obengele [2008] eKLR*, the Court of Appeal held that the breach of rules of natural justice would have no application to a simple contract of employment unless provision was made for it by the parties themselves in the contract. In fact in the *Oganda* decision the Court of Appeal boldly stated that the rules of natural justice were irrelevant and could not found a cause of action under an employment contract unless specifically incorporated into the contract.

34. In the *Oganda*, the Court of Appeal stated that:

But the appellant appeals to this court because having found and held that the summary dismissal was unlawful, the learned Judge proceeded to award to the respondent twelve months gross salary as general damages and despite the respondent's repeated admission that he had been paid for the three months salary in lieu of notice. Was the Judge entitled in law to do this?.....

With respect to the learned judge, *the rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise.....as we have said, unless there be a specific*

provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot found a cause of action'(emphasis mine)

35. A second case which affirmed the jurisprudence in the *Oganda* case is Court of Appeal *Nairobi Civil Appeal No. 108 of 2010, Kenya Revenue Authority v Mengina Salim Murgani*, where it was held that:

'it is for the parties to provide in the contract how such organs should operate and how hearings, if any, are to be conducted. A court of law cannot in our view, import into a written contract of service rules of natural justice and the Constitutional provisions relating to the right of hearing'.

36. In my considered view the *Oganda* decision was sound jurisprudence during the life of the Employment Act, Cap 226 which was repealed by the Employment Act, 2007 but because the Respondent's Code of Conduct incorporated natural justice, I need to discuss whether the process was applied in the case of the Claimant.

37. Part 4 of the Respondents Code of Conduct has classified various offences and what a breach of any of those offences would entail. An elaborate process is set out therein.

38. From the pleadings and evidence placed before me I am satisfied that the Respondent followed the procedures set out in the Code of Conduct before dismissing the Claimant. The Claimant was issued with show cause letters and appeared before the Respondent's Disciplinary Committee and therefore it cannot be said that her dismissal was procedurally unfair.

Whether the summary dismissal was Justifiable or lawful

39. Sections 17 of the repealed Employment Act allowed an employee to dispute or question the justifiability or lawfulness of the facts or grounds giving rise to a dismissal. I will therefore now proceed to examine whether the facts given by the Respondent justified the dismissal of the Claimant, or whether the dismissal was lawful.

40. The letter dismissing the Claimant gave the reason as *guilty of conspiracy to defraud which amounts to gross misconduct* necessitating dismissal pursuant to section 7.9 of the Code of Conduct.

41. The Investigations report by the Respondent which is marked serial number 8 in the Respondents List of Documents starting at page 26 noted that the cargo receipt for KAS 957Z/ZC 1405 had been entered as KAS 957Z/**ZC1071**. ZC 1071 was the number for the trailer for KAS 192A. And that this was done by a Mr. David Ruto, the Respondent's Excise Officer then based in Kisumu. The report in its general Comments and Conclusions state that the entire diversion scheme appears to have been hatched at the instance of this Mr. Ruto and a Mr. Andrew Langat of Dama Impex.

42. The report also noted that a Mr. John Kipkorir Kiprotich who was the driver of KAS 957Z held the key to unravel the conspiracy/diversion puzzle and that he should be questioned.

43. As for the Disciplinary Committee, the minutes of the meeting held on 20 June 2007 show that the Committee wanted to get information relating to the source of the complaint leading to the compounding of the truck KAS 192A/ZC 1071 leading to the payment of a fine/penalty of Kshs 160,500/- while taxes of over Kshs 4,500,000/- had been lost through the diversion. The Committee minutes indicate that it was informed by a Mr. R. K. Lubano that it was not procedural for Ms Omari to have handed over the trucks to the Claimant but should have handed the trucks to CPS officers who were familiar with URA operations.

44. The Committee also alluded to the fact that the Investigations file may have been tampered with and called for fresh investigations.

45. The new investigations confirmed that the two trucks had been verified by Ms Praxides Omari with the assistance of a trainee Revenue Officer and seals certified intact for export. Further the report established

that different 'drivers' using driving licenses which turned out not to belong to them had been entered into the outward and inward registers. It further reached the conclusion that Ms Omari did not exercise due diligence in scrutinizing the authenticity of endorsements by Uganda Revenue Authority.

46. The report at page 94 of the Defendant's List of Documents revealed that there were weaknesses at the material time in the systems in place regarding exiting of custom goods.

47. The report also indicated that Mary Wekesa and Charles Otema, who were the Claimant's witnesses, may have been her accomplices. These two witnesses on their part testified that they made appropriate entries to confirm that KAS 192A/ZC 1071 exited and returned to the country through Busia.

48. It is within this background that I have to determine whether the reasons given by the Respondent to dismiss the Claimant were justified or lawful. The Claimant had served with the Respondent for nearly 10 years and before that for nearly 17 years with the Ministry of Finance under which the Customs department then was. She had not been given any warnings previously.

49. It is quite clear to me that a conspiracy to dump the neutral spirits into the country and avoid paying taxes was hatched right before the two trucks left Kisumu and the anomalies in the entries made in form C63s in Kisumu were part of the scheme. The compounding of the offence and allowing the owner of the truck to get off with a paltry or light fine/penalty of Kshs 160,500/- was part of the conspiracy considering the amount of tax lost. The minutes of the Disciplinary Committee show that the Committee recommended that Mary Wekesa and Charles Otema be retired in the Authority's interest while David Ruto be cautioned.

50. In my view the conspiracy involved people high in the Respondents chain ladder and the Claimant was a mere pawn. Considering the contents of the investigation reports by the Respondent that there were weaknesses in the systems in place and also initially exonerating her and then later finding her culpable reinforces my view of involvement of forces higher than the Claimant. Indeed those referred to as her co-conspirators were retired and one person referred to as the one who most likely hatched the plot got a recommendation to be cautioned. The Claimant should not have been treated differently as there was nothing to suggest she was the one who hatched the conspiracy.

51. Considering all these factors and circumstances I find that the decision to summarily dismiss the Claimant was not justifiable. Having found so, I now must proceed to discuss appropriate relief.

Appropriate Relief

52. I will discuss appropriate relief to grant by looking at each head of Claim in the original Plaint as pleaded and prayed for by the Claimant

3 months salary in lieu of notice

53. The Claimant sought a sum of Kshs 160,000/- being three months salary in lieu of notice. The Claimant was dismissed on 17 July 2007. Her pay slip for June 2007 indicated that the basic salary was Kshs 41,665.80. This is the figure which the Respondent also pleaded and admitted in the Supplementary Statement of Response (erroneously marked Claim) filed in Court on 29 August 2011.

54. The Claimant did not establish or refer me to any document or contract entitling her to three months salary in lieu of Notice. Her appointment letter did not expressly provide for notice period. The Code of Conduct at Part 6C.2 dealing with compulsory retirement in the Respondent's Interest provide for payment of three months' salary in lieu of Notice. Having found her dismissal unjustified I would treat her case as retirement in the Respondent's interest for purposes of notice.

55. I would therefore assess three months salary in lieu of Notice in the sum of Kshs 124,997/40.

Unpaid Allowances from July 2005 to December 2008

56.The Claimant also sought payment of *unpaid transport, leave and medical allowances* from July 2005 to December 2008.

57.Evidence before the Court is that the Claimant was dismissed on 17 July 2007. She would not be entitled to any allowances after that date. The question I have to grapple with is whether she has established that she was entitled to transport, leave and medical allowance from July 2005 to 17 July 2007, if at all.

58.The pay slips produced through the Respondent's Supplementary List filed on 29 August 2011 indicate that the Claimant was being paid the sum of Kshs 4000/- per month as transport allowance and therefore this head of claim cannot succeed.

Unpaid salaries from July 2005 to December 2008

59.The Claimant was purportedly instructed not to handle any official documents and to report to the office of the Senior Deputy Commissioner, Human Resources through memo dated 18 July 2005 and exhibited at page 33 of the Claimant's List of Documents. These instructions were revoked through a Memo dated 10 August 2005 from the Senior Assistant Commissioner, Western region and exhibited at page 36 of the Claimant's List of Documents. The Senior Deputy Commissioner, Western region informed the Senior Deputy Commissioner, Human Resources of this on 11 August 2005. Apart from these correspondences, there is no indication that the Claimant was ever interdicted or suspended.

60.In the Respondent's Supplementary Statement of Claim, the Claimant's pay slips from July 2005 to July 2007 have been exhibited and they show that the Claimant was being paid her salary. I therefore find no merit on this head of Claim

Retirement Benefits

61.The letter dismissing the Claimant informed her that she was entitled to retirement benefits according to the Retirement Benefits Act, the Trust Deed and rules of the Respondent's Staff Pension Scheme. This was of course subject to the Claimant clearing with the Respondent which she has not done.

62.To ensure fairness, equity and to meet the ends of justice, and considering my finding that the summary dismissal of the Claimant was not justified, I do hold that the Claimant is entitled to the payment of her benefits inclusive of the Respondent's 100% contribution as of 17 July 2007.

Exemplary damages/Compensation

63.It is trite law that exemplary damages are not payable in cases of breach of employment contract. Exemplary damages are normally awarded where there is oppressive, arbitrary or unconstitutional action by the servants of the government, in cases in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff or in any other case authorized by statute.

64.Section 15(1)(ii) of the repealed Trade Disputes Act empowered the Industrial Court to order or make an award of not more than 12 months compensation in cases where the Court made a determination that a dismissal was wrong instead of reinstatement or in addition to the reinstatement.

65.The Claimant here did not seek reinstatement. In any case considering the time lapse since her dismissal it is my view that an order of reinstatement would not be appropriate.

66.Taking these factors into consideration it is my view that 12 months' compensation would be an appropriate and effective remedy to vindicate the unjustified summary dismissal of the Claimant. I do assess the 12 months' compensation at Kshs 499,980/-

Orders

67. Considering what has been stated herein above the Claimant's case succeeds only to the extent that I do declare that her summary dismissal was not justified and she is awarded:

- (i) Three months' salary in lieu of Notice Kshs 124,997/40
- (ii) 12 months' compensation Kshs 499,980/-
- (iii) Retirements benefits on leaving service inclusive of Respondents 100% contribution as of 17 July 2007.

68. There will be no order as to costs.

Dated, delivered and signed in open Court in Mombasa on this 12th day of April 2013

Justice Radido Stephen

Judge

Appearances

Mr. Anthony Oluoch instructed by

Lumumba & Lumumba Company Advocates

for Claimant

Ms Betty Odundo instructed by

Kenya Revenue Authority

for Respondent