



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NO. 2106 OF 2011

JANE JUMA ALOO CLAIMANT

VERSUS

THE HON. THE ATTORNEY GENERAL RESPONDENT

JUDGEMENT

This is a claim that was filed on 21st December 2011 by the claimant Jane Juma Aloo for a claim of unlawful termination of employment by the respondent, the Public Service Commission for whom the Hon. Attorney General is herein appearing. The respondent filed their defence on 24th February 2012 and with leave filed an amended defence on 1st November 2012. In evidence the claimant gave her sworn statement while the respondent called Mary Nafula Wanyama from Public Service Commission, Grace Njeri Wambugu a Personal Assistant with the Ministry of Foreign Affairs, George Onyango a Records Management officer with the Ministry of Foreign Affairs and Lazarus Opicho, a Police Superintendent, seconded to the Ministry of Foreign Affairs.

In the claim, the claimant states that on 21st June 1984 she was employed by the Public Service Commission (PSC) as a support staff and seconded to the Ministry of Foreign Affairs (MFA) but was on 1st October 2009 terminated and lost all her terminal dues. That this termination was unlawful as she had worked for 24 years, she was not paid her terminal dues or compensation for the unfair termination and thus claims service gratuity amounting to Kshs.400, 752.00 and compensation for lost future earnings amounting to Kshs.2, 604,888.00.

That on 26th February 2009 allegations were made against the claimant by her immediate boss George Onyango to the effect that she had lost a confidential letter given to her on 21st January 2009 for delivery. She was not aware of these allegations on the confidential letter and when she insisted that evidence be shown on how she took possession of it, she was interdicted. That she signed for all the letters she received and when she wrote to the PSC on the harsh decision upon her termination, the PSC confirmed the termination. That she was induced, coerced and misled into writing a letter that implicated her.

The claim is therefore that the respondent's actions were unlawful, irregular and a violation of the claimant's rights and there should be a declaration that she was unfairly terminated for compensation and payment of kshs.3, 005,640.00 together with costs and interest.

In her evidence the claimant stated that upon her employment by PSC, she was seconded to the MFA. On 21st January 2009 she was said to have failed to deliver a confidential letter which was not true since for every delivery she made, her supervisor Grace Wambugu would give her a book to sign and it would be counter-signed in confirmation that indeed she had received the letters for delivery. All letters from her

division for Europe and Commonwealth would be registered by the secretary Grace Wambugu and given to the claimant as the only subordinate staff in this division for delivery. On 21st January, the claimant failed to deliver letters addressed to Emanuel Kisombe, Permanent Secretary Ministry of State for Immigration, Michael Waweru, Commissioner General, Kenya Revenue Authority and Joseph Kinyua, Permanent Secretary Ministry of Finance.

That she never received any letters on 21st January 2009. She was only at the office on this day and there was nothing connecting her to the letters not delivered. On 9th March 2009 she was called by her boss at 5.30 pm, off work hours and forced to sign a letter that was written out and that she was threatened not to leave the office until it is signed. That George Onyango had written this letter. She was interdicted after this before she could be given a chance to defend herself and despite not having a previous disciplinary case, she was summarily dismissed with loss of all her benefits. She has never gone back to her work station and was never issued with a Certificate of Service. The PSC wrote to her to confirm her dismissal.

In cross examination, the claimant confirmed that upon her dismissal, she never made an appeal to the MFA or to PSC. That upon the hearing of her case MFA found that a person like the claimant who had 24 years experience should have ensured all letters given to her were delivered but that she never received any letter to deliver.

In defence, the respondent stated that the claimant was lawfully dismissed from service with effect from 1st April 2009 on account of gross misconduct and thus not entitled to terminal benefits. That due process was followed at arriving in the termination of the claimant noting that on 21st January 2009 the claimant failed to deliver letters addressed to three recipients, where the claimant failed to observe the confidentiality of handling official delivery book where the letters were registered but returned not signed being an indication that there was no delivery. That to date the whereabouts of the letters is unknown and this was a serious omission on the part of the claimant amounting to gross misconduct and thereof liable to severe disciplinary action including dismissal from service.

In evidence, Mary Nafula Wanyama stated that as the PSC Senior Human Resource Officer, and in the claimant's case, she was given a chance to defend herself, the matter was placed before the human resource committee which recommended that the claimant be dismissed. When the PS, MFA forwarded the case to PSC, a decision was taken and conveyed to the officer, the claimant. She was given another chance to defend herself where she lodged an appeal; it was not successful and was informed of the decision.

That the PSC followed due process in arriving at the decision to dismiss the claimant;

- She was given a show cause letter on the offence;
- She was given time to respond;
- The matter was placed before the Ministerial human resource management committee that made a recommendation on the sanction;
- Officer was allowed to appeal; and
- Case referred to PSC to communicate the decision.

Thus the right to be heard was availed to the claimant and thus her case should be dismissed with costs to the respondent.

On cross-examination the witness confirmed that the right to be heard was exercised through written responses by the claimant. That this did not restrict the claimant in any way. Her appeal was in writing but the same was not successful as the dismissal was confirmed. The committee of PSC makes an independent decision on each case as the first decision had been made by the Ministerial human resource committee and the PS confirmed the committee decision.

The second witness, Grace Wambugu, the Personal Assistant at MFA stated that she worked with the claimant in her department of Europe and Commonwealth Division as a subordinate for the division. That

the claimant was dismissed due to misconduct after several letters went missing. On 21st January 2009 she got several letters from the PS Thuita Mwangi for dispatch. These letters were confidential and she placed addresses on the envelope at around 2.30 pm she gave them to the claimant to deliver to various addressees. As the only subordinate in the division, the claimant was the only one to make such deliveries as the division could not use any other person. There was one delivery book and as a practice the name of messenger was not noted because it was known, the division was noted on the cover of this book. Other divisions used a separate book.

Upon receipt of the letters by the claimant, she delivered the ones going to outside town areas through the Mail Office but the one for delivery within town were never delivered. When the witness asked the claimant for the delivery book, she reported that she could not trace it and went looking for it. Later the claimant confirmed that she had made the delivery but the old book was full and needed a new book but after one month, the witness discovered that there were letters given to the claimant but were never delivered. These letters were official and confidential and very urgent with stickers on the envelope to this effect as signed by the PS and thus very important.

The witness knew that the letters were never delivered due to complaints. The security officer Mr. Opicho was asked to investigate and the witness wrote her statement noting that the claimant was supposed to deliver the letters. This was followed up and investigations revealed that the claimant only delivered letters going to outside areas but those for delivery within the city were never delivered.

In cross-examination Grace Wambugu confirmed that on 21st January 2009, the claimant was given seven (7) letters for delivery, the ones going to Aga Khan Development Network, Major General Gichangi and to the PS, Ministry of Water were delivered through the Mail Office but there were three (3) letters to the PS, Ministry of Immigration, Michael Waweru, Joseph Kinyua who had two letters were never delivered. There was a complaint from Mr. Kisombe at the Ministry of Immigration who was expecting communication but never got it from the PS, MFA.

That the subject of the evidence from Grace Wambugu was to confirm that indeed she supervised the claimant, she gave her letters to deliver and a delivery book but these letters never reached their recipients. There were 2 letters to Mr. Kisombe, 1 letter to Michael Waweru of KRA and 2 letters to Joseph Kinyua at the Finance Ministry. These letters were not delivered and the claimant was responsible as the only person responsible within MFA at Europe and Commonwealth division for deliveries.

The third witness was George Onyango the Records Management Officer who worked with the claimant and the overall supervisor in the line of the claimant's duties but Grace Wambugu was the immediate supervisor in the division of Europe and Commonwealth. On 26th February 2009 the claimant was served with an interdiction through his office as the head of the support staff roles. The interdiction was on the grounds that there were letters that she failed to deliver. From their division of work, the claimant was the subordinate staff for Europe and Commonwealth division, Public Affairs and Communication and Exchange divisions. Her duties were to circulate letters, provide tea, and any other duties of support to these divisions. There was shortage of staff and so the claimant was allocated more duties.

That the claimant signed a letter of apology on her failure to deliver the letters, he did not threaten her to write this letter of force her to admit on what had happened to the letters. He was aware that all deliveries made from the MFA were supported by a delivery book. Following investigations, the claimant was interdicted and show cause letter given to her and upon due process she was dismissed. The witness further stated that he got to learn about all these details on 26th February 2009 when he was given the interdiction letter to give to the claimant. He called the claimant together with another colleague Peris Okal who hold similar tasks like the claimant and explained to them about the interdiction letter. The claimant said that on 21st January 2009, she was unwell and she gave the letter for town deliveries to another person to deliver on her behalf. She confirmed to have given the letters to another messenger who did not use the delivery book. Since she had several letters to deliver, she was not aware that the letters she gave to her colleagues were never delivered.

The fourth witness was Lazarus Opicho a Police Superintendent seconded to MFA as head of Security. In

February 2009 he was called by the PS, MFA who told him that there were five letters that were lost in the process of being delivered, they never reached their destination and was asked to follow up and established why these letters were never delivered. He went to the secretary, grace, who gave an update and the circumstances within which she gave them to the claimant upon taking their record. He noted from the delivery book that there were 7 letters, 2 letters to PS, Immigration, Commissioner of KRA, Director of NSIS, Aga Khan Network and 2 letters to PS, Treasury. He established that only two letters were delivered and the letters going to PS, Immigration, and PS Finance and Commissioner KRA were never delivered.

Opicho called the claimant to his office and was candid as to what had happened. She gave her apology and felt sorry about it. That on this day she had a problem with her leg and since it was getting to evening, she asked a cleaner Moses Ingosi to deliver the letter going to Nyayo House to PS, Immigration. She never confirmed if the delivery was made. Moses Ingosi was called in the presence of the claimant and he was very sincere and said that he was given the letter by the claimant to deliver to Nyayo House without the delivery book. He had initially refused but the claimant gave him fare and insisted on him to make the delivery. He was given Kshs.20.00. he went with the letters to Nyayo House but arrived late and found some people outside and asked them if they were staff and he gave them the letter to the PS. He was however not sure if the PS got the letter.

The claimant confirmed that this is what had happened and she did make an apology. On the other letters to PS Finance and Commissioner KRA, the claimant insisted that she had delivered them. Opicho asked the claimant to do a statement as to what had happened, she did and signed. He filed his report and submitted to the PS, MFA.

The issues for determination in this cause are as follows:

- a. **Whether the claimant engaged in gross misconduct thereby justifying summary dismissal.**
- b. **Whether the claimant's termination was fair or unfair;**
- c. **Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.**

On whether the claimant engaged in gross misconduct, the court is guided by the provisions of subsection 44 (3) of the Employment Act, 2007 which provides that an employer may dismiss an employee summarily when the employee has by her conduct indicated that she has fundamentally breached her obligations arising under the contract of service. In the instant case the Respondent has alleged that the claimant as the Office Superintendent at the MFA was responsible for ensuring that all deliveries of letters were done and recorded in a delivery book. That the claimant failed to deliver several letters which were urgent, confidential and official and these failure was a serious omission in the line of duty where the claimant was responsible and hence an act of gross misconduct. That there was wilful neglect of duty and due to this gross misconduct, the claimant was disciplined and there was summary dismissal. The Respondent has also made the allegations as enumerated earlier in this judgment and whose major point of reference is that the claimant was vested with the duty to ensure letters were delivered as directed but failed to perform that duty. The court has examined the contents of the delivery book Appendix 3 in the amended Response noting the deliveries supposed to be made on 21st January 2009. This annexure outline key details that are to be recorded in the schedules hence stipulating the core duties and responsibilities of the claimant. There is a column for;

Date;

Name of addressees;

Messenger's name;

Contents, etc;

Hour dispatched;

Hour received; and

Signature.

Of these details and based on the evidence of Grace Wambugu the supervisor of the claimant, I note the following;

Date was noted as 21/1/09;

Name of addressee, are listed as

- *Maj. Gen Michael Gichangi, CBS, DCO Director General NSIS – Ruaraka Nairobi;*
- *the PS Min. of Water & irrigation Nairobi,*
- *Emmanuel Kisombe Ps-Min. of Immigration Nyayo House Nairobi,*
- *Mr. Michael G. Waweru Comm. General Times Towers Nairobi,*
- *Mr. Joseph Kinyua PS-Finance*

Messenger's name is noted at Emanuel Kisombe PS-Min. Immigration, 2 letters and Mr. Joseph Kinyua PS-Min Finance, 2 letters

I find these as important details hence the outline. Grace Wambugu noted that once she got the letters for delivery from Dr. Sang as directed by the PS Thuita Mwangi, she took note of these letters, did the envelopes and the record and handed them to the claimant for dispatch. If the record submitted by the respondent is anything to go by, then this record of the delivery book as noted by Grace Wambugu is a record that should be taken very seriously. From this record, a diligent officer would have ensured that all the details were recorded as outlined. The mere statement that the claimant was the only subordinate staff at the Europe and Commonwealth Division and hence the only one who delivered letters is a misnomer. As stated the letters to be delivered were urgent, confidential and official. There was the delivery book supposed to record the date, name of addressees, name of messenger, contents, hour of dispatch, hour received and signature. What was contested was this record does not indicate the messenger's name. Nowhere was it stated that it would be the claimant's duty to ensure or ensure proper recoding of the delivery book. The court has also considered the findings of the security officer and Mr. Opicho investigations as directed by the PS, Mwangi Thuita.

Mr. Opicho stated that the claimant admitted and gave a sincere record of what happened on 21st January 2009. That she sent Moses Ingosi to deliver letters to the Ministry of Immigration, Nyayo House. This was contested by the claimant. Moses Ingosi was never called in evidence. This is strange. I found this very strange that a witness who made an admission, a witness almost the same level as the claimant was never called to give evidence as to the role he played in a case where the claimant was accused of gross misconduct yet Opicho had been directed by the PS Mwangi Thuita to make enquiries and give him a report. This is strange that this witness was not called yet the respondent went to great lengths to bring witnesses based abroad to give evidence. Grace Wambugu stated that she was called from Tokyo to give her evidence. George Onyango was called from Geneva. Where was Moses Ingosi? This is the missing link.

Similarly noting the evidence of Mary Wanyama, the procedure used to determine that the alleged non-delivery of letters was categorized as gross misconduct was not submitted. Gross misconduct as outlined under section 44 can be disputed by an employee thus shifting the burden of proof to the party so alleging. Section 44 (4) (C) notes;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

...

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

The duty to show that the acts of omission alleged to have been committed by the claimant did occur was on the respondent. The records in support of this evidence show the contrary. The omission to take a full record of the delivery book that would link the claimant to the alleged lost letters is not there. The witness who would have confirmed that indeed these letters were given to him or other persons was not called. When the claimant contested being the author of the letter indicating that she admitted and made an apology, this should have caused the respondent to go a step further and bring Moses Ingosi as a witness to confirm receipt of the letters from the claimant.

Accordingly the court finds that the claimant did not engaged in gross misconduct and the purported summary dismissal was not justified. The Respondent has failed to produce any reports that show that the claimant was culpable as alleged. The Respondent alleged the reasons for summary dismissal existed but has failed to prove that the reasons indeed existed.

Under subsection 43 (2) of the Employment Act, 2007, the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. The court has found that the claimant was not vested with the duty to ensure that the delivery book was recorded properly noting all the outlined details and thus the claimant did not in any manner involve herself in the delivery, loss of acts of omission with regard to the letters alleged not to have been delivered.

Having failed to prove the reason for the summary dismissal, the court finds that the termination was unfair under Subsection 43(1) of the Employment Act, 2003. Further, in such circumstances, the provisions of Section 41 would suffice and the court finds that this not a proper case for summary dismissal, the claimant would be entitled to a notification and as the case turns out to be, the summary dismissal was invariably unfair.

On the remedies as prayed for in the memorandum of claim, the claimant did not seem keen to pursue the claim for reinstatement. Termination occurred in 2009; the respondent must have hired other officers and would not be proper to order a reinstatement where compensation would be more adequate.

Noting that this was not a proper case for summary dismissal and that the claimant was under a contract of employment with the respondent, termination notice as envisaged under subsection 35(1) (c) of the Employment Act would apply. The court finds that the claimant is entitled to the pay in lieu of notice at one month pay.

The claim for service pay or gratuity is due as under section 35 of the Employment Act. I note from the claimant's pay slip attached to her claim that her dues to NSSF and NHIF were remitted. She therefore becomes ineligible to claim service pay. This will be declined.

Compensation for future earnings would not arise where a claimant has not indicated what mitigating efforts she has gone into in ensuring she remains productive. Despite being out of the employ of the respondent the claimant should have moved on and looked for other employment. The court will award compensation in the alternative. Noting that the claimant had served the respondent for 24 years with no previous record of indiscipline, warning or any misconduct, this court will make an award of the maximum compensation at 12 month pay based on the last salary of the claimant at Kshs.16, 698.00 all amounting to Kshs.200, 376.00.

Judgment is therefore entered for the claimant against the Respondent for:

- a. a declaration that the summary dismissal of employment of the claimant was unfair;**

- i. **compensation for unfair termination amounting to kshs.200,376.00**
- ii. **notice pay at kshs.16,698.00**

total Kshs.21,074.00.

b. Respondent to pay costs of the cause.

Delivered in open court this 18th day of September 2013.

M. Mbaru

Judge

In the presence of

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