



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 216 OF 2015

JOSEPHINE WAMBURA GAKUO.....CLAIMANT

VERSUS

KIRINYAGA WATER AND SANITATION COMPANY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 20th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 25.11.2015 through Magee Wa Magee & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the deployment of the claimant as deputy area manager (Commercial) for Ndia Mutithi (Kandongu) is unreasonable, unlawful, null and void.
- b) An order for cancellation or reversal of the claimant's deployment as deputy area manager (Commercial) for Ndia Mutithi (Kandongu).
- c) A declaration that the warning issued to the claimant vide the letter dated 11.11.2015 is unreasonable, unlawful, null and void.
- d) Costs of the suit.

The claimant filed an amended statement of claim on 08.04.2016. The claimant made additional prayers as follows:

- a) A declaration that the claimant's summary dismissal as per the notice dated 08.01.2016 is unfair, unreasonable, unlawful, null and void.
- b) An order for reinstatement of the claimant to employment to her former position without loss of benefits or salary.
- c) Any further or better relief that the honourable court may deem fit and just.

The memorandum of response was filed on 02.12.2015 through Amolo and Kibanya Advocates. The respondent prayed that the cause be dismissed with costs and the claimant be ordered to report to her position as Deputy Area Manager (Commercial) for Ndia/Mutithi (Kandongu). The respondent filed

amended memorandum of response on 27.09.2016 through Lorraine Oyombe Advocate for the Federation of Kenya Employers. The respondent prayed that the suit be dismissed for lack of merit with costs awarded to the respondent.

The claimant was employed by the respondent as a clerical officer Job Group 6 effective on 01.04.2011. On 25.07.2013 the claimant was promoted to the customer care officer Job Group 4. The claimant is a member of the National Union of Water and Sewerage Employees (NUWASE). The trade union has concluded a recognition and collective agreement with the respondent. At all material times the claimant was a union shop floor representative.

It is the claimant's case that the respondent started to victimise her due to her work as a union representative culminating in the letter dated 06.11.2015 deploying the claimant as Deputy Area Manager (Commercial) for Ndia Mutithi (Kandongu). The claimant's case was that the deployment was a demotion because the designation was at Job Group 5. Further the deployment was in breach of Article 29 of the collective agreement because the claimant had not been consulted and she had not consented to such deployment. Further, the claimant being a person with disability, the deployment would affect her adversely. Thus, the claimant protested the deployment by her internal memo dated 11.11.2015 requesting for the reasons for the deployment and appointment. She stated that she had not been consulted and she was forwarding the case to her trade union as the decision had amounted to breach of her rights as the decision amounted to harassing her as a person with disability. She requested that the decision be stayed pending intervention by the union. On 12.11.2015 the claimant says she became ill and applied for 7 days' leave from 12.11.2015 to 19.11.2015 to resume work on 20.11.2015. On 20.11.2015 the doctor stated that she remains on off duty. Thus on the same date she reported at work to extend her leave but the warning letter dated 11.11.2015 was delivered to her. The warning letter stated that the respondent had made decided that she proceeds on transfer effective 10.11.2015 but she had refused to hand over to the incoming Customer Care Officer and which she was directed to do immediately. In that regard, she was asked to show within 7 days cause why disciplinary action should not be taken against her.

The claimant replied by the letter of 20.11.2015 that she was at the office to extend her leave. That she had not refused to hand over but that she had received the deployment letter on 10.11.2015 and it was necessary that she prepares a comprehensive hand over report in view of the sensitivity of the office. However, she was unwell and she was to start treatment on 12.11.2015.

By the letter dated 20.11.2015 the respondent suspended the claimant from duty for one week on the grounds that she failed to comply with the deployment letter of 06.11.2015, she had failed to reply to the warning letter of 11.11.2015, she deserted duty from 12th to 19th November 2015 on account of filling a leave form but which was not approved, and she had extended her unauthorised leave from 20th November to 27th November 2015. Thus she was suspended from duty from 20th to 27th November 2015 and to face the staff disciplinary committee on 30.11.2015 to exonerate herself. The respondent also issued the letter dated 22.12.2015 being a notice to show cause in view of the said allegation namely, absence from duty without permission from 12.11.2015 to 19.11.2015, 20.11.2015 to 27.11.2015, 7th, 8th, 9th, 10th, 11th, 16th, 17th, 18th, 21st, and 22nd December 2015. The claimant was required to reply in 7 days. The claimant replied by her letter advocates' letter dated 22.12.2015 to the following effect:

- a) The show cause notice was in contempt of court in view of the interim orders issued in present suit.
- b) In December 2015 the claimant had reported on duty other than on 9th and 10th when she applied for leave through her supervisor to attend a funeral of her first cousin but the respondent's managing director had held the application forms but while verbally telling the claimant she had permission to

attend the funeral. On 22nd she had been at work and had participated in the staff end of year party as was scheduled. It was demanded that the show cause notice be withdrawn in 3 days to avert contempt of court proceedings.

The respondent wrote to the advocates the letter dated 29.12. 2015 stating that the court orders issued on 25.11.2015 were about the demotion in view of the transfer and the show cause letter of 22.12.2015 required the claimant to answer the specific charges therein and she was being invited to a disciplinary hearing on 05.01.2016 at 11.00am at the respondent's Laboratory Office. She was advised about the entitlement to be accompanied by a workmate or a shop floor union representative.

The disciplinary hearing took place and the claimant's employment was terminated by the letter of summary dismissal dated 08.01.2016. The letter referred to the show cause letter of 22.12.2015 and the disciplinary hearing held on 05.01.2015 attended by the claimant and the union representatives and the claimant was summarily dismissed from employment effective 08.01.2016. The grounds for termination were absence from duty from 19.11.2015 to 27.12.2015 by filling leave application forms but failing to receive management's approval to proceed on leave or extend the same; on 7th to 11th December 2015 and 16th to 18th December 2015 she failed to provide evidence of signed staff attendance register or testimony by a witness that she had been on duty. She was to be paid terminal benefits in accordance with the collective agreement.

The claimant testified to support her case. The respondent failed to file a witness statement or list of witnesses and at the close of the claimant's case, the court ordered that the respondent was deemed to have opted not to call a witness because filing a witness statement and calling undisclosed witness long after the claimant had closed her case would have been irreparably prejudicial to the claimant's case. The court directed parties to file submissions and the claimant complied but the respondent filed an application to reopen the case for hearing. The respondent failed to serve that application as was directed and ordered by the court; and the court ordered the matter to proceed for judgment in line with the court's earlier orders in that regard and which had not been reviewed or set aside.

The court has considered the pleadings, the evidence, the submissions and all the circumstances of the case and makes the following findings on the issues in dispute:

1. There is no dispute that prior to transfer of the claimant by the respondent per the letter dated 06.11.2015, the claimant had been appointed to the position of Customer Care Officer Job Group 4 as per the letter dated 25.-07.2013. It is not in dispute that the deployment letter appointed the claimant to the position of Deputy Area Manager (Commercial). There is also no dispute that the respondent and the claimant's trade union entered a memorandum of agreement on 23.11.2014 thus, **"Following the successful conclusion of the parties CBA it is hereby agreed that the parties here below shall hold a review of the job grading and designations of the organisation within 30 days of signing the CBA. Adjustment will be done to the affected employees. The parties shall endeavour to meet at the earliest possible date within that period."** It is the respondent's case that the deployment and appointment as conveyed was within the reorganisation as agreed with the claimant's union. The respondent filed the relevant staff inventory prepared as per the agreement with union and the claimant fell to be redeployed and appointed as was done. In so far as the claimant's remunerative pay, basic salary and monthly allowances would not be reduced consequential to the appointment and the redeployment, the court returns that the appointment and redeployment was within the parties' memorandum of agreement and the claimant being a member and shop floor representative of the union, the court returns that the memorandum of agreement between the union and the claimant was binding upon the claimant as duly incorporated in her individual contract of service. Thus, the court returns that the deployment and appointment of the claimant to the position of Deputy Area Manager

(Commercial) did not amount to unlawful or illegal demotion or a breach of the contract of employment. The claimant lamented that the deployment was in contravention of Article 29 on transfers and which provides thus, **“The Managing Director may transfer an officer from one department to another, at the officer’s request or otherwise with the concurrence of the Head of Department concerned and provided that such a transfer does not amount to demotion or substantial change of the officer’s letter of appointment.”** The court has considered the job description for Customer Care Officer and for Deputy Area Manager (Commercial) and returns that the jobs were substantially similar and about keeping accurate records dealing with customers’ concerns and generally dealing with complaints. Thus, the overriding consideration would be that the claimant is not demoted in the process of the deployment and appointment. The court has considered the deployment and appointment letter dated 06.11.2015 and returns that it was not stated in the letter that the claimant’s remuneration would vary to her disadvantage and the job grade was not stated in the letter. The court has also revisited Article 12 of the collective agreement about job titles and the job of Deputy Area Manager (Commercial) is not listed and the court finds that it cannot be said conclusively that the job is at Job Grade 5 as was alleged by the claimant and that the claimant could possibly serve in the job as appointed and at Job Grade 4 that she had already attained. The court returns accordingly.

2. The court returns that the summary dismissal as conveyed to the claimant by the letter dated 08.01.2016 was unfair for want of a valid reason. In particular the court returns that the claimant has showed that on the days she was alleged to have been absent from duty without permission she had in fact submitted a request for leave on the prescribed form but the respondent had declined to grant approval even in circumstances whereby the supervisor or the managing director had given verbal permission. In alternative, the claimant has showed that in December 2015 she had been on duty on the dates in issue. In any event, the respondent failed to call a witness and failed to discharge the burden to prove the grounds for the termination as provided in section 47(5) of the Employment Act, 2007 as read with section 43 of the Act. It is curious that at the disciplinary hearing and also in the dismissal letter the respondent had unfairly shifted that burden by requiring the claimant to produce records of her signing of the check in register whereas the respondent carried the statutory burden to establish the grounds and to keep the employees’ records. The court has considered the proceedings of the disciplinary hearing and finds that there is no record of the respondent’s deliberations that found the claimant culpable and there is no record or minute of the decision that purportedly found that the claimant be summarily dismissed and as was subsequently conveyed in the letter of summary dismissal. The court returns that the termination had been unfair for want of a valid reason.

3. The court has considered the prayer for reinstatement. The court has considered the factors in section 49 (4) of the Act. The claimant is willing to continue in employment. The termination ensued at the time the claimant had initiated a valid grievance about her deployment as per the present case and in circumstances whereby the court had issued temporary orders sustaining the relationship between the parties. The respondent is a well established employer and there is no established bar to the claimant’s continued employment. The court has considered the claimant’s submission that she is a person with disability duly registered with the National Council for Persons with Disabilities. The court has considered the likely circumstance that she may find it considerably difficult to obtain alternative employment or to adjust to alternative gainful engagement. The court has considered that the claimant did not contribute to her termination in any established substantial manner. Accordingly, the court returns that the claimant is entitled to reinstatement in the employment of the respondent in the position of Deputy Area Manager (Commercial) Job Grade 4 personal to the claimant without loss of pay or benefits and effective 08.01.2016.

4. The court has considered the parties’ margins of success and returns that the respondent will pay 75% of the claimant’s costs of the suit.

In conclusion, the suit is hereby determined and judgment entered for the parties for:

a) The declaration that the deployment and appointment of the claimant by the respondent by the letter dated 06.11.2015 as Deputy Area Manager (Commercial) was not unlawful or in breach of the contract of employment but was in line with the memorandum of agreement between the respondent and the claimant's trade union dated 22.11.2014.

b) The declaration that the summary dismissal of the claimant as conveyed in the respondent's letter dated 08.01.2016 was unfair, unreasonable, unlawful, and null and void.

c) The claimant is hereby reinstated in the employment of the respondent in the position of Deputy Area Manager (Commercial) Job Grade 4 personal to the claimant with full pay and without loss of pay or benefits and effective 08.01.2016 – and the claimant to report to the respondent's managing director not later than 05.01.2018 for deployment and assignment of duties as appropriate.

d) Any outstanding back payment consequential to order (c) above be effected by the respondent by 15.01.2018 failing interest at court rates be payable thereon from the date of this judgment till the date of full payment.

e) The respondent to pay the claimant's 75% costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Wednesday, 20th December, 2017**.

BYRAM ONGAYA

JUDGE



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