



Case Number:	Cause 435 of 2013
Date Delivered:	03 Mar 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Monica Mbaru
Citation:	Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR
Advocates:	Enonda, Makoloo, Makori & Co Advocates for the claimant Albert Mumma and Co. Advocates for the Respondent
Case Summary:	<p style="text-align: center;"><u>Reinstatement of an employee back to employment after summary dismissal Mary Chemweno Kiptui v Kenya Pipeline Company Limited</u></p> <p style="text-align: center;">In the Industrial Court of Kenya at Nairobi</p> <p style="text-align: center;">Cause No. 435 of 2013</p> <p style="text-align: center;">M Mbaru, J</p> <p style="text-align: center;">March 3, 2014</p> <p style="text-align: center;">Reported by Teddy Musiga and Getrude Serem</p> <p>The claimant sued for unlawful termination of employment by the respondent (Kenya Pipeline Company Ltd). The claimant sought orders of reinstatement which the court granted.</p> <p>Issues</p>

1. Whether the termination of the employment of the claimant was lawful.
2. Whether or not there exist circumstances in which the court may order reinstatement of an employee whose services have been terminated.;

Employment law - termination of employment - unfair termination of employment - the procedure for dismissal in the event that an employee has been charged - valid reasons for termination of employment – claim for reinstatement to employment - Employment Act sections 41 and 43

Section 41 of the employment Act

“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.”

Section 43 of the Employment Act

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) 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.”

Held

1. Whatever reason or reasons that arose to cause an employer to terminate the services of an employee, that employee had to be taken through the mandatory process as outlined under section 41 of the

Employment Act. Those principles applied in cases for termination as well as in cases that warrant summary dismissal.

2. Section 41 of the Employment Act was couched in mandatory terms. Where an employer failed to follow those mandatory provisions, whatever outcome of the process was bound to be unfair as the affected employee had not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation was dire where such an employee's service was terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee had to be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.
3. Invariably, before an employer could exercise their right to terminate the contract of an employee, there had to be a valid reason or reasons that touched on grounds of misconduct, poor performance or physical incapacity. Once that was established the employee had to be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It was established as best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where that procedure was followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee would have had would be with regard to substantive issues only.
4. Summary dismissal on the other hand was largely at the instance of an employer. The standards applicable therefore were of a higher nature as the process was prone to abuse as the employer was in a more superior position than an employee.

Summary dismissal could take place when an employer terminated the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.

5. However, even in cases of serious breach of a contract as under section 44(3) or on committing acts as outlined under section 44(4) of an employee being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all those serious acts, such as an employee was subject to be treated as under section 41 of the Employment Act with regard to being accorded a hearing.
6. Under section 43(2) the reason or reasons for termination of a contract were 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. However those reason or reasons had to be addressed before the termination notice was issued and subjected to a hearing to establish if the employee had a defence that was worth consideration. The reasons could never be given after the termination had taken effect. That would have been an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.
7. A suspension therefore was ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period was a time available to an employer to control as the employee could be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.

The claimant (Mary Chemweno Kiptui) was reinstated to her position or to an equally suitable position with the respondent, with all her back salary, allowances, benefits, and any other legal dues within 30 days from the date of this judgement;

The claimant was to be paid all unpaid telephone allowances unpaid during the entire period of her suspension by the respondent being 17th February 2009 to 29th June 2012 being Kshs.23,000.00 per month;

The matter was to be mentioned after 35 days to confirm compliance; and

Costs of the suit awarded to the claimant

Cases

East Africa

1. *Kenya Ports Authority v Silas Obengele* Civil Appeal No 38 of 2005–(Applied)

2. *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* Cause No 74 of 2013 –(Explained)

3. *Kenya Union of Domestic Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) v Nairobi Club* Cause No 77(N) of 2005 –(Explained)

4. *Matemu, Mumo v Trusted Society of Human Rights Alliance & others* Civil Appeal No 290 of 2012 –(Followed)

5. *Nato, Joseph Sitati v Kenya Ports authority* Commercial Suit No 94 of 2006–(Explained)

6. *Washeke, Elizabeth and 62 others v Airtel Networks (k) Ltd and another* Cause No 1972 of 2012 –(Followed)

South Africa

	<p>1. <i>Avril Elizabeth Home for the mentally Handicapped v CCMA and others</i> [2006] 15 LC 1.11.4; [2006] 9 BLLR 833 –(Explained)</p> <p>2. <i>National Union of Mineworkers and another v Commission for Conciliation Mediation and Arbitration & 2 others</i> Case No JR 2512 of 2007 –(Explained)</p> <p>Australia</p> <p>1. <i>Concut Pty Ltd v Worrell</i> [2000] HCA 64 –(Explained)</p> <p>Statutes</p> <p>East Africa</p> <p>1. Anti-Corruption and Economic Crimes Act (cap 65) section 62(1)–(Interpreted)</p> <p>2. Employment Act, 2007 (Act No 11 of 2007) sections 5(7)(c); 40; 41(1); 43(1); 44(2)(c),(3(4)); 45; 49(4); 50–(Interpreted)</p> <p>3. Retirement Benefits Authority Act, 1997 (Act No 3 of 1997) In general–(Interpreted)</p> <p>4. State Corporations Act (cap 446) section 13–(Interpreted)</p> <p>Advocates</p> <p>1. Enonda, makoloo, Makori & Co Advocates for the Claimant</p> <p>2. Albert Mumma & Co Advocates for the Respondent</p>
Court Division:	Industrial Court
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-

Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 435 OF 2013

MARY CHEMWENO KIPTUI CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED RESPONDENT

JUDGEMENT

Enonda, Makoloo, Makori & Co Advocates for the claimant

Albert Mumma and Co. Advocates for the Respondent

1. This is a claim dated 2nd April 2013 by the claimant Mary Chemweno Kiptui claiming unfair termination of employment by the respondent Kenya Pipeline Ltd. The respondent filed their defence dated 29th May 2013 and admitted that they had employed the claimant but was terminated in February 2009 when investigations carried out by Kenya Anti-Corruption Commission (KACC) established that the claimant had abused her office and engaged in activities which were detrimental to the respondent's interests. At the hearing the claimant gave her sworn evidence in support of her claim, the respondent indicated their wish to call two witnesses but later opted not to call any witness. Both parties agreed to file their written submission dated 3rd February 2014 and 24th February 2014 for the claimant and respondent respectively.

Claimant's case

2. The claimant was employed by the respondent as a Legal Officer on 1st May 1995 and was promoted through the ranks to Company Secretary on 1st January 1999. On 3rd March 2009 the claimant was charged and arraigned in court in Chief Magistrate's Court in Anti-Corruption Criminal Case No. 7 of 2009 (CMCC) and as a result the respondent suspended the claimant and put her on half pay under the provisions of section 62 of the Anti-Corruption and Economic Crimes Act. While under suspension the claimant was summoned to her place of work severally to attend to various duties especially vide letter issued to her dated 18th may 2009, 15th June 2009 and 7th February 2011.

3. On 6th October 2009 the claimant was redeployed to the Pensions department but remained under suspension, she was given a pay increase of 15% effective 1st July 2010 but the claimant was later terminated on 29th June 2012 on the grounds of public interest. The claimant requested for a review of her termination as the same was unprocedural and with no substance, but this appeal was dismissed on 15th August 2012. Efforts to seek out the respondent to reverse the termination were fruitless, she was advised to resign as an option noting the Anti-Corruption case was ongoing for long but the claimant gave a conditional offer to tender her resignation on condition that her termination is lifted to enable her access her terminal benefits. The respondent did not reply to the offer. The respondent also refused to unconditionally reinstate the claimant.

4. At the time of termination, the claimant was earning half salary amounting to kshs.216, 160.00 together with allowances. While on suspension, the allowances were withdrawn especially telephone allowances of kshs.23, 400.00 per month. The claim is therefore that;

A) An order directing that the respondent to unconditionally reinstate the claimant to their employment services and former position with the respondent without any loss of benefits or seniority and without any conditionality

B) An order for the claimant to be adequately compensated for time lost out of employment

C) [claim has abated]

D) In the alternative and without any prejudice to the foregoing, the respondent be ordered to fully compensate the claimant for unfair, unlawful and wrongful termination of the employment services of the claimant with all attendant benefits as pleaded

5. In evidence the claimant stated that upon being employed by the respondent in 1995 as the Legal Officer she rose through the ranks to the Company Secretary. In February 2009 she was charged by the Anti-Corruption Commission on various charges and in March 2009 the respondent wrote to her stating that they had to comply with the law and was thus sent on suspension where she received half pay and all her allowances pending the criminal charges. During the suspension the claimant received her half pay but not the allowances which were withheld by the respondent. The claimant was also called to the office severally to give evidence in a case where the respondent needed her to do so. She appeared before the Chief Magistrate's Court in case between the Respondent versus William Ruto where the claimant appeared as a witness in her capacity as the respondent Company Secretary.

6. on 6th October 2009 the claimant was recalled and deployed to the Pensions Department, the salary was increased by 15% from 1st July 2010 but on 29th June 2012 the claimant was terminated on public interest. Pay in lieu of notice was paid and pension as per respondent retirement pension scheme. There was no hearing or prior notice and noting the reasons given for the termination, the claimant went into shock. On 11th July 2012 the claimant wrote seeking a review of her termination on the basis that the termination was against the law. As the respondent Company Secretary the claimant was aware of the respondent human resource policy and there was nothing that stated one could be terminated on 'public interest' and if this was not reviewed, the impact of it was to lock the claimant from any other public employment as under Chapter 6 of the Constitution and thus needed to have the termination reviewed. On 15th August 2012 the respondent and noted that the Board had made a decision confirming the termination of the claimant.

7. The claimant convened several meetings to have her case and termination addressed and have an amicable solution and thus held a meeting with the Minister for Energy, met the respondent Managing Director who indicated that the respondent did not wish to keep her in their employ and were willing to pay the claimant her dues and in the alternative the claimant was asked to tender her resignation. From these meetings the claimant wrote a conditional resignation with several conditions that;

- That the letter of termination be withdrawn;
- that she be paid all her salaries up to 30th April 2013;
- leave days due be paid for;

- that she be paid the telephone allowances not remitted during suspension;
- that bonus due at the end of the year be paid;
- there be pay of the total pension due;
- the half pay due and not paid during suspension; and
- That her notice of three months be accepted.

8. At this time the claimant had a car loan and requested that the balance due be offset from her terminal dues. However the respondent did not respond to the offer to settle the matter amicably and despite having discussed the same with the respondent Managing Director. On 29th January 2013 the respondent Managing Director called the claimant with information that the Board had confirmed her termination.

9. At the time of termination the claimant had not been paid her half salary of Kshs.216, 160 together with Kshs.15, 000.00 for telephone allowance and Kshs.8, 000.00 landline provision. These dues have not been paid for the entire period the claimant was on suspension and now seeks the court to direct the respondent to pay the same.

10. With regard to the anti-corruption case, the matter has been ongoing before the court; the claimant filed a petition to the High Court challenging charges against her which has not been concluded. The respondent is aware of these proceedings before the Magistrate's Court and the High Court pending arbitration. The charges of abuse of office or that the claimant used her office to wrongly confer benefits to herself therefore remain as allegations not yet confirmed by the courts as a conviction and thus the claimant is innocent.

11. That the claimant wanted a reinstatement but due to the wrangles ongoing within the respondent, they were not keen to have the matter amicably resolved. Due to the termination and non-payment of the terminal dues, the claimant is financially low and the respondent is taking advantage of the situation.

12. In cross-examination the claimant confirmed that in 2003 all managers at the respondent were sent on compulsory leave and for 2 ½ months she was away. This followed allegation of corruption on the procurement of ICT services. She was recalled and resumed duty and all her salary was paid. In 2003 December the claimant was again sent on compulsory leave following in a case of lending money but the claimant was later recalled and resumed duty. In February 2009 the claimant was arrested following investigations by KACC on the reasons that the claimant being the respondent Company Secretary illegally allocated herself a house which created a conflict of interest but the claimant defended herself that there was an allocating committee that reviewed all applications from those who wanted the houses, this committee comprised of the claimant in her capacity as the Company Secretary, the Manager, finance Officer, Human Resource officer and the Managing Director. The criminal charges that were levelled against the claimant are ongoing. That the claimant was redeployed to the Pensions department on 6th October 2009 while a new company secretary was appointment.

13. The respondent in Further communication to the claimant stated that her suspension has taken long due to ongoing criminal hearing been severally adjourned and further that they have undertaken organisational change and abolished the office the claimant was holding in the Pensions Department by outsourcing the same in compliance with the RBA Act. Thus they cannot take her back as there is no

position to go back to and therefore the claimant should not be reinstated. To this the claimant stated that she should be reinstated as her termination was unprocedural and efforts to settle the matter amicably were rejected by the respondent. In the alternative that her dues be paid together with damages and compensation for unfair termination.

Respondent's Case

14. In defence the respondent stated that as a state corporation they have sound employment policies hence the claimant while in their employ rose through the ranks as they are concerned with their staff career development and do not mistreat or terminate any employee unless there is a valid and compelling reasons to do so. In February 2009 there were investigations by a third party the KACC which established that the claimant had abused her office by engaging in activities which were primarily been detrimental to respondent's operations and interests. The claimant failed to comply with the directions of the respondent Board as the company secretary with the mandate to ensure all lawful and procedural operations were enforced and as a result KACC charged the claimant with acts of corruption in Case No. 7 of 2009. This was after elaborate and extensive investigations. The corruption and criminal offences were committed against the respondent and the Kenyan public who finance the respondent activities as a public body which was contrary to the terms and conditions of the claimant employment contract. On 2nd March 2009 the claimant was suspended.

15. When the claimant was charged in CMCC 7 of 2009 she filed a petition in the High Court being JR 230 of 2009 and got an order of stay halting the hearing of CMCC 7 of 2009. The stay was extended severally and 4 years later the matters are not concluded yet the claimant is earning without undertaking work. The suspension was unduly long and with no prospects to finalise the cases, the respondent took the decision to terminate the claimant in public interest noting that public funds were being used to pay the claimant yet she was not working. The termination was fair after following due process noting it was over 4 years the claimant was not keen to see progress in her criminal trial. The claimant faces serious criminal cases, these offences were against the respondent and the witnesses to be called are employees of the respondent thus her termination was based on sound reasons. The respondent offered to pay all terminal dues owing.

16. That the criminal charges the claimant faces pose serious questions with regard to her integrity as it is abuse of office and improper confer of benefit by accepting her own offer to purchase from property of the respondent being house number G5-15 at Karura estate in disregard of the guidelines of the Board of Directors. The respondent in Further communication to the claimant state that her suspension has taken long due to ongoing criminal hearing been severally adjourned and further that they have undertaken organisational change and abolished the office the claimant was holding in the Pensions Department by outsourcing the same in compliance with the RBA Act.

17. The respondent chose not to call any witness in support of their case.

Submissions

18. Both parties filed their written submissions in support of the evidence and case. The claimant on the one hand submitted that section 43(1) of the Employment Act create a burden on an employer to provide proof and or reasons for terminating an employee which reasons must then be assessed by the court to establish that they are valid. There was no evidence by the respondent in this regard. Based on the evidence submitted by the claimant, the reasons for her suspension that related to ongoing criminal hearing before the CMCC, she has not been found guilty and remain innocent. While the claimant remained on suspension, she was severally called to undertake duties with regard to her position with

the respondent; She was redeployed to the Pensions Department on 6th October 2009; on 1st July 2011 her salary was increased with 15%, all these while her suspension subsisted but on 7th July 2012 the claimant was served with a letter of termination on public interest. The claimant made efforts to settle the matter amicably but the respondent was adamant that she should resign and get terminal dues or go to court whereupon the claimant gave a conditional resignation but the respondent was not keen and thus confirmed the termination. The claim is therefore that the claimant should be paid her telephone allowances, half pay not remitted during suspension, and compensation for unfair termination.

19. The claimant further submitted that her summary dismissal and termination on public interest was unfair as this did not follow the provisions of section 44(3) of the Employment Act as the respondent failed to prove that the claimant ought to have been summarily dismissed. That the provisions of section 62 of the anti-Corruption and Economic Crimes Act are clear as a person charged under this law can be suspended from duty on half pay with full allowances until they are acquitted or discharged without jeopardising the employee based on any other law. The claimant was thus to remain under suspension until the conclusion of the criminal charges before court. That under section 41(1) of the Employment Act an employee is to be given a hearing before termination and where this apply a notice must be issued as under the terms and conditions of employment. In this case the claimant was not issued with notice or given a hearing thus violating the terms of her contract, the law and natural justice which was unfair.

20. That the respondent has intimated in the defence that the claimant was terminated as a result of operational requirements by virtue of section 45 of the Employment Act. However termination that result from operational requirements or due to redundancy has an outlined procedure that was not followed by the respondent and cannot be found to rely on such provisions as the letter of termination issued to the claimant was clear as to the reason for termination being that of public interest. That in any event the provisions of section 40 of the Employment Act is clear on the steps to be addressed by the employer who has to terminate an employer due to redundancy and or arising from operational requirement. This was not followed in the claimant's case.

21. That in the claimant's case she should be reinstated to her position with the respondent and be paid all her dues together with all benefits due and the financial losses she has incurred since the termination by the respondent, payment for leave, back pay and compensation due to the anguish the claimant has gone through. To support these submissions, the claimant cited the case of *KUDHEIHA versus Nairobi Club, Cause No. 77(N) of 2005* where the court ordered a reinstatement and back pay up to the time of termination and for the time lost after termination. In the case of *Kenya Medical Research Institute and Union of National Research and Allied Institutes Staff of Kenya*, the court held in a case of wrongful and procedural recruitment of employees that led to termination, it was not the mistake of an employee but a malpractice that should have been addressed by the respondent as the employees had done nothing wrong. The court thus reinstated the employees.

22. The claimant further submitted that the she should be paid damages together with reinstatement as held in the case of *Kenya Ports Authority versus Silas Obegole* where the court awarded damages where a person is wrongfully dismissed the financial loss that person has suffered as a result of the dismissal should be paid. That the emolument payable should factor the retirement age of the subject employee as held in *Joseph Sitati NATO versus Kenya Ports authority [2010] eKLR*. That in this case the claimant should be reinstated and awarded all her back pay. That in the alternative to the court directing a reinstatement and back pay the court should direct the respondent to pay the claimant 5 months' salary in lieu of notice, leave earned until judgement is made, half pay deducted during suspension, pay from termination to the date of judgement, withheld telephone allowances of Kshs.23,000 from 17th February 2009 to date, bonuses and other incentives due from 2011 to date, redundancy pay for each year of service, general damages for breach of contract, and full pension due per the pension scheme.

23. On the other part, the respondent submitted that the claimant was their company secretary until February 2009 when KACC carried out investigations and established that the claimant had abused her office and engaged in activities which were primarily detrimental to the respondent operations and interests. The claimant had also failed to comply with the respondent Board directions despite the fact that she was the company secretary who was to ensure lawful and procedural compliance of the respondent's decisions and operations. The claimant was thus charged in CMCC No. 7 of 2009 after elaborate and extensive investigations done by an independent third party KACC. Following these criminal charges on 2nd March 2009 the respondent suspended the claimant which lasted for over 4 years during which time the claimant received half pay and did not attend work. The suspension could not be indefinite and a period of 4 years is a long time and therefore the respondent took the decision to terminate the claimant's employment and informed her of the same. The suspension had arisen after the claimant acquired property of the respondent at a throw away price which fact cannot be wished away since this was the foundation of the criminal case before court and this case of the claimant's termination.

24. The respondent also submitted that the termination of the claimant was done on public interest in consideration of the foregoing and due to loss of public funds applied to pay the claimant salary and allowances without delivery of any services. The termination was fair and lawful after following due process by the respondent giving the claimant 4 years to resolve the criminal case she faced and on half pay but the claimant stayed the criminal proceedings to ensure that the hearing of the lower court did not precede.

25. The grounds of termination followed the prosecution and suspension of the claimant from the manner with which she sold the employer's property to herself and also failed to comply with employer directions despite being the company secretary. The result was the criminal charges in CMCC No. 7 of 2009 following KACC investigations as an independent body. The claimant did not attend to any duties while under suspension as alleged in the memorandum of claim and in evidence, she was only summoned to address discrepancies discovered in matters handled while on duty and the respondent had the duty to investigate any employee is suspected of having contravened any rules and regulations. While the claimant was on suspension, she remained the employee of the respondent and on 6th October 2009 she was deployed at pensions department.

26. The respondent also submitted that in the letter of termination, the respondent offered to pay the claimant in lieu of notice, full salary for the month worked, leave days, pension dues and half pay deducted while under suspension. That the termination was triggered and necessitated by the claimant's own actions and thus resulted in summary dismissal as under section 44(3) of the Employment Act, the conduct of the claimant necessitated her termination. The claimant was negligent in the performance of her duties and her employment was no longer sustainable. The offences committed by the claimant for which criminal charges was levelled against her in CMCC No. 7 of 2009 justify the summary dismissal under section 44(4) of the Employment Act as there was wilful neglect of duty creating reasonable and sufficient grounds for summary dismissal.

27. To support these submissions, the respondent relied on the case of *Concut Pty Ltd versus Worrell [2000] HCA 64* and the finding that the principle that a contracting party does not intend to abandon any remedies for breach of the contract arising from operation of the law. The claimant herein was negligent in her duties and section 44(2) (c) of the Employment Act was applied in her case. Section 13 of the State Corporations Act that regulates the disposal of property was not followed, in this case the claimant acted in bad faith towards the respondent and thus her dismissal. The claimant was the master of her own misfortune and should not benefit from it as she has not offered to return the illegally acquired property of the respondent and cannot therefore not be absolved of liability.

28. In the case of *National Union of Mineworkers and Another and the Commission for Conciliation Mediation and Arbitration, case No. JR 2512 of 2007* where the court observed that employment relationship can only exist in an atmosphere of trust and subject to an employee acting in good faith. When the respondent lost property due to the actions of the claimant, it was property to take disciplinary action and summarily dismiss her. The conduct of the claimant was regulated by the rules and regulations of the respondent. the claimant being the company secretary ought to have acted with due diligence in undertaking her work and in this case her handling of the respondent property was questionable as she made an offer to herself to buy the respondent property and went ahead to allocate herself a house which was completely acceptable. Being the legal advice of the respondent, the claimant ought to have conducted herself in a professional manner.

29. The respondent also submitted that the claimant abused her office when she engaged in acts that were inherently high risk and unethical which was corruption and once faced with criminal charges ensured that the process was stalled so as to continue benefiting without rendering any services tot eh respondent yet she was on half salary. As the person tasked by the respondent to advice on lawful processes, the claimant became a beneficiary of her abuse of office using her position to allocate the respondent's property to herself. This illegal act was addressed through summary dismissal. Upon this misconduct the respondent applied the rules and regulations with a suspension and later summary dismissal.

30. That the claimant was given a fair hearing as under section 41 of the Employment Act. The respondent was able to explain to the claimant the reasons for termination and was given time to make a representation. The wrong committed was brought to the attention of the claimant, she made a response in form of her defence which the respondent gave a consideration and decided that the termination was proper. To support these submission the respondent relied on the South Africa case of *Avril Elizabeth Home for the mentally Handicapped v CCMA and Others [2006] 15 LC 1.114* where an employer dismissed and employee implicated in theft and the test of probability was applied and the substantive view of the court was to establish if an employee had done their work well and an action of theft in itself was not the proper thing for an employee to do. In this case, the respondent could not retain the claimant in their employ noting her action in abuse of office and illegal allocation of respondent property to herself. She was therefore terminated in the public interest as the respondent is a state corporation governed by the State Corporations Act on how disposal of assets are to be done to avoid misappropriation but in this case the claimant used her office to illegal acquire prime property.

31. The claimant also submitted that they complied with section 43(1) of the Employment Act, there were valid reasons for termination and the claimant was aware of these reasons and does not despite that she was charged in CMCC No. 7 of 2009. On the reliefs sought the respondent state that it is now over 5 years since the suspension of the claimant, the trust relationship between employee and employer is irretrievably damaged and the respondent is unable to work with her again. No pay is due since termination as the claimant has not rendered any service to the respondent and there is nothing in compensation as the termination was lawful and due process was applied. The only benefits payable are pay in lieu of notice, leave days not used and pension due. The claimant contributed to her termination and thus should not be awarded as claimed but as per the termination letter. The claim should therefore be dismissed with costs to the respondent.

Determination of the issues

In the examination of the entire claim before court and the defence on record several questions emerge that must be addressed;

Whether there was a valid reason for the termination of the claimant;

Whether there is a good defence in terms of the respondent reorganisation so as to rely on the provisions of section 40 of the Employment Act;

Whether the claimant's termination was unfair in the circumstances of this case; and

Whether there are any remedies due

32. The industrial Court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the strict provisions of the law and to avoid making the same invalid. This Court in the case of *Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited Cause No. 74 of 2013* held that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrant summary dismissal. The section states;

41. (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.

[Emphasis added].

33. Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.

34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.

35. Summary dismissal on the other hand is largely at the instance of an employer. The standard applicable therefore are of a higher nature as this process is prone to abuse as the employer is in a more superior position than an employee. Summary dismissal can take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term. However, even in cases of serious breach of a contract as under section 44(3) or on committing acts as outlined under section 44(4) of an employee

being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious acts, such an employee is subject to be treated as under section 41 of the Employment Act with regard to being accorded a hearing.

36. 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. However these reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.

37. A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.

38. In this case, the claimant was on 2nd March 2009 sent on suspension by the respondent for the reasons stated that;

Following the 4th Board meeting held on 27th February 2009 it was decided that you be suspended from duty with effect from 17th February 2009 in line with the Anti-Corruption and Economic Crimes Act, section 62(1).

During this period of suspension you will not attend your place of work and must keep off the Company's operational premises unless requested otherwise. You will be entitled to 50% of your basic salary and full allowances during the period of suspension as itemised below:-

1. *Basic salary 50% Kshs.185,100*
2. *House allowance Kshs.58,500*
3. *Commuter allowance kshs.10, 000.*
4. *Responsibility allowance kshs.20,000*
5. *Entertainment allowance kshs.25,000*
6. *Security allowance Kshs.54,000*

...

39. With this communication, it was the duty of the respondent within the employer and employee contract of employment and as under the Employment Act to summon the claimant back to work and

give further directions. In this case, though the suspension was subject to the provisions of section 62(1) of the Anti-Corruption and Economic Crimes Act. This section provides;

A public officer who is charged with Corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.

40. Therefore due to alleged acts of misconduct and in pursuance to the provisions of the Anti-Corruption and Economic Crimes Act, the claimant was suspended from duty. While still under suspension, on 6th October 2009, the respondent wrote to the claimant thus;

During the 15th board of Directors' meeting that was held on 24th September 2009, the Board resolved to deploy you to Pensions. You will remain on suspension until further notice in view of the corruption proceedings filed against you.

41. This affirms the position that the respondent had the control and disposition to deal with the claimant as their employee and give directions with regard to the suspension period. This deployment to Pensions was done while the charges the claimant faced were ongoing and the defence that the claimant was being paid for not rendering any services thus not correct.

42. As things subsisted, on 29th June 2012, the claimant was terminated from her employment. This letter outlined the following;

TERMINATION OF EMPLOYMENT

We write to inform you of the Board of Director's decision that your employment be terminated in Public Interest. Accordingly, your employment is hereby terminated with effect from the date of this letter.

You will therefore be paid the following:-

...

43. Is this the procedure envisaged as under section 41 of the Employment Act" Did the respondent as the employer follow this procedure" Far from it. From 17th February 2009 to 29th June 2012, the claimant was still under suspension. The respondent Board of Directors met and made a decision to terminate the claimant on the reason of *public interest*. It was not pleaded or adduced in evidence as to the process employed by the respondent to arrive at this *public interest* reason of termination. The respondent has not claimed to have given notice or accorded the claimant the right to be heard before the issuance of the letter dated 29th June 2012. This is absurd as the very purpose of due process, natural justice and fair labour practices now demand that before a termination, even in a case where the employer is ready and willing to pay in lieu of notice, a hearing must be conducted where an employee is given a fair chance to defend self in the presence of a union representative and if not unionised, in the presence of a fellow employee of the employees' choice. This is a provision core to fair labour practices that each party to an employment relationship must respect. This right was espoused in detail by this Court in the case of *Elizabeth Washeke and others versus Airtel (k) Ltd and Another Cause No 1972 of 2012*. Section 41 of the Employment Act is mandatory as outlined above.

44. Going back to the reason given for the termination, this Court is as under section 43 of the Employment Act bound to look at the validity of the reason or reasons for termination;

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the

reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) 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.

45. Without going into the merits or demerits of the criminal case the claimant face before the subordinate court or the stay proceeding before the Judicial Review division of the High Court, the duty rests upon an employer to prove the reason or reasons for the termination and failure to do so such termination shall be deemed to have been unfair. In this case, the claimant closed her case on 10th June 2013. Counsel for the respondent stated that he had two witnesses to call and the court directed parties to attend court for defence hearing on 10th September 2013. On 3rd December the matter was in court when the respondent Counsel indicated that he did not wish to call any evidence. Further directions were taken on further documents to be filed and parties also agreed to file their written submissions. The case closed with the respondent well aware of the case against them but opted not to call any evidence. This was a grave omission noting that the claimant was terminated without being afforded a hearing hence a good basis that the same was uncalled for and ultimately unfair.

46. In this case, the respondent undertook a summary procedure that was supposed to have been procedurally addressed as a termination. The reason given as *public interest* is subjective as the respondent failed to adduce evidence setting out the criteria applied in arriving at such a hash reason that adversely affected the employment of the claimant. Even in a case where the respondent in submissions relied on criminal proceeding ongoing for a long time, there was already in motion a process addressing that scenario as the claimant was already on suspension on half pay and had been recalled to work and placed at the Pensions. Therefore as under section 43 of the Employment Act, the reason amounting to *public interest* rested on the respondent as the employer to proof that indeed there existed such a reason at 29th June 2012 to warrant an adverse action being taken against the claimant. The duty was on the respondent to demonstrate to this Court that there existed valid grounds to justify the termination of the claimant. I find no such material submitted before this court that establishes there was a *public interest* reason or ground to justify the termination of the claimant. In the final analysis, this reason of *public interest* remains vague, ambiguous and fails to articulate the provisions of the law that the respondent relied upon to arrive at such a reason. The principles governing public interest are as outlined by the Court of Appeal in the case of *Mumo Matemu versus Trusted Society of Human Rights Alliance et al [2013] eKLR*. The law one seeks to apply in pursuance to the protection of the *public interest* must be clearly outlined for the court to give a just and reasonable assessment of the same in arriving at its decision.

47. the respondent therefore Having failed to prove the reason for the termination, this court finds that the termination of the claimant was unfair under Subsection 43(1) of the Employment Act. Further, in such circumstances, Section 41 would apply and the court finds that this not having been a proper case for summary dismissal, the claimant would be entitled to a notification and hearing on the alleged grounds of misconduct, poor performance or negligence failing which, as the case turns out to be, the termination was invariably unfair

48. On the question whether this was a case for reorganisation or redundancy, this must be seen in the light of the remedy sought by the claimant seeking reinstatement. The respondent in defence stated that the position the claimant occupied at Pension has now been outsourced and is no longer available. This therefore pre-empts an order directing reinstatement. However, looking at the provisions of section 40 of the Employment Act, where an employer due to operational requirements is reorganising their

business and need to lay off staff, there are outlined procedures that must be adhered to. There was no evidence by the respondent indicating the process undertaken in arriving at the reorganisation that rendered the position of the claimant redundant. The claimant was the legal officer of the respondent, moved through the ranks and without prompting and while on suspension was deployed to Pensions department. It was not stated how many other employees were affected or whether they were laid off. To therefore give such a defence is to ignore the procedure and the substantive issues involved in a reorganisation process. The respondent cannot therefore not be found to rely on such a ground.

Remedies

49. The claimant is seeking a reinstatement to her position and back pay. This Court notes that the allegations made against the claimant are serious and required thorough investigations before the same could be used to terminate her employment. Nothing prevented the respondent from conducting their own interrogation and pursue recovery of alleged illegally acquired property by the claimant and to rely on criminal charges the claimant is facing in CMCC No. 7 of 2009 to terminate her employment is an unfair labour practice. During the pendency of CMCC No. 7 of 2009 the claimant was recalled and redeployed to pensions, a department of the respondent hence an indication that the respondent has the capacity and different positions they can deploy the claimant.

50. The termination of an employee is a penalty with serious consequences that must be done with outmost regard and notice to the affected employee, who should be granted a reasonable opportunity to give a defence. Based on submissions and documents on record, I find there was no proper enquiry on the part of the respondent in this case. The termination was therefore done without observance of the respondents' rules of procedure, contrary to public interest that the respondent officers are bound to protect and the guidelines on disciplinary procedures for public officers.

51. The claimant has served the respondent since 1995 faithfully. The Court is cognisant of the claimant long service with the respondent, has been diligent and faithful and that this is one exceptional case to order specific performance. this follows an enquiry as to the precedent conditions applicable in a case where reinstatement is sought, section 49(4) of the Employment Act. The claimant has a legitimate expectation of a reinstatement. Termination was on 29th June 2013 a time within the three (3) years rule when reinstatement can be considered.

52. For the above reasons I have come to the conclusion that the claimant's employment as Company Secretary of the respondent was unfair and unlawfully terminated. Being so terminated, the law is well settled in this respect under sections 49 and 50 of the Employment Act, that in the clearest cases of unfair and unlawful termination of employment and based on the best wishes of the employee, the Court may order a reinstatement without loss of back salary, benefits and privileges.

53. The respondent letter of suspension dated 17th February 2009 and outlined above [paragraph 38] the terms are clearly set out. The claimant was entitled to her telephone allowances together with other dues. Failure to pay these allowances would therefore not find any justification. The claimant is therefore to receive all her unpaid telephone allowances not remitted during the suspension period.

Accordingly, I enter judgement for the claimant as against the respondent and order that:

(a) The claimant Mary Chemweno Kiptui is hereby reinstated to her position or an equally suitable position with the respondent, with all her back salary, allowances, benefits, and any other legal dues within 30 days from the date of this judgement;

(b)The claimant shall be paid all unpaid telephone allowances unpaid during the entire period of her suspension by the respondent being 17th February 2009 to 29th June 2012 being Kshs.23,000.00 per month;

(c) There will be mention after 35 days to confirm compliance; and

(d) Costs of the suit awarded to the claimant

Dated and delivered at Nairobi this 3rd day of March, 2014.

Monica Mbaru

Judge

In the presence of:

Court Assistant:

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