



Koigi v Nakuru Water & Sanitation Services Co Ltd (Employment and Labour Relations Cause E001 of 2023) [2023] KEELRC 1508 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1508 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2023**

**HS WASILWA, J
JUNE 15, 2023**

BETWEEN

CLEMENT MBURU KOIGI CLAIMANT

AND

NAKURU WATER & SANITATION SERVICES CO LTD RESPONDENT

JUDGMENT

1. The Claimant instituted the Claim herein vide a Memorandum of Claim dated 3rd January, 2023 alleging to have been unlawfully, wrongfully, unfairly and unconstitutionally suspended from his employment in violation of his right to fair labour practices, fair administrative actions and rules of Natural justice. In the claim, he prayed for the following reliefs;-
 - i. A declaration that the suspension of the Claimant from employment by the Respondent was wrongful, unlawful, procedurally unfair and unconstitutional hence null and void ab initio.
 - ii. An order directing the Respondent to unconditionally lift the suspension of the Claimant from employment and the Claimant be immediately reinstated with no loss of seniority, privileges, salaries, allowances and benefits.
 - iii. An order directing the Respondent to immediately pay the Claimant's withheld emoluments during his period of suspension.
 - iv. An order of permanent injunction restraining the Respondent from terminating the employment of the Claimant either by itself, its employees, its servants, and/or agents.
 - v. An order for compensation by way of general and/or punitive damages to the Claimant for unfair and unlawful suspension.
 - vi. Costs of the Claim.



- vii. Interests at court rates on all the payments above if awarded, from the date of filing of this Claim until payment in full.
- viii. Any other or further relief that the Court may deem fit to grant in the interest of justice.

Claimant's case.

2. The claimant states that he was employed by the Respondent by the letter of appointment dated 30th June, 2022 to the position of Legal officer with effect from 1st August, 2022. His gross salary was Kshs 108, 152, made up of basic salary of Kshs 67,792, House allowance of Kshs 35,360, Commuter allowance of Kshs 5,000 among other benefits.
3. That he took over the said office and served the Respondent till November, when he received a letter dated 29th November, 2022 placing him on suspension but that no reason was given for the suspension, neither did the letter give any timelines for the said suspension.
4. After serving the suspension notice for a month without any communication from the Respondent, the claimant became apprehensive that the suspension will run till the end of his contract. Further that being on suspension meant that he was paid half salary which exposed him to financial embarrassments as he was unable to meet his financial needs. Therefore, that his right to dignity was violated.
5. During hearing the claimant testified as CW-1 and adopted his witness statement of 3rd January, 2023 that reiterated the contents herein above and produced the list of documents which were marked as Exhibit 1 to 3 respectively.
6. Upon cross examination, he testified that he is the Respondent's Legal officer and that he knew Kennedy Ndegwa and that before his death he had handed over his office as the Acting Administrative Officer to him. He admitted that the suspension period according to the HR policy is to last 90 days however that he filed this suit a month after the Suspension. He also admitted that the Respondent has a prerogative to suspend its employees but that the Respondent flawed the procedure in failing to inform him the charges he was facing in the suspension and also failing to subject him to disciplinary hearing.
7. On re-examination, the claimant stated that he was not informed of the reason for suspending him from employment.

Respondent's case.

8. The Respondent entered appearance on the 19th January, 2023 and filed a response to claim dated 16th March, 2023 admitting to employing the claimant on the terms indicated therein but denied illegally placing the claimant on suspension.
9. The Respondent stated that the claimant was only suspended from employment as an administrative prerogative to allow for internal investigations and disciplinary process in accordance with the [Employment Act](#) and having satisfied itself of the provisions of Article 41 (1) of [the Constitution](#).
10. It was submitted that the claimant is in breach of the principles of justice, equity and fair procedure as he never issued any demand notice but wishes to harvest with avarice from the Respondent while he was paid all his dues before and during suspension.
11. The Respondent also denied the jurisdiction of this Honourable Court in so far as the Claimant has not exhausted internal dispute resolution mechanisms. Further that the claimant is not entitled to the prayers sought in the Memorandum of Claim.



12. The Respondent did not call any witness in support of its case.

Claimant's Submissions.

13. The claimant submitted on two issues; Whether the suspension of the Claimant was unlawful, illegal, unfair and unconstitutional and whether the orders sought should be granted.
14. On the first issues, the claimant submitted that the *Employment Act*, 2007 does not have any provision regulating the suspension of employees by an employer. An employer is therefore free to formulate its procedures/policies provided they do not violate or threaten the freedoms and rights of its employees. Similarly, that the Respondent herein formulated its own procedures on suspension and reduced them in the Human Resource and Administration Policy and Procedures Manual (HR Policy). However, during the whole trial the Respondent did not point out under which section of the HR Policy the suspension was based on.
15. He argued that in the HR policy, there are only two places that allow for suspension of employees. Clause 8.2.1 which addresses issues of minor misconduct by an employee, which conduct include; Idling or loitering during working hours, Habitual lateness or early departure from place of work without approval of the supervisor, abetting misconduct, Failure to account for advance monies within the time limit specified and Poor performance due to lack of conscientiousness, carelessness or unreliability. In the event that an employee commits any of the above offenses the disciplinary procedure is as follows;
- i. The employee will be issued with an oral warning pointing out the nature of the offence is communicated to the employee.
 - ii. If no improvement is shown, a written warning will be issued and will form part of the employee's personal record for one year and the shop steward of the union shall be informed accordingly.
 - iii. If after the written warning, no improvement is shown by the employee, a second written warning will be issued and in case of union staff the union Branch Secretary shall be copied.
 - iv. Issuance of a third written warning could result in the employee's suspension and/or subsequent dismissal.
 - v. Provided that an employee completes one year from the date of second warning without further misconduct, any warning entered in his/her employment record shall be cancelled.
 - vi. The duration for suspension shall not exceed 60 days and the affected officer(s) will be informed of the outcome of his/her case immediately thereafter. The disciplinary committee shall ensure the cases are deliberated and completed within the stipulated period. If the case is not completed within the above stipulated duration due to the inability of the officer concerned failing to present himself/herself to the committee. The committee will take any disciplinary action to conclude the case.
 - vii. The Committee may at its sole discretion recommend termination of service or other disciplinary measures as it deems fit."
16. Based on that, the claimant submitted that the Respondent did not inform the Claimant whether he committed or was found to have committed any minor misconduct. But only that the suspension was its administrative prerogative. Furthermore, that the Respondent did not produce the warning



letter that was issued to the Claimant disclosing the kind of offense committed thus thwarting their allegation.

17. The other section that provides for suspension is clause 9.2 which states as follows;

- “(i) Where in the opinion of the Management an officer has been found guilty of an act or omission incompatible with the due and faithful discharge of his duties, the officer may be suspended from duty until the matter has been investigated. The maximum period of suspension shall be ninety (90) days and the officer shall be paid full house allowance, medical benefits and half (½) basic salary.
- (ii) Where criminal proceedings which involve Company#s interest have been instituted against an officer the head of Department may, subject to the provisions of any Act or Rule for the time being in force suspend such officer from duty without pay until the criminal proceedings have been concluded.
 - a. An officer who has been suspended pending the conclusion of criminal proceedings shall not be dismissed on any charge which raises a substantially similar issue to that on which he has been acquitted by the court.
 - b. Where an officer who has been suspended reinstated he shall be entitle to receive full pay in respect of the period suspension.”

18. Similarly, that under this clause, there must be a reason behind the suspension and that reason ought to be communicated to the employee. Which the Respondent failed to inform the Claimant which reason informed the suspension. During trial, the Respondent also did not lead any evidence on the reasons for the suspension, affirming the claimant’s allegation that there was no reason to warrant the suspension. Therefore, by suspending the Claimant in the way it did, the Respondent violated the claimant’s constitutional freedoms and rights enshrined in Articles 25 (c), 28, 41 and 47 of the Constitution. Further that the Respondent did not give the claimant an opportunity to be heard before the suspension in violation of Article 25(c) of the Constitution.

19. To support this argument, the claimant relied on the case of MWK & another v attorney General & 3 others [2017] eKLR asserted that without dignity, human life is substantially diminished. It said:

“In the South African case of S v Makwanyane, O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms: - The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3.”

20. Accordingly, that, the suspension of the Claimant exposed him to financial embarrassment as he was unable to meet his financial obligations. All these were an attack on his right to human dignity. Additionally, that the claimant was to be subjected to administrative action that is expedient and be given reason for the suspension. In this they relied on the Court of Appeal case in Judicial Service



Commission v Mbalu Mutava & another [2015] eKLR where the Court had an opportunity to express itself on the implications of Article 47 of *the Constitution*. It, thus, held:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

21. The claimant submitted in conclusion that in as much as the Respondent is the employer and has the upper hand, it still ought to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of the Claimant in the Bill of Rights.
22. On whether orders sought should issue, the claimant submitted that the fundamental freedoms and rights are the framework for social, economic and cultural policies. Furthermore, Article 19 (2) of *the Constitution* states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Similarly, that having suspended the claimant without any reason and procedure, the suspension is unfair for all intents and purposes.
23. The claimant submitted also that the *Employment Act* is silent on the remedies available for wrongful and unlawful suspension. However, Article 23 (3) of *the Constitution* provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including an order for compensation which can either be general or punitive as held by the Court of Appeal in Peter Ndegwa Kiai t/s Pema Wines & Spirits v Attorney General 7 2 Others (Civil Appeal 243 of 2017) [2021] KCEA 328 (KLR) (17 December 2021) (Judgment) stated that:

“ Articles 22 and 23 of *the Constitution* grants the High Court authority to enforce and uphold the Bill of Rights in claims of infringements of rights, and to grant appropriate relief, including an order for compensation. *The Constitution* does not define the term compensation, and recourse is in this regard had to the definition in Black’s Law Dictionary Tenth Edition at page 343 which is the “payment of damages or a other act that a court orders to be done by a person who has caused injury to another.”

The Court further gave the conditions that would allow a court to award general damages. It said:

“ General damages are given for losses that the law will presume are natural and probable consequence of a wrong, and may be given for a loss that is incapable of precise estimation, such as pain and suffering or loss of reputation.”

24. It was submitted that the relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004.

„...An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra



dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.#”

25. Similarly, that the violation of the Claimant’s freedoms and rights was an affront to his dignity which caused him pain and suffering which suffering is incapable of estimation but suggested a sum of Kshs 700,000 as compensation basing their case on the case of *Cosmas M Nzau & 2 Others v Honourable Attorney General* [2013] eKLR, the Claimants were each awarded general damages of Kshs. 800,000/-. This was after the court found that their employer was malicious in instituting criminal proceedings against them when it ought not to have instituted the same. They had also been suspended during the criminal proceedings. The court in awarding the said sum held that it was mindful of the anxiety, annoyance and other inconveniences that attended their prosecution.

26. The Claimant urged this Court to allow the claim as prayed.

Respondent’s Submissions.

27. The Respondent submitted on two issues; Whether the court can intervene and/ or interfere with an employer’s internal disciplinary proceedings and whether the Claimant is entitled to prayers as sought.

28. On the first issues, the Respondent invited this Court to take cognizance of Claimant’s admission of the prerogative of the Respondent to suspend the claimant as an administrative action to allow for internal investigations. Which suspension is an an administrative action imposed on him as an employee. Accordingly, this Court should be reluctant to intervene in an employer’s internal disciplinary process of its employee until the Respondent has run its course, except in exceptional circumstances – that is where grave injustice might result or where justice might not by other means be attained or when the process is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course. To support this the Respondent relied on the case of *Rosemary Waitherero Mburu VS Kenya Airways Limited* [2020] eklr which reiterated the same principle as follows;-

“Court are reluctant to interfere with an employer’s internal disciplinary process unless it is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course.”

29. They also relied on the case of *MTM –Versus- KIE Limited & Another* [2020] eklr where the court held that;

“Courts have held that Courts will interfere with the internal disciplinary action only when the process is flawed. The interference will thus be to be put back on truck the disciplinary process but not to do away with it all together.”

30. Accordingly, that that the decision to suspend the Claimant was not to the detriment of the Claimant but brought about by the Claimant’s conduct that might have led to the death of the Respondent’s employee, one Kenneth Ndegwa (deceased) who died shortly after his interaction with the Claimant. It was argued that the Claimant admitted having interacted with one Kenneth Ndegwa (deceased) two days preceding his death and by extension knowledge of at the reasons leading to her suspension which was a day after the news of death of one Kenneth Ndegwa (deceased). Although the same was not expressly indicated in the said letter of suspension. He added that the death of Kenneth Ndegwa (deceased) is a critical/sensitive subject whereas the investigations into the conduct of the Claimant leading to the said death was underway, the Respondent was weary that if the Claimant remained



in office he will interfere with on-going investigations, forcing them to suspend the claimant. Such suspension ought to be for a reasonable amount of time as was held in *Samson Omwoyo versus Maasai Mara University & Another Cause No.2367 of 2016* the court held as follows;

“... the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern.”

31. It was Submitted that the the Claimant did not allow the investigations to start off before filing the present suit barely a month into suspension, which month was a December holiday period. Further that The internal disciplinary hearing has not yet commenced against the Claimant, therefore the suit herein challenging disciplinary process/procedure which has not yet began is premature and pre-emptive. It was argued that it is only upon conclusion of the hearing of the internal disciplinary process that the Claimant can claim any infringement of his right to fair hearing and fair administrative process and this court can only intervene when the Claimant has justified that the Respondent is proceeding in an illegal manner, contrary to the procedure provided by the law. In this they relied on the case of *Geoffrey Mworira v Water Resources Management Authority [2015] eKLR Ongaya J* expressed himself as follows: -

“The court will sparingly interfere in the employer’s entitlement to perform any human resource functions such as ... disciplinary control ... To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the constitution* or legislation; or in breach of the agreement between the parties; or in manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

32. Based on the arguments above, the Respondent submitted that the Court has no jurisdiction to interfere with internal disciplinary process and when such interference is called for the court will not stop the process altogether but will only be limited to putting the process to the right course by directing that the Respondent follows due process accordingly and the Claimant should submit to a fresh, legal disciplinary process.
33. On whether the reliefs sought should, issues, the Respondent submitted that the claimant has sought for damages for alleged violation of his constitution rights and freedoms, when he has not particularized and demonstrated how the said rights have been violated to warrant award of compensation. In this they relied on the case of *Standard Group Limited v Jenny Luesby [2018] eKLR* where the Court of Appeal emphasized the need to plead and prove violations of constitutional rights as follows;

“So long as an employee can plead and prove breach of a constitutional right within the context of the employees’ contract of employment or demonstrate that he is entitled to damages in circumstances as contemplated under the *Employment and Labour Relations Court Act*, over and above those awardable for unlawful termination, we see no impediment for the trial Court granting such relief”.

34. Similarly, that the claimant failed to plead that a constitutional right had been violated or breached setting out the relevant particulars of the violation and the extent of the violation or breach, Neither did he led cogent evidence of the alleged violation neither was he cross examined on the said violations. Further that he to demonstrate that the payment of half of his salary subjected him to financial



embarrassment or that his lifestyle changed as a result of the Respondent action. In the absence of such evidence the claim for general damages on this basis ought to fall. In this they relied on the case of *Wekesa v Multimedia University of Kenya* (Cause 1682 of 2016) [2022] KEELRC 1507 (KLR) (13 June 2022) (Judgment) where Dr. Jacob Gakeri J emphasized that;

“the Claimant was duty bound and to demonstrate how the inaction by the Respondent affected him or amounted to psychological torture.”

35. On the prayer seeking to restrain the Respondent from terminating her contract of employment, the Respondent submitted that no evidence or demonstration of any actions taken by the Respondent that are likely to threaten the claimant’s employment, thus the prayers sought is not viable. In this they relied on the case of *Wekesa v Multimedia University of Kenya* (supra) where Dr. Jacob Gakeri J held that

“For a Court of law to make a prospective order such as the one sought by the Claimant there must be credible and cogent evidence pointing to the possibility of the employer interfering or threatening the contract of service in question which is not the case here. This is buttressed by the Claimant’s confirmation that after reinstatement by the Court the Claimant has been in the employment of the Respondent and no issue had arisen. For these reasons the prayer is declined.”

36. It was argued that the Claimant has duly returned back to work and has been paid his back wages as directed by the Court. Moreover, that the prayer for payment of the claimant’s withheld emoluments during his period of suspension has been settled. For these reasons the court should also decline to prayer on payment of withheld emoluments.

37. In conclusion, the Respondent urged this Court to find that the Claimant has, on a balance of probability, failed to demonstrate that the court should interfere with a disciplinary process which has not yet started or that he is entitled to prayers as sought and dismiss the suit with costs.

38. I have examined the evidence and submissions of the parties herein. The gist of this claim is what the claimant avers is an unlawful suspension by the respondent without valid reasons and without following due process.

39. The claimant submitted that the procedure to be followed by the respondent before suspension is 2 pronged.

1. Where a number of infractions and warnings have been issued to an employee over a period of 1 year.
2. Where there is a criminal offence committed and the employee has been charged or investigations are on going.

40. In the case of the claimant, the reason for the suspension were not indicated in his suspension letter dated 29th November, 2022.

41. The letter APP CMK 2 simply read as follows;-

“Re: Suspension

This is to inform you that you are hereby suspended from duty effective from the date of this letter”.



42. There is no indication that there was any investigation being done. The length of the suspension was not also stated. The claimant had also not been charged with any criminal case.
43. In the circumstances, the respondent chose to suspend the claimant from duty without following due procedure.
44. The respondent didn't call any witnesses in their favour. They however submitted that the suspension was lawful and that the claimant rushed to court without awaiting completion of internal disciplinary processes.
45. This court has an obligation to ensure the law is followed and this court would be reluctant to interfere with an employer's prerogative to institute disciplinary processes against its employees.
46. It is however trite law that an employer is bound by its own internal disciplinary procedures as stated in the HR manual or policy document. Where an employer however chooses to flout the law and procedure, the court is well within its jurisdiction to stop the illegality in order to protect rights of the employees.
47. In *Geoffrey Mworira Vs Water Resources Management Authority (2015)* eklr Ongaya J opined as follows;

“The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process”.

48. The law as it stands should be followed. I however find the respondent proceeded against the claimant unlawfully and unfairly and it is therefore fair and just that this court stops the illegality and put everything on the right course.
49. It is therefore my finding that the claim by the claimant is merited and is therefore allowed as follows;
 1. A declaration that the suspension of the Claimant from employment by the Respondent was wrongful, unlawful, procedurally unfair and unconstitutional hence null and void ab initio.
 2. An order directing the Respondent to unconditionally lift the suspension of the Claimant from employment and the Claimant be immediately reinstated with no loss of seniority, privileges, salaries, allowances and benefits.
 3. An order directing the Respondent to immediately pay the Claimant's withheld emoluments during his period of suspension.
 4. An order restraining the respondents from terminating the services of the claimant based on the suspension letter dated 29th November, 2022.
 5. An order of compensation equivalent to 1 month's salary.
 6. The respondent will pay costs of this suit.



DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF JUNE, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Koigi for Claimant – present

Chepkurui for Respondent – present

Court Assistant - Edna

