



Muchoki v Nakuru Water & Sanitation Services Co. Ltd (Employment and Labour Relations Cause E002 of 2023) [2023] KEELRC 1428 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1428 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E002 OF 2023**

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

BETWEEN

CARDITOR WANJIRU MUCHOKI 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 unfairly and unlawfully suspended from employment, which suspension has victimized, harassed and frustrated her. In her Claim, she 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. An order for compensation by way of general punitive damages to the Claimant for mental and psychological distress.



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

Claimant's case.

2. The claimant avers that she was employed by the Respondent in the year 2009 as a Human Resource assistant and served in that position till 2013 when she was promoted to acting Human Resource officer and in 2018 she was confirmed to the position of Human Resource officer.
3. The claimant served the Respondent so diligently that she was once again promoted to be the acting Human Resource and Administration Manager in 2020 as they company source for a substantive holder.
4. In mid, 2022, the Respondent advertised for the substantive position of Human Resource and Administrative manager position which the claimant applied for, was shortlisted, interviewed and emerged the best. She was appointed to the said position by a letter of anointment dated 29th June, 2022.
5. The claimant stated that her salary as the Human Resource and administration manager was Kshs 397,000 per month, comprising of Basic salary of Kshs 262,000, House allowance of Kshs 80,000, Fuel allowance of Kshs 30,000, non-practicing allowance of Kshs 10,000, entertainment allowance of Kshs 15,000 among other benefits attached to the said position.
6. She served her employer until 29th November, 2022 when she received a letter suspending her from duty with immediate effect. No reasons were given for the said suspension, neither did they given the eventual consequence of the said suspension. The letter of suspension did not also indicate the timelines of the suspension.
7. Due to the suspension, her salary was cut by half exposing her to financial constrains considering that she had other financial commitments. Furthermore, that she was an expecting mother while on suspension causing her more anxiety that affected her health and that of her unborn child.
8. During hearing the claimant testified as CW-1 and adopted her witness statement of 3.1.2023 and relied on the list of documents which were marked as Exhibits 1-5 respectively.
9. Upon cross examination she testified that she is the Human Resource and Administration manager at the Respondent, a position that she held from 1st July, 2022. She confirmed that she knew Kennedy Ndegwa, the assistant accountant, internal Audit, who died on 28th November, 2022 but that she did not communicate his death. She stated that the suspension is to last for a maximum of 90 days which had not lapsed at the time of filling this case. She also stated that they work over December holiday. She stated that she filed this case because the Suspension was not justified.

Respondent's case.

10. The Respondent entered appearance on 19th January, 2023 and filed a response to claim on the 16th March, 2023, admitting to employing the claimant on the terms indicated in the contract and the claim herein but denied suspending the claimant illegally stating that the suspension was effected as an administrative prerogative.



11. It is averred that the claimant was suspended in accordance with the law to allow for investigations and disciplinary process which in the events are concluded in favour of the claimant then she was to be reinstated back to employment with back wages.
12. The Respondent stated that the claimant was paid half salary on suspension as provided for under the law that required employer to pay an employee half salary on suspension, therefore that it acted in accordance with the law.
13. The Respondent also challenged the jurisdiction of this Court on the basis that the claimant has not exhausted all internal dispute resolution mechanism and the suit herein has been filed prematurely.
14. The Respondent did not call any witnesses in support of its case.

Claimant's Submissions.

15. 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.
16. 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.
17. 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.”
18. Based on that, the claimant submitted that the Respondent did not inform the Claimant whether she committed or was found to have committed any minor misconduct. But only that the suspension was its administrative prerogative to suspend the Claimant. Furthermore, that the Respondent did not adduce any warning letter that was issued to the Claimant disclosing a minor misconduct had been committed, confirming that indeed the claimant did not commit any offense under this clause.
19. 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.”
20. 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 the reason for her 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 Constitution.
21. 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.”



22. Accordingly that, the suspension of the Claimant without reason for an indefinite period, blocked her right to sharpen her skills in the work place and placed her on half salary, exposing her to financial embarrassment since she was unable to meet her financial obligations. All these, he argued was an attack on her right to human dignity as held in the Court of Appeal decision in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR which 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.”

23. The claimant submitted 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.

24. On whether orders sought should issues, 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 intends and purposes.

25. 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.

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 v 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.”

26. Similarly, that the violation of the Claimant’s freedoms and rights was an affront to her dignity. This affront caused her pain and suffering which suffering is incapable of estimation but suggested compensation of Kshs 700,000 basing their case on the case of *Cosmas M Nzau & 2 Others v Honourable Attorney General* [2013] eKLR, in which 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.
27. The Claimant urged this Court to allow the claim as prayed.

Respondent’s Submissions.

28. 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.
29. On the first issues, the Respondent invited this Court to take cognizance of Claimant’s admission of the prerogative of the Respondent to suspend its employees as an administrative action to allow for internal investigations. He argued that suspension is an administrative action imposed on the claimant as an employee. Accordingly, that 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 Waittherero Mburu v Kenya Airways Limited* (2020) eKLR. I 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.”

30. They also relied on the case of *MTM v 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.”

31. 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 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 that informed the investigations into the conduct of the Claimant in connection to the said death because the Respondent was weary that if the Claimant remained in office she will interfere with on-going investigations. He stated that 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.”

32. Similarly, that 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 commenced 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 her 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.”

33. 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 to follow due process accordingly and the Claimant should submit to a fresh, legal disciplinary process.
34. On whether the reliefs sought should issue, the Respondent submitted that the claimant has sought for damages for alleged violation of her constitution rights and freedoms, when she had not particularized and demonstrated how the said rights have been violated to warrant any 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”.



35. 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. He argued that the claimant did not lead cogent evidence of the alleged violation neither was she cross examined on the said violations. Further that she failed to demonstrate that the Respondent's conduct amounted to mental and psychological distress to be entitled to damages as prayed. In the absence of such evidence of the alleged deterioration of health or mental and psychological distress one of the foundations of the claim for general damages has collapsed. 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.”

36. 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. 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.”

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

38. 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 she is entitled to prayers as sought and dismiss the suit with costs.

39. 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.

40. 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.

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



42. 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”.

43. 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.

44. In the circumstances, the respondent chose to suspend the claimant from duty without following due procedure.

45. 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.

46. 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.

47. 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.

48. In *Geofrey Mworira v 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”.

49. 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.

50. 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

