Kutto v County Government of Uasin Gishu & another (Cause 46 of 2020) [2023] KEELRC 2580 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2580 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE 46 OF 2020

MA ONYANGO, J

OCTOBER 5, 2023

BETWEEN

CECILIA CHERONO KUTTO ..... CLAIMANT

AND

COUNTY GOVERNMENT OF UASIN GISHU ..... 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD UASIN GISHU COUNTY GOVERNMENT ..... 2ND RESPONDENT

JUDGMENT

1. The Claimant herein filed a Statement of Claim on 10th November 2020 against the Respondent seeking the following reliefs;

    a. A declaration that the Respondent's action of withholding the Claimant's half salary is unlawful, unprocedural and unfair

    b. An order be issued compelling the Respondents to forthwith pay the Claimant's salary areas at Ksh 1,421,280 plus Kshs 45,000 being "corona allowance" for the months of June, July and August.

    c. Costs of this suit and interests at court rates from time of filing suit until payment in full

    d. That an order be issued directing the Respondents or any party directly working with the Claimant not to subject the Claimant to victimization or loss of benefits

    e. Judgment in the sum of Kshs 1,446,280

    f. Any other relief that the Honourable court deems fit to grant.

2. In the Statement of Claim, the Claimant avers that she is employed by the 1st Respondent as a senior nurse 2 and earning a basic salary of Kshs 49,000 and a gross salary of Kshs 110,350. She is stationed at Kapteldon Sub-County Hospital within Uasin Gishu County.

3. It is the Claimant's contention that she served the Respondents with loyalty, diligence and full dedication until 16th January 2019 when she was issued with a show cause letter alleging that on the 12th January 2019, she absconded her duties and neglected a client who had come to deliver in the facility. She responded to the show cause vide her response dated 21st January 2019 explaining that on the fateful day, she had gone to pick her medication for diabetes having depleted her stock. She requested her colleague, Jane to stand in for her. Unfortunately the said Jane was called by the hospital administration to accompany an ambulance to a funeral to attend to any emergencies. That when Jane called to inform her that she was leaving, the Claimant left for work and arrived at 1.55pm and continued with her duties of attending to patients.

4. The Claimant states that on 7th February 2019, she was issued with a letter of interdiction suspending her from work on half pay pending finalization of her case.

5. She further states that she received a letter dated 25th June 2019 requiring her to attend a disciplinary meeting scheduled for 10th July,2019 which hearing she attended and gave her defence.

6. The Claimant contends that the Respondent did not communicate the outcome of the disciplinary hearing prompting her to instruct her advocate to write a letter to the Respondent; and that as a result of the said letter, she was summoned by the Respondents and issued with a letter dated 28th July 2020 lifting the interdiction which letter according to the Claimant contained an unlawful clause demanding that she forfeits the salary withheld during the interdiction period.

7. According to the Claimant, the said clause is unfair, unlawful and against labour laws since she is entitled to the retained half salary for the months she was on interdiction.

8. It is the Claimant's further contention that she went back to her duty station where her colleagues were paid "corona allowance" at Kshs 15,000 but she was not paid the said allowance which was a clear manifestation of discrimination by the Respondents.

9. She contends that the outstanding salary arrears are for the months of February 2019 to July 2020 when the interdiction was lifted.

10. The Claimant particularized the claim for unpaid salary arrears per month as;

    a. Basic salary.....Kshs (49,000-23,980) 25,110

    b. Commuter allowance.....Kshs 5,000

    c. Health risk allowance.....Kshs 3,850

    d. Health workers extraneous allowance.....Kshs 25,000

    e. Nursing allowance.....Kshs 20,000

    Total.....Kshs 78,960

    Total outstanding unpaid salary arrears is Kshs 78,960 x 18 months (February,2019 to July 2020) = Kshs 1,421,280 plus kshs 45,000 being Corona allowance for the months of June, July and August.

11. The Claimant also sought for a declaration that she was unfairly, unlawfully and maliciously discriminated from payment of "corona allowance" at Kshs 45,000. She prayed to be paid damages for discrimination.

12. The Respondents filed a Reply to the Claimant's Statement of Claim on 12th February 2021 and denied the claim.

13. In that rebuttal, the Respondent averred that the disciplinary process found the Claimant guilty of the allegations levelled against her but gave her a final warning and the punishment was that she forfeits her salary withheld during interdiction.

14. On 16th March 2023, the court directed the parties to dispose of the Claim by way of written submissions.

The Claimant's submissions

15. The Claimant in her submissions identified the main issues for determination as:

    i. Whether the prolonged stay of 1 year without communicating the outcome of the disciplinary hearing was lawful;

    ii. Whether the Respondents were justified to order forfeiture of the Claimant's withheld half salary even after lifting the interdiction;

    iii. Whether the Claimant is entitled to the reliefs sought.

16. On the first issue, it was submitted that the Claimant was entitled to prompt communication of the outcome of the disciplinary hearing right after the hearing or within a reasonable time. Counsel submitted that the Respondent failed to inform either the Public Service Commission or the Claimant about the reasons causing the delay of the outcome of the disciplinary hearing as required by Clause D31(1)(g) of the County Public Service Human Resources Manual, 2013 and Clause K3 (4) of the Human Resource Policies and Procedures Manual for the Public Service, 2016 on disciplinary procedures.

17. According to counsel for the Claimant, the non-communication of the verdict of the disciplinary hearing was unfair, unlawful and unprocedural and contrary to the right to fair labour practices as enshrined under Article 41 and Article 47 of *the Constitution* as well as Clause K3(4) of the Human Resource Policies and Procedures Manual for the Public Service, 2016. To buttress this point, reliance was placed on the cases of Kenya Union of Commercial Food and Allied Workers vs MEC Sacco Society Limited, Cause No. 167 of 2014, Davis Gitonga vs Judicial Service Commission, Petition No. 116 of 2018, Malindi Cause No. E008 of 2021, Benjamin Menza Kirimi vs Kilifi County Public Service Board & Another (2021) eKLR.

18. As to whether the Respondents were justified to order forfeiture of the Claimant's withheld half salary even after lifting the interdiction, it was submitted that Clause K6(4) of the Human Resource Policies and Procedures Manual for the Public Service, 2016 and section 70(3) of the *Public Service Commission Act* require that any benefit withheld during the interdiction period be restored to a public officer upon the termination of disciplinary proceedings provided that the public officer is not dismissed or otherwise punished.

19. The Claimant submitted that she was neither dismissed nor punished and as such, she was entitled to payment of the withheld salary upon lifting of the interdiction. The following cases were cited to support this positionBanking Insurance and Finance Union of Kenya vs Kenya Commercial Bank

Limited (2015) eKLR.Benjamin Menza Kirimo vs Kilifi County Public Service Board & Another (2021) eKLR.

20. Lastly, as to whether the Claimant is entitled to the reliefs she is seeking, Counsel submitted that having found the non-communication of the disciplinary outcome unlawful and unprocedural, the Claimant is entitled to her withheld salary of Kshs 1,421,280 and the "Corona allowance" as prayed.

21. In the end, the court was urged to enter judgment in favour of the Claimant as per her statement of claim.

The Respondents' submissions

22. The Respondents in their submissions framed the issues for determination to be:

    a. Whether the Respondent was justified to order forfeiture of the Claimant's withheld salary after lifting of the interdiction;

    b. Whether the prolonged stay without communication of the outcome of the disciplinary proceedings was justified;

    c. Whether the Claimant is entitled to the reliefs sought.

23. On the first issue, the Respondent submitted that section 59(1)(c) of the *County Governments Act* provides that disciplinary control is a function of the 1st Respondent. According to the Respondent, at all material times leading to this suit, they were performing their constitutional and statutory mandate of disciplinary control. That the Claimant was taken through disciplinary hearings as reflected in the letter dated 28th July 2020 which was to the effect that the interdiction imposed on the Claimant had been lifted, and that the Claimant was to forfeit the salary withheld during interdiction as Claimant had been served with a final warning.

24. It was the Respondents' submission that the Claimant was not fully exonerated as she was punished through a final warning and forfeiture of withheld salaries. The Respondents submitted that they were justified to order for the forfeiture of the Claimant's withheld salary even after lifting of the interdiction. Counsel for the Respondents cited clause 32.4 of the County Human Resource Manual 2013 which provides,

> "Where a public officer has been suspended and such public officer is neither dismissed or otherwise punished under these regulations, any other salary, remunerative allowances or any other benefit withheld under this paragraph shall be restored to the officer upon termination of such proceedings."

25. According to the Respondents, the Claimant was punished by way of warning and that as such, she cannot have her retained salaries restored as that would defeat the logic of the punishment and the rationale of forfeiture in both the statute and manual.

26. With regard to the "corona allowance", the Respondents submitted that the said allowance is strange, alien and unknown in public service and that the Claimant is therefore not entitled to it. The Respondents further submitted that no form or shape of discrimination was occasioned against the Claimant as no evidence has been adduced to show the basis of such intent or evidence of discrimination. Reliance was placed on the case of Boniface Momanyi Nyachae v Kenya Orient Insurance Ltd (2018) eKLR.

27. On the second issue as to whether the prolonged stay without communication of the outcome of the disciplinary proceeding was justified, it was the Respondents' submission that the statutory limitations of determination of disciplinary proceeding is six months as per clause K3(4) of the Human Resource Policies and Procedure Manual for the Public Service,2016 and that as such, a delay can only begin after expiry of six months from the date a disciplinary hearing. It was submitted that the accusations against the Claimant were serious and investigations had to be conducted with manifest scrutiny and that the delay was in good faith for the benefit of public service standards. The Respondents submitted that the committee held its meetings between 8th and 20th April 2020 and that the suspension was lifted on 28th July 2020. According to the Respondent, the period within which the decision was reached and delivered to the Claimant was reasonable considering that during the said period, there was Covid 19 as a result of which there were stringent measures to the detriment of meetings.

28. As regards the issue whether the Claimant is entitled to the reliefs sought, it was submitted that she is not entitled to any of the reliefs sought. The court was urged to dismiss the Claimant's case with costs.

Determination

29. From the pleadings on record and the rival submissions of the parties herein, the issues that arise for determination in this case are as follows:-

    i. Whether the delay in communication on the outcome of the disciplinary hearing was justified;

    ii. Whether the forfeiture of the Claimant's salary withheld during the interdiction period was justified; and,

    iii. What orders should issue.

30. It is not in dispute that the Claimant herein was interdicted on 7th February 2019 as a result of what the respondents termed "gross misconduct and serious allegation of neglecting duty". This was after she arrived late for work causing a patient to give birth on her own.

31. Prior to her interdiction, the Claimant was issued with a notice to show cause letter dated 12th January 2019 which she responded to vide a letter dated 21st January, 2019.

32. From the pleadings on record, it is evident that the Claimant was invited for a disciplinary hearing on 10th July 2019 and the interdiction was lifted on the 28th of July 2020 with a final warning and the forfeiture of her withheld salary.

33. The Claimant has come to court seeking that this court finds that the prolonged period of non-communication on the disciplinary hearing outcome and the subsequent condition on forfeiture of withheld salary upon lifting of the interdiction is unfair and unlawful.

i. Whether the prolonged period for non-communication on the outcome of the disciplinary hearing was justified

34. The Claimant has faulted the period the Respondents took to give a verdict on the disciplinary process. According to her, she was interdicted on 7th February 2019 but invited to a disciplinary hearing on 10th July 2019 vide a letter dated 25th June 2019. She averred that she never heard from the Respondents until after her advocate wrote a letter dated 15th June 2020 following which she was summoned and issued with a letter dated 28th July 2020 lifting the interdiction.

35. The Respondents on the other hand have attributed the delay to the seriousness of the accusations levelled against the Claimant which according to them, required investigations to be conducted with manifest scrutiny.

36. Clause K3(4) of the Human Resource Policies and Procedures Manual for the Public Service,2013 provides that;

> "Disciplinary cases should be dealt with promptly and finalized within a period of six (6) months. Where it is found impracticable to do so, the authorized officer shall report individual cases to the Public Service Commission explaining the reason for the delay."

37. I have considered the chronology of events herein. Ideally, since the disciplinary hearing was conducted in 10th July 2019, from the above manual, it would have been expected that the outcome of the disciplinary process would have been communicated to the Claimant on or before 10th February 2020. However, the court takes judicial notice that during this period, there was a lot of disruption on the general running of businesses worldwide as a result of the Corona Virus pandemic. In my view the explanation given for the delay is reasonable in the circumstances and the court find it as such.

ii. Whether the Respondents decision to order the Claimant to forfeit her salary withheld during the interdiction was justified

38. The Respondents have submitted that they were justified in withholding the Claimant's salary for the period she was interdicted on grounds that under section 70(3) of the *Public Service Commission Act*, an employee on interdiction can only have restoration of benefits withheld during interdiction where an employee is not dismissed and when no other punishment has been given. The Respondent maintained that the Claimant was found culpable of the acts of negligence and punished by way of a final warning upon conclusion of the disciplinary proceedings.

39. The letter lifting the interdiction addressed to the Claimant is as reproduced hereunder:

> OUR REF: 1997020148/69 DATE: 28th July ,2020
>
> Cecilia Jerono Kutto
>
> Senior Enrolled Nurse
>
> Thro'
>
> Chief Officer, Health Services
>
> Lifting Of Interdictions
>
> Further to the Interdiction Letter Ref. UG/COH/STAFF/DISC./2/17/2019 dated 7th February, 2019 and your subsequent written and oral submissions dated 21st February, 2019 and 10th July,2019 respectively, this is to convey the County Public Service Board decision that your case was accorded due consideration and you were not fully exonerated from the allegations. Consequently, it was resolved that;
>
> iii. The interdiction imposed on you be and is hereby lifted with effect from the date of this letter
>
> iv. You forfeit the salary withheld during the interdiction period
>
> v. You be served with the final warning

In view of the above, this letter has been served to you as a final warning that a repeat or similar misconduct in future will lead to commencement of proceedings for your dismissal from service.

Signed

John K. Kemboi

AG. Chief Officer,

Public Service Management

CC: County Secretary

Secretary, CPSN

Chief officer, Health Services

CHRM

40. From the above letter, it is evident the Claimant was given a final warning as a result of gross misconduct. This begs the question, is warning a form of punishment?

41. A warning in my view is a disciplinary measure taken by the employer against an employee found culpable of misconduct. It is therefore a form of punishment.

42. In the case of Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, the court held;

> " The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of *the Constitution*; it is unconstitutional."

43. It therefore follows that since the Claimant was given a final warning, which warning served as a form of punishment, she is not entitled to withheld salaries as she was not exonerated from the misconduct she had been accused of.

44. The Claimant also sought to be paid Ksh 45,000 which she alleged that the same was paid to her colleagues to her exclusion. However, no evidence was tabled before court to show that indeed there was such an allowance. The claim for "Corona allowance" is therefore declined for lack of particulars and proof.

iii. What orders should then issue?

45. Having found that the Respondents have justified the prolonged period in giving a verdict on the disciplinary hearing and that they were justified in withholding the Claimant's salary, it follows that the Claimant is not entitled to any of the reliefs sought in her claim. The same is accordingly dismissed. In view of the subsisting relationship between the Claimant and the Respondents, I will make no orders as to costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 5TH DAY OF OCTOBER, 2023.

M. ONYANGO

JUDGE