



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO.10 OF 2019

NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF WEST POKOT.....1ST DEFENDANT

WEST POKOT COUNTY PUBLIC SERVICE BAORD.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

J U D G E M E N T

1. By a memorandum of claim filed on 5th March, 2019, the claimant averred among others that:

- a. On 19th February, 2019, the 1st and 2nd respondents summarily dismissed more than 55 nurses who are employee of the County Government of West Pokot.
- b. On 27th February, 2019 the Chief Officer in charge of medical services the 1st respondent issued a directive to all formally contracted nurses directing them to stay away from their places of work allegedly because they had been dismissed.

The laws violated and or breached

- c. The claimants avers that the summary dismissal of the more than 55 nurses by the 1st and 2nd respondents is unprocedural, discriminatory and therefore unfair as it offends the provisions of section 59(1)(c) of the County Governments Act.
- d. The claimant further avers that the dismissal of the more than 55 nurses amounts to an unfair termination as it offends the provisions of Section 45(1)(2)(a)(b)(c) of the Employment Act.
- e. The claimant states that the dismissal of the more than 55 nurses by the 1st and 2nd respondents further offends the provisions of Article 47 of the constitution.
- f. It is the averment of the claimant that the actions of the 1st and 2nd respondent further offends the provisions of article 41(1)(2)(c) (d).

2. The respondent in their response to the claim stated among others that.

- a) In further response, the 1st & 2nd Respondents state that there are two categories of nurses: nurses employed on Permanent and pensionable basis; and nurses employed on contract.
- b) The 1st and 2nd respondents deny the contents of paragraph 6,7,8 and 9 of the Amended statement of claim and put the claimant to strict proof thereof. The Respondents wish to state as follows:
 - i) As at 24th January, 2019 the 1st and 2nd Respondents herein were in the process of confirming some health officers into permanent and pensionable terms of service.

- ii) On 25th January 2019, some of the health officers were absorbed into permanent and pensionable terms of service.
 - iii) Regardless of this, some health officers who had been confirmed on permanent and pensionable terms together with contracted nurses, most of whom had expired contracts decided to participate in a strike that had been suspended by the Court.
 - iv) On 5th February, 2020, the Employment and Labour Relations Court in Nairobi Cause No. 69 of 2019: Council of Governors versus Seth Panyako & Others the Court suspended the strike for a period of 60 days.
 - v) As a result, on 11th February, 2019, all striking nurses were directed to resume normal duties and they were informed the consequences of not reporting to work. Further, the President through a press statement also emphasized the need for the nurses to resume work on 13th February, 2019.
 - vi) Notice to show cause letters were not issued because the nurses were absent from work which made it difficult to access them.
 - vii) On 18th February, 2020, a list of 114 nurses who had participated in the strike was forwarded to the 2nd respondent for action. The list included nurses who had also been recently confirmed to pensionable terms.
 - viii) Some nurses who participated in the strike resumed work while the rest remained absent.
 - ix) Thereafter, a Board Meeting was held on 19th February, 2019 in which the disciplinary case was discussed and a resolution passed that 73 nurses on contract be summarily dismissed for being out of duty without permission from 4th February, 2019; and for taking part in unprotected strike or any form of industrial action while on contract terms of services.
 - x) To be precise, 73 nurses on contract were summarily dismissed on 19th February 2019 on account of gross misconduct for being absent from duty without permission and taking part in an unprotected strike.
 - xi) Personal dismissal letters were issued to each one of them on 19th February, 2019 by the 2nd Respondent; and
 - xii) On 27th February, 2019, the Chief Officer in charge of medical services of the 1st respondent issued a stay away directive to all the dismissed contracted nurses because they had been dismissed for gross misconduct.
- c) The 1st and 2nd Respondent further state that of the 73 dismissed nurses who brought this claim, 20 have officially withdrawn their cases against the 1st and 2nd respondents herein.
- d) The 1st and 2nd respondents state that a lot of trauma was caused to patients in most of the hospitals. Consequently, the 1st and 2nd Respondents have continuously been recruiting nurses to add to the workforce to ensure that the constitutional right to life which encompasses the right to dignity, right to highest attainable standard of healthcare, right to emergency medical treatment as espoused under Articles 26,28 & 43 of the Constitution is fully realized.
- e) The nurses cannot purport to have been unaware of the consequences of their actions yet they disobeyed the court order requiring them to call off the strike and resume duty. In fact, in the ruling delivered on 18th February 2019 by Hon. Justice Abuodha in Nairobi ELRC Cause 69 of 2019: Council of Governors versus Seth Panyako & Others, the officials of the Claimant were found to be in contempt of the said order.
- f) In response to paragraph 10 – 16, the respondents state that the dismissal was fair and in accordance with section 44 of the Employment Act, 2007 as read together with section 78 & 81 of the Labour Relations Act, 2007.
- g) The contracts for the nurses employed on contract were to expire on 31st December, 2018 and 2019. The 1st and 2nd Respondents extended their contracts for one month to end on 28th January, 2019. At the time the officers went on strike, some had already been confirmed into permanent and pensionable terms.
- h) In further response, the respondents state that they were engaging nurses whose contracts had already expired for purposes of renewal of their contracts. However, they proceeded on strike, refused to negotiate the renewal of the contracts, and joined the permanent and pensionable nurses in the strike. As a result, the respondents were left with no option but to summarily dismiss them because their actions implied that they did not want to have their contracts renewed by staying away from work for over 2 weeks occasioning great suffering and trauma to patients.
- i) Practically, some of the nurses' contracts had expired and it was necessary that the employment comes to an end since the nurses had no existing contracts. The contracted employees whose contract commenced early February, 2016 deserted work from 4th February, 2019 a few days after expiry of their contracts while those whose contracts began in 2019 had few days remaining prior to the lapse of their contract. As a result, it was impossible for the employer to engage them on new terms of employment following the gross misconduct committed.
- j) The 1st & 2nd respondents' state that health officers cannot purport to have been unaware when their contracts would terminate as

it is legitimately expected that an employee would read and understand the terms of their employment contract upon commencement of the same.

k) On the issue of discrimination, the 1st and 2nd respondents state that the rights of the nurses are to be weighed and against the right to highest attainable standard of healthcare and public interest in general. By initiating and participating in an unprotected strike, the nurses went against the Court Order suspending the claimant's strike by for a period of sixty days (60) and that the parties submit themselves to conciliation. Moreover, the nurses risked the lives of West Pokot patients as well as infringing their right to health, life and dignity under Article 43, 26 & 28 of the Constitution, respectively.

l) If the nurses had an issue regarding their respective remuneration, they should have raised it at the commencement or during their continuation of employment and not upon termination. This court cannot therefore rewrite a contract between parties.

3. On 10th June, 2021 the court issued directions that the matter be disposed of by way of written submissions. The court in further consultation with the parties framed the following issues for determination:

- a) **Whether the termination of the service of the nurses concerned was fair within the requirements of the Employment Act.**
- b) **Whether there was discrimination against the nurses concerned in the absorption of the rest into permanent and pensionable terms.**
- c) **Whether the dismissed nurses were entitled to same terms of employment as their colleagues on permanent and pensionable terms.**
- d) **Whether the dismissed nurses are entitled to reinstatement and absorption on permanent and pensionable terms.**

4. In his submission in support of the claim, Mr. Omulama for the claimants submitted in the main that at paragraph 10 of the amended statement of claim, the claimant had listed 58 nurses who averred that they were unfairly and discriminately summarily dismissed from employment on 19th February, 2019 while their contracts were still subsisting. Further at paragraph 18 of the statement of claim, the claimant had further pleaded that the body or person who initiated the dismissal of the nurses i.e. Intergovernmental Relations Technical Committee did not have the mandate to do so as this was a function of the County Public Service Board pursuant to section 59 of the County Government Act.

5. It was therefore the submission by Mr. Omulama that the summary dismissal of the nurses was unprocedural, unlawful and wrongful as it was not undertaken by the County Public Service Board through a resolution of the Board contrary to section 59(1)(c) of the County Government Act. Further the respondent violated section 41(2) of the Employment Act as they failed to hear and consider any representations which the nurses may have had on the grounds of the alleged misconduct.

6. Mr. Omulama further submitted that in so far as the reason for the dismissal was cited as "being out of duty without permission" and "taking part in an unprotected strike or any form of industrial action," the respondents had no proof of these two reasons as alleged hence the dismissals ought to be found to be in contravention of section 43 of the Employment Act. The allegation of being out of duty without permission had neither been explained with evidence nor had any order of the Court declaring the alleged strike illegal had been presented as evidence.

7. Mr. Omulama further submitted that the respondents acted in violation of the nurses' fundamental rights as enshrined in article 27 and 41 of the Constitution by not subjecting them to due process of discipline.

8. On the issue whether there was discrimination against the nurses concerned in the absorption of the rest of their colleagues in permanent and pensionable terms, Mr. Omulama submitted that at paragraph 5 of the amended statement of claim, the claimant listed 67 names of nurses who were employed in February, 2016 on contract for two years. At paragraph 7 of the claim, the names of 33 nurses were listed as those who were confirmed into permanent and pensionable terms of employment out of the 67 who were on contract. Further at paragraph 8 of the amended claim, the respondent in February, 2018 employed 44 nurses on contract out of 15 were absorbed into permanent and pensionable terms.

9. The claimant thus submitted that without any reasons adduced why some nurses in both groups of 2016 and 2018 were considered for permanent employment while others were left out, the dismissed nurses had a legitimate expectation that they too could be employed permanently as those who had been absorbed from their group had no special qualifications that put them above the dismissed nurses and no interviews were conducted for purposes of confirmation into permanent and pensionable status. The dismissed nurses at the time their colleagues were being absorbed without any reason was discriminatory and contrary to section 5(3)(b) of employment Act.

10. Mr. Omulama further submitted that the absorption of some of the nurses into permanent and pensionable employment to the exclusion of the dismissed nurses was contrary to Section 65(1) (a) (f) (g) (2) and 70(1) of the County Government Act which enjoins the County Public Service Board to consider standards, values and principles set out in article 10, 27(4), 56(c) and 232(1) of the constitution.

11. In support of the foregoing submissions Mr. Omulama relied on the cases of **Jane Khalachi -v- Oxford University EA [2013] eKLR and Sollo Nzuki V SRC & others [2020] eKLR.**

12. On the issue whether the dismissed nurses were entitled to same terms and conditions of employment as their colleagues on permanent and pensionable terms, Mr. Omulama submitted that as a matter of policy, the dismissed nurses were employed pursuant to their respective qualifications and put in various job categories in accordance with the revised Scheme of Service for Nursing Personnel issued in 2014

through circular Ref. No. MDP/DPSM/HRM/14/1/VOL II/(90) dated 17th June, 2014. It was the claimant's submission that the job description in the scheme of service for nurses was applicable to contract nurses as was evidenced by the copies of appointment letters.

13. Mr. Omulama further submitted that apart from being paid lower salaries than their colleagues on permanent and pensionable terms, the contract nurses were denied basic allowances which their colleagues were being paid as approved by Salaries and Remunerations Commission and Public Service Commission. The allowances were approved and or enhanced on various dates by the Salaries and Remunerations Commission. In opposing the allowances the Salaries and Remunerations Commission did not direct that the same should not be awarded to contract nurses as they applied across the board save where Salaries and Remunerations Commission had directed otherwise. He further submitted that the respondents failed to subject the contracted nurses to basic minimum conditions of employment contrary to provisions of section 26 of the Employment Act. All nurses who were employed on contract in grade III job group G were put on a salary of Kshs. 30,000/= without any other allowances and those employed in grade II job group H were paid a gross salary of Ksh. 35,000/= without any allowance. It was further submitted that the appointments in the County Government for Nurses were based on the Revised Scheme of Service for Nursing Personnel of May, 2014. A look at the scheme revealed that there were no separate job groups and job descriptions for Nurses on contract terms.

14. On the question of reinstatement of the dismissed nurses, Mr. Omulama submitted that Section 12(3) (sic) Labour Relations Act and section 49(4) empowers the Court to order reinstatement since three years had not lapsed since the claimants were terminated.

15. It was further submitted that the dismissed nurses did not contribute to their dismissal as the strike they were alleged to have participated in was a nationwide strike which was called by the national officials of their union and which was within their right and protected under section 4 of the Employment Act and Article 41 of the constitution. It was never intended to end their relationship with the employer and the same was never declared unprotected by the Court. Mr. Omulama further submitted that whereas the strike was national, in almost all Counties, no other County Government except the respondent dismissed its nurses on account of the strike hence it could have been an act of discrimination against the nurses if their dismissal was upheld by the court.

16. Further, the nurses were selectively dismissed simply because they were on contract yet the respondent had confirmed many of their colleagues into permanent and pensionable employment. By the time of the dismissal, the nurses had worked for more than 2 years and were still in employment without any formal communication to the individual nurses referring their fate. Mr. Omulama therefore submitted their continuance at work after expiry of their contract without communication created a new regime of engagement. In this regard Mr. Omulama relied on the cases of **Samwel Chacha Mwita -v- KEMRI [2014] eKLR and Jayne Kanini Mwanzia -v- National Water Conservation and Pipeline Corporation [2014] eKLR.**

17. Mr. Wanyama for the respondent on the other hand submitted that under section 59(1)(c) of the County Government Act the respondent had power on behalf of the County Government to exercise disciplinary control over and remove persons holding or acting in those offices. Therefore the 2nd respondent had power to dismiss the nurses as opposed to the claimants submission that the dismissal was initiated by the Intergovernmental Relations Technical Committee. According to Counsel, the respondent held a meeting and passed a resolution to dismiss the nurses.

18. On procedural fairness counsel submitted that the respondent issued a memo/letter directing all striking nurses to report back to work because a court order suspending the strike had been issued on 5th February, 2019. Investigations were done and a rollcall taken daily to identify specific nurses who failed to resume their duties, further the list of those who participated in the suspended strike and failed to report to work was compiled.

19. Counsel further stated that the nurses were inaccessible therefore it became impracticable to serve them with notice to show cause letters. Further the respondents Board met and weighed the right to life, human dignity and highest attainable standard of health to the entire residents of West Pokot viz-a-viz the nurses gross misconduct and came to the decision that the nurses be summarily dismissed. They were therefore issued with termination letters and informed of their right of appeal.

20. Mr. Wanyama further submitted that it was misleading for the claimant to state that the respondents have not furnished any court order declaring the strike illegal yet on 5th January, 2019 the Court suspended the strike for a period of sixty (60) days in **ELRC Cause No. 69 of 2019 Council of Governors -v- Seth Panyako & 7 others.** Despite the said Court order, the nurses proceeded to participate in the strike from 4th to 19th February, 2019 crippling the delivery of health services at the County Government of West Pokot. Based on the adverse effects of 11th February, 2019 the respondent issued a letter to all striking nurses to resume normal duties by 12th February 2019 and further that a roll call would be taken to ascertain resumption. The letter further stated that failure to report to work warranted disciplinary action.

21. Mr. Wanyama further submitted that an investigation was thereafter conducted on 18th February, 2019 and a list of County nursing staff who participated in the strike submitted to the 2nd Respondent for further action.

22. According to Counsel, on 19th February, 2019 when the respondent held a meeting to discuss the disciplinary case for the nurses, they were striking hence inaccessible for service of notices to show cause. Consequently, the Board decided to summarily dismiss the 73 nurses for being out of duty without permission and for taking part in the unprotected strike.

23. On the issue of substantive fairness counsel submitted that the respondent hold the view that the termination of the nurses was fair and within the requirements of the Employment Act. The reasons for dismissal were valid and fair because they specifically related to the claimants' conduct in relation to the participation in a strike which the Court had suspended and that they chose not to report to work.

24. On the issue whether there was discrimination against the nurses concerned in the absorption of the rest of their colleagues, counsel submitted that there were various considerations an employer took into account before absorbing an employee to permanent and pensionable terms. A party must show merit and ability; a valid practicing license from Nursing Council of Kenya and enrolment certificate issued by the

Council and budgetary allocation for the health docket amongst other considerations. The claimant in this case have not shown how the nurses were discriminated. Further, the dismissal of the nurses was not related to the absorption into permanent and pensionable terms as other colleagues. According to counsel, the relevant Department of Health, Promotion Services and Medical Services analyzed the requisite criteria and thereafter submitted a list of nurses to be confirmed on permanent and pensionable terms. Further, if the nurses had an issue regarding absorption to permanent and pensionable terms, they should have raised it at the commencement or during their continuation of employment and not upon their dismissal or expiry of contract.

25. Mr. Wanyama further submitted that the claimant was using the forum to achieve its objective to have any interest relating to nurses generally, addressed by the Court instead of focusing on the core issue which led to the dismissal which was absconding work and participating in unprotected strike.

26. On the issue whether the dismissed nurses were entitled to same terms and conditions for employment as their colleagues on permanent and pensionable terms, counsel submitted that the dismissed nurses were employed on contractual terms as per their appointment letters. The contract provided for a consolidated remuneration which they accepted at the time of signing the offer. The salary attached to the contract was a consolidated pay with all the remunerative allowances and entitlements for work done, joined together without stating the breakdown.

27. In the memorandum of claim, the claimants sought orders among others that :

(a) An order setting aside the dismissal letters issued to the more than 55 nurses.

(b) An order directing 1st and 2nd Respondents to reinstate the dismissed nurses into their employment without loss of pay and any other benefits.

(c) An order directing the 1st and 2nd respondents not to discriminate against the more than 55 nurses in future employment at the expiry of their current contract and to absorb them into permanent and pensionable terms.

28. The background to this claim as can be gleaned from both the memorandum of claim and the response can be summarised thus:

(a) Sometimes in 2016 and 2018 the second respondent employed nurses on different contract terms for two years.

(b) Upon expiry of the contract for the 2016 nurses. The 2nd respondent extended the same for one month from January, 2019 to 28th January, 2019.

(c) On 4th February, 2019, the nurses decided to participate in a strike. This strike was suspended for sixty days to enable parties explore amicable solution through an order made in **Nairobi ELRC No. 69 of 2019 Council of Governors -v- Seth Panyako & others**

(d) According to the respondent, inspite of the order of the Court issued as above on 5th February, 2019, the nurses continued with their strike crippling the delivery of health services at the County Government of West Pokot. As a result, on 11th February, 2019, the respondent issued a letter/memo to all striking nurses to resume normal duties by 12th February, 2019 and that a roll call would be taken to ascertain the resumption. The letter further warned that failure to report warranted disciplinary action.

(e) Some nurses according the respondent, resumed work while others did not. The respondent thus on 18th February, 2019 compiled a list of nurses who had resumed work and those who had not. Those who had not were referred to the Board for further action.

(f) The respondents subsequently convened a meeting with an agenda to discuss the disciplinary case for the nurses who had participated in the strike. The respondents Board at the conclusion of the meeting decided to summarily dismiss the nurses for being out of duty without permission form 4th February, 2019 and for taking part in an unprotected strike.

(g) According to the claimant 33 out of the 67 nurses that were employed on contract by the respondent were confirmed into permanent and pensionable terms. No explanation was given why some were absorbed and others were left out.

(h) Further according to the claimant, the 2nd on respondent on or about 2nd February, 2018 further employed 36 nurses on contract and out of these in February, 2019 the respondent absorbed 15 out of the 36.

(i) According to the claimant, to of both groups of nurses employed in 2016 and 2018 more than 58 were unfairly discriminatively and summarily dismissed from employment on 19th February, 2019.

29. From the foregoing it would seem that whereas the respondent takes the view that the nurses were summarily dismissed for taking part in an unprotected strike, the claimant maintains that they were discriminatively, unfairly and unlawfully summarily dismissed.

30. The claimant did not deny that the nurses participated in the nationwide strike which took place sometime in 4th February, 2019. The claimant however contended that the strike was a nationwide strike which was called by the National officials of the Union and which was within their rights and protected under section 4 (sic) of the Employment Act and article 41 of the constitution.

31. The claimant further did not deny that the 4th February, 2019 strike was suspended by the Court on 5th February, 2019 in ELRC Cause no. 69 of 2019 Council of Governors -v- Seth Panyako & others.

32. The suspension of the strike was a Court order hence the claimant and the nurses concerned were obliged to obey the same or seek the variation or setting aside the same. The respondent was therefore in the circumstances justified to take disciplinary action against its employees who continued to participate in the same since for all practical purposes the strike became unprotected the moment the Court suspended the same.

33. It was common ground that the nurses concerned were employed in two batches. Some in 2016 and others in 2018. The terms of engagement were on fixed term basis. That is to say they were issued with two years fixed term contract with possibility of renewal and or absorption into permanent and pensionable employment. Although the nurses were members of the claimant union their contracts were individual as opposed to collective and renewal or non-renewal thereof was dependent on individual performance and at the discretion of the respondent as an employer. There was therefore no obligation on the respondent to renew any or all the contracts. The issue of discrimination raised by the claimant therefore does not arise.

34. The contention by the claimant on whether the nurses concerned were entitled to the same terms and conditions of employment as their colleagues on permanent and pensionable terms is not sustainable for two reasons. First, the claimants' signed fixed term contracts which spelt out their terms and conditions of engagement including remuneration. They could not therefore midstream demand terms not contained in contracts they voluntarily entered into.

35. Second, the issue of terms and conditions of service of the nurses concerned could only be delved into if they were still in respondents service. In this particular case, the nurses concerned were summarily dismissed.

36. In conclusion the Court finds the claim in its entirety unmerited and hereby dismisses the same.

37. Considering the uniqueness of this matter. That is to say the fact that the nurses participated in a strike which had been suspended by the Court and further that some of the nurses have since been absorbed by the respondent and some left the respondent's employment through expiry of their contracts, there will be no order as to costs.

38. It is so ordered.

Dated and delivered at Eldoret this 25th day of February, 2022

Abuodha Nelson Jorum

Judge ELRC