



Wanyama v National Government Affirmative Action Fund Board (Cause 102 of 2019) [2022] KEELRC 12783 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12783 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 102 OF 2019
S RADIDO, J
SEPTEMBER 28, 2022**

BETWEEN

CAROLINE NAMWEYA WANYAMA CLAIMANT

AND

**NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUND
BOARD RESPONDENT**

JUDGMENT

1. This cause was heard on January 31, 2022 when Caroline Namweya Wanyama (the claimant) testified and on 23 May 2022 when the Chief Executive Officer of the National Government Affirmative Action Fund Board (the respondent) testified.
2. The claimant filed her submissions on June 21, 2022, and the respondent on July 4, 2022.
3. The claimant identified 3 questions for adjudication:
 - i. Whether the claimant's suspension was contrary to the disciplinary procedure for public servants?
 - ii. Whether the respondent should be compelled to pay the claimant all her salaries without loss of benefits?
 - iii. Who should bear costs of the suit?
4. The respondent set out 6 Issues for determination:
 - i. Whether the suit was filed prematurely?
 - ii. Whether the suspension was lawful?
 - iii. Whether due procedure was followed?



- iv. Whether the long suspension was justified?
 - v. Whether the claimants termination was unlawful?
 - vi. Whether the claimant is entitled to any relief?
5. The court has considered the pleadings, evidence, and submissions and adopted the Issues outlined by the parties in the submissions.

Unlawful suspension

6. The Chief Executive Officer of the respondent received a complaint dated June 27, 2018 alleging embezzlement of funds. The complaint made allegations against the claimant.
7. On July 4, 2018, the Chief Executive Officer issued a memo to the claimant. The Memo requested the claimant to give a written response and informed her that investigations had started.
8. The claimant responded on July 19, 2018, and an audit was conducted from August 27, 2018 to 6 September 2018. Upon receipt of the audit report, the respondent suspended the claimant through a letter dated November 9, 2018.
9. The suspension was to facilitate disciplinary action, and the claimant was requested to show cause within 21 days.
10. The claimant responded on November 28, 2018 and on February 26, 2019, the respondent made a formal report to the police seeking for further investigations to be conducted.
11. The claimant did not get feedback and on March 19, 2019, she wrote to the respondent seeking to get an update. The Chief Executive Officer replied the same day indicating that the case was before the board and a decision would be conveyed at the right time.
12. The police wrote to the respondent on October 29, 2019, indicating that it had completed investigations and was waiting for further instructions from the Director of Public Prosecutions.
13. On October 29, 2019, the respondent issued a show cause to the claimant and on November 4, 2019, she moved to court.
14. In court, the claimant contended that the 1 year on suspension without pay violated her right to a fair hearing and was therefore unlawful.
15. To support the contention, the claimant asserted that normally, a suspension should not exceed 21 days and that section K(3)(4) of the human resource policies and procedures manual for the public service provided that a disciplinary process should not take more than 6 months.
16. The respondent's witness admitted that the manual applied because at the material time, it had not adopted its own human resources policies and procedures manual.
17. Section K(3)(4) of the manual requires a disciplinary case to be finalised promptly within 6 months and where the timeline cannot be met, a report be made to the Public Service Commission and the cause of the delay be explained.
18. The respondent did not place before the court any evidence that it communicated with the Public Service Commission after the lapse of 6 months after suspension or that it provided the commission with an explanation for the delay.
19. Equally no explanation for the delay was disclosed in court.



20. The said manual also provides that an officer on suspension is entitled to full house allowance and medical benefits. The respondent did not demonstrate or provide records that it paid the claimant full house allowance and medical benefits during the period of suspension.
21. The respondent attempted to make much of the point that the case against the claimant was pending further investigations by the police.
22. It is now generally accepted through case law in Kenya that police investigations cannot stop an employer from proceeding with internal disciplinary action against an employee. The respondent did not advise the claimant that her case had delayed due to police investigations.
23. In terms of the applicable human resources policy manual, the respondent should have finalised the case against the claimant by May 9, 2019 (6 months). No sufficient or reasonable grounds have been placed before the court why the case of the claimant went beyond the prescribed timelines.
24. The court, consequently, finds that the suspension was unlawful upon lapse of the 6 months provided for in the manual.

Unfair termination of employment

25. The claimant did not plead a case or seek a remedy for unfair termination of employment. She also did not make any submissions on this particular issue and the court will, therefore, not consider it.

Salaries and benefits

26. With the findings above, the court is of the view that the claimant is entitled to the salaries and benefits she would have earned from May 9, 2019 to the point of show cause dated October 29, 2019.

Conclusion and orders

27. From the above, the court finds and declares that the continued suspension of the claimant after May 9, 2019 to the time of show cause dated October 29, 2019 was unlawful.
28. The respondent is ordered to compute and pay the salaries and remuneration the claimant would have earned during the period within the next 30 days.
29. The amount to attract interest at court rates from date of judgment if payment is not made within the 30 days.
30. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 28TH DAY OF SEPTEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Bruce Odeny & Co. Advocates

For Respondent Office of the Attorney General

Court Assistant Chrispo Aura

