



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. E248 OF 2021**

**CAROLINE NJERI NGUGI.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT KENYA HOSPITAL**

**ASSOCIATION T/A NAIROBI HOSPITAL.....RESPONDENT**

**AND**

**CAUSE E251 OF 2021**

**IRENE JEPKOSGEI KIBET.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT KENYA HOSPITAL**

**ASSOCIATION T/A NAIROBI HOSPITAL.....RESPONDENT**

**RULING**

1. The Claimants/Applicants in **Causes E248 of 2021** and **E251 of 2021** filed similar Notices of Motion dated 23<sup>rd</sup> March 2021 seeking for Orders that pending the hearing and determination of their applications *inter-partes* and of their suits, the Respondent be and is hereby ordered to reinstate them into employment without loss of salary. They further seek that costs of their applications be borne by the Respondent. The two Applications were disposed simultaneously which is the reason for the somewhat altered citation at the beginning of this Ruling. The Claimants/Applicants make similar averments in their Supporting Affidavits that they were formally employed by the Respondent in the Finance Division specifically, Admissions, Discharges and Transfers. They both assert that they have been diligently working for the Respondent with utmost dedication, exemplary competence and unquestionable loyalty but under extreme pressure of work due to patient traffic at the Respondent hospital and amidst a global COVID-19 Pandemic. That in a turn of events, they and fellow employees in their department were asked on 18<sup>th</sup> January 2021 via an email titled 'CIC SUSPECTED FRAUD CASE' from the Finance Director's office, to report to the Security office. They assert that the hospital's Security officers then asked them questions in regards to some files the Applicants had handled which had some concerns raised by Co-operative Insurance Company (CIC) on the legitimacy of claims raised by the Respondent for payment of some individuals not on the CIC cover. The Applicants further aver that they each subsequently recorded a statement on the files raised and confirmed they had no knowledge of anything irregular or fraudulent going on at neither the Insurance company nor at the Respondent. That they were however given one-month suspension letters by the Respondent's Credit Controller together with Show-Cause Letters and were also asked to hand in their work badges and leave the Respondent's premises immediately. That they were thereafter taken through a disciplinary process which included an extension of their suspension and which events took place from 18<sup>th</sup> January 2021 to 18<sup>th</sup> March 2021. They further aver that the Respondent has never found them culpable of professional negligence, gross misconduct and or poor performance in the course of their employment and that the Court has powers to save their employment in the interest of justice.

2. The Applications were opposed and the Respondent filed Replying Affidavits sworn on 29<sup>th</sup> April 2021 by the Acting Company Secretary of Nairobi Hospital, Maxwell Maina who avers that the Claimants were lawfully and procedurally dismissed from employment for defrauding the Respondent. He deposed that the Claimants fraudulently conducted transactions with one Mr. Dennis Munene Ntwiga of CIC Insurance Group worth Kshs. 217,000/- and which amounted to gross misconduct and was against the Code of Ethics signed by the Claimants. He stated that the Claimants/Applicants were suspended with full pay and taken through a disciplinary process in accordance with the law and that termination of their services was thereafter recommended by the Respondent's Disciplinary Committee. He further avers that

the Claimants are not deserving of the prayers sought in their Applications because their employment did not in any way involve use of specialized skill which can only be utilized at the Respondent and that they can secure an alternative job in Kenya. He avers that a perusal of the Claimants/Applicants' pleadings show that the Applicants have failed to clearly demonstrate exceptional circumstances for the Court to exercise its discretion and order specific performance at interlocutory stage in respect of the contract of service. He urges this Honourable Court to therefore dismiss the Applications with costs.

3. On the issue of an interim relief of reinstatement, the Honorable Court on 14<sup>th</sup> April 2021 returned that the balance of convenience tilts in favor of withholding the relief sought as it can be granted upon full hearing of the suit. The Court then directed parties to nevertheless file their submissions on the matter. The Claimants/Applicants submissions were to the effect that reinstatement is provided for under Section 49(3) (a) of the Employment Act 2007 as one of the remedies that a Court by dint of Section 50 of the Act, shall be guided by. Further, that the guiding principles are set out in Section 49(4)(a) to (m) of the Employment Act 2007. They assert that they are rightly before this Court by virtue of Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011 as amended by Misc. Amendment Act No. 18 of 2014 under which their applications are brought and read together with Section 49 of the Employment Act 2007. They submit that the provisions give this Honourable power to order a reinstatement in appropriate cases and that their cases stand out as cases where reinstatement would be the best remedy to address the wrongful, unjustifiable, malicious and unfair dismissal by the Respondent Hospital. The Applicants cite the case of **National Bank of Kenya v Samuel Nauru Mutonya [2019] eKLR** where the Court of Appeal affirmed the decision by the Industrial Court in **ELRC Cause No. 1279 of 2014** and held that reinstatement was the most appropriate remedy in the circumstances of the appeal. The Applicants' submit that there are no criminal charges preferred against them or any judgment of 'guilty' made against them by any court of competent jurisdiction and that their position is that the reason advanced by the Respondent is either not valid or premature in the circumstances. They are guided by the opinion of the Court in disciplinary cases against employees where in the opinion of the employer there exist a criminal element as per the guiding applicable principles set out in **Industrial Cause No. 37 of 2013 at Nakuru, Mathew Kipchumba Koskei v Baringo Teachers Sacco [2013] eKLR**. They submit that fraud being a complex matter, the tenets of natural justice mandated the Respondent to be patient enough and await the outcome of the Criminal Investigations at least before summarily dismissing the Claimant/Applicant's employment. They submit that the Respondent thus acted contrary to the rules of natural justice and that this Court may be guided by the disposition of the issue of natural justice by the Court of Appeal in **Onyango Oloo v Attorney General [1986-1989] EA 456**. The Applicants submit that no cogent or admissible evidence has so far been placed before the Court to substantiate the Respondent's allegations and that the Respondent even had an option of surcharging them if indeed it was able to substantiate its claim beyond doubt.

4. The Claimants/Applicants submit that this Court has to review the evidence that triggered the disciplinary process which is criminal in nature. They further submit that those tasked with the responsibility of determining the dispute were to do so with a lot of care and caution. The Claimants/Applicants submit that the relief of reinstatement is not unreasonable or incapable of being granted or enforced and that they are ready and willing to go back to work as they are yet to secure another job elsewhere. They further submit that the Court can take Judicial Notice under Section 60 of the Evidence Act of Kenya this being a matter in the public domain, that the abrupt dismissal is being done when the Applicants have financial obligations to fulfill, during the global Corona Virus (COVID-19) Pandemic and with common knowledge that it is difficult to secure formal employment in our country at the moment. They submit that as the Respondent has also not indicated in the Replying Affidavit that the Applicants' positions have been filled or taken up or that they have been replaced, they believe the prayers sought are capable of being granted. The Applicants urge the Court to exercise its discretion in their favour and also award costs and interests to them.

5. The Respondent submits that it has produced before this Court a **Final Investigation Report into Suspicious Insurance Claims Conducted between CIC Staffs and the Nairobi Hospital Staffs** (marked as "MM4") and that the Internal Audit Department of the Respondent carried out an in-depth investigation (marked as "MM9") which found the Applicants' culpable of misconduct. It further submits that a perusal of the documents in support of the Respondent's case shows that the Hospital had a valid reason for terminating the Claimants' employment as required by the dictates of Sections 43 and 45 of the Employment Act, 2007. The Respondent submits that the Claimants/Applicants are seeking a final order of reinstatement at this interlocutory stage and have not justified why this Court should order interim reinstatement without waiting for the hearing of the main case. It submitted that the authority cited by the Applicants being the case of **National Bank of Kenya v Samuel Nguru (supra)** was a decision by the Court of Appeal regarding a judgment of the Employment and Labour Relations Court rendered after the hearing of the main case. It further submits that this Court does not concern itself with severity of the sentence meted upon an employee who has misconducted herself at a workplace and that such a matter is left at the managerial prerogatives/discretion of the employer. Further, the Respondent submits that the allegations facing the Applicants were very serious bordering on criminal law and that to thus argue that the Applicants' case is a clear cut case for reinstatement is mistaken and not borne of facts. That to further submit that it was wrongful and pre-mature to dismiss the Applicants without the requisite criminal process being done by a competent body or institution is not entirely correct as the two processes are distinct and separate with different outcomes. The Respondent submits that it should not be forgotten that a complainant in a criminal case has no role as to whether the DPP will charge the suspects or not and is only that of a witness because the case belongs to the State. The Respondent submits that the Applicants will continue committing the same offences they were accused and found guilty of by the Respondent if they are reinstated.

6. The Respondent submits that the Applicants have not established a *prima facie* case warranting interlocutory reinstatement as was explained in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** that the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. The Respondent relies on the holding by this Court in **Allan Pamba v Kenya Hospital Association for and on Behalf of the Nairobi Hospital [2020] eKLR** where the Court held that:

*"I do not think it would be logical in the circumstances, to force the Claimant and the Chairman to work together. The balance of convenience would thus militate against granting orders of injunction. In addition to the foregoing, as already observed, an injunctive order would have the consequence of reinstating the claimant, which according to Section 49(3) of the Employment Act may only be done upon making a finding of unfair termination and considering the factors under Section 49(4)."*

7. The Respondent submits that its interpretation of Section 49(3) of the Employment Act is that a remedy of reinstatement can only issue when an employee's summary dismissal or termination is found to have been unfair to the employee. That bearing the forgoing authority, this Honourable Court should be hesitant to issue an order of temporary reinstatement that may not be confirmed upon full trial and that in any case the law allows this Court to find order reinstatement as the appropriate remedy upon hearing the case. It further cited the authorities of **Richard Muimo Parsitau v Kajjido County Government & 2 Others [2014] eKLR; Sosten Kipruto Kerich v Monarch Insurance Co.**

**Ltd [2018] eKLR**; and **Joab Mehta Oudia v Coffee Development Board of Trustees [2014] eKLR** in support of its submissions. It also relies on the Court of Appeal decision in **Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union [2018] eKLR** where the Court of Appeal set aside an interlocutory order of reinstatement. The Respondent submits that consequently no prejudice will be suffered by the Applicants if an interim reinstatement is refused at this stage and that the Claimants/Applicants have also pleaded and prayed for an award of General damages which would also be a sufficient remedy if they are successful at the trial. It further submits that the Applicants have not met a case for the orders sought and that their applications should be refused in entirety.

8. The parties submissions and the clarity of argument for their rival positions is commended. Their research is worth commenting on as being focused and well articulated. Having said that, let me delve into the issue at hand, reinstatement. The Claimants/Applicants argue that they ought to be reinstated to their position as the action by the Respondent of relieving them of their office prior to the determination by the Police of the fraud investigations ongoing at the Respondent's hospital is premature and without legal basis. On its part, the Respondent argues that an order of reinstatement is a remedy available to the Claimants at the end of the suits against the Respondent and ought not be given in the interim as the Claimants have not demonstrated cause for the grant of this order at this stage. Reinstatement is a remedy available to parties who are aggrieved by their termination. It can be granted either at interlocutory stage or at final judgment. The rule of thumb is where the termination took place without any element of natural justice it is almost axiomatic. However, where the employer makes effort to afford the employee the benefits of natural justice by hearing the employee prior to dismissal, the rule of thumb is to allow a fuller ventilation of the matter before ordering reinstatement. In the case of **National Bank of Kenya v Samuel Nuru Mutonya (supra)** where the Court of Appeal affirmed the decision by the Industrial Court in **ELRC Cause No. 1279 of 2014** and held that reinstatement was the most appropriate remedy in the circumstances, the Court of Appeal was affirming the decision taken at the end of trial confirming that under Section 49, after hearing both parties and weighing the facts, the evidence and the law, a Court can reinstate an employee in circumstances where such would be an appropriate remedy. In this case, the merits of the case are yet to be heard, the parties are yet to unveil all the facts regarding the claim and as such I would find and hold that as matters stand, the balance of convenience would thus militate against granting the orders of reinstatement. Per the provisions of to Section 49(3) of the Employment Act may reinstatement is one of the remedies that would be available to the Claimants upon the Court making a finding of unfair termination and upon weighing the factors under Section 49(4). In the premises the motions by the Claimants are dismissed with costs being in the cause.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE 2021**

**NZIOKI WA MAKAU**

**JUDGE**