



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CAUSE NO E008 OF 2021**

**BENJAMIN MENZA KIRIMO.....CLAIMANT**

**VS**

**KILIFI COUNTY PUBLIC SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**KILIFI COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 25<sup>th</sup> June 2021, the Claimant filed a Memorandum of Claim citing the following as issues in dispute:

- a) Unlawful suspension from employment without due and fair process;
- b) Illegal and unjustified withholding of monthly emoluments and benefits.

2. By his Memorandum of Claim, the Claimant seeks the following remedies:

- a) A declaration that his suspension was unlawful and therefore illegal;
- b) A declaration that his indefinite suspension amounts to constructive dismissal leading to unfair termination of employment;
- c) An order directing the Respondents jointly and severally to reinstate the Claimant to his employment position forthwith;
- d) A permanent injunction restraining the Respondents jointly and severally from demoting, summarily dismissing and/or terminating the Claimant from employment on account of allegations in the suspension letter dated 13<sup>th</sup> December 2019;
- e) Payment of all emoluments withheld by the Respondents with effect from January 2020;
- f) General damages for unlawful suspension and withholding of the Claimant's salary.

3. Alongside the Memorandum of Claim, the Claimant filed a Notice of Motion seeking the following reliefs:

- a) An order directing the Respondents jointly to unconditionally lift the suspension of the Claimant and an order for his immediate reinstatement;
- b) An order for the immediate payment by the Respondents of the Claimant's withheld emoluments during the period of suspension;
- c) An order of injunction restraining the Respondents, either by themselves, their employees, servants and/or agents from terminating the employment of the Claimant;
- d) An order restraining the Compliance and Quality Assurance Committee of the Respondents or any other body constituted by the Respondents from taking any action against the Claimant on the basis of the suspension letter dated 13<sup>th</sup> December 2020.

4. The Motion is based on the following grounds:

- a) That the Claimant was employed by the Ministry of Health as a Clinical Officer on 5<sup>th</sup> May 2004 and deployed at Malindi

General Hospital;

- b) That the Claimant was later confirmed to his job position on 6<sup>th</sup> May 2008 under Permanent and Pensionable Establishment, with effect from the date he was placed on probation, being 5<sup>th</sup> May 2008;
- c) That upon coming into effect of Legal Notice No 16 on the transfer of Health Functions from the National Government to County Governments, the Claimant was seconded to Kilifi County Government as Clinical Officer I under Job Group 'K' effective 1<sup>st</sup> January 2014;
- d) That the Claimant has held this position and has worked diligently and effectively;
- e) That the Claimant was suspended from employment from 13<sup>th</sup> December 2019, which suspension is unlawful and contrary to the Claimant's terms and conditions of service, the Employment Act, 2007 and the Constitution of Kenya, 2010;
- f) That the Claimant's terms of contract were bound by the Public Service Commission Human Resource Manual, the Employment Act and the Constitution of Kenya, 2010;
- g) That the provisions on suspension in the said Human Resource Manual were never followed by the Respondents;
- h) That the said suspension is without any pay during the suspension period, which amounts to unfair labour practice and inhumane treatment;
- i) That the said suspension is based on the allegation that the Claimant sanctioned a medical doctors strike, by forging a signature to approve the strike;
- j) That the said reason for suspension fronted by the Respondents amounts to blackmail as there has never been any claim and/or reports of forgery ever reported and/or investigation carried out to confirm forgery;
- k) That further to the claim of forgery, the Respondents have claimed that the Claimant mercilessly discharged patients, without following the due process, in order to force the 2<sup>nd</sup> Respondent to enter into a staff medical cover contract, which allegations are false;
- l) That the Claimant has been called to a hearing that was wrongly constituted and is intended to ensure that he is summarily dismissed;
- m) That after a disciplinary meeting held on 21<sup>st</sup> January 2020, the Disciplinary Committee requested the Claimant to do written submissions which the Claimant had initially filed but the Respondents were adamant, which is contrary to the Human Resource Manual, the Employment Act and the Claimant's labour rights as enshrined in the Constitution of Kenya, 2010;
- n) That the Respondents have made their actions to suspend the Claimant and/or omission to act and render a verdict to be a punishment on the Claimant's financial and economic wellness as he relied on his job to feed his family;
- o) That the call by the Respondents to suspend the Claimant without pay and without calling for a notice to show cause amounts to gross violation of the Claimant's rights;
- p) That further, on 19<sup>th</sup> May 2021, the Claimant received a message calling him to appear before the Compliance and Quality Assurance Committee but was not informed the basis of the meeting;
- q) That the Claimant honoured the call and appeared before the Committee on 20<sup>th</sup> May 2021 only to be surprised that he was required to give oral submissions on his suspension of 13<sup>th</sup> December 2019;
- r) That since he was not aware of the purpose of the meeting he informed the Committee that he had already done the submissions before a different committee and had been waiting for a verdict since 21<sup>st</sup> January 2020;
- s) That to his surprise, he was served with letter dated 18<sup>th</sup> May 2021 requiring him to appear before the Committee;
- t) That the Committee postponed the hearing and its deliberations to 9<sup>th</sup> June when it was expected to render a verdict;
- u) That any such verdict by the Compliance and Quality Assurance Committee will be unfair and unprocedural and will very much prejudice the Claimant hence this application and claim;
- v) That it is manifestly clear that the Claimant will suffer irreparable damage and loss if the suspension by the Respondents is not lifted and all his emoluments paid to him forthwith.

5. Looking at the prayers sought by the Claimant in his Notice of Motion, I find that he seeks to prosecute his entire claim by way of

interlocutory application.

6. In its decision in *Olive Mwihaki Mugenda v Okiyah Omtata & 4 others* [2014] eKLR, the Court of Appeal cited with approval, the following holding in the Indian case of *Deoraj v State of Maharashtra (Civil Appeal No 2084 of 2004)*:

*“Situations emerge where the granting of an interim relief would be tantamount to granting the final relief. And then there may be converse cases where withholding of an interim relief would be tantamount to dismissal of the main petition itself; for by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the Petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case...the court may grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases.”*

7. In this case, there are serious allegations made against the Claimant, of which he would be required to give an account, in a full hearing. It is therefore unsafe to determine the case at the interlocutory stage.

8. For this reason, the Claimant’s Motion filed on 25<sup>th</sup> June 2021 is declined with costs in the cause.

9. I direct that this file be placed before the Judge in **Malindi ELRC** on **15<sup>th</sup> September 2021** for directions on hearing and disposal of the main claim.

10. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY JULY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Karita for the Claimant

No appearance for the Respondents