



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.E397 OF 2021

KENYA UNION OF JOURNALISTSCLAIMANT

MOHAMUD ALI MOHAMMED1ST RIEVANT

BASHIR MOHAMED 2ND GRIEVANT

VERSUS

BBC EAST AFRIC BUREAU RESPONDENT

MUHYADIN ROBLE INTERESTED PARTY

DIRECTORATE OF CRIMINAL INVESTIGATIONS

ATTORNEY GENERALSTATE

RULING

The claimant and the grievants filed application dated 13th August, 2021 under the provisions of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, Article 50 of the Constitution and seeking for orders that interim orders issued on 20th May, 2021 be extended and the respondent be restrained from taking any advance action against the grievants; that the respondent be restrained from taking or proceeding to take any advance action against the grievants; that there be immediate reinstatement of the grievants back to work.

The claimant and the grievants are also seeking that the director of criminal investigations be directed to furnish the claimant with copies of statements, materials and report of investigations following complaint made against the 2nd grievant under OB No.67/11/02/2021 and a declaration do issue that the disciplinary proceedings conducted on q8th May, 2021 contravened article 50 of the constitution and section 41 of the Employment Act.

The claimant is also seeking leave to withdraw application dated 17th May, 2021.

The application is supported by the annexed affidavit of Erick Oduor, secretary general of the claimant union and on the grounds that the respondent is in abuse of the disciplinary powers leading to a hearing of the grievants on 18th May, 2021 contrary to Article 50 of the Constitution and section 41 of the Employment Act. The hearing was manifestly unfair and the allegations made against the grievants had no evidence and nothing was served upon them before the hearing save for a summary of investigations which was vague and without particulars.

That the disciplinary hearing was convened during the Islamic religious festivals and the grievants had limited time to prepare defences or be able to inform the claimant union for representation in breach of the law and policy and the orders sought should issue.

In reply, the respondent filed the Replying Affidavit of Juliet Njeri, Deputy Managing Editor and who avers that on 20th May, 2021 the claimant was issued with interim orders following application dated 17th May, 2021 and which directed the respondent to cease any further disciplinary action with regard to the grievants pending court attendance on 31st May, 2021 when parties were directed to file submissions and to take a date at the registry. Interim orders were not extended.

Njeri also avers that the claimant failed to comply as directed and on 12th August, 2021 the respondent issued decision on the disciplinary process pending after the hearing of 18th May, 2021.

The claimant then filed application dated 23rd July, 2021 which has not been served upon the respondent and the instant application is a

replica of the earlier applications which have not been addressed.

The respondent has followed the due process in addressing the grievants case and on 13th April, 2021 they were issued with show cause notices and they replied thereto and then invited to a disciplinary hearing conducted on 18th May, 2021. The right to be represented was secured and the respondent shared a pack containing all information relevant at the disciplinary hearing with a summary of the investigations. The rights under Article 50 of the Constitution and section 41 of the Employment Act were not breached.

Njeri also avers that the following decision taken on 12th August, 2021 the grievants have made an appeal as part of the due process accorded to the grievants.

Both parties attended and made oral submissions.

Determination

The orders sought by the claimant and the grievants that interim orders issued on 20th May, 2021 be extended and that leave be granted to withdraw application dated 17th May, 2021 upon which the referenced interim order arise is a contradiction. On the one part, the claimant in seeking to extend the interim orders and on the other part is seeking leave to withdraw the attendant application. The court is left without material upon which the interim orders vested.

As correctly submitted by the respondent, the interim orders issued on 20th May, 2021 lapsed as of 31st May, 2021. There is nothing for extension.

The claimant and the grievants are seeking to restrain the respondent from taking any advance orders against them on the grounds that following the disciplinary hearing, a decision has been issued and the grievants should be reinstated. The defence is that on 12th August, 2021 the respondent issued the 1st grievant with a warning and the 2nd grievants employment was terminated. Noted action has taken effect.

The instant application was filed after the respondent had issued notices to the grievants on 12th August, 2021. One was a warning and the other termination of employment. From both, there are appeals and a decision has taken effect.

To therefore direct the respondent not to take any advance action against the grievants and reinstate them would entail returning them to the position subsisting as of 11th August, 2021.

The claimant, with knowledge of applications dated 17th May, 2021 and another dated 23rd July, 2021 sat back and did nothing to forestall matters resulting in the decision of the respondent issued on 12th August, 2021.

As noted above, the claimant's application premised on the provisions of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that an order of reinstatement should only issue as a final order. Such would necessitate a full hearing of the main claim. Such a Rule is not far removed from the provisions of section 49 of the Employment Act, 2007 read together with section 12 of the Employment and Labour Relations Court Act, 2011.

The claimant is also seeking for an order be issued directing the Director of Criminal Investigations to issue the grievants with all evidence and investigation report following report under OB No.67/11/02/2021. Though the Directorate of Criminal Investigations is outlined here as a party, procedures for criminal investigations are foundationally different from those required for internal disciplinary procedures within the realm of employment and labour relations.

In this regard, the grievants do not contest that they were issued with show cause notices in April, 2021 and subsequently were invited to a disciplinary hearing and an outcome decision thereof has since issued on 12th August, 2021.

Whether the process was lawful and or fair and whether the resulting decision is lawful, fair and justified, such are matters which can well be gone into at a full hearing.

The claimant has since filed an amended claim which shall be formerly put on the record since under Rule 14 pleadings have not closed. Upon service, the respondent's right to a response is secured.

Accordingly, application dated 13th August, 2021 is found without merit and is hereby dismissed with costs. Application dated 17th May, 2021 is overtaken by events and serves no purpose and is marked withdrawn.

DELIVERED IN COURT AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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and