



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO E008 OF 2021

BENJAMIN MENZA KIRIMO.....CLAIMANT

VERSUS

KILIFI COUNTY PUBLIC SERVICE BOARD..... 1ST RESPONDENT

KILIFI COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. This is a dispute between the Claimant and the two Respondents concerning the lawfulness of the decision by the Respondents to suspend the Claimant from duty pending inquiry into a disciplinary issue affecting the Claimant. Only the 2nd Respondent entered appearance and filed a defense to the cause.
2. The brief facts of the matter are that the Claimant is employed by the 2nd Respondent as a clinical officer. He is attached to the ACK St Lukes Mission Hospital, Kaloleni Sub-County.
3. The Claimant is also a member of the Kenya Union of Clinical Officers. Apparently, he is an official of the said Trade Union's Kilifi branch.
4. Around October 2019, the Claimant's Trade Union together with another Trade Union, the Kenya National Union of Nurses made a joint effort to address staff welfare matters for their members working for the 2nd Respondent. Of particular interest to the two Trade Unions were matters relating to staff medical cover, non remittance of staff statutory deductions, employment of more staff in the 2nd Respondent's health department, adjusting positions of staff in line with their academic qualifications and reorganization of the management of the department housing health workers in the Sub-County of Kaloleni. This led to the first meeting between the County Secretary, County Government of Kilifi and officials of the two Trade Unions.
5. Despite the tentative agreement between the parties on managing the above issues, it would appear that no firm resolutions were reached. This would see the parties later hold several other deliberations on the matters.
6. It would appear that both the County Secretary and the two Trade Unions were in consensus that the issue of medical cover affected more than just the health workers in the 2nd Respondent's human resource establishment. Consequently, they agreed to bring on board Trade Unions representing other staff working for the 2nd Respondent. As a result, it would appear that the relevant Trade Unions formed what the Claimant describes as a Trade Union caucus comprising of the initial two Trade Unions and the Trade Unions representing medical doctors and other civil servants within the rank and file of the 2nd Respondent.
7. From the record, the several Trade Unions were henceforth working as a team. They appear to have pursued the joint issue of medical cover up to the point it appeared that the 2nd Respondent was not keen to finalize the matter. It is at this point that the Trade Union caucus opted to call a strike to push their case.
8. In fact, from the witness statement by RW1, Hezbon Mae, the Claimant was appointed as interim official of an Executive Council of Trade Union officials representing workers in all departments of the 2nd Respondent. In my view, this is evidence of the fact that the Respondents were aware of and had no problem with the several Trade Unions representing employees engaged with the 2nd Respondent working jointly as a team on a number of common human resource issues. This history is important in order to appreciate the circumstances under which a joint strike notice was issued by the several Trade Unions involved in the dispute.
9. As mentioned above, on apprehending delay in resolving the medical cover issue, the several Trade Unions called for a strike. From

paragraph 5(b) of the 2nd Respondent's response to the claim, the strike was called based on a notice issued in November 2019. The exact date of the strike notice is not given in the statement of defense. However, in their oral testimony, both the Claimant and RW1 indicated that the notice was dated 15th November 2019.

10. From the County Secretary's letter of 19th December 2019 suspending the Claimant, the strike kicked off on 22nd November 2019. This is also confirmed in the 2nd Respondent's reply to the claim (see par 5 (e) of the Response).

11. These dates are critical as they demonstrate that the strike took place at least seven (7) days from the date of issue of the strike notice. In line with the requirements of the Labour Relations Act, a strike may only be called once the party seeking to strike has issued the other with a seven (7) days written notice of intention to strike. As this strike was commenced some seven (7) days after the date of issue of the notice, it is evident that the employees' Trade Unions complied with this requirement of the law.

12. I must mention that the law does not place restrictions on who should sign the notice. Where the strike involves a Trade Union, the Union officials will sign it. And where the Unions are working as a caucus as was the case here, it is my considered view that any official authorized to sign the notice will lawfully sign it.

13. The parties did not file a copy of the impugned strike notice for review by the court. However, it is evident from the evidence presented that the dispute revolved around the authenticity of the notice.

14. According to RW1, the notice was illegal because it was not properly signed. RW1 contended that the Claimant purported to sign the strike notice on behalf of the doctor's Trade Union official one Dr. Matano while aware that he was neither a member of the doctor's union nor was he sanctioned by Dr. Matano to sign it.

15. On the other hand, the Claimant asserted that he lawfully signed the notice after Dr. Matano authorized him to sign it on his behalf. That this was not a strike by the doctors' union but by the caucus of Trade Unions. Therefore, any official of the Trade Unions involved could sign it so long as he had been authorized to do so.

16. This evidence by the Claimant was confirmed by the several witnesses he called. All of them said that Dr. Matano was unable to make it to the joint Trade Union meeting where the strike notice was signed. That Dr. Matano was called in the presence of a majority of them when he authorized the Claimant to sign the notice on his behalf.

17. Although the 2nd Respondent contends that the Claimant forged Dr. Matano's signature, it did not call the said doctor to give evidence that indeed his signature was forged. And neither was evidence tendered to suggest that there had been any report to the state investigative agencies regarding the purportedly forged signature.

18. Taking into account the totality of the foregoing and having regard to the history preceding the signing of the impugned strike notice I am convinced that the Claimant acted on the authority of Dr. Matano to sign the document. And that the parties had been representing a caucus of Trade Unions that had been trying to address the issue of medical cover with the 2nd Respondent. Accordingly, I find that the Claimant's signature on the notice on behalf of Dr. Matano could not have been an attempt to forge the said doctor's signature as has been suggested by the Respondents.

19. In their submissions, counsel for the 2nd Respondent argue that the strike was also illegal as it was called before the trade dispute in question had not been subjected to conciliation as required by law. However, I note from the record that this point was not taken as a point of attack in the pleadings filed by the Respondent. And neither was evidence led on it. Simply put, this was not an issue for determination before the court. Therefore, it cannot be properly taken up at the stage of submissions.

20. From the record and as appears from the evidence presented by the parties, the Claimant was subjected to an internal staff disciplinary process over the matter. The first of these sessions was held before the 2nd Respondent's Departmental Human Resource Committee in January 2020. This organ recommended the dismissal of the Claimant for allegedly calling an illegal strike on the basis of a forged strike notice.

21. The matter was then escalated to the 2nd Respondent's County Human Resource Advisory Committee (CHRAC). This committee upheld the findings of the Departmental Committee.

22. On 3rd June 2021, the County Public Service Board Disciplinary Committee (CPSBDC) reviewed the Claimant's case. This appears from the report filed by the 2nd Respondent in its list of documents dated 15th October 2021. This report was produced in evidence by RW1.

23. From the report, the CPSBDC recommended that the Claimant's suspension be lifted. According to the CPSBDC, the case against the Claimant had many grey areas which pointed to weaknesses in the Respondents' case against him. For instance, the CPSBDC indicated that it could not authenticate some accusations leveled against the Claimant such as causing the removal of intravenous medical equipment from patients. Therefore, it recommended that the Claimant be permitted to resume duty with a warning. It also recommended that his withheld salary and other benefits be worked out and be paid to him. It also recommended that the case be closed by 30th June 2021 as the matter had dragged for close to one and half years.

24. Both the Claimant and the 2nd Respondent's witness produced documents which made reference to the ***Human Resource Policies and Procedures Manual for the Public Service, 2016***. The 2nd Respondent also refers to the manual in its submissions. The court has considered this document. It provides guidelines on best practices in managing human resource in the public service both at national and county level.

25. The document makes elaborate provisions regarding processing and management of disciplinary issues in the public service. Its objective is to entrench a practice where discipline cases against public servants are dealt with in a manner that is expeditious, efficient, lawful and procedurally fair.

26. One of the key features of the policy is to require that discipline cases against public servants be concluded within six (6) months of their institution. Where this is not possible, the public body conducting the case must report to the Public Service Commission explaining the reason for the delay.

27. In my view, these regulations are intended to guard against abuse of the disciplinary processes by bodies charged with them to the disadvantage of employees in the public sector. They do so by entrenching accountability mechanisms against the disciplinary organs.

28. The CPSBDC perhaps in reference to these guidelines observes in its report that the case against the Claimant had been pending for more than six (6) months. In fact, it observes that the matter had been on for close to one and half years. The Claimant's Union in its letter to the 1st Respondent dated 7th December 2020 and produced in evidence also raises similar concerns.

29. In view of the foregoing, I think that the appropriate remedy in this matter is as has been recommended by the Respondents' own organ, the CPSBDC. There is no explanation why these recommendations have not been implemented even after the CPSBDC asked that the matter be resolved by 30th June 2021.

30. Although the law is silent on the length of time an employee can remain on suspension pending conclusion of a disciplinary issue against him, the period must nevertheless be reasonable. Otherwise too long a suspension infringes on an employee's constitutional rights to fair labour practice and fair administrative action as protected under articles 41 and 47 of the Constitution. This is particularly so where the employer elects to indefinitely withhold the entire of the employee's salary. Such conduct besides breaching a fundamental term of the contract of service on the duty to pay salary infringes on the employee's right to human dignity (see **Grace A. Omolo v Attorney General & 3 others [2012] eKLR**).

31. I agree with the 2nd Respondent's submissions that an administrative suspension of an employee from duty is a lawful tool available to the employer to enable appropriate inquiry into a discipline issue against the employee. However, where the suspension is unduly long and without valid justification, it becomes unlawful as was observed in **Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & Another [2012] eKLR**. It only mars the credibility of the disciplinary process and goes towards suggesting bad faith on the part of the employer.

32. The suspension against the Claimant was issued in December 2019. It was without pay. More than one year down the road, the matter has not been closed. Even more disturbing is that more than four (4) months after a recommendation for lifting the suspension was made by one of the Respondents' organs, this has not been done. And no explanation has been given by the Respondents why this is so.

33. Under the Employment and Labour Relations Court Act, the court has jurisdiction to grant several reliefs as more specifically set out under section 12 of the Act. In addition, the court is empowered to grant any other appropriate relief as it may deem fit to grant.

34. I have considered this matter. I note that the Claimant had prayed for among others, an order that the extended suspension be declared as constituting a constructive dismissal and that an order issues for his reinstatement. However, in his evidence, he stated that he is in agreement with the recommendation by CPSBDC that his suspension be lifted and that he be allowed back to work and be paid his withheld dues. In any event, there has not been a termination yet. The Claimant is in law and fact under suspension. I will therefore enter judgment for him as follows: -

a. The indefinite suspension of the Claimant by the Respondents is declared unfair and therefore unlawful in so far as it violates the Human Resource Policies and Procedures Manual for the Public Service, 2016 and the Claimant's right to fair labour practice and right to fair administrative action.

b. The Respondents are ordered to give immediate effect to the recommendation by their County Public Service Board Disciplinary Committee issued on 3rd June 2021 to the intent that the Claimant's suspension is lifted and the Claimant is forthwith and in any event within 15 days of this judgment allowed to resume duty and is paid all his withheld salary and other benefits.

c. The Claimant shall have costs of this Claim.

DATED, SIGNED AND DELIVERED ON THE 14TH DAY OF DECEMBER, 2021

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE