



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 181 OF 2016**

**STEPHEN KABURIA RUTERE.....CLAIMANT**

**-VERSUS-**

**KENYATTA NATIONAL HOSPITAL BOARD....1<sup>ST</sup> RESPONDENT**

**JUSTUS KIMATHI MBUI.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 9<sup>th</sup> April, 2020)

**JUDGMENT**

The claimant filed the statement of claim on 11.02.2016 through Eshiwani Ashubwe & Company Advocates. On 26.09.2018 the claimant changed his advocates to Chimei & Company Advocates. The claimant prayed for judgment against the respondents for:

- a. An order that any decision by the Staff Disciplinary and Advisory Committee (SDAC) to interdict the claimant was unlawful.
- b. An order lifting the interdiction of the claimant and be allowed to resume his duties without loss of benefits.
- c. An order for payment to the claimant of all financial losses as particularized at paragraph 11 thus:
  - i. Unpaid salary for period the claimant continues to be on interdiction at Kshs.35, 496.00 per month.
  - ii. Health worker extraneous allowance Kshs.20,000.00 per month.
  - iii. Health Risk Allowance Kshs.3, 850.00 per month.
  - iv. Leave travel allowance.
  - v. The cost of servicing a loan from Barclays bank Kshs.44, 000.00 per month.
  - vi. Cost of the suit.
  - vii. Damages for wrongful interdiction.
  - viii. Interest at Court rates on (a, b, c, d, e, f and h above).
- d. An order that any bad record that might have been placed in the claimant's file in relation to the unlawful interdiction be expunged from his records of employment.
- e. The Honourable Court to issue any other relief it may deem fit to grant.

The respondent appointed Lubulellah & Company Advocates to act in the matter. Despite the Court's directions and leave for the respondent to file and serve a statement of response, witness statement and the list and copies of documents, the respondent failed to comply. Despite service of a hearing notice, the respondent failed to attend the hearing which was fixed for 17.12.2019. Upon application by the claimant's

Counsel on 17.12.2019, the documents filed for the claimant were admitted in evidence to be relied upon in determining the suit. The hearing proceeded ex-parte.

The claimant's Counsel summarised the claimant's case in his opening remarks as follows:

**“The case is about unlawful dismissal of the claimant from the respondent's service. It is unlawful because there was no due process and KNH Board was not involved and before termination there were interim orders by Abuodha J barring respondent from dismissing claimant. They acted in disobedience and dismissed him from service hence the 3 contempt applications. Dismissal was on 30.10.2017.”**

The claimant testified that he relied on his witness statement on record filed on 11.02.2016 and dated on 10.01.2016. Further, the interim Orders by Abuodha J were confirmed in a ruling delivered on 13.03.2017. The parties filed their respective submissions.

To answer the **1<sup>st</sup> issue** for determination, there appears to be no dispute that the claimant and the 1<sup>st</sup> respondent were in a contract of service at all material time. The 1<sup>st</sup> respondent being a state corporation is a public hospital and the 2<sup>nd</sup> respondent is at all material times the Human Resource Officer for the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent employed the claimant as a Nursing Officer III in the Department of Nursing as per the contract of employment dated 24.12.1998. At the time of the dispute the claimant earned Kshs. 70, 992.00 being the consolidated monthly pay.

The **2<sup>nd</sup> issue** for determination is whether the claimant's interdiction was unlawful. The claimant has pleaded that he was interdicted on 20.12.2013 by the 2<sup>nd</sup> respondent for allegedly calling the employees of the 1<sup>st</sup> respondent to go on strike. Further the claimant was summoned to appear before the respondent's Staff Disciplinary and Advisory Committee (SDAC) on 20.08.2014. It is the claimant's case that the interdiction was malicious and without due regard to the claimant's rights and welfare because:

- a. The claimant was not given a fair hearing prior to the interdiction.
- b. The interdiction was without due regard to disciplinary rules and procedure.
- c. Subjecting the claimant to SDAC, a committee whose legality is questionable.
- d. Interdiction of the claimant by unauthorised person.
- e. Failure by the respondents to act promptly in resolving the interdiction issue of the claimant.

The claimant's further case is that by reason of the interdiction the claimant has suffered great financial loss, psychological torture, social disintegration in his life, career stagnation and damages. Thus he prays as per the statement of claim.

The respondents did not file a defence or call a witness. The Court finds that the claimant's case is not opposed as per the prevailing rules and directions.

The interdiction letter is dated 20.12.2013. The letter signed by the 2<sup>nd</sup> respondent alleges that it had come to the attention of the 1<sup>st</sup> respondent's management that the claimant was spotted on 19.12.2013 between 8.00pm and 10.00pm distributing undated leaflets urging the 1<sup>st</sup> respondent's health workers to join the strike by the county health workers but which had already been declared illegal and unconstitutional by the courts. The letter stated that the alleged conduct was in violation of sections 78, 80, and 81 of the Labour Relations Act, 2007 and under section 80, an employee who takes part in, calls, instigates or incites others to take part in a strike that is not protected is deemed to have breached the employee's contract and is liable to disciplinary action. The letter continued, **“In view of the above and considering the seriousness of the offence, it has been decided that you should be and are hereby interdicted from duty with effect from the date hereof. On interdiction, you are entitled to half your basic salary. You will however, continue to be paid house, medical outpatient and transport allowances. You should not leave your duty station without permission from the Deputy Human Resource Manager or any other person duly authorised to grant such permission. You will also be required to be reporting to the Deputy Human Resource Manager once a week (i.e Wednesday) between 9.00am and 12 noon until your case is finalised.**

Yours faithfully

signed

J.K. Mbui

**For: SAD, HR & ADMINISTRATION**

The claimant's case and evidence is that the 2<sup>nd</sup> respondent who wrote the interdiction letter did not have the legal mandate to write it and to interdict the claimant from the service of the 1<sup>st</sup> respondent. Thus the disciplinary process as flowing from that letter is unlawful. Further the 1<sup>st</sup> respondent never sanctioned the interdiction by itself or by a committee duly constituted by the 1<sup>st</sup> respondent. Further he was summoned by letter dated 20.08.2014 to appear before SDAC on 26.08.2014 but the claimant disputes the legality of SDAC in that regard. The claimant's evidence is that the 1<sup>st</sup> respondent's Board is supposed to constitute a disciplinary committee but which was not done in his case of interdiction. Further, after his interdiction he has continued to earn a net of only Kshs.655.00 per month and he has suffered a lot.

The Court finds that claimant's case that the 1<sup>st</sup> respondent's Board or its duly constituted committee had the authority to interdict the claimant has not been challenged. The Court further finds that the claimant's evidence that he was interdicted by the 2<sup>nd</sup> respondent who lacked authority to do so and invited before SDAC which was not a committee duly authorised by the 1<sup>st</sup> respondent's Board has not been rebutted. Accordingly the Court returns that as urged and submitted for the claimant, the interdiction was *ultra vires*, null and void as it was unlawful.

The 1<sup>st</sup> respondent is established as a state corporation under the State Corporations Act and as per the Kenyatta National Hospital Board Order, 1987. Paragraph 4 (1) of the order states thus, **"(1) The Board shall, under the control of the Minister for the time being responsible for matters relating to health, be responsible for the administration, management and development of the hospital established in Nairobi by the Government known as the Kenyatta National Hospital (hereinafter referred to as "the hospital")."** The letter by the Principal Secretary, Ministry of Health dated 26.11.2014 addressed to the 1<sup>st</sup> respondent's Chief Executive Officer in the disciplinary case of Douglas Munyala Malombe stated that the 1<sup>st</sup> respondent's Board must be involved in the disciplinary cases of the 1<sup>st</sup> respondent's employees because the Board is the one which is mandated and accountable for human resources in terms of employment and discipline of the employees. Indeed section 5(3) of the State Corporations Act provides that a state corporation may engage staff and employ such number of staff in consultation with the State Corporations Advisory Committee. The evidence is that the 1<sup>st</sup> respondent's Board had the power to employ and exercise the disciplinary powers over the claimant and the Board's mandate in that regard had not been delegated to the SDAC or the 2<sup>nd</sup> respondent or the person the 2<sup>nd</sup> respondent signed the letter for, thus, **"SAD, HR & Administration"**. The interdiction was therefore unlawful. Further, the evidence is that it was the Board which had employed the claimant and the Court considers that in absence of any other material before the Court, it was the Board which could impose the interdiction.

The Court has considered the submissions made for the respondents and while the Court agrees that the interdiction was a preliminary step in the disciplinary process, the respondent has not by pleadings and evidence established that the 2<sup>nd</sup> respondent had the authority to issue the interdiction letter as was done and that the SDAC had the authority to summon the claimant to a disciplinary hearing as was done. On the other hand, the claimant has by pleadings and evidence established that he was employed by the 1<sup>st</sup> respondent's Board and by evidence including Ministerial instructions, only the Board could impose the interdiction.

The **3rd issue** for determination is whether the subsequent dismissal of the claimant from the 1<sup>st</sup> respondent's employment was unlawful. It is submitted for the 1<sup>st</sup> respondent that the claimant did not plead dismissal and make a relief in that regard. The claim and prayer should therefore fail because parties are bound by their respective pleadings. For the claimant it is submitted that the 1<sup>st</sup> respondent purportedly issued a show cause letter on 07.08.2017 on related charges despite the court order barring any disciplinary action pending the hearing and determination of the suit. The reasons in the dismissal letter dated 30.10.2017 relate to actions of the 1<sup>st</sup> respondent which were in disobedience of a court order and they are about the claimant allegedly inciting colleagues to go on strike. It was submitted for the claimant that the 1<sup>st</sup> respondent provided no evidence that the strike in issue was illegal and the Court finds that indeed no such evidence was provided as per sections 43 and 47 of the Employment Act, 2007.

As for the issue of pleading raised for the 1<sup>st</sup> respondent, the claimant prays for, **" An order that any bad record that might have been placed in the claimant's file in relation to the unlawful interdiction be expunged from his records of employment."** The Court returns that within that prayer, the ensuing dismissal may be amenable to orders in the present case in so far as it is such bad record flowing from the unlawful interdiction. In so far as the dismissal letter dated 30.10.2017 states and alleges that the claimant had not been reporting to the duty station every Wednesday as required of officers who are on interdiction and his whereabouts had remained unknown thereby resulting in insubordination, the Court returns that indeed, the dismissal flows from the offensive interdiction. The dismissal letter further purported to lift the interdiction of 20.12.2013 without loss of the withheld salary during the period of interdiction. In the ruling by Abuodha J delivered herein on 31.03.2017 it was ordered, **"The court therefore confirms the orders issued on 11<sup>th</sup> February, 2016 pending the hearing and determination of the main claim."** The orders issued on 11.02.2016 were as follows, **"2. That interim orders be and are hereby granted restraining the 1<sup>st</sup> respondent either by its agents, assignees, servants, and/or representatives from victimizing, intimidating, suspending, dismissing and/or terminating the employment services of the claimant/applicant until 25<sup>th</sup> February 2015."** The Court finds that the dismissal was in clear contravention of the order which expressly restrained the 1<sup>st</sup> respondent from dismissing or terminating the claimant's employment in view of the suit that had been filed to challenge the interdiction in issue. Accordingly, the Court finds that the ensuing dismissal was unlawful as it was in contravention of the subsisting temporary Court order. While making that finding, the Court finds that the submission made for the 1<sup>st</sup> respondent that the dismissal was with a good reason is vacuous for want of the relevant pleading and evidence as per sections 43, 45 and 47 of the Employment Act, 2007. In particular the Court finds that the respondent has failed to plead by way of a defense or statement of response and failed to provide the evidence at the hearing that as at termination, it had a valid reason to terminate the claimant's contract of service by way of the letter of dismissal.

The **4<sup>th</sup> issue** is whether the claimant is entitled to the remedies as prayed for. The Court finds that the claimant is entitled except to, Kshs.44,000.00 per month on loan repayment which was not justified at all, and further except to leave travel allowance which was not quantified or shown to be remunerative. The Court considers that the other allowances as prayed for were remunerative and will be paid as agreed on monthly basis. Since the remunerative payments withheld during the interdiction and up to the date the claimant will resume duty will be paid, the Court returns that the claimant is not entitled to general damages for unlawful interdiction as prayed for. As the claimant has succeeded in his claims and prayers the 1<sup>st</sup> respondent will pay the costs of the suit. The 2<sup>nd</sup> respondent being an employee of the 1<sup>st</sup> respondent the Court will not make any specific orders against the 2<sup>nd</sup> respondent.

In conclusion judgment is hereby entered for the claimant against the 1<sup>st</sup> respondent for:

- a. The order that the decision conveyed by the 2<sup>nd</sup> respondent as per the letter dated 20.12.2013 and decision by the Staff Disciplinary and Advisory Committee (SDAC) conveyed by the letter dated 20.08.2014 to interdict the claimant was unlawful.
- b. The order lifting the interdiction of the claimant conveyed in the letter dated 20.12.2012 and all processes flowing from that letter

and the claimant be allowed to resume his duties without loss of benefits; and for that purpose to report on duty not later than 02.05.2020 at 08.00 am for assignment of duty by the 1<sup>st</sup> respondent's Chief Executive Officer and without break in the claimant's tenure of service.

c. The order for payment to the claimant by the 1<sup>st</sup> respondent of all financial losses as particularized at paragraph 11 of the statement of claim thus:

i. Unpaid salary for period the claimant continues to be on interdiction at Kshs.35, 496.00 per month.

ii. Health worker extraneous allowance Kshs.20, 000.00 per month.

iii. Health Risk Allowance Kshs.3, 850.00 per month.

iv. Cost of the suit.

v. The amount due under (i) to (iii) be paid by 01.07.2020 (but payable less due PAYE) failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

d. The order that any bad record that might have been placed in the claimant's file in relation to the unlawful interdiction (including the correspondence and process leading to the dismissal and the dismissal letter dated 30.10.2017 and processes flowing from that letter) are hereby expunged from the claimant's records of employment.

e. The amount of money payable under this judgment be computed and be part of the decree and in event of any dispute in computation the deputy registrar to resolve the same in terms of this judgment.

f. The amount payable be paid by 01.08.2020 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.

g. In view of the COVID 19 pandemic there be stay of execution of the decree with respect to the amount payable until 01.08.2020 but there will be no stay of execution of the decree with respect to the orders about the claimant's reporting to resume duty.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday, 9<sup>th</sup> April, 2020.**

**BYRAM ONGAYA**

**JUDGE**