



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1116 OF 2012

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF HEALTH.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Claimant filed an Amended Statement of Claim on 14.11.2018 on behalf of Lenpika Mutunga Kioko, the grievant herein, contending that the dismissal of the grievant by the Respondent was unlawful and wrongful. She therefore sought the following reliefs:

- a. A declaration that the dismissal was wrongful, time barred, unprocedural and/or unlawful.
- b. An order directing the respondents to compensate the grievant for the 17 month worked between the period of March 2000 and July 2001 amounting to Kshs. 1,339,430.00 with interests at court rates.
- c. An order directing the Respondents to compensate the grievant for loss of salary and allowances from 1996 when he was first dismissed to 25th February when he was first reinstated amounting to Kshs. 3,781,920.00 with interest at court rates.
- d. An order directing the Respondents to compensate the grievant for loss of salary and allowances between the month of April 2002 when he again was dismissed to the year 2010 when he was reinstated back to employment amounting to Kshs. 9,218,430.00 with interest at court rates.
- e. An order be granted that the Respondent pay the Grievant the difference of the consolidated wage between the period he served under job grade G for period of 36 months amounting to Kshs. 2,093,652.
- f. Damages for unfair dismissal and emotional distress against the Respondents at court rates.
- g. A declaration that the grievant be deemed to have been in service from the first time he was dismissed.
- h. A declaration that the grievant's promotion stagnated and ought to be in job group M and above.
- i. A declaration that the 1st Respondent pay the grievant salary, allowances and other emoluments for the arrears in pay Change Advice dated 23/8/1996 12 months by Kshs. 79790.00 amounting to Kshs. 945,480.00
- j. A declaration that all the payments attract the interest accrued at the court's current rate.
- k. That the Honourable Court be pleased to order the 1st Respondent to retain the grievant with the first personal file and number in order to have continuity of service rendered to the 1st Respondent and in consideration to not losing his years of service and/or retirement benefits.
- l. Costs of this suit be borne by the Respondent.

2. The Respondents filed their Amended Statement of Defence on 28.1.2019 contending that the grievant's purported 6 months' unpaid leave was contrary to the Code of Regulations and as such he was lawfully dismissed for desertion. They averred that the grievant was issued with the show cause letter dated 15/6/2001 and he tendered his explanation but the same was unsatisfactory. They further averred that though the grievant filed his first and second appeals to the 2nd Respondent, he did not raise any new and sufficient evidence thus his appeals were dismissed. Finally, they averred that the purported reinstatement of the grievant did not take away the employer's right to conclude the disciplinary hearing.

Claimant's case

3. The grievant testified as Cw1. He told the court that he was employed by the Ministry of Health in July 1980 and worked continuously until 20.11.1995 when he applied for 6 months' unpaid leave from 20.11.1996 to 2.5.1996. He further testified that the leave was granted and after its lapse he reported back to work but the management officer told him to write a letter asking for his reinstatement which he did. However, the letter was not forwarded to the Ministry Head Quarters and as such he remained out of service until 2000 when his request for reinstatement was forwarded to the Head Officer and he was allowed to resume work in March 2000.

4. He testified that his understanding of his reinstatement was only in reference to the payroll because he had not been dismissed. However, from March 2000 when he resumed duty, he was not paid any salary up to June 2001 despite the fact that he discharged his duties. In June 2001, he was served with a show cause letter questioning his absence from work during the period he was on the unpaid leave and he responded on 1.8.2001. However, he denied that he resigned from service.

5. On cross-examination, he admitted that he applied for unpaid leave and left work before the leave was approved. He further admitted that he did not have the approval in court as an exhibit. He maintained that he resumed work after the 6 months but he was not allowed to work. He admitted that the Code of Regulations in force then did not allow more than 50 days leave. He maintained that he wrote a letter of reinstatement and thereafter the letter dated 20.2.2000 instructed him to resume duty.

6. He admitted that in the letter dated 1.8.2001 he admitted that he deserted duty. He testified that a domestic land issue and mild depression led him to proceed on leave before it was approved but admitted that he did not have records to support the alleged matters. He denied being paid when he was not in service. He clarified that he was doing locum at Jordan Hospital when he was not on duty but later joined the Hospital from January - May 2002.

7. In re-examination, he contended that the Respondents have acknowledged that his leave had been granted.

Respondents' case

8. Luka Kaburu Marete testified as Rw1. He stated that the letter produced by the grievant asking him to resume work is suspicious because any letter from the Human Resource must be copied to the relevant authorities for supervision. He contended that the letter should have been copied to the Provincial Medical Officer, Eastern Province and the Ministry of Health, Kitui where the grievant was to be stationed.

9. He testified that the suspicion was confirmed by the Memo dated 8/3/2001 by Mrs. E. W. Kimani, Senior Personnel Officer addressed to the SPPO. He testified that Mrs. Kimani doubted the authenticity of the letter dated 25.2.2000. He further testified that the SPPO agreed that the letter was suspicious by endorsing his handwriting on the Memo.

10. He testified that the grievant was on an unauthorised leave for 6 months without pay and that there is no record that he reported back to work after the unpaid leave. He contended that from the Respondents' documents, the grievant's application for internship stated that from the year 2000 to 10.4.2002, he worked at Jordan Hospital Limited. He testified that this is the same period that he grievant alleged that he was working for the Ministry of Health (the Ministry).

11. He testified that though the letter dated 22.4.2010 the Ministry offered the grievant the position of Registered Community Health Nurse in a 3 year contract, there was a possibility that he did not disclose that he had been dismissed. He testified that the grievant's case is generally misguided as it was not straight forward.

12. On cross examination, Rw1 admitted that the letter dated 25.4.2000 reinstated the grievant pending further action and that this is a conditional reinstatement as there was a pending appeal. He maintained that the grievant proceeded on unauthorised leave. However, he admitted that the grievant's application for unpaid leave bears the work "file" meaning that it was placed in the file at the Hospital. He maintained that there is no record to show that the grievant reported back after the unpaid leave. He contended that prolonged leave required a notice to the Principal Secretary (PS) from the Supervisor that the leave had expired and if the Supervisor failed to notify the PS, the grievant was to do so.

13. He testified that the procedure for dealing with an issue of absconding duty for over 48 hours or where an employee's whereabouts are unknown includes; the employer is expected to serve a show cause letter to the employer who is to respond within 21 days; his salary is stopped pending his response and if no response is provided the case is finalised and forwarded to the Ministerial Advisory Committee at the Ministry's Head Quarters; and finally, if the Committee is not satisfied with the response, the Committee recommends to the PSC for the dismissal of the officer.

14. He testified that the grievant absconded duty from 1.12.1995 and that the show cause letter was dated 15.6.2001 which was 5 years from the date he absconded. He admitted that there was no meeting where the grievant was called to defend himself verbally and clarified that the case was dealt with by the Ministerial Advisory Committee. Finally, he contended that he has no record that the grievant was reemployed by the employer as he alleged.

15. In re-examination, he testified that the grievant was issued with a show cause letter in 2001 and the reason for delay was that there were

many cases being handled. Finally, he denied that the grievant worked at Jordan Hospital on locum basis.

16. John Kimani Njorio the Assistant Director at the PSC, the 2nd Respondent herein, testified as Rw2. He stated that under the Code of Regulations and the PSC Regulations, that were in force at the material time, only 30 days' unpaid leave was allowed with prior application and approval. He contended that the grievant proceeded on unpaid leave without prior approval and extended it beyond the 6 months requested. He further testified that after his dismissal, the grievant made two appeals which were all dismissed because from the record presented there was no prove of the reason for his absence from duty.

17. On cross-examination, he confirmed that there was a recommendation letter dated 17.8.2001 from the Medical Officer Health to the PS asking that the grievant's appeal be considered favourably. He however testified that in making a decision, the PSC does not rely on one document rather it looks at the whole record. He admitted that the grievant was not present at the meeting of the Ministerial Advisory Committee that recommended his dismissal. He further admitted that the PSC never called Claimant to attend the hearing of his appeals and contended that the regulations gave the PSC discretion whether or not to call the employee to attend the hearings.

18. He admitted that the grievant's salary was stopped before he was notified and contended that prior notification was not a requirement under the law. He contended that the grievant's case was treated as one of absence from duty. He admitted that there were disciplinary proceedings at Kitui because that was also not provided for.

Claimant's submissions

19. The Claimant submitted that section 43 of the Employment Act provided that where an employer summarily dismisses an employee, the employer must have a valid reason. She contended that from the onset the Respondents had no valid reason to dismiss the grievant. She maintained that his leave was approved but the approval letter was never given to the grievant and relied on admission by previous Counsel on record through an affidavit sworn on 16/8/2016. She contended that if leave was granted then the question of absconding should not arise and consequently there was no reason to dismiss the grievant.

20. She further submitted that the excerpt of the Regulations produced by Rw2 indicate that unpaid leave would be allowed on grounds of urgent private affairs in cases of exceptional hardship or compassionate grounds. She also urged the Court to find that the 30 days' period could be extended if need be. She contended that since he lost his employment after proceeding on leave, the same amounted to constructive dismissal because his supervisor was aware of the leave but he instigated that he had absconded duty. She relied on **Boniface Francis Mwangi v B.O.M Iyego Secondary School [2019] eKLR** where the Court held that the Respondent's failure to contact the Claimant fell short of the standard of duty of care.

21. The claimant further submitted that the Respondents failed to take the grievant through due process as required by the law and relied on **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** where the Court cited with approval the case of **Jackson Butiya v Eastern Produce** where the Court held that procedural fairness requirements under section 41 of the Employment Act are fulfilled by asking an employee to respond to a show cause letter and attend a disciplinary hearing.

22. She submitted that the disciplinary procedure started 5 years after the allegations of misconduct and was contrary to the procedure explained out by Rw1. She submitted that the inordinate and unexplained delay in conducting the grievant's disciplinary case was crafted to ensure that he was dismissed. Therefore, she submitted that the grievant was denied an opportunity to explain himself at the hearing and urged the Court to find that the procedure was flawed leading to unfair dismissal.

23. In addition, the claimant submitted that the grievant was not heard on his first and second appeal and contended that the letter wrote communicating the outcome of his appeal was just a formality. She therefore urged that she has required her case in the required standard and prayed for all the reliefs set out in the Amended Claim plus costs of the suit.

Respondents' submissions

24. The Respondents submitted that the grievant admitted to the charge of desertion from duty for over 4 years and requested for leniency as it was his first offence. They relied on the case of **Martin Waweru v Attorney General [2019] eKLR** where the Court held that the grievant's apology meant that he admitted that he was guilty of the charge against him.

25. They further submitted that the applicable law to the instant case is the Employment Act Cap 226 (repealed) which did not provide that the employer provides reasons for dismissal.

26. With respect to disciplinary procedure, the respondents submitted that the procedure followed was provided under the PSC Code of Regulations and it was complied with when the case was deliberated upon by MHRAC on 1.12.2001.

27. They submitted that the Claimant is not entitled to any damages since the dismissal was fair. They further submitted that the Claimant is not entitled to salary for 17 months because during the material time, he was working for Jordan Hospital. They submitted that the Claimant has not guided the Court how he arrived at the claim for compensation amounting to Kshs. 1,339,430/=. They urged the court to reject the invitation to adopt the salary increment upon promotion vide the letter dated 23.9.1996, because the grievant is not entitled to any increment as he had deserted duty without permission for 4 years.

28. They further submitted that the law applicable to his case entitled him to only payment of salary in lieu of notice and urged that some of the remedies sought are in relation to the period after he ceased being in employment of the Respondents. They submitted that these claims are not legally or contractually justifiable and relied on **D.K. Njagi Marete v Teachers Service Commissions [2013] eKLR** for emphasis. Finally, they urged the Court to dismiss the claim with costs.

Issues for determination and analysis

29. It is common ground from the pleadings, evidence and submissions that the grievant was employed by the respondents from July 1980 to 4.4.2002 when he was summarily dismissed from service. The issues for determination are:

- a. Whether the dismissal of the grievant was wrongfully and unlawful.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the dismissal was wrongful and unlawful

30. The Claimant's case is that the grievant applied for 6 months' unpaid leave and after the 6 months' period he resumed work but was not allocated any duties by the then Medical Health Officer until March 2000 when a letter from the Head Quarters directed him to resume duty. It is her further case that the grievant resumed work and continued until without pay until July 2001 when disciplinary process was initiated against him, culminating in the dismissal on 4.4.2012 without being accorded a fair hearing.

31. The Respondents case is that the 'grievant absconded duty for 4 years from February 1995 and as such his summary dismissal was justified. They further urged that the applicable law to the instant suit is the repealed Employment Act which was in force when the dismissal was done and not the 2007 Act upon which the claimant has based her suit.

32. I have carefully considered the material presented to the court and I agree with the Respondents that the applicable law in the instant case is the Employment Act, Cap 226 (repealed) as the cause of action herein arose on 4.4.2002. I gather support from **Kenya Ports Authority v Andrew Ochieng Odongo [2017] eKLR** where the Court of Appeal held that:

“It must be borne in mind as we consider these two questions that the suit giving rise to this appeal was instituted in 2006 before the coming into force of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 but the hearing and determination took place between 2012 and 2015... We find no express intention in the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011, for their retrospective application.”

33. Under the repealed Employment Act, Cap 226, there was no provision requiring the employer to have a justifiable reason for dismissing an employee or to accord the employee any prior oral hearing as it is the case with the 2007 Act. Nevertheless, I find that the Claimant testified that he proceeded on unauthorised leave and he was heard through a Show cause letter. In his letter dated 1.8.2001, he admitted that he had deserted duty from 1.1.1996. During cross-examination herein, he admitted that he proceeded on unpaid leave before he received approval. On the other hand, Rw2 testified that unpaid leave could only have been for 3 months. Considering the foregoing observations, I am satisfied that there was a valid reason justifying the summary dismissal of the grievant and proceed to return that the dismissal was neither wrongful nor unlawful.

Reliefs

34. In view of the foregoing, I decline to make a declaration that the dismissal was wrongful, time barred, unprocedural and/or unlawful.

35. However, I grant the prayer for salary for period the grievant served from March 2000 to July 2001 because there is evidence on record to prove that he was reinstated to work and he performed his duties effectively. The Advisory Committee during its meeting on 27.11.2001 observed that the grievant was reinstated to work on 3.3.2000 as directed by the letter dated 25.1.2000. The committee further noted that the MOH Kitui in his letter dated 17.8.2001 stated that the grievant had been attending to his duties effectively until 15.6.2001. Denying the grievant his salary for the work done before the formal dismissal on 4.4.2002 would amount to upholding servitude and inhuman treatment contrary to the constitutional tenets.

36. The claimant prayed the unpaid salary for 17 months based on a monthly salary of Kshs 78,790 equalling to kshs. 1,339, 430. The evidence relied upon is the letter dated 23.9.1996 which promoted him to Job Group H. However, according to the said letter the highest salary in that Grade was kshs 5157 and he entered at Kshs 3435. He did not therefore demonstrate that he was entitled to a salary of kshs. 78,790 per month during the said period of 17 months. Even considering the Offer of Appointment to the grievant dated 22.4.2010, the consolidated salary for a Nurse, Job Group H, was Kshs 23,832 per month. I will therefore award him the salary stated in the Statement of Overpayment produced by the RW2 being kshs. 6727. The said salary was the basis upon which the dismissal letter demanded from the grievant a refund of salary for 6 months totalling to kshs. 40,862. Consequently, I award him kshs 6727 x 17 = kshs. 114,359 plus interest at court rates from the date of filing the suit.

37. The claim for compensation equalling to 4 years' salary for being denied to resume work from 1996 to February 2000 lacks legal basis and it is dismissed. As acknowledged by the claimant, his reinstatement by the letter dated 25.2.2000 was subject to pending disciplinary action. Therefore, I find that the claim for the said compensation must fail because the reinstatement was conditional upon disciplinary action which ended up being summary dismissal.

38. The claim for salary for the period between April 2002 when he was dismissed and 2010 when he was reinstated is also dismissed because the claimant has not proved that the grievant was reinstated. In my view the said Offer Letter dated 22.4.2010 manifested a fresh appointment as opposed to reinstatement. The claim is therefore not justified in law and public policy which contemplates payment of wages only for work done.

39. The claim for the difference between the consolidated salary for 36 months when the grievant served under Job Group G has not been substantiated by precise pleading and evidence. Consequently, it is dismissed.

40. The claim for damages for unfair dismissal and emotional distress lacks basis in the repealed Employment Act and it is therefore dismissed. Likewise, the claim for arrears in Pay Change Advice dated 23.9.1996 lacks particulars and evidence to substantiate and it is declined. The claim that the grievant ought to be in Job Group M also lacks evidence and is dismissed.

41. In the end, I enter judgment for the claimant in the sum of kshs. 114,359 plus interest at court rates from the date of filing the suit but less statutory deductions. The claimant will also have costs.

Dated, signed and delivered at Nairobi this 23rd day July 2020.

ONESMUS N. MAKAU

JUDGE