



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 49 OF 2017

{Formerly Kisumu Cause No. 233 of 2016}

(Before Hon. Justice Mathews N. Nduma)

FRANCIS OLUNGA NAMASAKA.....CLAIMANT

VERSUS

KAKAMEGA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGMENT

1. The claimant seeks reinstatement to his position as a works officer as the indefinite suspension is illegal and that he be paid all his arrear salary and benefits and costs of the suit.
2. The facts of the claim are that the claimant was employed by the respondent as a works officer and was initially Doughtsman III employed by the public Service Commission on 18th April 1996. That the claimant rose through the ranks to assistant works officer on 27th January 2006 and to works officer, the current position held.
3. That on 4th March 2015, the claimant was suspended from work and required to show cause based on four (4) allegations of fraud, forgery, false payments and unprocedural grant of contracts in a situation where the claimant was conflicted.
4. The claimant responded to the allegation on 22nd May 2015 denying the offences. The claimant stated that the suspension was unlawful since he was not given a hearing before it was effected and that conclusion of the matter has taken inordinate long time to his loss and detriment.
5. The claimant was invited to attend a disciplinary hearing on 8th April 2016. That the hearing did not take place and the claimant was awaiting further communication as at the time he filed the suit.
6. The claimant states that the indefinite suspension is unlawful in that under the CBA CA NO. 14 of 2013 which regulates the relationship of the respondent and its employees suspension ought not to exceed three (3) months period.
7. The suspension is without salary, except full house allowance and medical allowance. The claimant earned Kshs. 74, 670 at the time of suspension out of which 62,670 comprise basic salary that is now not being paid.
8. The claimant testified under oath denying the charges against him and prays for the reinstatement to his job and a declaration that the suspension is unlawful, null and void.

Defence

9. In its amended statement of defence filed on 4th June 2018, the respondent whilst admitting all the particulars of employment and subsequent suspension states that it is the claimant who declined to attend disciplinary hearing to which he was invited on a number of occasions, instead resulting to issuing ultimatums as conditions precedent to his attending those meetings.
10. Upon closure of the claimant's case on 29th May 2018, Defence hearing was set down for 26th September 2018 on that date Mr. Amani holding brief for Mr. Ashitiva for respondent sought adjournment of the hearing on the basis that the main witness had left employment of the respondent and they were yet to trace him. Mr. Osundwa for the claimant opposed the application for adjournment since the date was taken by consent many months earlier. That justice of the case would be defeated by further delay since the claimant had not received his

basic salary since 4th May 2015. That the claimant was still on half pay and unable to earn a living and was a father with family to support.

11. Mr. Amani in response admitted that the hearing date was taken by consent but they could not proceed without a witness since he had left the employment and could not be traced.

12. The court ruled that the application for adjournment was for no good reason provided since no alternative witness had been provided by the respondent then or in future.

13. The defence case was deemed closed and directions on final submissions given.

Determination

14. The testimony by the claimant is not controverted at all. The claimant has proved on a balance of probabilities that he has been kept under suspension and without pay of basic salary from 4th May 2015 pending conclusion of a disciplinary hearing on charges made against him.

15. It is now more than four (4) years whilst the claimant is under suspension yet in terms of the Collective Bargaining Agreement (CBA) governing the parties, suspension ought not to be for more than three (3) months.

16. The conduct by the respondent is unlawful, unfair and amounts to unfair labour practice in violation of *Article 41 of the constitution of Kenya 2010*.

17. The conduct by the respondent also violates the human dignity of the claimant by tying him to the respondent without doing any work and without earning his entitlement under the contract of employment.

18. On the facts of this case, the court finds that the respondent has abused its managerial prerogative to discipline an employee fairly and in a timely manner thereby rendering the whole process unlawful, unfair and unfair labour practice in violation of *Article 41 of the constitution of Kenya 2010*.

19. Accordingly, the court makes the following orders in favour of the claimant as against the respondent:

(a) The suspension of the claimant by a letter dated 4th May 2015 for an indefinite period to date is an unfair labour practice in violation of *Article 41 of the constitution of Kenya 2010* and the parties CBA NO. 14 of 2013 and the same is unlawful, unfair, null and void.

(b) The respondent to reinstate the claimant to his substantive position still held by him without loss of any salary and/or benefits from the 4th May 2015.

(c) The unpaid salary arrears to attract interest at court rates from the date of suspension (4th May 2015) until the amount is paid in full.

(d) The respondent not to revive the disciplinary process against the claimant based on the same facts that led to his suspension

(e) Costs of the suit.

Judgment Dated, Signed and delivered this 11th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Osulwa for claimant.

Mr. Ashitiva for Respondent.

Chrispo – Court Clerk