



**REPUBLIC OF KENYA**

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

**AT NYERI**

**CAUSE NO. 54 OF 2016**

**CAROLINE WAMBUI KARUGO.....CLAIMANT**

**VERSUS**

**THE MURANG'A COUNTY ASSEMBLY SERVICE BOARD.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent and averred in her statement of claim that she was retained as a procurement officer and on 2<sup>nd</sup> March 2016 was suspended pending the finalization of an alleged Police case. In the letter of suspension it was alleged there was a Police investigation into the loss of Kshs. 7,000,000/- paid to Benkways Insurance Agency as premium for the medical cover for the Assembly members and staff and that the premium was not remitted in full to Britam Insurance Company Kenya Limited. She averred that in the suspension letter it was alleged that Simon Ngugi Njogu gave the Claimant Kshs. 7,000,000/- from the money paid by the County Assembly. She was suspended without any salary but with full house allowance and medical allowance. The Claimant averred that the suspension emanated from the letter from Simon Ngugi Njogu to the County Assembly dated 1<sup>st</sup> March 2016 which was to the effect that he was working hard to sort out the issue and ensure the full sum was paid and that he wanted the money repaid so that the matter can be settled. The Claimant averred that there was a handwritten note that the money was collected from his office by the Claimant. The Claimant contended the money for the premiums was paid vide Real Time Gross Settlement (RTGS) in two tranches of Kshs. 10,000,000/- and 5,232,258/- and it was the responsibility of the agent to remit the money in full to Britam Insurance Company Limited. The Claimant averred that to date she had not been served with any court summonses nor arrested or arraigned in court for any offences pertaining to the alleged loss of Kshs. 7 million to which she is a total stranger. She averred that she was also aware that the County Assembly and its organs had not served her with summons, show cause letters or any other documents suggesting that an investigation is ongoing. The Claimant averred that according to the letter the complaint was directed to the clerk and the handwritten part was only inserted as an afterthought to try and save the skin of the clerk. The Claimant averred that the suspension was a total abuse of power and the Claimant sought the suspension meted out to her be declared baseless and of no effect and she thus sought to be reinstated back to work. She sought costs from the Respondent as demand had been made for her reinstatement on 3<sup>rd</sup> March 2016 but the Respondent ignored it.

2. The defence filed by the Respondent it was averred that the Respondent was not the Claimant's employer. The Respondent averred in the alternative that the suspension was legal, regular and procedural in full compliance of the Human Resource Manual. The Respondent averred that criminal investigations and prosecutions are not their responsibilities nor were they in any control of the same and if the Claimant is aggrieved in any way by the ongoing criminal investigations against her by the complaint against her by her employer vide OB No. 20/26/2/2016 she should recourse against the Police. The Respondent averred that it had discharged its disciplinary procedural duty and that the rest of the process was subject to the criminal investigatory and judicial processes which the Claimant must await the outcome of and seek recourse in the courts for remedy. The Respondent averred that the claim was an attempt to scuttle the ongoing criminal investigations which the Respondent is not in charge of and that the Claimant was not the one to determine her innocence in the matter and that she must await the criminal due process to take place and only after she was found innocent can she be regularly and legally be reinstated. The Respondent averred that the Claimant did not merit nor is she entitled to the reliefs she has prayed for in the claim and thus sought the dismissal of the claim with costs.

3. The Claimant was heard but the Respondent did not attend the hearing. Due to the age of the case there was no adjournment allowed as the Claimant sought to defer hearing pending the conclusion of a criminal trial in Murang'a Law Courts which was stated to have a bearing on this case. She testified that she was currently undertaking studies and had been employed by the defunct Municipal authority on 16<sup>th</sup> June 2014 and that she carried out her duties as a procurement officer until her suspension in March 2016. She stated that in her suspension letter the allegation was that a large sum of money was lost in the medical cover of both the County Assembly and the members of staff. She testified that she was not given the opportunity to respond to the said letter nor was she invited for a disciplinary hearing to discuss the alleged misconduct. She stated that she was charged in Cr. Case No. 455 of 2016 at Murang'a Law Courts and that the case was ongoing. She stated that despite the case no disciplinary process had been initiated. She testified that her suspension emanated from the agent's letter which mentioned her only in the footnote which was the source of the complaint against her. She stated that she therefore sought reinstatement without loss of benefit as well as costs of the claim.

4. The Claimant filed submissions in which it was asserted that the Respondent did not follow the laid down procedure in the Murang'a County Assembly Human Resource Manual. The Claimant submitted that the complaint to the County Assembly was that the agent could not remit the full premium to Britam Insurance Company Limited as the clerk and his staff had taken Kshs. 7,000,000/- from the agent's office and through the letter the agent sought that the clerk refund the money. The Claimant submitted that the letter had an amendment which was handwritten and not typed as the rest of the letter to the effect that the Claimant had collected the money from his office. She submitted that her suspension was on account of the written statement of the complainant but the statement of the complainant was not filed in court. The Claimant submitted that her suspension cannot be said to be valid as the Respondent had jumped the gun and suspended her before setting the disciplinary process under the Manual in place. The Claimant submitted that the Respondent cannot rely on the criminal process as part of its disciplinary mechanisms or the cause of the Claimant's suspension. The Claimant submitted that the Respondent did not follow the steps in its Human Resource Manual but instead chose to disregard it. The Claimant relied on the case of **Nicholus Muasya Kyula v Farmchem Limited [2012] eKLR** and submitted that an employer cannot disregard its internal administrative controls. The Claimant

submitted that there is a distinct difference between criminal proceedings and internal disciplinary proceedings by an employer and that a criminal case cannot be a bar to internal disciplinary process. She relied on the case of **Faith Njoki Muthee v G4S Security Services (Kenya) Limited [2016] eKLR** for the proposition that though facts may be similar in criminal and civil proceedings there are different causes of action and the assertion that the Claimant should await the conclusion of the Murang'a criminal case No. 455 of 2016 escapist and meant by the Respondent to avoid responsibility in effecting disciplinary measures. The Claimant submitted that the Respondent's Human Resource Manual was inconsistent with the law in that it required the Claimant to be suspended until the conclusion of the criminal case. The Claimant submitted that the letter from the agent inculpated others such as the Clerk of the County Assembly Chris Kinyanjui and his staff and the Claimant was at a loss as to how as a procurement officer she had caused the loss of Kshs. 7,000,000/- paid to the agent M/s Benkways Insurance Agency. The Claimant submitted that it was not surprising that Chris Kinyanjui would try to pass the blame to someone else hence the handwritten portion directed at her. The Claimant submitted that she should be reinstated as her suspension was unlawful and unfair. She cited the case of **Parliamentary Service Commission v Christine Mwambua [2018] eKLR** where the Court of Appeal dealt with an appeal against an order of reinstatement and upheld the decision to reinstate the claimant in that case as the remedy of reinstatement was discretionary and should be guided by Section 49(4) of the Employment Act which includes the practicability of reinstatement and re-engagement and that reinstatement should only be ordered in very exceptional circumstances.

5. The Respondent submitted that the Claimant was charged in court and was suspended pending the outcome of the criminal case. The Respondent submitted that the Claimant was still on its payroll and cannot have her handle similar matters in the office as that would be a mockery of the investigations and subsequent prosecution. The Respondent submitted that the Claimant ought to have preferred an appeal against the decision of the County Service Board to suspend her and not file the suit in court. It submitted that the procedure of appeal was to be followed as held in the case of **Shem Okora Onywera v Kisii County Government & Another [2018] eKLR** where the court dismissed the claim on the basis that the Claimant had failed to appeal to the Public Service Commission under Section 77 of the County Governments Act. The Respondent submitted that suspension is permitted in line with the Claimant's terms of service and that was reiterated in the case of **Donald C. Avude v Kenya Forest Service [2015] eKLR**. The Respondent submitted that on the strength of **Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR** the public interest would be best served if the officer against whom there is an ongoing investigation is suspended as it would be sending the wrong message for offenders to be released and thereafter resume duties as that would send the negative image of impunity and condoning illegalities. The Respondent submitted that the cases cited by the Claimant were distinguishable as they all related to termination and not suspension. The Respondent submitted that a parallel civil process would be grossly unfair and cited the case of **Patrick Njuguna Kariuki v Del Monte (K) Ltd [2012] eKLR** and the case of **Mathew Kipchumba Kosgey v Baringo Teachers SACCO [2013] eKLR** the Respondent submitted that the Claimant can have restoration by grant of re-engagement with back salaries without loss of benefits, status and privileges. The case of **Dennis Nyagaka Ratemo v Kenya Film Commission & Another [2014] eKLR** was cited in support of the submission on reinstatement and re-engagement. The Respondent submitted that the criminal process should be permitted to be concluded.

6. The Claimant was suspended on suspicion of being involved in the misconduct forming part of the complaint in her suspension letter and the basis of her charges in Cr. Case No. 455 of 2016 at Murang'a Law Courts. The Claimant attacks the suspension on grounds that she should not be on suspension indefinitely pending the determination of the criminal case. The Respondent's human resource manual provides that an employee would be suspended on half pay for the duration of the criminal trial. The Claimant is therefore validly under suspension. What is troublesome is that after her suspension she chose to rush to court instead of seeking the reversal of the suspension through the Public Service Commission in terms of Section 77 of the County Governments Act. As such, her claim was prematurely presented to court and therefore untenable as held in the case of **Shem Okora Onywera v Kisii County Government & Another (supra)**. It was stated in that case

‘that where there is clear procedure for the redress of any particular grievance prescribed by constitution or an Act of parliament that procedure should be strictly followed’

13. The Judge went on to say –

“Aside from the views expressed in the two decisions set out above I take this view for the two additional reasons. First, it is my view that the Legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of section 77 of the County Government Act evince an intention to have all disputes arising out of appointment, by County Service Boards dealt with by the Public Service Commission, hence its grant to the commission of the mandate in mandatory terms by providing that the commission ‘shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office’. There is no option given to a party to choose whether or not to file grievances with the commission.”

Granted the provisions of Section 77 of the County Governments Act the claim is not merited and the same is dismissed but with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 11<sup>th</sup> day of December 2019**

**Nzioki wa Makau**

**JUDGE**