



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 614 OF 2016

(CONSOLIDATED WITH ELRC 615, 616, 617, 618 & 619 OF 2016)

OMAR BAKARI HANZI & 5 OTHERS.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA....1ST RESPONDENT

THE MOMBASA COUNTY PUBLIC

SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought separate suit on 19.8.2016 seeking lifting of their interdiction which was imposed on them on 18.7.2013 for participating in a strike. They also sought to recover salary arrears for the period of interdiction plus damages for the unlawful interdiction. The Claimants amended their claims on 7.10.2017 basically to enjoin the second respondent.

2. The Respondent have however denied that the interdiction of the Claimants was unlawful and unfair. They are unanimous that the Claimants participated in an unlawful strike called by their trade union in cause of which they committed criminal offence and they WERE charged in Court and later convicted. It is the defence case such circumstances entitled then to interdict the Claimants on half pay pending finalization of their cases. They therefore prayed for the suit to be dismissed with costs.

3. The suits were consolidated on 9.1.2017 and heard on 22.5.2017 when Mr. Omari Bakari Hanzi (claimant in ELRCC 615 of 2016) testified as Cw1. Thereafter the counsel for both sides agreed to dispense with calling further witnesses and instead adopted the written statements and filed written submissions to dispose of the suit.

Summary of claimant's case

4. The Claimant's case is that their salaries were delayed for 3 months and their trade union served a strike notice on the Respondents and the Labour Officer. Thereafter they participated in the strike together with other employees of the Respondents in July 2013. On 5.7.2013 the Claimants were arrested and charged with the offence of illegal dumping and committing nuisance in the public contrary to Mombasa City County By Laws 34(1) and 19(e).

5. On 18.7.2013, the Respondents served the Claimants with interdiction letters and which also invited them to show cause why they should not be dismissed for the said misconduct in addition to absconding duty without permission. All the Claimants responded to the show cause letter but they received no further communication from the Respondent.

6. On 25.4.2014, the Claimants were convicted of the offence of illegal dumping of refuse contrary to By-law 34(1) read with By-law 41 of the Municipal Council of Mombasa (Environmental Management) By-law of 2009. Thereafter no communication was given to them by the Respondents and they are up to now serving the interdiction drawing half salary. According to them, the said interdiction is unfair and unlawful because the case upon which it was based has since been concluded. In addition, the Claimant faults the Respondent for extending the interdiction for too long without making any communication about whether or not their services are terminated. They however admitted that they continue to draw half salary to date and some have even been promoted and given salary increment.

7. Finally, the Claimant contends that the interdiction is unfair because it was done in a discriminatory manner by selectively victimizing only the Claimant from among many other employees who also participated in the strike. They therefore prayed for reinstatement to work and payment of all their salary arrears. They also prayed for general damages for unlawful and unfair interdiction.

Defence case

8. The Respondents have contended that the Claimants participated in an illegal strike on 3rd and 4th July 2013 during which they absconded duty for 14 days. The Respondents further contended that in the course of the strike the Claimants dumped waste on the roads and caused nuisance to the public contrary to the Respondents' By-laws as a result of which they were arrested and charged with Criminal case No. M3068 of 2013. Following the said Criminal charges, the Claimants were interdicted on half pay pending the outcome of their trial.

9. The case ended on 25.4.2014 with a conviction and the Claimants were invited to a disciplinary hearing on 25.6.2015 where they were accorded a chance to defend themselves. Thereafter the committee relied on the conviction of the Claimants to recommend for their summary dismissal under section 44(4) (g) of the Employment Act. However, before the termination process was completed, the Claimants brought this suit.

10. The Respondents have denied the alleged bad faith and use of unfair procedure in interdicting the claimants' and maintained that due process was observed. They however admitted that the claimants are still receiving half pay and some have been promoted and given salary increment.

Analysis and Determination

11. There is no dispute from the evidence and submissions presented that the claimants were interdicted by the respondents from 18.7.2013 after being charged with criminal offences committed against their employer. The issues for determination are;

- (a) Whether the interdiction of the claimants is unlawful and unfair.
- (b) Whether the reliefs sought should be granted.

Unlawful and unfair interdiction

12. The reason cited for interdicting the Claimants is the Criminal charges they were facing in Case No. M3068 of 2013. The letter dated 18.7.2013 stated as follow

“In the meanwhile, it has been decided that you be and are hereby interdicted from exercising the duties of your office from the date of this letter pending finalization of your case”.

13. In my view, the interdiction was lawful by dint of clause D.31 of the County Public Service Human Resource Manual (2013) which provides as follow:

“1. The interdiction process entails the following:

(a) An Officer may be interdicted where misconduct which is likely to lead to dismissal is reported or a report that an officer has been charged in criminal proceedings is received."

(b)

(c) A county public officer who is interdicted shall receive half basic salary and full house allowance but all other benefits shall be withheld by the authorized officer; provided that an officer on suspension shall be paid medical allowance or medical insurance premium is remitted whichever is the case."

14. There is no legal requirement that an employee be accorded any hearing before interdiction is imposed on him or her. All what is necessary from the said HR manual is that the authorised person is satisfied that the employee has committed a misconduct which may lead to a dismissal or information that the employee has been charged with criminal proceedings like in this case.

15. In my view, however the continuation of the interdiction years after the close of the criminal proceedings is unfair and uncalled for. The exercise of disciplinary process and control by the employer must be exercised within reasonable time to avoid situation where the employee is subjected to untold suffering and deprivation of human dignity. The reason for the going view is that during interdiction or suspension an employee's income is reduced, his freedom of movement is curtailed and most of his benefits are withheld. Such situation should not be extended for years at the whim of the employer. In this case, the claimant having been interdicted in July 2013, it is unfair and indeed unreasonable to continue interdicting them today, 5 years down the road on half salary and without the freedom to leave their work station or look for alternative jobs.

16. The continued interdiction again in my view, leads to the reasonable conclusion that the Respondents do not wish to terminate the claimants services. The foregoing view is fortified by the admission by the defence that some of the claimants have been promoted and their salaries increased while still servicing the interdiction.

Relief

17. In view of the foregoing finding that the continued interdiction of the Claimants is unfair, I direct that the Claimants be reinstated to their employment forthwith and all their withheld salary from July 2013 to dated be paid to them. The said salary arrears shall be calculated by the respondents and paid by 1st Respondent to the Claimant within 30 days of today. In default the parties shall file submissions on the proposed payments for the court to determine. Thereafter the respondents will be at liberty to subject the claimants to disciplinary process when they shall be ready to do so. The rest of the reliefs are dismissed.

18. For the reasons stated herein above, I enter judgment for the claimants lifting the interdiction and reinstating them to their employment forthwith. In addition to the directions stated above on their accrued salaries. The claimants shall have costs and interest.

Signed and dated and at Nairobi this 15th day of March, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of April, 2018.

LINNET NDOLO

JUDGE