REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 9 OF 2016

(Before D. K. N. Marete)

HOSEA KIPKORIR SEREM.....…….....CLAIMANT

VERSUS

MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT

JUDGEMENT

This matter was originated through a Memorandum of Claim dated 14th January, 2016. It does not disclose an issue in dispute on its face.

The respondent in a Respondent's Defence dated 23rd June, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that by letters of suspension dated 8th May, 2012, the Chief Executive Officer of the 1st respondent suspended the claimant from service under the terms;

> *"You will therefore be required to stay away from the hospital premises."*

The claimant's further case is that he is a Kenyan and public servant subject to constitution safeguards enshrined in the Constitution of Kenya, 2010 as follows;

> *5. Constitutional Guarantees*
>
> *Article 27 of the Constitution of Kenya, 2010 provides that-*
>
> *(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
>
> *(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
>
> *(4) The State shall not discriminate directly or indirectly against any status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.*

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

6. Article 47 of the Constitution of Kenya, 2010 provides that-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) provide for the review of administrate action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

7. Article 50 2 (a) of the Constitution of Kenya 2010 provides that-

(1).....

(2) Every accused person has the right to a fair trial, which includes the right-

(a) to be presumed innocent until the contrary is proved;

(b) ….....

(c) ….....

(d) ….....

8. Article 236 of the Constitution of Kenya 2010 provides that

A public officer shall not be

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

The claimant in further support of his case recites the Public Service Commission Code of Regulations, 2005 as follows;

Section 23 of the Public Service Commission Act, Chapter 185 Laws of Kenya and the regulations made there under provides that-

(1) If in any case an authorized officer is satisfied that the public interest requires that a public officer should cease forthwith to exercise the powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.

(2) A public officer who is interdicted shall receive such salary, not being less than half his salary,

as the authorized officer shall think fit.

(3) Where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such public officer is neither dismissed nor otherwise punished under these regulations, the whole of any salary withheld under paragraph (2)

(4) If any punishment other than dismissed is inflicted, the public officer may be refunded such proportion of the salary withheld as a result of his interdiction, as the commission shall decide.

Further;

Section 24 of the Public Service Commission Act, Chapter 185 Laws of Kenya and the regulations made there under provides that-

(1) Where a public officer has been convicted of a serious criminal offence, other than such as are referred to in regulation 37(3), an authorized officer may suspend the public officer from the exercise of the functions of his public pending consideration of his case under these regulations.

(2) An authorized officer may suspend from the exercise of the functions of his public office, a public officer against whom proceedings for dismissal have been taken if, as the result of those proceedings, he considers that the public officer ought to be dismissed.

(3) While a public officer is suspended from the exercise of the functions of his public office under this regulation, he shall not be entitled to any salary:

Provided that the authorized officer may, if he thinks fit, direct that any suspended public officer shall be granted an alimentary allowance in such amount and on such terms as he may determine.

(4) A public officer who is suspended may not leave his station without the permission of the authorized officer or of any public officer who is empowered to give such permission on behalf of the authorized officer.

It is the claimant's other case that before suspension, an employee should be given two warnings, with these expiring at least 12 months of each year served without disciplinary action on their part. In the circumstances of his case, the suspension notice was made in the absence of a Notice to Show Cause. He was also denied an opportunity to be heard. This renders the suspension illegitimate.

In the penultimate, the claimant avers and contends that if the respondent were (to pursue legality she would be bound by the Public Service Commission Regulations, 2005 on the discipline of civil servants which sheds light on the subject matter.

He prays as follows;

a) An order to compel the respondents restore claimant pay with effect from 8th day of May, 2012 when the respondents suspended the claimant.

b) A declaration that the decision to suspend the claimant without pay was unconstitutional and illegal.

c) A declaration that the decision to suspend the claimant without pay infringed on the claimant constitutional rights and contravened Articles 28, 41(1), 47, 48 and 50(1) of the Constitution of Kenya, 2010.

d) An order for reinstatement for the claimant to be returned and/or reinstated to his former position as clerical officer I and or a position similar to the said position and/or a promotion.

e) Damages of illegal suspension with effect from 8th day of May, 2012.

f) A declaration that the claimant is supposed to be reinstated by virtue of his acquittal.

g) Costs and interest at court rates with effect from 8th day of May 2012 to judgment date.

h) Any other relief the Honourable Court may deem fit just to grant.

The respondent's case is that she admits paragraphs 1,2,4,5,6 and 7 of the claim but opines that the claimant is not such a public servant who is protected by Article 236 of the Kenya constitution. This is because the claimant willfully neglected to perform work which it was his duty to have performed, and or carelessly and improperly performing work which from its nature it was his duty, under his contract, to have performed carefully and properly. He would therefore not be entitled to protection under Article 236 thereof.

It is the respondent's case that in exceptional circumstances and more so in the circumstances like those of the claimant's case, an employer is entitled to suspend an employee without pay. That the action was necessary to protect the respondent's legitimate business interest. The respondent was guided by good faith and duty to act fairly when taking its action against the claimant. Again, the respondent conducted its own inquiries from competent public authorities to ensure that the charges against the claimant and the resultant actions were well founded.

The respondent's further case is that the claimant is not a deserving case for protection under Article 236 in that he willfully neglected to perform his work, did this carelessly and improperly thus entitling the employer to suspend him without pay. This was done in good faith and duty to act fairly in so doing.

The respondent's further case and submission is that due process was pursued and this included the right to be heard but the claimant waived this by failing to honour these

invitations to disciplinary committee meetings. He cannot therefore be heard to recall these at this late hour. She further denies a nexus between a criminal trial and internal disciplinary proceedings at the work place even when the charges are identical as the standards are different.

She prays as follows;

a) An order that the respondent has a right to suspend the claimant without a salary.

b) An order that the respondent has a right not to pay claimant any salary since.

c) A declaration that the claimant cannot be reinstated only by virtue of his acquittal without regard to the respondent's internal disciplinary mechanisms.

d) An order as to costs and interests.

The matter came to court variously until the 27th July, 2016 when the parties agreed a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful.

2. Whether the claimant was entitled to pay during suspension.

3. Whether the claimant is entitled to the relief sought.

4. Who bears the costs of this claim.

The 1st issue for determination is whether the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 16th August, 2016 reiterates his case in support of the claim. It is his case that the respondent, through her legal officer, one, Sylvia Chepkemoi implicated him in a theft of a cheque No.017621 dated 15th December, 2011 for Kshs. 890,022.00 belonging to Dr. Pallavi Shah. This was done on 23rd December, 2011. The respondent also claimed that the claimant stole cheque No. 015642 for Kshs.78,880.00 belonging to Davis Shirtliff. Both of these cheques were deposited in the National Bank Branch in the account of Butula Financial Services. The claimant denies this.

The claimant further submits that the respondents initiated a criminal process and also issued a notice to show cause/suspend the claimant on the aforementioned terms. This meant that the claimant was not supposed to be seen at the respondent's premises until the determination of the criminal case. He puts it thus,

> The *claimant responded to the show cause letter denying any involvement in the alleged fraudulent activities in that the stolen cheques were not in his designated working area and hence the charges that he had any involvement in the disappearance of the cheques were malicious. This letter was never replied to nor the contents taken into consideration. This clearly shows that there was malice on the part of the respondent.*

The claimant further submits that the suspension was made without having been issue with a show cause letter and again, he was denied a right to be heard which amounts to a breach of the rules of natural justice by a unilateral imposition of suspension by the respondent. This also goes against the Public Service Commission Code of Regulations, 2005 as annexed.

The claimant's other case is that on 11th September, 2015 he was acquitted of the criminal charges. This was more than three years down the line and further that the officials from the hospital never appeared in court to testify in the matter. He subsequently sought reinstatement and payment of due salaries vide a letter from his advocates dated 21st September, 2015 but this has not been responded to date.

The claimant submits that it seems the respondent conducted disciplinary proceedings before the determination of the criminal case and without the claimant's involvement. To him, this was contrary to the suspension letter's condition that he should not go anywhere near the respondent premises until determination of the case. He further, submits as follows;

> *" ….. it is the Claimants case that this committee did not have any good will and the sittings were actuated by malice because of these reasons:*
>
> *a) The suspension notice clearly forbade the claimant from stepping anywhere near the hospital premise pending the determination of the criminal case.*
>
> *b) The committee did not wait for conclusion of the criminal case.*
>
> *c) The claimant was never informed of the committee sitting.*
>
> *d) Despite the return of service of the notices by the committee being clearly marked as "UNCOLLECTED" the committee still sat and made a decision in the absence of the claimant. (Your Honour the return marked as uncollected is seen in the respondents list of documents and marked as AC8(c))*
>
> *e) Some of the committee members e.g Sylvia Chepkemoi (Legal Officer) were the complaints and witnesses in the criminal case and yet they wanted to deliberate over the same issue yet there is clear conflict of interests. Your Lordship, there is a famous saying in the African community which states that "You cannot send a hyena to deliberate on the problems facing a forest and expect the*

antelope to get justice." It is clear from the committee's composition that the members in the committee were the witnesses,prosecutors and judges in their own cause. This goes against all tenets of law and rules of natural justice and infringes on the right to a fair trial. Your honour, it is our humble submissions that one Sylvia Chepkemoi ought not to have sat in the Hospital Staff Disciplinary Advisory Committee meeting held on 28th July 2015 because of the established principles of law Nemo Judex in causa sua – which means that procedures must be free from bias.

The claimant also sought to rely on the authority of **R V. Hendon Rural District Council ex-parte Chorley (1933) 2K.B. 696** which establishes that disciplinary proceedings should be free from bias;

In this case the court quashed the decision of a rural district council allowing some residential property in Hendon to be converted into a garage and restaurant because one of the councillors who was present at the meeting which approved the application to convert the premises was an estate agent who was at the same time acting for the owners of the properties. The court issued certiorari to quash the decision of the council on the ground that the agent's interest in the business disqualified him from taking part in the council's consideration of the matter.

Again, in the authority of ***Metropolitan Properties Ltd. Vs. Lannon (1968) 3 A:: E R 304***, the court observes as follows;

"…in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal who sits in a judicial or quasi judicial capacity. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be nevertheless, if right minded of bias on his part then he should not sit. And if he does sit, his decision cannot stand. Surmises or conjecture is not enough there must be circumstances from which a reasonable man would think it likely or probable that it would or did favour one side fairly at the expense of the other."

The court quashed the decision of a rent assessment committee reducing rent of a certain flat because the chairman of the rent assessment committee lived with his father in those flats.

….similarly, we pray that you quash the decision of the committee for failing this fundamental test.

f. This committee was set up to try and cure the incurable abuse of the disciplinary process and mechanism. It is a mere after thought and aimed to put up a defence in this case because the findings if any have never been communicated to the claimant or his advocate when the claimants advocates wrote a letter demanding his reinstatement.

The respondent submits that the claimant and his accomplish one, Judith Jemeli Kesse were at the respondent's at the memorial wing and amenity wings of the respondent's private wing at the material time of the theft. Investigations into the theft reveal that the after stealing the cheque, the claimant and his accomplish presented the cheque for discounting to Mr. Erick Mokaya Amwona after they were introduced to him by a Mr. Josephat Omwere on 28th December, 2011. They met at the Eldoret Post Office where the claimant introduced himself in his own names while his accomplish pretended to be Dr. Pallavi Mishra. They agreed on the discounting commission and the claimant presented two cheques (cheque No's. 017621 for Kshs. 890,222/= drawn by the respondent in the name of Dr. Pallavi Mishra and 015647 for Kshs. 78,880/= drawn in favour of Davis and Shirtliff company) to Mr. Erick at Jeff K. Centre Ronald Ngala street

Eldoret town. They agreed to be paid after the cheques matured. The two received Kshs.700,000.00/= in cash on 11th January 2012 upon the cheque maturity (attached and marked A.C 3a to k of the respondent's HR & T Managers sworn affidavits are the witnesses' statements recorded by the police officers at the Eldoret police station)

At the findings above, the claimant was asked to show cause as to why his contract could not be

dismissed for gross misconduct. The claimant responded to this vide a letter dated 11th May, 2012 but this was a mere denial and did not explain how the claimant got hold of the cheques and why he presented them for discounting knowing well they were stolen property. The respondent further invited the claimant to appear before the Hospital Staff Disciplinary Committee but all efforts to contact him were fruitless. This is as follows;

> ***"****The respondent in compliance with the law invited the claimant to appear before the Hospital Staff Disciplinary Committee meeting. All the efforts made to contact the claimant through the mobile phone number that he had supplied to the respondent and through which he was called to collect his letter of suspension and also through registered mail to the claimants last known Postal Address which also were returned uncollected. It is worth noting that the claimant accomplish who the respondent had reason to believe the claimant was in touch with attended the Disciplinary committee meetings and explained her case. The reason being; at all material times the claimant was attending the criminal case hearings/mentions with his co-accused and surely he could not have failed to inquire what was happening in relation to his Disciplinary proceedings, from the co-accused who was attending the disciplinary committee meetings when invited. (Please see annexure A.C 10,11 and 6a to C and 7).*

This amounted to hide and seek on the part of the claimant and he therefore was summarily dismissed from employment for good cause.

I agree with the submissions of the respondent that the claimant cannot rely on Article 236 of the Constitution of Kenya, 2010 in support of his case. This constitutional provision as aforecited provides protection for public servants who are victimized by their employers while doing their work in accordance with the terms and conditions of employment or contract. In the circumstances of this case, the claimant's services were terminated for gross misconduct and therefore does not qualify for relief under these provisions. Moreover, he does not in any way demonstrate a case of harassment while he was innocent and diligent in his work. This is well illustrated in the case **of Industrial Alliance Life Insurance Company v. Gilbert Cabiakman (indexed as: Cabiakman v. Industrial Alliance Life Insurance Co. 2004 SCC 55)** where it delivered itself thus paragraph 29;

> *"The employee is bound to carry out his or her work with prudence and diligence and to act faithfully and honestly toward the employer. The flexibility and malleability of an individual contract of employment enable the parties to provide in the contract that the employer has the power to suspend, and to establish the conditions on which it may do so."*
>
> *"A contract of employment imposes reciprocal obligations on the parties. The employer agrees to allow the employee to perform the work agreed upon, to pay the employee remuneration and to take any necessary measures to protect the employee's health, safety and dignity (art. 20187 C.C.Q.). The employee is bound to carry out his or her work with prudence and diligence and to act faithfully and honestly toward the employer (art. 2088 C.C.Q.)."*
>
> *Section 16.10.3 (b) of the respondent's terms and conditions of service provides for summary dismissal of an employee for gross misconduct with loss of all benefits"*

Again, the claimant looses in his claim that his suspension was unlawful for being effected by an unauthorized person and also that he was not paid during his suspension whatsoever. This is countered by the respondent's submission that the suspension was effected by an Acting Director who had express authority to perform the duties of a Director during his leave of absence. This was heretofore settled in the authority of **Josphat Waswa MUkhwana vs. Moi Teaching and Referral Hospital cause 274 of 2013** where Radido, J. at paragraph 16 and 17 stated thus;

> *16. "In the pleadings, the claimant also challenged the suspension on the ground that it was done by an Acting Director, while the terms and conditions of service envisaged a Director suspending an employee.*

17. In my view, this contention is misplaced and was the court to accede to it would be tantamount to interfering with an employer's managerial prerogative. Unless expressly barred from so acting, an Acting Director of a public institution such the respondent can lawfully carry out the functions of the Director as far as discipline is concerned."

Further, the authority of **Grace Gacheri Murithi vs. Kenya Literature Bureau**, **2012 eKLR** establishes that employers under certain circumstances and conditions are not bound to pay salary to suspended officers.

"*The respondent terminated the claimant's service by the letter dated 20th December 2010 received on 30th December 2010 and with effect from 18th May, 2010, the effective date of the suspension. The issue before the court is whether the claimant is entitled to be paid for the period between the date of suspension and the date of conclusion of the disciplinary case being the date the letter of termination was delivered, that is, 30th December 2010. In opposing this claim, counsel for the respondent has cited paragraph 6.2.4 of the respondent's terms and conditions of service, 1999 which provides, thus,*

"An employee under suspension will not be entitled to any salary, but may, in case of hardship, and on request be granted an alimentary allowance in such amount and such terms as may be determined by the Managing Director.

The court considers that an employee or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee if found culpable."

The Canada Supreme Court of Appeal addressed a case with similar circumstances of the claimant's case in the Industrial Alliance Life Insurance Company v. Gilbert Cabiakman (indexed as: Cabiakman v. Industrial Alliance Life Insurance Co. 2004 SCC 55) where it delivered itself thus

"According to the Civil Code of Quebec, a contract of employment imposes reciprocal obligations on the parties. The employer must allow the employee to perform the work agreed upon, pay the employee remuneration and take any necessary measures to protect the employee's health, safety and dignity. The employee is bound to carry out his or her work with prudence and diligence and to act faithfully and honestly toward the employer. The flexibility and malleability of an individual contract of employment enable the parties to provide in the contract that the employer has the power to suspend, and to establish the conditions on which it may do so. Absent such an agreement, an employer has, in Quebec civil law, a unilateral power to temporarily suspend the effects of an individual contract of employment or certain of the obligations under the contract. The power to impose a disciplinary suspension is generally recognized. As for the power to suspend for administrative reasons, it is a necessary component of the power of direction the employee has accepted if the performance of his or her work should compromise the business's interest. The residual power to suspend for administrative reasons because of acts of which the employee has been accused is thus an integral part of any contract of employment, but it must be exercised in accordance with certain requirements. First, the action taken must be necessary to protect legitimate business interest. In this regard, the employer has the burden of showing that its decision is fair and reasonable. To determine whether a suspension was reasonable, it must be

considered from the perspective of the point in time when the decision was made. Facts subsequent to the employer's decision may be admissible in evidence, however, if they are relevant and if they can be used to determine whether the employer's decision was justified.

In the case at bar, the suspension of the respondent was justified, as it was made to protect the business's interest."

This therefore dis-entitles the claimant's pursuit of pay during suspension.

The claimant's submission on rights due to his acquittal at the criminal trial is also off balance. It is trite law and practice that there is no nexus between a criminal trial and internal disciplinary process at the work place. From the onset, the standard of proof in these proceedings are different. In criminal proceedings, the test is *beyond reasonable doubt* whereas in disciplinary process, the highest test expected is that observed in civil process- *balance of probabilities.* This could even be reduced in these internal disciplinary proceedings, depending on the circumstances and implications of the case to the employer and work place. To imagine that acquittal in a criminal case would automatically or in any way warrant consideration in disciplinary proceedings or work place trial would be foolhardy, to say the least. This was enunciated in the authority of **Nahashon Murithi Wambugu vs. Teachers Service Commission (2016) eKLR** as follows;

19. This court has in the past, held that there is no obvious nexus between a criminal trial and internal disciplinary proceedings at the work place, even when the charges and particulars are identical (see Wilberforce Ojiambo Oundo v Regent Management Limited (2013) eKLR and Milkah Khakayi Kulati v. Sandstorm (Africa) Limited (2014) eKLR). The only exception would be where it is expressly provided either by law or in disciplinary rules that internal disciplinary proceedings will await the outcome of a criminal trial.

20. The Court had occasion to read the respondent's code of regulations for secretariat staff (revised 2006) which applied to the claimant and did not find any provision connecting a criminal trial and internal disciplinary proceedings. It follows therefore that the respondent was well within its right to require the claimant to submit himself to disciplinary proceedings despite the pendency of a criminal trial for the same offence. Additionally, the fact that the claimant was acquitted by the criminal court did not hand him an automatic clearance at the internal disciplinary stage.

23. In light of my finding that there was in fact no nexus between the criminal trial and the internal disciplinary proceedings, the court finds no justification for the claimant's failure to attend the disciplinary hearing as required. Having squandered the opportunity to defend himself before the disciplinary committee, the claimant cannot turn around and say that he was not heard.

26. The result is that there were reasonable ground to believe that the claimant was directly involved in the preparation and production of the forged payslip and the respondent had a valid reason for dismissing him. With regard to the claimant's complaint about his interdiction without pay, the only thing to say is that regulation 59 of the Code of Regulations provides that staff facing charges of fraud, such as the one the claimant faced, are not entitled to pay during the period of interdiction.

The submissions of the respondent display a case of lawful termination of employment of the claimant. Her case *in toto* overwhelms that of the claimant. The claimant cannot be seen to want to benefit from his own wrong doing. He does not in evidence or any other manner exonerate himself from the accusation of involvement in fraud, theft and encashment of cheques belonging to his employer. Again, he cannot bank on not being notified of his disciplinary proceedings when all indicators point to the fact that he evaded service of notice. His accomplish, Judith Kemeli Kesse did attend the disciplinary proceedings and the possibility of him not knowing of this and the events leading to these disciplinary proceedings is about nil. It is not probable. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant was entitled to pay during suspension. This has been answered in the cause of analysis of the 1st issue for determination. It is an emphatic No.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having failed on a case of unlawful termination of employment, he would not be entitled to the relief sought.

I am therefore inclined to dismiss this claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 21st day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr Wabomba instructed by D.L. Were & Company Advocates for the claimant

2. Mr. Josphat Mutuma Kirima for the Respondent