



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 98 OF 2016**

***(Before D. K. N. Marete)***

**JUDITH JEMELI KESSE.....CLAIMANT**

**VERSUS**

**MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim dated 18th May, 2016. The issues in dispute are therein cited as;

- 1. Unfair termination of the claimant's employment by the respondent.*
- 2. Refusal to reinstate the claimant to her employment by the respondent.*

The respondent in a Respondent's Defence dated 29th June, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant in a claimant's Reply to the Respondent's Defence dated 13th July, 2016 joins issue with the defence save for instances of admission of the claim. She particularly denies that;

- i. The dismissal or termination was fair.*
- ii. She did not discharge her work properly.*
- iii. She performed her work carelessly or improperly.*
- iv. The dismissal was meant to protect the respondent's legitimate business interest.*
- v. The respondent acted in good faith in termination her employment.*
- vi. The respondent is allowed to carry out investigations.*
- vii. There was no nexus between the criminal case and the disciplinary proceedings.*
- viii. A court of law cannot interfere with the claimant's termination.*

*ix. The claimant acted fraudulently.*

*x. The disciplinary proceedings were meant to protect the respondent's reputation and or prevent further injury to the respondent.*

*xi. The respondent was entitled to suspend the claimant without salary.*

*xii. The claimant is not entitled to the reliefs she seeks.*

*xiii. The claimant is not entitled to reinstatement to her employment with the respondent.*

The claimant's case is that he was at all material times between 2007 and 2015 an employee of the respondent as a clerical officer. At the time of unfair termination she earned Kshs.26,110.00. This was however never paid to her on periods between May, 2012 and May, 2015.

It is the claimant's further case that the reason for termination was;

*i. Involvement in corrupt practice*

*ii. Abuse of her office*

*iii. Commission or suspicion of commission of a criminal offence against or to the substantial detriment of the employer's property.*

The claimant's further case is that she was not paid any salary on suspension between May 2012 and May 2015 and is entitled to;

*i. Payment of salary while on suspension*

*ii. The salary she will have earned till she retired*

*iii. Payment of her salary effective the date of suspension till she is reinstated to her employment.*

She submits and prays as follows;

*a) She was employed by the respondent as a clerical officer.*

*b) She diligently discharged her duties at all material times.*

*c) She never misconducted her duties at all material times.*

*d) She never stole a cheque.*

*e) The respondent's decision to terminate her employment is untenable and unfair.*

*f) The claimant was not paid any wages/salary during the suspension period between May 2012 and May 2015.*

*g) The claimant's appeal to the respondent for reinstatement has been unsuccessful.*

*h) The respondent did not observe the tenets of equity and justice in terminating the claimant's employment.*

*i) The claimant ought to be reinstated to her employment for the remainder of her working age till she retires at age 60 years.*

*j) The cause of action arose in Uasin Gishu County.*

*k) Demand and notice to sue has been issued to no avail hence the claim.*

She, in the penultimate prays for;

*i) A declaration that the termination of the claimant's employment with the respondent was unfair.*

*ii) Reinstatement of the claimant into her employment with the respondent.*

*iii) Payment of the claimant's salary/wages for the period between her suspension and reinstatement.*

*iv) Payment of her salary during the period she was on suspension.*

*v) Alternatively payment of the claimant's salary between May 2012 to the time she will have attained the mandatory retirement age.*

*vi) Costs of the claim.*

*vii) Interest*

The respondent's case is that the claimant willfully neglected to perform her work and/or carelessly performed this work thus forcing the respondent to take remedial action. The respondent further avers that in exceptional circumstances like this one, the respondent is permitted to suspend an employee without pay. This is as follows;

*5. "The claimant having willfully neglected to perform work which it was her duty to have performed, and or carelessly and improperly performing work which from its nature it was her duty, under her contract, to have performed carefully and properly the respondent was entitled to take remedial action. That in exceptional circumstances and more so in the circumstances like those of the claimant case, an employer is entitled to suspend an employee without pay. That the action was necessary to protect the respondent's legitimate business interest. That the respondent was guided by good faith and duty to act fairly when taking its action against the claimant. That 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 therefore 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 the claimant any salary since the disciplinary process outcome led to her (claimant's) dismissal.*

*c) A declaration that the claimant cannot be reinstated into employment only by virtue of her acquittal without regard to the respondents internal disciplinary mechanisms.*

*d) An order as to costs and interests.*

The matter came to court variously until the 24th January, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

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

- ii. Whether the claimant was entitled to pay during suspension.
- iii. Whether the claimant is entitled to the relief sought.
- iv. 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 her written submissions dated 23rd February, 2017 submits that her termination of employment took place in May, 2015 and that she had been sent on termination prior to this to await determination of criminal proceedings in the Chief Magistrate's Court Criminal Case No.2067 of 2012 at Eldoret.

It is the claimant's further submission that this criminal case was determined on 11th September, 2015 and by this time the claimant's employment had been terminated by the respondent. The claimant further submits that the respondent failed to establish a *prima facie* case to enable the court to put her in defence and also did not pursue an appeal against the decision on acquittal under Section 210 of the Criminal Procedure Code. In view of this, termination on grounds of theft of cheque does not hold water and she ought to be reinstated back to employment. This is more so bearing in mind that the respondent had decided that the payment was to remain on suspension pending determination of the criminal case and therefore her disability to terminate employment before determination of the case.

It is her submission that once the criminal case was determined in her favour and particularly on the basis that the evidence was too weak to warrant her being put on defence, the respondent ought to reinstate her to employment with payment of what was outstanding during suspension and what she would have earned to date. Alternatively, the claimant should be paid an amount of Kshs. 7,696,200.00 being the amount she would have earned till retirement at age 60.

The claimant further submits on the incompetency of the disciplinary proceedings of 24th April, 2015 as this committee had made a decision on the matter on 14th August, 2014. The respondent did not act prudently and in good faith by sitting and giving two different decisions on the same subject and therefore this should be disregarded.

The respondent in her written submissions reiterates her case;

The Canada Supreme Court of Appeal addressed a case with similar circumstances to 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 the court 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 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. This 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 interests. 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 interests.”*

*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.*

She further sought to rely on the authority of **Nahashon v. Teachers Service Commission (2016) eKLR** where this court at paragraph 18 to 23, 26 and 27 delivered itself thus;

18. *In response to the letter of interdiction, the Claimant wrote a letter dated 13<sup>th</sup> September 2004 denying the allegations made against him. The claimant also asked the respondent to allow the criminal court to determine his case. The claimant subsequently declined to appear before the respondent's disciplinary committee on the ground that the matter was pending in court and when he was acquitted he sought reinstatement.*

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 provisions 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.*

21. *As held by Azangalala J (as he then was) in **Constantine Simati V Teachers Service Commission and Another (2011) eKLR** an internal disciplinary tribunal is not held to the same standards as a court of law. This becomes even more critical where an employee seeks to enforce an acquittal in a criminal trial as evidence of innocence in internal disciplinary proceedings.*

22. *In reviewing disciplinary action taken against an employee by an employer, the court does not apply the “beyond reasonable doubt” standard of proof applicable in criminal case. In fact, the court does not even ask what it would have done if it were in the shoes of the employer, all it asks is whether the action by the employer was one that would have been taken by a reasonable employer acting on a fair understanding of the facts and appreciation of the law.*

23. *In light of my finding that there was in fact no nexus between the criminal trial and 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.*

27. Overall, the Court finds the Claimant's claim to be without merit and proceeds to dismiss it."

The respondent faults the claim by the respondent for compensation for lost years of employment and seeks to rely on the authority of *Menginya Salim Murgani v Kenya Revenue Authority (2008) eKLR*, where Hon. Justice Ojwang stated thus;

*"Today he is aged 45-46 years; and from the court's observation during the hearing, the plaintiff is an able-bodied, and intellectually and professionally, a well endowed man. From his curriculum vitae which is part of the court record. I recognize, on the basis of judicial notice, that the plaintiff is a well-educated and trained professional who is the most likely to find occupational engagement, outside the defendant's employ. These facts are to be applied to the governing principle of law, that an aggrieved party in a civil dispute has the obligation to mitigate his or her own losses."*

This is so.

The long and short of the respective cases of the parties brings out a case of lawful termination of employment. This is because the claimant in her pleadings and submissions has failed to rebut or controvert the respondent's case that she was indeed dismissed for gross misconduct. The respondent's illustration of this in her pleadings and written submissions leaves no doubt that this was the case. I therefore find a case of lawful termination of the employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost a case of unlawful termination of employment, she becomes disentitled 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. Oboso holding brief for Mr. Momanyi instructed by Annasi Momanyi & Company Advocates for the Claimant.
2. Mr. Joshpat Mutuma Kirima for the Respondent.