



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 384 OF 2015
(Originally Nairobi Cause No. 1802 of 2015)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

v

KENETH MISOI AG. CHIEF OFFICER PUBLIC SERVICE

MANAGEMENT, COUNTY GOVERNMENT OF UASIN GISHU....1ST RESPONDENT

PUBLIC SERVICE BOARD OF COUNTY

GOVERNMENT OF UASIN GISHU.....2ND RESPONDENT

COUNTY GOVERNMENT, UASIN GISHU.....3RD RESPONDENT

JUDGMENT

1. The Court is called upon to determine

1. Whether the suspension of the Grievant was lawful.
2. Whether the Grievant was given a fair hearing before suspension was effected.
3. Whether the duration of the suspension of the Grievant was lawful.

2. For the record, the issues as proposed by the Kenya National Union of Nurses (Union) were adopted for hearing after Mr. Kipkoech (holding brief for Mr. Kenei) indicated they could be adopted.

Background

3. Lilian Akinyi Onyango (Grievant) was employed by the Ministry of Health through a letter dated 10 June 1998 as Kenya Enrolled Community Nurse III JG 'G'. The appointment was effective 31 December 1997.

4. With the devolution of health services pursuant to the requirements of the Constitution, 2010, the Grievant was seconded to the service of the 2nd and 3rd Respondents.

5. Through a letter dated 11 December 2014, the 1st Respondent notified the Grievant of her suspension pending finalisation of a case against her for *gross misconduct/ negligence of duty*. The details of the misconduct/negligence were On 3rd November 2014, an abandoned child was found at West Clinic and a decision was reached by the nurse in charge to take the child to police station and report the incident. You were assigned by the in charge to take the child to police station but you decided to take the child to MTRH where you abandoned the child to an elderly lady.
6. The letter made reference to section 44(4)(e) of the Employment Act, 2007.
7. The Union, through a letter dated 13 January 2015 asked the 3rd Respondent for a meeting to discuss the suspension of the Grievant, among other issues.
8. The request by the Union must have prompted the 3rd Respondent to invite the Grievant for a disciplinary hearing through a letter dated 5 February 2015. The disciplinary hearing was scheduled for 13 February 2015.
9. According to extracts of Uasin Gishu Public Service Board minutes Staff Disciplinary Case (signed on 6 May 2015), the Grievant attended the hearing accompanied by a union official and she made representations.
10. The extract of the minutes show that the 2nd Respondent recommended that the Grievant be dismissed from service on grounds of gross negligence of duty.
11. On the same day the minutes were signed, the Union issued a 14 day strike notice and among the reasons given for the strike was a demand for the unconditional reinstatement of suspended nurses including the Grievant.
12. The strike notice led to a meeting between the Union and the 3rd Respondent, and among the resolutions was that because the disciplinary cases had been forwarded to the Public Service Commission, it should be left to proceed with the cases.
13. On 9 October 2015, the Union instituted legal proceedings against the Respondents and the issue in dispute was stated as Unfair and Unlawful suspension of the Grievant contrary to Article 41 and 47 of the Constitution.
14. The Statement of Claim was accompanied with a motion under certificate of urgency seeking interim orders stopping the dismissal of the Grievant.
15. Nzioki wa Makau J, before whom the application was placed allowed the application and granted orders restraining the Respondents from terminating the Grievant's contract of employment.
16. The Judge further ordered that the Grievant's outstanding salaries and allowances be paid in full from date of suspension (the Grievant testified that the order has not been complied with and the 2nd Respondent's witness admitted in cross examination the entitlements would be paid).
17. On 29 October 2015, when the motion came up for *inter partes* hearing, Wasilwa J, at the request of the parties directed that the Cause be transferred from Nairobi to Nakuru. The interim orders were extended.
18. When the Cause was placed before me on 14 December 2015, the Union informed me that it wished to abandon the motion dated 9 October 2015 because the parties had agreed that the Grievant would not be dismissed pending conclusion of the Cause.
19. The Court therefore gave directions to progress the Cause towards hearing and after dispensing with a preliminary objection by the 4th Respondent (4th Respondent was removed from the proceedings), the

Cause was heard on 28 February 2017 when the Grievant testified and on 10 April 2017 when the 2nd Respondent's Chair testified.

20. The Union filed its submissions on 29 May 2017, while the Respondents filed their submissions on 30 June 2017.

21. The Court has given due consideration to the pleadings, evidence and submissions.

Whether suspension was lawful

22. To be lawful, a suspension should be anchored either on contractual authority or statutory power.

23. The regulations applicable to the 2nd Respondent's employees contemplate suspension of an employee pending disciplinary action but within prescribed limits.

24. The Court therefore concludes on this issue that there was statutory foundation to the suspension of the Grievant pending conclusion of disciplinary action against her.

Whether Grievant was given a fair hearing before the suspension was effected

25. The Union did not draw the attention of Court to any express contractual or legal provision which requires that an employee, such as the Grievant, is entitled to a hearing before suspension.

26. The closest legal provisions are section 41 of the Employment Act, 2007 which require a hearing before dismissal and Article 236 of the Constitution which protect public officers from disciplinary action without due process.

27. The Union did not demonstrate that these provisions were violated by the Respondents.

Whether duration of the suspension was lawful

28. A disciplinary case involving a public officer such as the Grievant ought to be concluded within 3 months.

29. There must be policy reasons for the timelines, not least because the employee under suspension is prejudiced financially during the period under suspension.

30. In many cases, the remuneration is the sole source of income for the employee and his/her family (the Grievant herein demonstrated the hardships she had to undergo including payment of rent, medical bills for children and the like, without challenge from the Respondents).

31. The instant case therefore should have been concluded before 11 March 2015. That was not the case and therefore technically the suspension did not meet the letter of the law.

32. But the Court must be alive and alert to the reality that in some instances, such deadlines may not be complied with by employers.

33. In such a case, the employer should notify the employee that the disciplinary process would not be completed within the prescribed timelines and also give the reasons for the failure.

34. The Grievant herein was not notified of the reasons why her case was not resolved within the prescribed timelines. That delay even prompted the Union to give a strike notice.

35. Although it appears that the case was later forwarded to the Public Service Commission, no evidence was presented in Court that that was the case.

