



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 177 OF 2012**

**MAHMUD KARIUKI KIBUE.....CLAIMANT**

**VERSUS**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2ND RESPONDENT**

**MINISTRY OF PUBLIC HEALTH AND SANITATION.....3RD RESPONDENT**

**JUDGMENT**

**Introduction**

1. This matter was part heard before my brother **Nzioki wa Makau J**, before he proceeded on a one year study leave from August 2016. When the parties appeared before me on 17<sup>th</sup> November 2016, they agreed to commence the hearing *de novo*.

2. The Claimant's claim is contained in a Memorandum of Claim dated 7<sup>th</sup> February 2012 and filed in Court on even date. The Respondents filed a response on 10<sup>th</sup> May 2012. At the hearing, the Claimant testified on his own behalf and the Respondents called a Human Resource Management Officer working at the 2<sup>nd</sup> Respondent, Avisa Kiguhi Harold. The parties also filed written submissions.

**The Claimant's Case**

3. By letter dated 18<sup>th</sup> December 1996, the Claimant was employed as a Public Health Technician, in the Ministry of Health. He was confirmed on permanent and pensionable terms of employment on 31<sup>st</sup> July 2003.

4. The Claimant was suspended without pay from August 2005, on grounds of desertion of duty. His employment was terminated on 18<sup>th</sup> October 2007. He states that he appeared before a District Disciplinary Panel in May 2006, whose decisions and recommendations he complied with.

5. The Claimant complains that the accusations against him were made more than once to the District Medical Officer, the Provincial Medical Officer and the Permanent Secretary. He therefore claims that he was punished more than once for the same offence and that the termination of his employment was unlawful and unfair

6. The Claimant claims the following:

- a) Reinstatement without loss of benefits;
- b) Salary arrears from the time of suspension in August 2005;
- c) Leave allowance from 2005;
- d) Compensation for unlawful termination of employment;
- e) Payment of accrued loan interest with Afya Sacco;
- f) Costs plus interest.

### **The Respondents' Case**

7. In their response dated 9<sup>th</sup> May 2012 and filed in Court on 10<sup>th</sup> May 2012, the Respondents state that the termination of the Claimant's employment was lawful and procedural. Further, the decision of the 2<sup>nd</sup> Respondent on the Claimant's appeal was in accordance with existing rules and regulations.

8. It is the Respondents' case that the Claimant absconded duty and therefore failed to perform his duties carefully and properly. They add that the entire process leading to the Claimant's dismissal was fair and just. Specifically, the Respondents conducted a hearing after allegations against the Claimant were received. The Claimant was accorded a fair hearing and there was a reasonable cause for his dismissal.

### **Findings and Determination**

9. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

10. On 25<sup>th</sup> May 2005, the Medical Officer of Health, Kajiado District Hospital wrote to the Claimant raising concern over the Claimant's absence from duty, from 1<sup>st</sup> February 2005. This letter made reference to two previous letters on the same matter, dated 31<sup>st</sup> March 2005 and 17<sup>th</sup> May 2005. It required the Claimant to explain his absence from duty within 14 days and advised the Provincial Medical Officer of Health to stop the Claimant's salary, until further notice.

11. On 24<sup>th</sup> June 2005, the Provincial Medical officer, Rift Valley wrote to the Claimant, through the Medical Officer of Health, Kajiado stating that it had been reported that the Claimant had absconded duty, since 1<sup>st</sup> February 2005 and that his whereabouts were unknown. The letter gave the Claimant thirty (30) days to show cause why he should not be dismissed from service.

12. Subsequent to this, the Permanent Secretary, Ministry of Health wrote to the Claimant on 28<sup>th</sup> June 2006, on the same matter. By this letter, the Claimant was required to make his representations within twenty one (21) days. In the meantime, the Claimant's salary was stopped vide GP 33 dated 20<sup>th</sup> June 2006.

13. On 5<sup>th</sup> July 2006, the Claimant wrote to the Permanent Secretary, stating that the accusation made against him had in fact been dealt with, at the district level and the Claimant had since resumed duty. Attached to this letter was an earlier one dated 17<sup>th</sup> May 2006 in which the Claimant stated inter alia:

*"Sir, I acknowledge as an oversight on (sic) me; since my salary was stopped in August 2005, I*

*have not been performing my duties as required while my case is being reviewed.”*

14. A meeting of the Ministerial Human Resource Management Advisory Committee held on 14<sup>th</sup>, 20<sup>th</sup> and 27<sup>th</sup> June 2007 recommended that the Claimant be dismissed from service, effective 1<sup>st</sup> February 2005. Following this advice, the Permanent Secretary, Ministry of Health wrote to the Claimant on 18<sup>th</sup> October 2007 as follows:

*“Dear Sir*

***RE: DISMISSAL FROM THE SERVICE***

*This is to convey the decision of the Authorised Officer on the advice of the Ministerial Human Resource Management Advisory Committee held on 14<sup>th</sup>, 20<sup>th</sup> and 27<sup>th</sup> June, 2007 that you be dismissed from the service w.e.f 1.2.2005 on account of absence from duty.*

*Please be informed that on dismissal you have lost all rights to the terminal benefits you may have been due (sic) had you left the service in the normal manner.*

*Enclosed herewith please find the Official Secrets Act Declaration form for officer leaving the service for your signature and return the same duly witnessed together with your Civil Servants’ Identity Card for our records.*

*Please be informed that you have the right of appeal against the decision to the Public Service Commission through this office within a period of six (6) weeks from the date hereof if you feel aggrieved.*

*Yours faithfully*

***J.K. Kuria***

***For: PERMANENT SECRETARY”***

15. Both the Claimant’s appeal and application for review were disallowed. From the several correspondence and record of proceedings produced before the Court, it is evident that the Claimant faced only one charge; unauthorised absence from duty. By his own letters, the Claimant admitted being absent from duty, at least from August 2005, when his salary was stopped.

16. Regarding the Claimant’s absence prior to the admitted date of August 2005, the Respondents produced a record of disciplinary proceedings held at the district level on 17<sup>th</sup> June 2006. Minute 3/5/06 records the Claimant’s defence as follows:

- a) That he had fallen while at the gym and he had received treatment at a nearby facility;
- b) That he had sent a letter in March 2005 which was not delivered;
- c) That he had responded to the show cause letters issued to him;
- d) That he had made efforts to see his superiors but had not succeeded.

17. The Claimant did not contest this record nor did he adduce evidence on submission of sick off sheets within the stipulated period of seven (7) days. Taking the evidence on record in its totality, the Court reached the conclusion that the Claimant absented himself from duty without lawful cause and there was therefore a valid reason for his dismissal.

18. Regarding the procedure leading to the dismissal, the Court was referred to Section 2 of the Public

Service Commission Disciplinary Manual, setting out the disciplinary procedure in cases of unauthorized absence from duty. In my estimation, this procedure was fully applied in the Claimant's case.

19. Moreover, jurisprudence emerging from this Court on this matter is that all an employer alleging desertion of duty is required to do, is to demonstrate that the deserting employee has been put on notice that their dismissal is being considered (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR*). The reasoning for this position is straightforward; that it is not always possible to bring a deserting employee to the disciplinary table.

20. This Court is satisfied that in dealing with the Claimant's case, the Respondents observed both the law and the applicable internal disciplinary rules. Overall, I find no reason to disturb the decision taken to dismiss the Claimant, which is hereby confirmed. The result is that the Claimant's entire claim fails and is dismissed.

21. Each party will bear their own costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mahmud Kariuki Kibue (the Claimant in person)

Miss Akuno for the Respondents