



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO CAUSE NO. 593 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th July, 2016)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF HEALTH.....3RD RESPONDENT

THE INSPECTOR GENERAL–NATIONAL POLICE SERVICE....4TH RESPONDENT

COUNTY CHIEF MEDICAL OFFICER – ROBERT AYISI.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed its memorandum of Claim together with a Certificate of Urgency, and verifying affidavits all dated 13th April 2015 and filed on the 16th of April 2016 through the firm of Nchoe, Jaoko and Company Advocates. The Claimant has also filed an Amended Claim dated 2nd November 2015 where the Claimant seeks orders:

1. That an order of this Honorable Court be and is hereby granted directing the 1st Respondent, its agents or servants stopping them from harassing, intimidating, assaulting (through County Government Askaris), threatening to dismiss or threatening to cause to be arrested any of their Nurses who are currently employed at Pumwani Maternity Hospital Nairobi.

2. That an order of this Honorable Court be and is hereby granted directing the 1st and 2nd Respondents to provide security to the Nurses who are currently employed at Pumwani Maternity Hospital Nairobi and ensure their general safety and protect them from being attacked by the County Government Askaris or members of the public on grounds circumstantial to this claim.

3. That an order of this Honorable Court be and is hereby granted directing the 1st Respondent, its agents and or servants not to victimize any Hospital staff, Nurses who left the Hospital due to a hostile working environment following allegations of swapping/stealing Jacinta Wanjiku's babies which caused insecurity in the institution and or on any other grounds circumstantial to this claim.

4. That an order of this Honorable Court be and is hereby granted directing the 2nd Respondent to protect all seconded staff working at Pumwani Maternity Hospital and stop the 1st Respondent from unilaterally suspending/dismissing them from service in an unprocedural and unlawful manner during transition period or at all.

5. That an order of this Honorable Court be and is hereby granted quashing any suspension and or dismissal letters which were unprocedurally given to Pumwani Maternity Hospital Nurses following the allegations of swapped babies and reinstating all the dismissed Nurses without loss of benefits.

6. That an order of this Honorable Court be and is hereby granted directing the 1st Respondent to provide the workers at Pumwani Maternity Hospital with necessary tools and equipment which are essential for proper performance of their duties.

7. That costs of this suit be borne by the 1st Respondent.

8. Any other relief that this court may be deem fit and just to grant.

2. The Claim is supported by the annexed affidavit of Seth Panyako.

Facts of the Matter

3. On or about the 6th of April 2015, an issue surrounding the twin male babies belonging to Jacinta Wanjiku and Dedan Mathenge arose whereby it was alleged that two Nurses Sera Kilei and Veronica Odhiambo while on duty at Pumwani Maternity Hospital had swapped live babies. Several media houses got wind of the story leading to the accusations of swapping and stealing of babies at the hospital sparking public outrage.

4. The Nurses claim that their safety was put at risk as they were threatened with rape and physical abuse, ensuing in fracas that led to one of the Nurses, a Mary Wafula getting injured. Moreover, there was a group of young men who stormed into the hospital on or around the 7th of April 2015 which led to the administration calling on the police to come in and deal with the matter.

5. A second incident involved a baby who was born in a poor state on the 4th of April 2015 who later died and was disposed of by the hospital. This led to a Nurse being threatened by the relative of the mother of the deceased child. Later, on the 7th of April, a third baby died also leading to confrontation between the Nurses and family who claimed foul play.

6. The Nurses stopped offering their services for fear of their security and on the 10th of April 2015, Dr. Ayisi the Chief Health Officer of Nairobi County ordered them back to work but they declined because of the incidents. Dr. Ayisi finally suspended 64 Nurses, on unjustifiable grounds as they were not on strike but feared for their safety. Moreover, the 2nd Respondent (Public Service Commission) was not consulted on the suspension, who is their employer as they were seconded to Pumwani Hospital by the Public Service Commission contrary to Section 138 of the County Government Act.

7. They aver that the suspension was done without giving the Nurses an opportunity to be heard, and defend themselves before a disciplinary committee. The Nurses state that the 1st and 4th Respondents have failed to put in proper measures to guarantee their safety and that their salaries and allowances have

been unprocedurally withheld and they have been deliberately frustrated.

1st Respondents Response to the Amended Statement of Claim

8. The 1st Respondent filed a Response dated 4th February 2016 through the firm of Kithi and Company Advocates.

9. In it they deny that the Claimant did issue a strike notice on the 13th of April 2015 which was to commence within 7 days from the date of notice. They aver that a strike commenced and proceeded despite the same being expressly prohibited in law and a court order stopping the same.

10. They state that the suspension at the hospital were justified and were within the scope of the duties of the officer in charge of the County Public Service Management, further, the Nurses absented themselves from work for over two months necessitating an action being taken against them.

11. They state that they served the Nurses with show cause letters, to show why they absconded duty, which were ignored and wrote two letters addressing the security issues, stationed two police officers at the hospital during the day and two more at night.

12. They state that the withholding of salary was not unlawful and the disciplinary action taken toward the nurses were due to gross misconduct and was necessary and within the law.

13. They state that the Claim herein is an abuse of the Court process that only a few Nurses from one Union are the ones who are aggrieved, the Court has previously denied orders to reinstate the Nurses and the position is yet to change.

They pray that the claim be dismissed.

2nd, 3rd, 4th and 5th Respondent Grounds of Opposition

15. The said Respondents herein have opposed the claim herein stating that it is incompetent, misconceived in law and a waste of the Courts time and process.

16. They state that the prayers sought to redeploy or transfer 186 Nurses are not enforceable since the Health Services are now devolved as per the fourth schedule of the constitution. They state that under Article 235 of the Constitution 2010, each County has its own Public Service and under Section 59(1) of the County Government Act, there is the County Public Service Board whose functions include the prayers sought.

17. They state that Section 72 of the County Government Act explicitly deals with the power to deploy County Officers or employees and Section 73 (1) of the County Government Act provides that:

1) That the National Government shall put in place measures to protect its public officers on secondment to the counties from loss or disadvantage with respect to revenues, benefits, gratuity or other terminal benefits...”.

18. They state that they only function of the National Government then is to protect loss of benefits of the claimants upon redeployment to county government which loss of benefits have not been pleaded at all by the Claimants.

19. They state that the security of the Claimants has been improved with no complaint received since, and reiterate that they find that there are no enforceable orders, that the claim lacks merit, and that the claim be dismissed with costs to the Respondent.

Claimant's Supplementary Affidavit.

20. The Claimant filed a Supplementary Affidavit in response to 1st Respondent's Response to the Amended Claim. They state that they do not agree with the contents of each and every paragraph of the 1st Respondent's response.
21. They aver that the letters to show cause sent by the 1st Respondent dated 12th of May 2015 were sent via the post office and received on the 14th of May 2015 when the time within which to respond had already lapsed.
22. They further state that the suspension letters were sent via the Chief Officer in charge of health Services who received them on the 28th of May 2015, and many were sent forwarded via post, and again took a long time to reach the Nurses.
23. They received letters of dismissal on the 1st of August 2015, informing them that they had been dismissed with effect from 8th April 2015, without being heard, which in effect meant that the letters sent for notice to show cause and suspension were malicious and not done in good faith.
24. The General Secretary submitted a report explaining the circumstances surrounding the alleged disappearance/swapping of twin babies at Pumwani Hospital and the problems the Nurses were facing, which report was to be used by the Senate for investigations.
25. They further aver that on the 25th of March 2015, the Claimant wrote a Memorandum of protest to the Governor, Senate and the County Chief Officer of Health regarding negative publicity and evasion of truth in the twin babies saga.
26. They further had a meeting on the 26th March 2015, with the 1st Respondent represented by the Chief Officer in charge of Health and Director for Medical Services in the Ministry of Health where it was agreed that there would be no victimization of staff following a sit in by Nurses due to insecurity in Pumwani. It was further agreed that essential medical equipment would be purchased immediately.
27. On 9th of April, they aver that they wrote to the President Hon. Uhuru Kenyatta on the problem at Pumwani Hospital, copied to all other institutions and officers, and further on the 27th of April 2015, the Pumwani Hospital Matron wrote to the Human Resource Officer seeking any assistance to be accorded to a Nurse by the name of Mary Wafula who had been injured by an attack at the hospital.
28. They have written several letters, dated 7th June 2015, 13th May 2015, 13th May 2015, 16th June 2015, 8th July 2015, 22nd July 2015, 4th August 2015, 5th August 2015, 6th August 2015, 11th November 2015, 28th October 2015, 30th October 2015, 11th November 2015, 12th November 2015, 18th November 2015 and 3rd December 2015, 10th December 2015 regarding this issue with little or no response received in most instances, and there has been no change in the situation.
29. They reiterate that the disciplinary action taken against the Claimant was unprocedural and unlawful and unfair. The action was contrary to the law as envisioned in Section 41(1) of the Employment Act.
30. They aver that the 1st Respondent never paid the requisite house allowances and medical allowances, and that the salaries of the nurses were not paid up to the date they were unlawfully dismissed instead choosing to procedurally backdate the dismissal letters to April 2015 whereas the unlawful act took place in August.
31. They aver that the 1st Respondent has deliberately denied to participate in conciliation in an effort to resolve the dispute, and that their entire response has been signed by the counsel for the Respondent without a verifying affidavit and the same should not be admitted in Court.
32. They pray for judgment to be entered in their favour.

Response of the 1st Respondent to the Claimant's Supplementary Affidavit.

33. The 1st Respondent avers that the Claimants' issued a strike notice that they would proceed on strike on the 20th of April 2015. They aver that the Ministry of Labour responded and issued directions and advise on the same.

34. They aver that the Claimants' then went to Court, in an effort to legalize and justify the strike seeking orders of prohibition against the Respondent from harassment, intimidation, assault and threats and orders were granted ex-parte on the 16th of April 2015.

35. The County Government made all effort to get the nurses back to work, but, those of the Claimant Union refused to budge while others of other unions went back to work.

36. They aver that the claimant union proceeded on strike even after the Honorable Court via **Petition 35 of 2015 Nairobi City County vs. Kenya National Union of Nurses** issued orders prohibiting the said strike which orders were blatantly ignored.

37. They aver that the notice to show cause letters issued were done through hand delivery to those on strike and through registered post. They were dated 12th May 2015 and received on the 14th of May 2015, which shows that they were done in good time, further, the nurses had more than sufficient time to respond to the letters, however they Claimants Secretary General advised them not to pick the letters until 18th May and refuse to respond to the same.

38. They aver that out of 186 nurses, only those belonging to the Claimants Union refused to return to work, no response was received from them and subsequently in the month of August, 4 months after they had unlawfully absconded, the County Government through the Human Resource Management Advisory Committee made a resolution to a have the nurses who even after being given an opportunity to be heard and refused to do, be dismissed with effect from the day they were last at work.

39. They aver that upon being denied orders by the Hon. Lady Justice Wasilwa, they attempted to approach another judge by way of application dated 27th October 2015 and misrepresented the position of the Hon Lady Justice Mbaru obtaining ex-parte orders however on application, the 1st Respondent managed to set aside those orders.

40. They aver that they have honored numerous meetings which have been frustrated as the Claimant does not honour decisions reached therein. Further, the Nurses were invited for disciplinary hearings which they failed to attend.

41. They pray that the Claim be dismissed with costs.

Claimants' submissions

42. The Claimant submits that there was procedural fault in the way the disciplinary action was carried out against the nurses as the officer a Mr. Leboo Ole Morintat, the head of Public Service Management, who performed it, did so without express authority from the Secretary, Nairobi County Public Service Board or the Public Service Commission.

43. They submit that there is no letter showing that Mr. Morintat had authority to conduct such tasks and it could be stated that he conducted the duty under his own capacity.

44. They submit that disciplinary control in the County Government for staff employed by the Public Service Board is the mandate of the Public Service Board directly through the secretary who is the CEO or through the member of the board on the delegation in writing. All other staff employed by the County Government, the Human Resource Advisory Committee and or any other Chief Officer can discipline public officers save for limitation provided for in Section 35(6) of the Public Servants Code of Regulation

2006 which states that:

“35(6)where in case under this regulation, it is the opinion of the authorized officer that the punishment to be inflicted is dismissal or reduction in rank or seniority. The authorized officer shall forward to the commission the record of the disciplinary proceedings together with his comments thereon and the commission shall decide the punishment, if any which should be inflicted on the Public Officer, or whether he should be retired in the Public Interest”.

45. They therefore submit that the Chief Officer in charge of Public Service Management Mr. Morintat did not have power or authority from the Public Service Commission to dismiss the 64 Nurses, further, there are no minutes of the alleged sitting of the alleged committee meeting that ordered the dismissal of the Nurses.

46. They submit that direction given to them to appeal to the Public Service Commission was misleading as the Commission does not have the mandate to hear such appeals.

47. The Claimant submits that the Nurses have endured great pain and suffering following the allegations of child swapping at the hospital. The staff has put up with insults, disrespect, and negative image as a result of the allegations.

48. There has been a Court ruling where the Court is convinced that there is situation affecting the security of the Nurses that needs additional security be provided and submit that to date this has not been complied with, deeming the action that they took as necessary.

49. The Claimant submits that 64 of the Nurses at the Hospital were seconded there by the Public Service Commission pursuant to Section 138 of the County Government Act, and these Nurses are subject to the provisions of the Public Servants Code of Regulations Revised in 2006. Regulation G.32 (3) (6) which provides that:

“When an officer is suspended from the exercise of the functions of his public office under this regulation, he shall not be entitled to any salary. The officer will however be eligible to be paid house allowance and medical allowances.

(6) An officer on interdiction or suspension should report to his supervisor at least once a week and should not leave his duty station without express permission”.

50. They submit that the Nurses were denied their allowances making it impossible for them to remain in their rented premises and report to their workstations at least once a week. They were rendered destitute and unable to receive communication about the disciplinary action as they could not report to work.

51. They Claimant further submit that the 1st Respondent could not dismiss seconded staff as they were not the primary employer. They rely on Section 138(1)(a)(b) of the County Government Act which provides that:

“138 (i) Any public officer appointed by the Public Service Commission in exercising of its constitutional powers and functions before coming to effect of this Act and is serving in a County on the date of the Constitution of the County Government shall be deemed to be in the service of that County under secondment from the National Government with their terms of service as at that date:

a) The officer’s terms of service including remuneration, allowances and pension or other benefits shall not be entitled to the officer’s advantage.

b) The officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the

time of commencement of the proceedings for the removal; and

c) The officer's terms and conditions of service may be altered to the officers advantage.

52. Additionally they rely on the Public Servants Code of Regulations Revised in 2006 at Section 35(1)(2)(6)(7)(8).

53. They therefore submit that the 1st Respondent and Mr. Morintat did not have the authority or mandate to dismiss the Pumwani Nurses and that the National Government should have put in measures to protect them and ensure that their staff are not exposed to such losses.

54. As to the allegations of absconding from duty, the Claimant submit that they did not abscond, as the issue of insecurity was serious, largely known and that the definition of abscondment in legal terms is that one who has run away from legal proceedings which they had not as no proceedings were on going.

55. They submit that it was the duty of the 1st Respondent to provide a secure working environment and that their absence from duty due to fear of security is protected by the provisions of Section 14(i) of the Occupational Safety and Health Act No. 15 which provides that:

“14(i) every employee shall report to the immediate supervisor any situation which the employee has reasonable grounds to believe presents an imminent or serious danger to the safety or health of that employee or of other employees in the same premises, and until the occupier has taken remedial action, if necessary the occupier shall not require the employee to return to the work place where there is continuing imminent or serious danger to safety or health”.

56. They submit that the 64 Nurses ran from imminent danger and serious danger to their safety and that their actions cannot be misconstrued to mean abscondment from duty.

57. The Claimant submit that the dismissal of the Nurses was unfair as it went against the provisions of Section 41 (1)(2) and 45(1)(2)(a)(b)(i)(ii)(c) 4(b) and 5 of the Employment Act of 2007.

58. They submit that they were not invited to attend any disciplinary hearing nor was the procedure as laid out in Section 45 of the Act followed. They said the decisions reached are therefore unfair and should be quashed and Nurses reinstated to their former positions without loss of their benefits.

59. The Claimant further submits that there was lack of equipment necessary for them to deliver their services which was discussed and agreed to be rectified, however, this was not done, making it a failure on the part of the Respondent to facilitate the efficient delivery of services.

60. They submit that the refusal by the Respondent to honour conciliation meetings makes them a difficult and unco-operative employer and that since they refused to attend conciliation, an order or judgment of the Court should not be entered in their favour. They rely on Section 77 (2) of the Labour Relations Act No. 14 of 2007 which states that:

“77(2) a party that failed to attend any conciliation meetings may not seek relief under Subsection (1)(b).

1) The Industrial Court may in granting relief in respect of any application made under subsection (1) (b), direct the parties to engage in further conciliation in good faith with a view to resolving the dispute”.

61. In support of their case, the Claimants' relies on the case of **Geoffrey Muguna Mbuguru vs Attorney General Civic Case No 3427 of 1994** where the Hon Acting Judge JB Ojwang at page 32 – 33 provided that:

“Employment in the public service both provides a machinery of serving public interest and

benefits the employee who is compensated by approved methods for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment.

It is in the interest of both the public, to whom services are rendered and the employee, who has a personal relationship with the working arrangements that the governing law affecting continued productivity in public office be given fulfillment.

This law which will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices, constitutes the objective criterion of correct delivery and good services. It is a distortion of the quality of public service, when self-interested individuals take over the process of service, jettison the law to the winds, and impose their subjective inclinations on the delivery process. Yet this is precisely what took place when the permanent secretary allowed himself to be entrapped in a crusade to ferret the plaintiff out of the civil service establishment, clearly without regard to the safeguards of the law”.

62. They submit that the disciplinary procedures and final dismissal of the Pumwani Nurses are similar in the manner they were executed and the law was not followed.

63. The Claimant submits that the 1st Respondent filed a Response to the Amended Claim but it is not a Replying Affidavit neither has it been filed together with a Verifying Affidavit and the entire Response should then be struck out.

64. They also submit that 1st, 2nd and 3rd Respondents have failed to file a Response to the Claim and as such their case acts as undefended and the ClaimantS pray that they should be awarded as prayed.

1st Respondents submissions

65. In addition to their Statements in their affidavits, they submit that the right to strike is not a right that cannot be limited, and in this particular case, the right was limited by statute, reason being that the participation of health workers in a strike would endanger the lives of the general public.

66. The Labour Relations Act under Section 78 prohibits strikes or lockouts of employees engaged in an essential service, which essential service is described in Section 81 as one where interrupted would endanger the lives of a person.

67. They submit that in light of the foregoing, the strike by the Claimants was seen to be unprotected and the employer is entitled to withhold salary and carry out disciplinary procedures.

68. They submit that the Employment Act under Section 44 provides for incidences where an employee can be summarily dismissed, listing absenteeism without permission from the employer as one such instance. The nurses in this instance refused to report to work and did not respond to notices to show cause when such were issued against them.

69. The 1st Respondent submits that the office of the Chief Officer, Public Service Management was recruited and recommended for the said position by the County Public Service Board; and the said department was created to deal with all Human Resource issued including disciplinary issues. The said Chief Officer therefore, acted well within his mandate when dealing with disciplinary issues of the Claimant.

70. They submit that an appeal to a decision on disciplinary issues lies with the Public Service Commission under the County Government Act Section 77. The Public Service Commission being both a Constitutional and Statutory Body is the one best placed to handle and determine the issues raised by the Claimant herein on termination of its members of employment.

71. They submit that as the Claimant has filed an appeal, the Court is stopped from listening to this matter

as the two cannot run parallel, and further the law is clear that where there is an alternative remedy provided for in statute, then the Court ought not to come in and exercise its powers before the procedure provided for is strictly observed and exhausted.

72. They rely on the case of **Republic vs. Energy Regulation Commission ex-parte Pekenya Gas Supplies Limited (2016) eKLR** where Justice Odunga held as follows:

“62. The respondent contended that the applicant ought to have appealed to the Energy Tribunal instead of coming before this court. Section 89 (a) of the Act provides for an appeal to the Energy Tribunal in case a person is aggrieved by the decision of the Respondent.

As was held by this Court in Republic vs Ministry of Interior and Co-ordination of National Government and Another ex parte ZTE judicial review case no 441 of 2013.

One must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng J in John Fitzgerald Kennedy Omanga vs The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA NO. 997 of 2003 for the court to require the alternative procedure to be exhausted prior to resorting to judicial review is accord with judicial review being properly regarded as a remedy of last resort through the application will not be required to resort to some other procedure if that other procedure is less convenient or otherwise appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was reaffirmed by the Court of Appeal in Speaker of the National Assembly Vs Karume Civil Application No Nai 92 Of 1992 where it was held that there is considerable merit in the submission that where there is clear procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

73. They conclude that the orders sought cannot be granted as they are overtaken by events and further orders on harassment, threats, assault and use of County Askaris have not been provided in any way.

The 2nd 3rd and 4th Respondent submission

74. They reiterate their grounds of opposition. They submit that the mandate to redeploy or transfer Nurses in the said hospital is within the purview of the Nairobi County Services Commission and not the Public Service Commission. The functions of the National Government and County Government are set out under schedule four of the Constitution of Kenya, and the County Government Act 2012.

75. The National Government is conferred with the mandate of developing the National Health Policy and management of referral hospitals while the County Government deals with county health services. The employee nurses in this case were employed under the county and it is the mandate of the county to re-designate and or deploy public officers within its County.

76. They submit that Pumwani Hospital is under the Nairobi County Government and the Court has no jurisdiction to order the management of the said hospital to revert back to the Ministry of Health and National Government.

77. The procedure for transfer of functions is set out under Article 187 of the Constitution, where it states that such transfer can happen where there is an agreement between the Governments; that a function would be more effectively performed by the receiving Government. Therefore, the Court does not have the power to transfer as it is vested in the Governments.

78. They submit that the Inspector General ensures the security of the Nurses and the same had not been complained of again.

79. They pray that the case against them be dismissed with costs.

80. Having considered the evidence and submissions of all the parties, the issues for determination by this Court are as follows:

1. Whether there were valid reasons to warrant dismissal of the Claimant members.

2. Whether due process was accorded to the said Claimant Union Nurses before dismissal.

3. What the appropriate remedies are in the circumstances.

81. On the issue, on 27.5.2015 the Claimant Union Members were suspended from duty on the grounds that they had absconded duty with effect from 8th April 2015. During the period of suspension, they were informed that they would not receive any salary. The letter was written by one Leboo Ole Morintat, County Chief Officer Public Service Management of the Nairobi County.

82. Before this suspension, the Claimant Members had been served with show cause letters dated 12th May 2015 and were expected to respond to the said letters relating to absconding of duty within 7 days. Whether the letters were received by the Claimants within the time expected to respond is not clear as one addressed to one officer E. Ouma was said to have been received on 26th October 2015. One to Mary Wagura is stated received on 14.5.2015, the one to Robert Mwenda was sent to him by registered post. Some of the officers received their letters on 14.5.2015. One Officer Robert Mwenda's letter of show cause was dated 4.6.2015 and received on 23.10.2015. The reasons explained in these letters of show cause and suspension are abscondment of duty.

83. They were informed that Section 27 of Public Service Commission Regulation 2005 states that an officer who is absent from duty without leave or reasonable or lawful cause for a period exceeding 24 hours can be summarily dismissed. The letters also referred to Section 44 (4) (a) of the Employment Act 2007 on absence from duty.

84. The Respondents submitted that the Claimant Union Members never responded to the show cause letters as expected. It is then that on 6.8.2015, they were dismissed. The dismissal letters were dated 6.8.2015 but received on different days by the Claimant Members. They were also asked to appeal to the County Public Service Board within 42 days from the date of the said letter through the County Secretary, Nairobi City County.

85. Earlier on, on 13.4.2015, the Claimant had approached this Court seeking certain orders through a Notice of Motion of even date. The Court heard the application ex-parte and directed that the Inspector General of Police provide security to the Applicants at their work place.

86. After hearing the application inter-partes, the Court made further orders in its ruling of 19.10.2015 confirming its orders that security of the Nurses at Pumwani Maternity Hospital be enforced by the 1st Respondent and 4th Respondent. I reiterated that whereas the Nurses were not to be harassed or intimidated, this did not take away the Respondents power to discipline errant employees whilst following due process. The parties were also encouraged to consider negotiations and reconciliations.

87. After now considering the main suit, it appears there was a disconnect between the application and the main suit because the conciliation process didn't work and it appears the Claimants were engaged in other acts of indiscipline that led to them being suspended and their being asked to show cause why they should not be dismissed. Back to the reasons of dismissal – abscondment of duty.

88. Under Section 44 of Employment Act, absence from duty is a reason that may warrant summary dismissal as it is one of the actions termed as being gross misconduct. However, under Section 43 (2) of Employment Act – it is imperative that the employer proves reasons for dismissal.

89. From the evidence of the Claimants, they agree they were absent from duty due to insecurity caused by the disappearance of some twin babies born at the Pumwani Hospital. This actually caused the Claimants to come to Court in April 2015 asking for provision of security.

90. This Court ordered security to be provided. It is however not clear why out of the over 160 Nurses at this facility, only the Claimant Members felt very insecure that they didn't go back to work. They were even asked to resume duty but they declined to do so.

91. It is therefore this Court's finding that abscondment of duty was a valid reason to warrant dismissal from duty of the Claimant's Members as envisaged under Section 43 of Employment Act.

92. On the 2nd issue of due process, the Claimant Members argued that due process was not followed before their dismissal. They argue that the disciplinary action was carried out against the Nurses by an officer called Mr. Leboo Ole Morintat – the Head of Public Service Management who performed it without the express authority from the Secretary, Nairobi Public Service Board or the Public Service Commission.

93. They argue that disciplinary control in the County Government for staff employed by the Public Service Board is the mandate of the Public Service Board directly through the Chief Executive Officer or through a member of the board on delegation in writing.

94. Did Mr. Morintat conduct the said disciplinary process? A glance at the letters of suspension and dismissal to the concerned Nurses shows that he was conveying the decision of the Nairobi City County. The letter was written on the letter head of the Public Service Management and he wrote it as Chief Officer Public Service Management.

95. What is the process of discipline for the County Public Service Staff. The County Government Act 2012 is the Principle Law on County Government Administrative function.

96. Under Section 58 of the County Government Act the County Public Service Board is established. Section 59 of County Government Act the functions and powers of a County Public Service Board are exhibited. Under Section 59(b) the functions are listed as follows:

a);

b) appoint persons to hold or act in offices of the County Public Service including in the Boards of cities and urban areas within the County and to confirm appointments;

c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this part;

d) prepare regular reports for submission to the County Assembly on the execution of the functions of the Board;

e) promote in the County Public Service the values and principles referred to in Articles 10 and 232;

f) evaluate and report to the County Assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the County Public Service;

g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;

h) advise the County Government on Human Resource Management and Development;

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97. It is clear that it is the County Public Service Board (CPSB) that has power to deal with the Human Resource functions of the County Public Service including appointments, discipline and removal from office of any person serving within the County Public Service.

98. The entity that is said to have disciplined and dismissed the Claimants herein is the Public Service Management which is a new entity not in the Act and where the Head of this Public Service Management got powers to discipline or dismiss the Claimants is not clear.

99. The process of discipline is also set out in the County Public Service Human Resource Manual which state as follows:

“D.28 Disciplinary Powers and Procedures

(1) The powers of disciplinary control and removal of County Public Officers from the service are vested in the CPSBs or Authorized Officers as specified in the County Government Act.

D. 29 Principles Guiding Exercise of Disciplinary Control

(1) Adherence to the principles of natural justice:

(i) A person affected by a decision must be given an opportunity to be heard; and

(ii) the person making the decision must not be Biased”.

100. This process of fair hearing was never adhered to. It is therefore my finding that the dismissal of the Claimants was unfair and unjustified as stated under Section 45(2) of Employment Act as follows:

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

101. The 3rd issue concerns remedies to grant in the circumstances. The Claimants sought various remedies including provision of security at the Pumwani Maternity Hospital which I directed should be provided for by the 1st and 4th Respondents.

102. Another order concerned the provision of necessary tools for the workers at the hospital. The said necessary tools were not listed by the Claimants and therefore it is not possible to address the prayer.

103. The notable prayer which I must then address is on quashing of the suspension and dismissal letters which is in my view an order for reinstatement.

104. I have already in this judgment stated that the suspension letters and the dismissal letters were done by a person or entity not authorized in law to do the suspension/dismissal. That being the position, it follows that the said letters are null and void and of no effect.

105. Whether reinstatement then is the remedy to grant is what I should determine.

106. Section 12(3) of Employment and Labour Relations Court Act provides as follows:

3. In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:-

- (i) interim preservation orders including injunctions in cases of urgency;**
- (ii) a prohibitory order;**
- (iii) an order for specific performance;**
- (iv) a declaratory order;**
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;**
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;**
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or**
- (viii) any other appropriate relief as the Court may deem fit to grant”.**

107. Under (vii) above an order of reinstatement can be granted within 3 years of the dismissal but subject to conditions the Court may impose.

108. Section 49(4) of Employment Act 2007 gives a guideline on what could be considered in case of reinstatement. The Section reads as follows:

“(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following:-

- (a) the wishes of the employee;**
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- (c) the practicability of recommending reinstatement or re-engagement;**
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- (e) the employee’s length of service with the employer;**
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- (h) the value of any severance payable by law;**
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- (j) any expenses reasonably incurred by the employee as a consequence of the termination;**

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

109. Taking into consideration the above guidelines, the Respondents herein have not expressed any reservations about reinstatement of the Claimants. Practically reinstatement of the Claimants would not inconvenience the Respondents as the services of the Claimants are still needed by this Country and the Respondents County as a whole given that Pumwani Maternity Hospital is the largest Maternity Hospital in the region.

110. The Claimants have also served the Respondents in various capacities over a long period of time and some of them are not capable of securing suitable or comparable jobs in this period.

111. I believe reinstatement will be the only viable remedy in the circumstances.

112. I therefore find for the Claimants and order them reinstated to work unconditionally with no loss of salary and allowances within 30 days from today.

113. Costs of this case to the Claimants.

Read in open Court this 19th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

David Omulama for Claimants – Present

Mutua and Ouma Respondents – Present