



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 490 OF 2014**  
**(Originally Nakuru CMCC No. 1001 of 2009)**

<b>JACKSON KIMANI WAWERU</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>DANIEL KAGORI NJUGUNA</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>BENJAMIN CHETEREK KIMENGICH</b>	<b>3<sup>RD</sup> CLAIMANT</b>
<b>DAVID KARIMI MARETE</b>	<b>4<sup>TH</sup> CLAIMANT</b>
<b>PATRICK GAKOBO MATHENGE</b>	<b>5<sup>TH</sup> CLAIMANT</b>
<b>HASSAN GODANA BAGAJA</b>	<b>6<sup>TH</sup> CLAIMANT</b>
<b>v</b>	
<b>ATTORNEY GENERAL</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>COMMISSIONER OF POLICE</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>NAKURU COUNTY PUBLIC SERVICE BOARD</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>NAKURU COUNTY GOVERNMENT</b>	<b>4<sup>TH</sup> RESPONDENT</b>

**JUDGMENT**

1. The Claimants commenced legal proceedings on 16 December 2009 in the Chief Magistrates Court against the Attorney General (1<sup>st</sup> Respondent), Commissioner of Police (2<sup>nd</sup> Respondent), one Shadrack Mulanga and the Municipal Council of Naivasha alleging defamation, false detention and malicious prosecution and unlawful suspension from employment (4<sup>th</sup> and 5<sup>th</sup> Claimants were reinstated and withdrew their claims on 17 January 2012).
2. Shadrack Mulanga and the Municipal Council of Naivasha filed a joint Statement of Defence on 13 January 2010, but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not enter appearance.
3. On 22 January 2010, the Claimants applied for interlocutory judgment against these 2 Respondents.

4. However, the Attorney General entered appearance on 26 February 2010 on behalf of himself and the 2<sup>nd</sup> Respondent, and a joint Statement of Defence on 27 April 2010.
5. On 1 April 2010, the Claimants applied to have the 3<sup>rd</sup> and 4<sup>th</sup> Respondents Defence to be struck out for being frivolous and not raising any triable issues.
6. The parties entered into some sort of negotiations and on 17 September 2010, a consent in the following terms was filed in Court
  - (a) *The plaintiffs who are employees of the Municipal Council of Naivasha currently on suspension for alleged gross misconduct be paid their half salaries due to them by the 4<sup>th</sup> Defendant pending hearing and final determination of this suit.*
  - (b) *The suit be fixed for hearing on a date convenient to all parties on priority basis.*
  - (c) *Today's costs be on course.*
7. The consent was adopted as an order of Court on 24 September 2010.
8. The Municipal Council of Naivasha did not comply with the consent order and on 22 November 2010, the Claimants sought leave of Court to commence contempt proceedings.
9. The application was dismissed on 25 January 2011.
10. On 17 January 2012, **David Karimi Marete** and **Patrick Gakobo Mathenge** withdrew their suits against the Respondents because they had been reinstated to work.
11. On 21 November 2013, the Municipal Council of Naivasha raised a preliminary objection on the ground that it was improperly enjoined in the suit in light of the Constitution of Kenya, Chapter 2, Section 6(1) and Chapter 11, Section 176(1) of the Laws of Kenya.
12. When the preliminary objection came up for hearing on 11 March 2014, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents sought that the suit be stood over generally for the pleadings to be regularised
13. On 27 February 2014, one Mary Wairimu Mwaniki applied to Court to be substituted as a Claimant in place of Benjamin Cheserek Kimengich who had died on 4 September 2013.
14. The subordinate Court allowed the application for substitution on 6 March 2014 although there is nothing on record to show that the said Mary Wairimu Mwaniki had been granted letters of administration by a Court of law.
15. On the same day, the Claimants filed their list of documents.
16. On 4 July 2014, the Court ordered that the suit pending before the subordinate Court be transferred to this Court for hearing and determination.
17. On 5 December 2014, the Court granted the Claimants leave to file an amended Statement of Claim and fixed hearing for 22 October 2015.
18. Come 22 October 2015, the Claimants' advocate was not in Court, and the Court directed that summons be issued to him to explain the absence.
19. On 4 November 2015, the firm of Brian Otieno & Co. Advocates filed a Notice of Change of Advocates to come on record for the Claimants and on 13 November 2015, the new advocates filed an Amended Plaintiff in which Shadrack Mulanga was removed and replaced by Nakuru County Public

Service Board as 3<sup>rd</sup> Respondent and Municipal Council of Naivasha replaced by Nakuru County Government as 4<sup>th</sup> Respondent.

20. Rodi Orege & Co. Advocates filed a Notice of Appointment of Advocate to act for the 4<sup>th</sup> Respondent on 5 December 2015 and on 9 February 2016, the firm filed a joint Memorandum of Response to the Amended Plaintiff on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Memorandum of Response was admitted by the Court on 9 February 2016.

21. These 2 Respondents filed a List of Documents on 8 February 2016.

22. The Claimants filed a List of Documents, witnesses and witness statements on 25 February 2016.

23. The Cause was heard on 1 March 2016, 8 July 2016 and 27 July 2016 followed by filing of submissions by the Claimants on 26 September 2016 (instead of before 26 August 2016), while the Respondents submissions were not on file by this morning, possibly because the Claimants submissions were filed late (not even clear if same were served upon the Respondents).

24. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimants arrest and prosecution was malicious, whether the Claimants were defamed by the arrest and prosecution, whether the suspension of the Claimants were unlawful and appropriate remedies.*

### **Malicious arrest and prosecution**

25. The Claimants were all charged with taking part in unlawful assembly contrary to section 79 of the Penal Code. The particulars of the charge were that the Claimants took part in an unlawful assembly by singing and shouting on 12 January 2009 at the Naivasha municipal council compound.

26. The trial Court found that the charge was defective as it did not comply with the provisions of section 137(f) of the Criminal Procedure Code, because it did not state where the offence was committed.

27. The Court also noted from the evidence of the Police who arrested the Claimants that they did not create any disturbance nor were they violent in any way. The Police evidence was that they found the Claimants peaceful and not violent.

28. The Court found that the prosecution had failed to prove a *prima facie* case against the Claimants and acquitted them under section 210 of the Criminal Procedure Code.

29. The torts of false imprisonment (false detention as pleaded here) and malicious prosecution are closely related and in order to succeed, the party asserting so must prove 4 things to wit, that the Respondent set the law in motion against him on a criminal charge; that the same was without reasonable or probable cause; the Respondent acted maliciously and the criminal proceedings terminated in the Claimant's favour.

30. The Claimants did not prove all the essential elements either in respect to malicious prosecution or false detention.

### **Defamation**

31. Defamation occurs when one person publishes a statement which, tends to lower the reputation or dignity of another in the estimation of right thinking members of the society generally or which tend to make him (she) to be shunned or avoided.

32. The defamatory statement in particular causes one to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem.

33. The Claimants did not plead the required particulars of defamation or lead any evidence as to the alleged defamation nor was a reference made thereto in the submissions and this head of claim is therefore unsupported by evidence and is for dismissal.

### **Whether suspension was unlawful**

34. To be lawful, a suspension in employment should be underpinned either by statute or contract.

35. The Respondents contended in the Response that the suspensions were anchored in law and reference was made to the Local Government Act, the Local Government Regulations, Municipal Council of Naivasha Employment Regulations and a resolution of the Council.

36. The Claimants were all suspended a week after being charged in Court, through letters dated 19 January 2009 (except for the 2<sup>nd</sup> Claimant who was suspended on 24 December 2008 for unrelated reasons) and the letters set out the circumstances of the suspensions.

37. The Court has looked at the Public Service Commission (Local Authority Officers) Regulations, 2007 Legal Notice No. 72 of 2007 filed by the Claimants in Court on 17 January 2012.

38. Regulation 25 thereof provided for suspension in circumstances where a local authority officer had been *convicted of a serious criminal offence or against whom proceedings for dismissal had been taken*.

39. By the time the Claimants were being suspended there is nothing which has been placed before Court to demonstrate that they had been *convicted of a serious criminal offence, or that disciplinary proceedings which could lead to dismissal had been initiated*.

40. The Claimants had only been charged with criminal offences a week earlier, on 12 January 2009 (except for 2<sup>nd</sup> Claimant who was charged on 9 February 2009 and convicted on 15 August 2011 but later successfully appealed).

41. The Court would therefore reach a conclusion that the suspensions were unlawful for not being in compliance with the statutory regime in place.

42. The Claimants ought to have been placed on *interdiction* in terms of regulation 24, if there were grounds for such action and not *suspension*, which is regulated by regulation 25.

43. The Court will next consider whether the suspensions complied with contractually agreed provisions.

44. The Claimants produced a collective bargaining agreement between the Association of Local Government Employers and Kenya Local Government Workers Union.

45. Clause 30 of the agreement envisaged suspension for a period of not more than 3 months, where an officer had been *found guilty of an act or omission incompatible with due discharge of duties pending investigations*.

46. The Clause also allow for suspension where *criminal proceedings involving a council's interest* had been instituted.

47. No material was placed before Court to show that the Claimants had been found guilty of an act or omission in terms of clause 30, or that criminal proceedings involving the council's interest had been instituted.

48. The Respondents did not show or even attempt to explain in this Court the nexus between the charges the Claimants faced and the council's interest.

49. On the same footing, the suspensions went beyond the 3 months provided for in the collective

bargaining agreement and the Respondents have not made any attempt to show extenuating circumstances in that regard.

50. The Court also finds it curious that the 1<sup>st</sup> Claimant who was transferred to the City Council of Nairobi through a letter dated 5 November 2008 could be suspended in January 2009 on other grounds and not for failing to report to the new work station; and that a consent could be entered by the parties on 17 September 2010 to pay the Plaintiffs half salaries when the 3<sup>rd</sup> Claimant had been retired in the public interest on 22 December 2009, and the 4<sup>th</sup> Respondent Hassan Godana Bagaja summarily dismissed through a letter dated 21 December 2009. That consent was vague.

51. Before examining appropriate remedies, the Court wishes to stress that none of the Claimants have challenged their dismissals in the present proceedings though they were aware immediately after filing the suit of the termination of their employments (Court was informed that the 2<sup>nd</sup> Claimant had challenged his dismissal in Nairobi Cause No. 132 of 2006 which is yet to be concluded).

### **Appropriate remedies**

#### ***Lifting of suspensions***

52. The Claimants are longer in the employment of the Respondents either due to transfer, death or dismissal and it would be a pyrrhic victory for the Court to order lifting of the suspensions or reinstatement.

53. The Court has already noted that they did not challenge the dismissals.

54. The most the Court can do is to order the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to pay the wages which accrued during the period of suspension and date of separation and/or transfer in terms of the consent of 17 September 2010.

#### ***Damages for false detention and malicious prosecution***

55. It is telling that this head of relief was not pursued or referred to in the Claimants submissions. It is for dismissed.

#### ***Damages for defamation***

56. This head of claim was also not proved and is for dismissal.

### **Conclusion and Orders**

57. The Court finds and holds that the suspension of the Claimants was unlawful and orders the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to compute and pay them

(a) Wages accrued/due up to dates of separation.

58. The other reliefs are dismissed.

59. Claimants are denied costs because of filing submissions completely outside the agreed timelines without any explanations.

**Delivered, dated and signed in Nakuru on this 7<sup>th</sup> day of October 2016.**

**Radido Stephen**

## **Judge**

### **Appearances**

For Claimants

Ms. Moenga instructed by Brian Otieno & Co. Advocates

For 1<sup>st</sup> & 2<sup>nd</sup> Respondent

Ms. Khatambi, Litigation Counsel, Office of Attorney General

For 3<sup>rd</sup> & 4<sup>th</sup> Respondent

Ms. Yebei instructed by Rodi & Orege & Co. Advocates

Court Assistant

Nixon