



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1321 OF 2016

DOROTHY NJOKI NDUNG’U.....CLAIMANT

VERSUS

MACHAKOS UNIVERSITY COLLEGE.....1ST RESPONDENT

DEPUTY PRINCIPAL (ADMINISTRATION PLANNING AND FINANCE)

MACHAKOS UNIVERSITY COLLEGE.....2ND RESPONDENT

RULING

1. On 5th July 2016, the Claimant filed application and Notice of Motion seeking urgent orders that;
 1. *Spent*
 2. *Spent*
 3. *Spent*
 4. *Spent*
 5. *Pending the hearing and determination of this claim the Court do issue a declaration that the suspension, disciplinary process and action meted out upon the applicant is, in the circumstances, unlawful and therefore a nullity ab initio.*
 6. *Pending the hearing and determination of this claim the Court be pleased to lift, set aside and or quash the applicant’s suspension and disciplinary action made by the respondent’s letter of 14th June, 2016 and order reinstatement of the applicant.*
 7. *Upon the grant of order at 6 above, the Court be pleased to order payment of the applicant of all withheld salaries, allowances, benefits and reinstatement of her medical cover.*
 8. *Pending hearing and determination of the claim the Court be pleased to declare that the applicant is entitled to medical leave and make an order that the applicant be allowed to continue with treatment during the leave period in line with the respondents’ Human Resource Policy.*
 9. *Pending the hearing and determination of this claim, an injunction do issue directed at the 1st*

and 2nd respondents, their agents, servants and or in any way those acting under them, restraining them from terminating the applicant from her employment without following the applicable law and the terms and conditions of her employment.

2. The application is supported by the affidavit of the Claimant and on the grounds that the Claimant has been a lecturer (Teaching Assistant) with the Respondents for 3 years before her suspension on 18th December 2014 on unlawful and unfounded allegations of absconding duty and insubordination. The Claimant applied for medical leave on 29th April 2016 but the Respondents have purported to disapprove the same on 7th June 2016 in violation of her constitutional right to access health and labour rights with leave which rights are non derogable. The Respondents were aware of the claimant's medical condition and ongoing treatment, they proceeded to level unfounded allegations of absconding duty and suspended the Claimant on 14th June 2016.

3. Further grounds in support of the application are that the Claimant has been suspended from duty without a salary and her medical cover and all allowances and benefits under her contract withdrawn. The Claimant is now unable to attend treatment which is an act of discrimination against her on health status and against the express provisions of the Employment Act. That these acts are inhumane, cruel and meant to expose the Claimant to grave depravity, humiliate, subdue and intimidate her and pose danger to her life. The Claimant is due for a surgical procedure and the same is threatened by the withdrawal of the medical cover. She made representation on her health to the respondent, submitted medical reports which have been ignored and instead been invited to a disciplinary hearing on 6th July 2016. That this is not fair labour practice or fair administrative action and such actions relate to the fact that the Claimant is the Secretary General/Spokesperson of UASU in execution of her duties which have differed with the respondent.

4. That unless the orders sought are granted, the Claimant shall suffer loss and damage. There will be violation of constitutional and legal rights under the constitution and the Employment Act.

5. In her affidavit, the Claimant avers that upon employment by the 1st Respondent she has diligently served and also been elected the UASU Secretary General of the 1st Respondent branch. that while at work and due to long standing attending duty, she developed health complications on both lower limbs around the heels and knee joints and since September 2015 has been undergoing treatment. The condition worsened and the doctor recommended she stops intensive activities and standing. These details were discussed with the Respondent when in April 2016 the 2nd Respondent advised that she should take medical leave so as to attend treatment. By letter dated 29th April 2016 she applied for medical/convalescent leave and later applied for medical leave as she could no longer attend to her duties as her health condition had deteriorated.

6. There was no response by the Respondent until 30th May 2016 when the Claimant was asked to show cause why she had been absent from duty. The Respondent then initiated disciplinary proceedings and on 7th June 2016 the Respondent disapproved the medical leave request. On 14th June 2016 the Claimant was suspended from duty on allegations of absenteeism and insubordination.

7. The Respondent has directed for a replacement of the Claimant which constitute termination or summary dismissal. The Claimant wrote to the Respondent on 19th June 2016 on the reasons why she was unable to attend to her disciplinary hearing and asked for reasonable accommodation and time to recover but the Respondent has refused to set aside the suspension with the intention to justify a termination.

8. In response the Respondent filed a Replying Affidavit professor Kenneth Muvuti, the Deputy Principal (Administration Planning and Finance) of the 1st Respondent and sued as 2nd respondent. He avers that the claimant's application is without merit and should be dismissed. The Claimant has not been terminated from her employment with the Respondent and what exists is an administrative disciplinary process and the rules of national justice requires that each party be given a fair hearing. The Claimant was issued with a suspension letter after she failed to attend and teach her units and absconding duty and

failing to reply to correspondences to here.

9. Mr Muvuti also avers that the 1st Respondent Human Resource Policy (HR Policy) at section 21.6 provides that during a suspension, no salary is payable and medical cover being a benefit of the salary is also suspended.

10. The Claimant was employed by the 1st Respondent on 28th December 2012 as a tutor grade II on permanent and pensionable terms, she was promoted to Teaching Assistant; Graduate Assistant II; and Assistant Lecturer, in the Department of Business Entrepreneurship and Management Sciences, School of Business and Economics. On 4th May 2014 a meeting was held and work distributed. The Claimant signed for her work duties for the semester commencing May/August 2016, but on 9th May 2016, the Claimant had not picked her units allocation and on 10th May 2016 the Claimant replied indicating that she was not going to take up such duties as she had personal engagements. A student in 4th year bachelor of Commerce lodged a complaint that the Claimant had not attended to her lectures, unit BBA 402, and Management of International business.

11. Mr Muvuti also avers that on 26th may 2016 the chairperson of the department, Business Entrepreneurship wrote to him noting that the Claimant had not attended to her lectures or duties allocated since the beginning of the semester. On 31st may 2016 a letter⁵ was thus issued to the Claimant to explain why she failed to attend to the lectures allocated and she replied that she was on medical leave seeking medical attention/treatment and that all universities wee on long holiday as per the CUE Regulations.

12. That on 30th May 2016 the Claimant was issued with memo noting that she had not taught 2 units in her work allocation from May/August semester. He also notified the Claimant that she was not on official leave and on 3rd June 2016 a show cause was issued pursuant to section 44(4) of the Employment Act. The Claimant was required to respond as to why she should not be sanctioned for failing to attend to her work duties and why she had neglected her duties; that there was no policy of a long vacation in may/August 2016 to warrant desertion of duty; that she had absconded duty contrary to the HR Policy and Employment Act; and that service delivery to student ranked in priority.

13. On 14th June 2016 the Claimant was suspended from duty in line with section 44(4) (a) of the Employment Act and the HR Policy section 21.6 which provides that an employee on suspension no salary is payable and by extension, the medical cover is also suspended and the employee removed from the payroll. The defence by the Claimant that she was on sick leave is not correct as she failed to seek the relevant approvals in accordance with the HR Policy. Where the Claimant was on annual leave, she had not submitted the necessary applications or received approval for the same.

14. The Claimant refused and failed to attend to her duties despite students contacting her, her immediate supervisor and chairperson contacting her and an internal memo being issued to her. The decision to therefore invite the Claimant to the disciplinary committee was administrative, procedural and fair. The action of absconding duty amounts to gross misconduct and a subject of summary dismissal under the Employment Act. No termination has taken effect and the application herein is only meant to mislead the Court into grating the claimant's order where she has been economical with the truth.

15. The application should be dismissed with costs to the respondent. The interim orders vacated.

Submissions

16. Both parties filed written submissions.

17. The Claimant submit that the disapproval of her sick leave is unconstitutional and contrary to the Employment Act and the subsequent disciplinary action as a result is unfair labour practice. The suspension that followed as a result is unlawful and contrary to fair administrative action. Section 30 of

the Employment Act allow for sick leave subject to production of a medical certificate and which provisions are given affirmation by article 28 of the constitution on the right to human dignity. Article 30 of the constitution and section 4 of the Employment Act prohibit slavery and servitude and the Claimant should not be forced to work while on medical leave. The application lodged by the Claimant on 29th April 2016 should have been approved as it was based on facts submitted vide medical reports from her medical practitioner. There is evidence the Claimant was sick and the Respondents were aware of these facts and to thus deny her medical leave amounts to unfair labour practice.

18. The Claimant also submit that the disciplinary action initiated by the Claimant against her employer is founded on law as she has good reasons to do so and should not be unfairly treated pursuant to the provisions of section 46(h) of the Employment Act. The disciplinary action subject of these proceeding was to commence on 3rd June 2016 while the Claimant was still on sick leave and therefore the same has no foundation or basis. The reasons given for suspension are not genuine and relate to her unionisation and membership to UASU which has been raised with the respondents.

19. The explanation by the Claimant of the reasons for her absence from duty vide letter dated 31st may 2016 should have warranted the Respondent to investigate the same before taking a drastic decision to commence disciplinary action against the Claimant and suspending her salary and medical cover. In **Frederick Aaundu Amolo versus Principal Namanga Mixed Day Secondary School & 2 others, Cause N0.747 of 2014** the Court held that an interdiction or suspension is the equivalent of criminal trial arrest with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment and such should follow disciplinary enquiry in exceptional cases.

20. The Claimant also submit that to hold an employee's salary constitute an unfair labour practice and pre-empts termination as held in **Peterson Ndung'u & 5 others versus The Kenya Power & Lighting Co. Ltd, Cause No.1149 of 2011**. In this case the Claimant has established a prima facie case with a probability of success and she will suffer irreparable loss and damage if the orders sought are not granted pending hearing of the main claim and the balance of convenience favours the claimant. The Claimant has also replied on the cases of **Professor Gitile j Naituli versus Multi Media university College another Cause No.1200 of 2012; Rebecca Ann Maina 7 others Versus Jomo Kenyatta University of Agriculture and Technology, Cause No.1789 of 2013**. That where fairness has not been addressed the Court can intervene and stop administrative action and disciplinary process commenced unprocedurally by an employer.

21. The Respondent submit that the orders sought by the Claimant in the interim cannot issue as they relate to reinstatement; stay of disciplinary action; that the suspension be declared unlawful and thus be lifted; payment of withheld salaries and medical cover be reinstated. To grant such orders in the interim would be to deal the main claim at the interlocutory stage and deny the parties a chance to argue the merits of the case.

22. Rule 16(8)(a) of the Employment and Labour Relations Court (Procedure) Rules do not allow reinstatement in the interim and courts should not direct employers on how to conduct administrative action as such would deny the employer the managerial prerogative. The Court retains the power of reinstatement as a final remedy is the claim finds merit. The Claimant has not satisfied the principles of the grant of orders sought as set out in **Giella versus Cassman Brown** case. There is no prima facie case that has chances of success upon hearing and where there is a good case such can be compensated by damages and the balance of convenience favours the Respondent who has made all effort to have the Claimant at work but she has opted to be absent.

23. The Respondents have applied internal mechanisms to address the claimant's case as required by the HR Policy and by her coming to Court is to pre-empt the decision to be taken noting the gross misconduct committed. The Claimant has failed to undertake her duties as directed and further remained absent from work contrary to section 44(4) of the Employment Act which is subject to summary dismissal but the Respondents have given her a chance to explain her case and defence but also failed to attend. Where the Claimant required sick leave or annual leave, no approval was obtained and the medical records now submitted to the Court were not submitted with the Respondent in application for such absence as

required by the HR Policy.

24. As such the application lacks merit, the same is an abuse of Court process and should be dismissed.

Determination

The Claimant in her application is seeking various orders and declarations and I set out the following issues for determination;

Whether there should be injunction against the Respondent from terminating the Claimant from her employment;

Whether the Court should stay further disciplinary action against the Claimant by the respondents;

Whether pending hearing of the main suit the claimant's salaries, allowances, benefits and medical cover should be reinstated;

Whether the suspension against the Claimant should be declared unlawful; and

Whether the Court should declare the Claimant is entitled to medical leave.

25. It is common cause and a fact admitted by the Respondents that there is no termination of employment of the claimant. thus the orders seeking reinstatement at this stage are far-fetched and in any case to seek such orders at this stage and without good cause that warrant exceptional circumstances for the Court to go contrary to the provisions of Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, published vide Kenya Gazette Supplement No.129 of 12th August 2016. Such would require the Court to take evidence and pursuant to the provisions of section 49 of the Employment Act, award as appropriate.

26. The core of the claimant's application is that she was forced to be absent from work due to her medical condition for which she made application of sick leave on 29th April 2016 but the Respondent disapproved the same on 7th June 2016 and 6th July 2016 respectively. That the Respondents were aware of her medical condition but proceeded to suspend her and also commence disciplinary action vide show cause notice and notice for hearing on 14th June 2016. That such is contrary to fair labour practice, a violation of her rights under the constitution and the Employment Act.

27. Sick leave is a right of every employee. However, in grating that right, section 30 of the Employment Act has given safeguards to ensure that the same is enjoyed within reasonable measures and that the employer does not visit injustice upon an employee who is sick and who requires urgent medical attention. the law is therefore set out in a manner that an employee suffering from illness, sickness or is unwell and thus unable to attend duty is given a reasonable latitude to enjoy the right to sick leave but in return, where absence from work is required, to ensure that the employer has knowledge of the same within reasonable time. Section 30 thus provides;

30. (1) After two consecutive months of service with his employer, *an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.*

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

(3) For the purposes of sub-section (1) and (2) "full pay" includes wages at the basic rate

excluding deductions from the wages allowable under section 19.

[Emphasis added].

28. Section 30 of the Employment Act must be read in full and not in portions. The section gives the right to sick leave and creates a duty upon the employee to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre. ...As this is a conditional right which causes an employee to be absent from work due to sickness and any unlawful absence from work is a serious subject of section 4494) conditions for summary dismissal, section 30(2) goes ahead to create another duty upon an employee the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

29. The Court in the case of **Fred M Shilanga versus Emco Billets & Steel Ltd, Cause no.2327 of 2012** held that;

*Section 30(2) of the Act requires an employee who seeks sick leave to notify the employer of their absence as soon as is reasonably practical. ... in **Banking, Insurance & Finance Union (Kenya) Vs Barclays Bank of Kenya Limited [2014] eKLR** [the Court held that] failure by an employee to notify their employer of their illness avails the employer a good defence in a claim for unlawful termination of employment.*

30. The issue of the enjoyment of sick leave was well gone into by the Court in the case of **Simon Ngugi Kamau v Silpack Industries Limited [2015] eKLR;**

... Thus there are parameters set on the enjoyment of sick off. Where the employee is sick and requires medical attention, such an employee is entitled to take time off with full pay to seek such medical attention. Such an employee must however produce a certificate of any incapacity/sickness/illness to the employer, which certificate should be signed by a qualified medical practitioner. Such a medical certificate should as of necessity note the nature of illness/sickness that the employee is being treated for or with regard to the privacy of such an employee, the certificate note as appropriate.

...

Absence from work is an issue so serious that an employer should address. Where such absence is caused by sickness, then the employer should take appropriate action to support the affected employee. Where an employee becomes sick and requires medical attention and has to be absent from work, and then they must disclose their whereabouts and allow the employer to interrogate such absence. The production of a handwritten medical note however urgent and whatever sickness or ailment an employee is suffering from, where the employer demands that proper certification be produced to confirm such illness or sickness to confirm the absence or need for support to such an employee, then such an employee must oblige. The practice that any medical note, treatment card from any establishment is acceptable is a notion that should be discarded.

31. Based on the above, the Claimant has admitted that she submitted her sick off application on 29th April 2016, that the Respondents were aware of her medical condition but proceeded to disapprove the same on 7th July 2016. From these facts only, the Claimant proceeded on sick leave upon her application for the same and before the same was approved by the respondents. I take it then, this was not an immediate emergency that arose suddenly and required the Claimant to be immediately admitted in hospital. She had the time to make her application for sick leave in accordance with the HR Policy of the respondents. Indeed in her supporting affidavit at paragraph 7 the Claimant avers that;

I had on various occasions discussed my health issues with the Respondents and in particular the 2nd Respondent who upon discussions in his office sometimes in April 2016, advised me to seek medical leave during the less busy period of the academic year (being May-august Semester) so as

to attend proper treatment and avert any further aggravation of the ailment.

32. Thus, the subsequent application referenced by the Claimant and dated 29th April 2016 attached as expenditure “DNN1” refers to *Request to proceed for Studies and Medical Treatment*. The claimants goes on to state in her application;

... It is in reference to the above information that I wish to proceed on out of class activities for studies. Secondly, I have a health issue that need proper medical treatment and can only be acquired during May –August trimester as this is the period when students are assumed to have proceeded on long holiday. This period I will have enough time to attend all appointments. To justify my leave application, I have already met my workload of (8) units in the university calendar and do not wish to take part time classes during the trimester.

33. Was this then application for studies or for sick leave? I find matters set out by the Claimant a complete contradiction. On the one hand she notes that she has deliberately picked this period of May-August semester as students are normally on long holiday and therefore since she needs to upgrade herself in terms of education, and had already done her 8 units for the calendar, then she was justified to be away. Secondly, while away, she would attend to her medical condition.

34. Unfortunately, the Claimant took it for granted that such leave would be granted. It was not. There was no study leave or sick leave granted and approved by the claimant. The medical letters attached to the claimant’s affidavit, “DNN 3” relate to periods after 16th June 2016 and periods before 23rd September 2015. Did the Claimant submit the required medical certificates to warrant the grant of sick leave or approval of the same upon being sick?

35. Based on the documents submitted at this stage, I find grey areas that can only be established in evidence. However, on the same to stay the disciplinary proceedings commenced in view of the work lapses against the Claimant would be to deny the Respondent from addressing the any case of misconduct by the Claimant based on the evidence only available at the shop floor, the work place. To proceed on medical leave or sick off without approval by the employer or fail to notify the employer of such absence immediately or within reasonable time is a grave case of misconduct that an employer must address. The Court process cannot be used to cover for such misconduct. The approvals required by the Claimant to proceed on sick leave, taking section 30 of the Employment Act into account, can well be gone into within the internal procedures of the respondent.

36. As such, to stay such a process and or stay the suspension, would be to remove the Respondent from engaging in a fair process where facts with regard to the reasons as to why the Claimant had to be absent from work would be established. At the hearing, the Claimant would have the best forum to give her side of defence and submit all relevant documents in response. To leave such matters to the Court to arbitrate where the Claimant in her own affidavit has not met the prerequisites for the grant of the orders sought would be to deny her a chance to address any concerns that emerge from the internal hearing.

37. I therefore find no irregularity by the Respondents in addressing the absence of the Claimant from work. The facts herein can be distinguished from cases cited by the Claimant in her submissions especially **Alfred Nyungu versus Bomas of Kenya, Cause No.620 of 2013** where the Court held that the employee had been treated unfairly by being moved from one department to the other and the Court did not stop the disciplinary process but set the records straight particularly on what the employer was required to do so as to ensure the internal administrative process was properly conducted. Similarly in the case of **Rebecca Ann Maina**, cited above, the Court allowed internal disciplinary process to proceed subject to the employer ensuring that the employee was accorded due process.

38. There are certain facts that can only be confirmed and or ascertained from the shop floor. Therefore when an employee is invited to a disciplinary hearing upon a suspension, this does not amount to termination of employment. This is simply to give both parties a chance to be heard and ensure that each party has his/her case in defence heard. Otherwise, the truth cannot be ascertained where an employee such as the Claimant keeps away from work. Whatever the medical condition, employment is regulated in

law and the minimum requirements addressed section 30 of the Employment Act.

39. The Claimant has admitted that on 29th April 2016 she applied for a medical/convalescent leave. She then applied for medical leave. Such application was not approved vide letter dated 7th July 2016. There are reasons assigned by the Respondent for the disapproval of the medical leave application. I find the Claimant did not help matters either as when invited to make her case, she failed to attend. The certificates required under section 30 of the Employment act is not for the benefit of the Court but to the employer to be satisfied that indeed an employee was sick leave attended to my a registered medical practitioner. The law with regard to an employee seeking medical attention and of being off work to attend to medical issue is very flexible. Such flexibility is found at section 34 of the Employment Act;

34. (1) Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill

40. A third party is allowed to attend before an employer and make presentations on the same. Indeed the law goes further to allow an employee who is sick or unwell to have up to 30 days away but upon return must submit particular documents, a medical certificate from a medical practitioner. Such I find to be quite open and generous to meet. Otherwise, an employee will claim illness without taking the necessary steps and abscond duty and when put to task, claim a violation of constitutional and legal right. The law is not only meant to address an employee's rights, the law serves both parties to an employment relationship and rights at the work place.

41. As such, the Claimant shall submit herself to the internal disciplinary mechanisms of the Respondent unconditionally. The Claimant does not set out her current health status. During the pendency of the application before court, the Claimant has enjoyed interim orders. Such should not be abused by keeping off work as where time off is required to attend to medical issues, I find the Respondent has the policy manual on how to go about it and the applicable law, the Employment Act gives further guidelines, procedures and mechanisms on how to apply to sick off.

42. Before conclusion, the question of salaries and medial cover due was set out as an issue for determination above. The Respondent has complied with the interim orders of the Court as a sign of good faith. Work benefits and particularly the salary due to an employee is a right that cannot be negated by the workplace policy, a written contract or by implication of a disciplinary or administrative action by the employer. To interfere with a salary of an employee while the employment subsists is essentially to frustrate the employment. Such employment should not be compromised until there is a decision communicated in writing that there is dismissal or termination of the employment relationship.

43. The Claimant shall therefore remain on the payroll of the Respondent and enjoy the medical benefit that go with the employment until such employment is terminated for good cause. The subject policy that take way the right to a salary while a disciplinary process is ongoing amount to a gross illegality that should be urgently addressed by the respondent. there exists public officers policy documents available with the Public Service Commission in this regard where the Respondents can borrow from and avoid a scenario such as this one as otherwise to take away the entire benefit of a salary and medical benefit from an employee on suspension will be a constant subject of challenge as herein and in the future.

In the penultimate, the Claimant shall abide by lawful directions given by the Respondents with regard to her suspension and notices for internal disciplinary hearings.

In conclusion, the application by the Claimant lack merits save that the salaries due and medical cover that go with the benefit of employment shall not be negated while such employment subsists. Save for these affirmations, the application dated 5th July 2016 is hereby dismissed, costs to the Respondents.

ORDERS ACCORDINGLY.

Delivered in open court at Nairobi this 13th day of October 2016.

M. MBARU

JUDGE

In the presence of:

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