



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

CAUSE NO. 370 OF 2015

(Originally Nairobi Cause No. 1803 of 2015)

KENYA NATIONAL UNION OF NURSES

CLAIMANT

v

CHIEF OFFICER PUBLIC SERVICE

MANAGEMENT (MIRIAM KOSGEI)

COUNTY GOVERNMENT OF UASIN GISHU

1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD, UASIN GISHU

2ND RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU

3RD RESPONDENT

PUBLIC SERVICE COMMISSION

4TH RESPONDENT

JUDGMENT

1. The Kenya National Union of Nurses (Union) commenced legal proceedings against the Respondents on 9 October 2015 alleging that the suspension of *Kibii Koech Simon* (Grievant) by the 1st Respondent on 30 September 2014 was illegal and unlawful.
2. At the same time, the Union filed a motion under certificate of urgency seeking several interim injunctive orders. Nzioki wa Makau J before whom the application was placed granted orders restraining the Respondents from terminating the Grievant's employment. The Judge also ordered that the Grievant's outstanding salaries be paid.
3. The orders were confirmed by the consent of the parties on 3 December 2015.
4. The 1st to 3rd Respondents filed a Joint Memorandum of Response on 26 January 2016 and this prompted the Union to file a rejoinder on 22 February 2016.
5. The 4th Respondent on its part filed a Notice of Preliminary Objection to the Cause on 2 March 2016 and this prompted the Union to seek leave to amend the Statement of Claim.
6. Leave was granted and on 22 March 2016, the Union filed an Amended Statement of Claim.

7. The 4th Respondent thereafter filed a Response on 12 July 2016.
8. The Union filed its proposed List of Issues on 12 July 2016 and the parties agreed that the *Issues as proposed* by the Union be adopted as the ones for trial.
9. Despite the pendency of the Cause and the consent orders, the Grievant was purportedly dismissed through a letter dated 14 June 2016 (the dismissal was revoked after the Union moved Court to challenge its lawfulness).
10. The Cause was heard on 27 September 2016 and 28 September 2016. The Union filed its submissions on 19 October 2016, while the 1st-3rd Respondents filed their submissions on 21 November 2016.
11. The Court has given due consideration to the evidence and submissions and will examine the issues as agreed by the parties.

Whether Grievant an employee of the 4th Respondent or 3rd Respondent

12. This question was not one of the issues identified by the parties in the *Agreed Issues* filed on 12 July 2016, but it arose in the pleadings and the evidence.
13. Traditionally, both the common law and now codified employment law have developed certain tests to determine the existence of an employee/employer relationship.
14. The very initial test was the *control test* identified in the case of *Regina v. Walker* (1858) 27 L.J.M.C. 207, where it was held that

a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.

15. However, the test proved to be too rudimentary with advancements in the workplace and technology and the Privy Council in *Montreal v. Montreal Locomotive Works Ltd* (1947) 1 D.L.R. 161 came up with the *four fold test involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss.*
16. The Privy Council was of the view that control in itself is not always conclusive.
17. Just a couple of years later in the case of *Stevenson Jordan and Harrison Ltd. v. MacDonald and Evans* (1952) 1 T.L.R. 101, the *integration test* was developed thus

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

18. In the view of the Court, these tests do not and cannot help in establishing whether the Grievant, and other staff in the devolved health function in this country are employees of the counties or the Public Service Commission of Kenya, the 4th Respondent herein, despite the counties paying remuneration and exercising daily control over the staff.
19. The reason for surmising so will become clear shortly.
20. It is not disputed that the Grievant was initially employed by the 4th Respondent at a time when health was the responsibility of the National Government.
21. With the coming into effect of the Constitution 2010, the health function was devolved to the County Governments.

22. Parliament in its legislative function has enacted statutes to realise the devolution architecture. Of particular relevance here are the *Transition to Devolved Governments Act* and the *County Governments Act*.

23. The Transition to Devolved Government Act, 2012 granted certain functions to the Transition Authority including

7. (1) The Authority shall facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution.

(2) Despite the generality of subsection (1), the Authority shall—

(h) pursuant to section 15 (2) (b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, including—

(i) such criteria as may be necessary to guide the transfer of functions to county governments; and

(ii) the criteria to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities;

(m) advise on the effective and efficient rationalization and deployment of the human resource to either level of government. ...

24. The Transition Authority, pursuant to the mandate under section 7(2)(m) published *Guidelines for Transition of Staff to Counties* through Gazette Notice No. 825, in the Special Issue of the Kenya Gazette of 7 February 2014.

25. The effect of the Gazette Notice was to second certain public officers from the National to the County Governments.

26. The secondment was for a period up to 3 years after the first elections under the Constitution 2010.

27. Under the Gazette Notice, the *transfer of service* of the seconded officers was to be effected after the respective county governments had established *county pension scheme, declaration of county public service* and after the *appointment of the seconded officers by the county public service board*.

28. None of the parties herein placed before the Court any instrument or material to show whether the Respondents had established a county pension scheme.

29. On the other hand, section 73 of the County Governments Act provide that Secondments.

73. (1) 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 pension benefits, gratuity or other terminal benefits.

(2) Unless there is an agreement to the contrary, it shall be the responsibility of the national government to pay the salaries, remuneration, allowances and other benefits due to the staff seconded to a county government during the transition period.

(3) If for any reason it is not necessary for an officer on secondment to remain seconded and the secondment period has not lapsed, the officer shall be entitled to revert back to the public office held before secondment.

(4) The County Public Service Board shall not allow a public officer to proceed on secondment if it

is not in the interest of the public officer or the concerned county public service.

(5) The County Public Service Board making a decision on secondment shall not allow the secondment unless it has considered the representation by the concerned authorized officer or head of department.

30. Section 138 of the County Governments Act which is even more relevant and material provides that

Arrangements for public servants.

1 of 2013, s. 24.

138. (1) Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and—

(a) the officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer's disadvantage; and

(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 office's advantage.

(2) Every public officer holding or acting in a public office to which the Commission had appointed the officer as at the date of the establishment of the county government shall discharge those duties in relation to the relevant functions of the county government or national government, as the case may be.

(3) The body responsible for the transition to county governments shall in consultation with the Public Service Commission and relevant ministries facilitate the redeployment, transfers and secondment of staff to the national and county governments.

(4) The provision under subsection (2) shall not preclude—

(a) the County Public Service Board or other lawful authority from promoting or appointing the officer to another public office in the county; or

(b) re-deployment by the relevant lawful authority.

(5) The period of secondment under subsection (1) shall cease upon the transfer of a public officer from the national government to a county government or upon the release of an officer by the county government to the national government.

(6) Appointment of a public officer by the Commission includes

appointment of a public officer on powers delegated by the Commission.

(7) The provisions of subsection (1) shall not apply to a public officer serving in a county government and performing national government functions under the Constitution or any written law.

31. Considering the statutory intervention as gleaned from the aforesaid provisions, it is the Court's view that before the compliance or fulfilment of all the preconditions set out in the *Transition to Devolved Government Act* and the *Gazetted Guidelines* and the *County Governments Act*, seconded officers such as the Grievant herein remain legally employees of the 4th Respondent despite the control exercised by the county governments and its organs. The 4th Respondent in other words remain the *putative employer* pursuant to the applicable statutory provisions.

32. In reaching the conclusion, the Court is alert to the fact that this finding may open a legal and logistical can of worms, but there is no reason which was placed before Court why the statutory conditions had not been complied with by the relevant legal bodies/Respondents.

33. The Court makes the observation with the realisation that the seconded officers are on the payroll of the county governments and generally enjoy contractual entitlements such as leave under the control of the counties.

34. The 4th Respondent was at a vantage position to open up on exactly what policies and logistics had been put in place to implement the law of the land on devolution of the health function, but its witness did not appear ready to disclose information despite deep prodding by the parties and the Court. The lack of clarity could be one of the issues bedeviling the health sector in the counties.

Whether suspension of the Grievant was lawful

Contractual or statutory authority

35. The Grievant was suspended through a letter dated 30 September 2014.

36. The 1st to 3rd Respondents contended that their suspension of the Grievant was lawful as he had absconded duty after transfer.

37. According to these Respondents, they were exercising a delegated power from the 4th Respondent.

38. The 4th Respondent on the other hand asserted that upon devolution of the health function, the powers of control reposed to the Counties.

39. For a suspension to be lawful, it should have a foundation either in contract or law. If there are procedures to be complied with by an employer before the suspension, the procedures should be followed scrupulously.

40. Failing either contractual or legal authority, a suspension would be a breach of contract.

41. That has been the position both under the common law and statutory law (see *McKenzie v Smith* (1976) IRLR 345).

42. As regards, contractual provisions on suspension and the procedures prior to such suspension, the parties did not disclose any such provision to the Court, and the Court will therefore examine the statutory framework.

43. The Respondents produced a *Delegation Instrument* to County Public Service Boards and County Assembly Service Boards issued by the 4th Respondent.

44. The document makes reference to regulation 23 of the Public Service Commission Regulations in respect of suspension of seconded public officers.

45. The regulation envisage suspensions under 2 different scenarios, one, where a public officer has been *convicted* of a serious criminal offence and, two *where dismissal proceedings* have been taken.

46. The Respondents had before the suspension of the Grievant issued to him a show cause notice dated 9 June 2014 and 1 September 2014. It is clear from the tenor of the notices that disciplinary proceedings which could lead to dismissal were contemplated.

47. The Court therefore finds that the suspension had a statutory foundation despite the suspension letter making reference to section 44(4)(a) of the Employment Act, 2007, which section in the Court's view cannot avail the Respondents. The section give grounds for dismissal in a summary manner and not the procedural aspects of suspension.

Procedures prior to suspension/hearing before suspension

48. The Union impeached the suspension of the Grievant on the grounds that the Grievant was not informed of charges to confront before the suspension. The Union also asserted that the Grievant ought to have been given an opportunity to be heard before the suspension.

49. The Court has perused the Public Service Commission Regulations, 2005 and the *Delegation Instrument* and has not found any provision entitling a public officer to a hearing before suspension. It is only after preliminary investigations have been carried and charges drawn that an officer is entitled to be informed of the charges with a view to a disciplinary hearing.

50. The Court has also looked at Articles 41, 47 and 236 of the Constitution but has not found any express provision for an entitlement to a hearing before suspension.

Indefinite suspension

51. The Union also impugns the suspension because it was for an indeterminate period and that the invitation notices to appear for disciplinary hearings were received long after the scheduled dates.

52. It is correct to state that the letter (dated 30 September 2014) suspending the Grievant did not set out the suspension period.

53. The Union moved Court on 9 October 2015 and by that time, one year later, the Grievant was still on suspension.

54. The question therefore begs whether this interlude was unfair in terms of Articles 41 and 47 of the Constitution, and the Regulations and *Guidelines* governing the operations of the Respondents.

55. In terms of the Guidelines issued by the 4th Respondent on 21 February 2014, disciplinary process involving public officers ought to be concluded within 3 months.

56. On 16 October 2014, the Grievant was invited to a disciplinary hearing slated for 22 October 2014. Other invitation letters were dated 3 December 2014.

57. The Grievant's testimony as to the non-delivery of those letters was not controverted in substance.

58. In the Court's view, an indefinite suspension would amount to an unfair labour practice depending on the obtaining circumstances, and the Court will therefore find that the indefinite suspension of the Grievant amounted to an unfair labour practice in the circumstances of this case.

59. The Grievant should have been informed of extension of the suspension and given reasons for not concluding the disciplinary process within the prescribed period.

60. The Court in the event finds that although the suspension of the Grievant was underpinned by statutory authority, its indefinite nature and failure to conclude the disciplinary process with no explanation to the Grievant rendered it unfair.

Reasons for suspension

61. As to the validity of the reasons for suspension, it was contended that the same was as a result of the Grievant's union activities and therefore unlawful.

62. In the view of the Court and in consideration of the conclusions reached on the previous issues, it is not necessary to examine or reach a conclusion the validity or fairness of the reasons for the suspension.

Conclusion and Orders

Wages during suspension

63. Because of the previous Court order (12 October 2015) that the Grievant be paid full salary and allowances from the date of suspension, the Court would confirm that order and order for purposes of clarity, that if the same have not been paid, the Grievant should be paid immediately.

Declaration that suspension a nullity

64. Arising from the above examination, the Court is of the considered view that granting prayer (i) in the Amended Statement of Claim would be appropriate to vindicate the rights of the Grievant.

65. As to the appropriate order to make flowing from the declaration, the Court would order that the Grievant do report immediately to the station he was transferred to or any such other station the 2nd Respondent may designate.

66. In the Court's view, the grant of the declaration and the consequent order in the above paragraph make it superfluous to grant the other substantive remedies sought by the Union on behalf of the Grievant.

67. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 25th day of November 2016.

Radido Stephen

Judge

Appearances

For Union Ms. Ashubwe instructed by Eshiwani Ashubwe & Co. Advocates

For 1st – 3rd Respondents Mr. Kenei instructed by Gumbo & Associates

For 4th Respondent Mr. Mbaka, Litigation Counsel, Office of the Attorney General

Court Assistant Nixon