



**REPUBLIC OF KENYA**

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

**CAUSE NO 29 OF 2013**

**DR. JOSEPH MAINGI MAITHA.....CLAIMANT**

**V**

**THE PERMANENT SECRETARY**

**MINISTRY OF MEDICAL SERVICES.....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**AWARD**

**Introduction**

1. **Dr. Joseph Maingi Maitha** worked as a Pharmacist with the Ministry of Medical Services from November 2001 until September 2012 when he was dismissed. He therefore brought an action by way of a Statement of Claim dated 7<sup>th</sup> January and filed in Court on 9<sup>th</sup> January 2013. The Respondents filed a Response on 18<sup>th</sup> February 2013 and the matter was heard on 3<sup>rd</sup> April and 17<sup>th</sup> November 2014. The Claimant testified on his own behalf and Nahashon Thiong'o, a Human Resource Officer with the Ministry of Health testified for the Respondents.

**The Claimant's Case**

2. The Claimant was employed by the 1<sup>st</sup> Respondent as a Pharmacist Intern in Job Group L effective 12<sup>th</sup> November 2001. He rose through the ranks up to the position of Assistant Chief Pharmacist in Job Group P as at the time he was dismissed.

3. On 20<sup>th</sup> August 2009, the Claimant was transferred from Tigoni District Hospital to Kinango District Hospital in the position of Assistant Chief Pharmacist. The Claimant took issue with this transfer as the Pharmacist -in-Charge and the Medical Superintendent to whom he was to report were three job groups lower than him.

4. The Claimant pleads that when he reported to Kinango, he was granted leave by the Medical Superintendent to relocate his family. This leave was to run from 3<sup>rd</sup> September 2009 to 31<sup>st</sup> October 2009. The Claimant goes on to state that he was granted further leave by the Coast Provincial Director of Medical Services running from 1<sup>st</sup> November 2009 to 2<sup>nd</sup> December 2009.

5. While the Claimant was on leave, the Medical Superintendent at Kinango wrote to the Ministry claiming that the Claimant had deserted duty. The Claimant went on leave again between

5<sup>th</sup> February and 19<sup>th</sup> March 2010. He subsequently traveled home for the Easter weekend up to 2<sup>nd</sup> April 2010 and while at home, he fell ill on 5<sup>th</sup> April 2010 upon which he sought treatment at Tigoni District Hospital where he was granted 14 weeks' sick leave. While on sick leave, the Claimant's salary was stopped effective 2<sup>nd</sup> July 2010.

6. On 9<sup>th</sup> August 2010, the Claimant was transferred to Coast Provincial General Hospital and later to Port Reitz District Hospital from 10<sup>th</sup> September 2010. On 13<sup>th</sup> November 2010 while working at Port Reitz, the Claimant received a suspension letter dated 2<sup>nd</sup> July 2010 from the Ministry Headquarters on allegations of absence from duty. The Claimant was also implicated in the disappearance of 7 boxes of Amoxil capsules. The Claimant however continued working on the strength of a letter dated 16<sup>th</sup> September 2010 indicating that the matter facing him had been resolved.

7. The Claimant eventually stopped working on 30<sup>th</sup> April 2011 and on 24<sup>th</sup> July 2012, he was summoned to a disciplinary hearing at the office of the Coast Provincial Director of Medical Services. The Disciplinary Committee recommended the Claimant's dismissal which was backdated to 1<sup>st</sup> July 2010. The Claimant prays for reinstatement to the public service with full benefits from the date of suspension.

### **The Respondent's Case**

8. In their Response, the Respondents state that the Claimant failed to perform his duties by absconding duty. Specifically, the sick leave which the Claimant used to explain his absence was not properly authorised. Further, the Claimant proceeded on unauthorised annual leave. It is the Respondents' case that the Claimant's dismissal was justifiable and procedurally fair.

### **Findings and Determination**

9. The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment was justifiable and fair;
- b. Whether the Claimant is entitled to the reliefs sought.

### **The Termination**

10. The Claimant's termination letter dated 28<sup>th</sup> September 2012 states *inter alia*:

***“This is to convey to you the decision of PSC(K) that you be dismissed from the service with effect from 1st July, 2010 on account of gross misconduct.***

***Please be informed that, on dismissal you have lost all rights to terminal benefits that may have been due to you had you retired in a normal manner.***

***Yours faithfully***

***S.O Bolo***

**FOR: PERMANENT SECRETARY”**

11. Prior to the termination, the Claimant had been placed on suspension by letter dated 28<sup>th</sup> October 2010 on allegations of absence from duty without permission and involvement in the disappearance of 7 boxes of Amoxil capsules. The Court noted that the issues raised in the Claimant's suspension and subsequent dismissal had in fact been addressed in previous disciplinary proceedings culminating with letter dated 16<sup>th</sup> September 2010 by the Coast

Provincial Director of Medical Services, **Dr. Maurice P. Siminyu**. According to this letter, the disciplinary case facing the Claimant was concluded and sentence passed against the Claimant as follows:

- a) Recovery of pay for the days the Claimant had absented himself without proper authorisation;
- b) Surcharge for the loss of 7 boxes of Amoxil Capsules;
- c) Warning.

12. For some reason which was not made known to the Court, the Claimant's case was reopened in October 2010 and in September 2012, he was dismissed. In ***Banking Insurance and Finance Union (Kenya) vs Kenya Commercial Bank***

***Limited [2015] Eklr*** this Court held that once some form of disciplinary action is taken against an employee, the allegations forming the subject matter of the disciplinary process cannot be made the subject of future disciplinary action.

13. In the current case, the Claimant was taken through a full circle of a disciplinary process on account of desertion of duty and involvement in the loss of 7 boxes of Amoxil capsules culminating with a disciplinary action as communicated by letter dated 16<sup>th</sup> September 2010. His case was however reopened in October 2010 and two years later he was dismissed without terminal benefits.

14. Dismissal with loss of terminal benefits is the ultimate disciplinary action and must be taken procedurally. Even assuming that the Claimant's bosses at the Ministry of Medical Services Headquarters found the disciplinary action taken against the Claimant by the Coast Provincial Director of Medical Services inappropriate, there was no justification to subject the Claimant to double jeopardy through a repeat disciplinary process. For this reason, the Court finds that the Claimant's dismissal was procedurally unfair.

## **Reliefs**

15. The Claimant claims reinstatement without loss of benefits. Reinstatement is one of the remedies uniquely available in this Court. However, the law provides that this remedy is to be granted in very exceptional circumstances. In my view, reinstatement or re-engagement is not available to an employee with a negative employment record.

16. One of the major complaints advanced against the Claimant was that he absented himself from work for considerable periods of time without proper authorisation. While finding no reason to hold the Claimant a deserter during the period he was on sick leave, the Court was unable to understand why he proceeded on undocumented annual leave for 38 days from 24<sup>th</sup> September 2009 to 31<sup>st</sup> October 2009 and 31 days from 1<sup>st</sup> November 2009 to 2<sup>nd</sup> December 2009.

17. In this regard, the Court rejected the Claimant's explanation that this leave had been authorised verbally. Being a senior officer of long standing, the Claimant had no reason to ignore laid down procedures regarding annual leave. For this reason, I find that the Claimant's employment record was tainted and decline to grant the prayer for reinstatement.

18. However, having found that the summary dismissal was un-procedural, I convert it to normal termination and direct the Respondents to tabulate and pay to the Claimant all his terminal benefits. I also award the Claimant the sum of Kshs. 760,266 being six months' salary in compensation for unfair dismissal.

19. The Respondents will pay the costs of this case.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT NAIROBI THIS 28<sup>TH</sup> DAY OF  
JANUARY 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimant

Mr. Ngumi for the Respondent