



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 998 OF 2014

(Before Hon. Justice Maureen Onyango on 26.1.2015)

DONALD C. AVUDE CLAIMANT/APPLICANT

-VERSUS-

KENYA FOREST SERVICE RESPONDENT

R U L I N G

By a Claim dated 16th June and filed on 17th June 2014 the claimant seeks the following orders against the respondent:-

- a. An Order directing the respondent to unconditionally lift the suspension of the claimant from employment and Order for his immediate reinstatement.**
- b. An Order for the payment by the respondent the claimant's withheld emoluments during this period of his suspension.**
- c. An Order of injunction restraining the respondent either by themselves, employees, servants and/or agents from terminating the employment of the claimant.**
- d. Costs of this suit.**

Together with the claim the claimant filed a notice of motion under certificate of urgency seeking the following orders:-

- 1. That this application be certified urgent and service thereof be dispensed with in the first instance.**
- 2. That this honorable court be pleased to make an order directing the respondent to unconditionally lift the suspension of the claimant from employment and order for his immediate reinstatement pending the inter parties hearing and determination of this application and claim.**
- 3. That upon prayer 2 herein above, this honorable court do hereby make an order for the payment by the respondent the claimant's withheld emoluments during this period of his suspension.**

4. That pending the hearing and determination of this application and claim, this honorable court do make an order of injunction restraining the respondent either by themselves, employees, servants and/or agents from terminating the employment of the claimant.

5. That cost of this application be in the cause.

The motion is grounded on the affidavit of the claimant/applicant sworn on 16th June 2014 and on the grounds:-

1. That the claimant has been suspended from employment from 16th April, 2014 which suspension is unlawful and contrary to the claimant's terms and conditions of service, Employment Act of 2007 and the Constitution of Kenya, 2010.

2. That my terms of contract was bound by the Human Resource Manual of the respondent.

3. That the said Human Resource Manual does not provide for provisions for suspension which effectively renders this suspension illegal.

4. That the said suspension is bereft of any pay during the said period which amounts to unfair labour practice.

5. That the said suspension is based on the fact that the claimant has been charged in a court of law *inter alia* for creating a disturbance contrary to Section 95(1) and it further demands for the claimant to show cause why he should not be dismissed.

6. That the offence in question was not committed in the cause of employment.

7. That the said offence concerns matter extraneous to which the respondent has no control over thus showing cause is tantamount to self-incrimination contrary to Article 50(2)(c) of the Constitution of Kenya 2010.

8. That the final determination of the said offence is the court. The show cause by the respondent may be used by them inappropriately to terminate his employment.

9. That the indictment of the claimant is not gross misconduct within the meaning of Section 44 of the Employment Act 2007.

The respondent filed a Statement of Response in which it states that the claimant made certain public utterances in breach of certain Clauses of the respondents Human Capital Policy and Manual (The Manual) and Article 232, and 260 of the Constitution. The respondent further avers that the claimant's utterances were in breach of the Public Officers Ethics Act Sections 9(b), 16(2) and 20(1). The respondent avers that as a result of the utterances it commenced disciplinary process against the claimant by sending him on suspension and issuing him a show cause letter.

The respondent further states in the defence that whereas the alleged utterances by the claimant did not occur in the course of employment, the claimant remains a public officer and is mandated to act with integrity both in public and private.

The respondent also filed a replying affidavit of Esther Kiege, the Corporation Secretary and Head of Legal Services of the respondent sworn on 2nd July 2014 in which she substantially repeats the averments in the response to the claim.

The application was initially heard *ex parte* on 18th June 2014 when I ordered *status quo* after hearing arguments by Mr. Ojienda, counsel for the applicant.

The parties appeared before me for *inter partes* hearing of the application on 23rd June 2014 when I

directed that the parties proceed by way of written submissions.

The claimant/applicant was represented by Mr. Ojienda while Ms. Nungo appeared for the respondent. The claimant thereafter filed a supplementary affidavit and written submissions while the respondent filed a replying affidavit and written submissions.

A summary of the facts as set out in the pleadings, affidavits and submissions are that the claimant is employed by the respondent as Assistant Director Grade 5. At the time of the incident that is the subject matter of this claim the claimant/applicant was stationed at Lamu as the Ecosystem Conservator.

On 9th April 2014 the applicant was arrested and the following day on 10th he was arraigned before the Senior Principal Magistrate's Court, Mpeketoni and charged with the offence of creating a disturbance contrary to Section 95(1) of the Penal Code. The claimant was also charged with a second count of offensive conduct contrary to Section 94(1) of the Penal Code and a third count of resisting arrest contrary to Section 253(b) of the Penal Code. The applicant pleaded not guilty to all the charges and was released on cash bail of Kshs 5,000/= and a surety of Kshs 20,000/=.

On 11th April 2014, the County Police Commander Lamu wrote to the Head of Conservation, Kenya Forest Service, Coast Region reporting the complaint against the claimant.

On 14th April 2014 the Head of Conservancy Coast wrote to the Director Kenya Forestry Service reporting the incident and recommending suspension and disciplinary action against the applicant.

On 16th April 2014 the applicant was suspended from duty by letter of the same date which also required him to show cause within 14 days why his services should not be dispensed with for the misconduct.

The applicant responded to the show cause letter by his letter dated 2nd May 2014.

I have noted from the respondent's copy of applicant's letter dated 2nd May 2014 that there is an endorsement to the Chair/Disciplinary Committee to await outcome of the court case. The endorsements were dated 12th and 30th May 2014.

This claim was filed soon thereafter on 17th June 2014. The applicant's argument is that the respondent's Manual does not provide for suspension and neither does the Employment Act. That in the absence of such provision the suspension of the applicant is illegal. The applicant has relied on the Canadian Supreme Court decision in the case of **Cabiakman V Industrial Alliance Life Insurance Co.** [2004] 3 S.C.R. 195 SCC 55. The facts of this case.

"Gilbert Cabiakman ("Cabiakman") was a sales manager at Industrial Alliance Life Insurance Co. ("Industrial Alliance"). Three months after Cabiakman was hired, he was arrested and charged with conspiracy to extort money. Once Industrial Alliance got wind of these charges, it suspended Cabiakman because of the connection between the nature of the charges and Cabiakman's position.

Cabiakman had been on an indefinite suspension without pay for two years while the charge was pending. After Cabiakman was acquitted of all charges, he was reinstated in his position at Industrial Alliance. Cabiakman commenced proceedings against Industrial Alliance for lost wages during the period of suspension and for moral and punitive damages.

The Supreme Court of Canada ("SCC" or "Court") upheld the decision of the Quebec Court of Appeal that ruled that Industrial Alliance was not justified in suspending Cabiakman without pay and awarded him \$200,000 in damages. However, the SCC affirmed the employer's right to suspend an employee for administrative reasons. The court stated that employer conducted itself properly, however, since the suspension remained administrative in nature at all times, there was no reason to refuse Cabiakman's salary as he remained available to work."

The applicant further relied on the case of **Shaw V DPP [1962] AC 220 HL** and argued that the criminal charges against the applicant occurred 5 km away from the respondent's premises and did not infringe Article 10 of Chapter 6 of the Constitution or the Public Officers Ethics Act, that for the said provisions to be contravened the conduct complained of must be fundamental to the employer's business, and the employee must act in a manner that the public forms an opinion that he is an employee of the respondent.

The applicant's counsel further submitted that there is no justification for withholding the applicant's salary and prayed that the court grants the orders sought.

The respondent's case is that the applicant uttered certain disparaging words in a public place, that as a public officer the applicant is subject to the Constitution and the Public Officers Ethics Act. That the applicant is also subject to the respondent's Manual. That the offensive utterances were in breach of the claimant's terms and conditions of employment, that the offensive words were insulting and embarrassing to the respondent as a State organ, that insulting behaviour is recognized as a disciplinary offence under Clause 10.14(v) of the Manual, and in breach of the Constitution and Public Officer's Ethics Act. That the respondent therefore had legal basis to take disciplinary action against the applicant.

The respondent further argued that the purpose of the notice to show cause was initiating disciplinary process to inquire into the allegations relating to the breach of the claimant's obligations to the respondent with a view to terminating the employment contract in compliance with Section 41 of the Employment Act and the respondents Manual and Human Resources Policies and Procedure Manual.

The respondent argued that the applicant had not established a *prima facie* case with probability of success to justify the grant of an injunction. The respondent relied on the case of **Ismail Hassan Abdullahi V Kenya Ports Authority** which the court explained that the purpose of a disciplinary process is different from that of a criminal trial.

The respondent further argued that the applicant's loss if any, would be quantifiable and can be compensated by way of damages and finally, that the balance of convenience was in favour of the respondent. The respondent argued that should the court grant the orders sought it would be hindering the respondent from administering the claimant in accordance with his terms and conditions of employment, and this would be enforcing the respondents policy documents. That even if the process of suspension is flawed, the applicant would have the opportunity of restoration after the full hearing.

The respondent also relied on the case of **Dennis Nyagaka Ratemo V The Kenya Film Commission & Peter Mutie** where the court observed that the claimant can have full restoration by a grant of reinstatement or re-engagement with back salaries without loss of benefits, status and privileges.

The respondent further submitted that the orders prayed for in the interlocutory application are the same ones sought in the main claim and that the court has been cautious in dealing with such applicants to ensure that the court does not find itself in a situation where it is severely infringing on the employer's right to manage and administer its policies. The respondent further relied on the case of **Prof. Gitile Naituli V University Council of Multimedia University College & Another** and **Alfred Nyungu Kimungui V Bomas of Kenya** where the court declined to grant an injunction restraining the employer from carrying out disciplinary process against the claimant on grounds that it was a prerogative of the employer.

On the applicant's authorities the respondent submitted that the case of Cabiakman (*infra*) which formed the basis of the applicant's submission is distinguishable from the present case as in that case there was no express breach of employment terms as in the present case. That further the case involved an administrative suspension while the present case involves a disciplinary suspension.

I have considered the submissions by both parties and the authorities cited. The main issue for consideration is whether the respondent's terms and conditions of employment permitted suspension and secondly if the suspension of the applicant was justified. Finally, whether applicant is entitled to the orders sought.

The first issue is whether the respondent's terms and conditions of employment on the law justify commencing disciplinary process against the claimant/applicant based on the charges that had been preferred against him in the criminal case.

The Employment Act provides at Section 44(4)(f) and (g) that an employer may dismiss an employee on the ground that:-

"(f) In the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property".

From the arguments of the respondent, the reason for taking disciplinary action against the claimant is that while the claimant was in Subira Guest House, Hindi Trading Centre on 9th April 2014 at around 9 pm, he uttered the words "**mlichagua raisi mjinga hakuna kitu anaweza fanya na nyinyi wameru mnalamba mkundu wake**". These words are also the basis of the charges against the claimant/applicant in counts I and II. The claimant denied the charges. In his response to the letter of suspension and show cause letter, the claimant again denied the charges. As I have already pointed out above, there is an endorsement on the claimant's response to the effect that the disciplinary proceedings should await the outcome of the court case.

In the letter of suspension, the only grounds given by the respondent for the suspension of the claimant is that he was charged with the offence of creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95(1) of the Penal Code and the "KFS" Code of Conduct. No specific paragraph of the KFS Code of Conduct is referred to in the letter.

According to Section 44(4) (f) and (g) being charged with a criminal offence alone is not a ground for dismissal. It is only if the employee is not released within 14 days, or the offence is against the employer or the employer's property, that an employee becomes liable for dismissal in which event the employer can commence disciplinary proceedings against the claimant/applicant. Even if the claimant was to be convicted, the nature of the charges are such that they are unlikely to attract custodial sentences. This however is a decision that is yet to be made by the court before which the claimant has been charged. This being the case, the arguments made on behalf of the respondent as well as the affidavit of Esther Keige, which are based on the fact that the claimant uttered the words referred to above amount to a mere conjecture. They are based on information that is pending in court for determination. The information may be found to be true or false.

Should the claimant be convicted, as I have already pointed out above he is unlikely to be imprisoned as all the charges are misdemeanors. Should he not be convicted then the whole of the disciplinary process would flop.

The parties have also made elaborate arguments about legality of the suspension. The claimant argues that suspension being a process not provided for by law, must be considered in line with the criteria set in the decision of the Supreme Court of Canada in the case of **Cabiakman V Industrial Alliance Life Insurance Co.** [2004] 3 S.C.R. 195, 2004 SCC 55. The court in this case distinguished between "disciplinary" suspension and "administrative" suspension. For the purposes of the case, disciplinary suspension was defined as "**a punitive measure for a reproachable act made during work**" while administrative suspension is "**a preventive measure which can be taken when the interest of the employer's business require it, even in the absence of an act made by the employee while working.**"

In the Cabiakman case the court set the criteria for administrative suspension as follows; sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be

prejudicial to the employer or to his reputation; the existence of immediate, important inconveniences that cannot be practically countered by alternate measures (for example: assigning the employee to another post); and, the necessity of protecting the public.

The respondent's Manual at Clause 10.16.4 provides for suspension as follows:-

- i. Where an employee has been charged with a criminal offence, the employee will be suspended from the exercise of his duties by the Director pending consideration of the case.**
- ii. KFS will have the discretion to finalize such a case administratively separate from the court process if it is in view of KFS that the offence amounts to gross misconduct and is injurious to its interest or image.**
- iii. An employee who is suspended may not leave KFS without the permission of the Director or an officer who is empowered to give such permission.**
- iv. While an employee is under suspension, he will not be entitled to any salary but will be eligible to payment of full house allowance and medical allowance.**

I find the provisions of the Clause to be in contravention of Article 41(1) of the Constitution which provides for the right to fair labour practices as well as Sections 41 and 44 of the Employment Act as it provides for suspension in the event of an employee being charged with any offence which would include an offence that does not affect the employer in any way, and minor offences such as traffic offences. My understanding of suspension of an employee is that it is intended to enable an employer carry out investigations where the presence of the employee may jeopardize the investigations, or where an employee has been convicted and is awaiting sentence as provided for in the Public Service Code of Regulations, or where the employee has or is suspected of having committed a criminal offence to the substantial detriment of the employer as provided in Section 44(4)(g) of the Employment Act. In all these cases suspension should be for a determinate period where such suspension is without pay. Otherwise it would constitute inhuman treatment especially in the case of the respondent's Manual where the employee is required to be at the place of work without a salary and for an indeterminate period.

The respondent has in the submissions urged me to find that the claimant/applicant has not established a *prima facie* case to demonstrate that he will suffer irreparable damage unless the orders prayed for are granted as any withheld emoluments would be payable at the end of the suspension period, that the balance of convenience favours the respondent whom the court must not hinder in the administration of its policies. I do not agree with the respondent. Withholding salary exposes the claimant to financial embarrassment that cannot be remedied by the mere release of the withheld salary. It was also argued by the respondent that courts should not interfere in the respondent's exercise of its disciplinary process and further that the court should not give final orders at interlocutory stage of cases. That should be the normal situation where the respondent is carrying out valid disciplinary process. The court will however intervene and if necessary, grant relief where the consequence of non-interference would be to subject the applicant to extreme hardship or irreparable harm, or in cases where the action by the respondent has no legal basis as is the case in this suit.

I find the disciplinary action premature as the basis of the disciplinary process has not been established. Even if established, it would not be necessary to suspend the claimant/applicant as there would be no investigations necessary to establish the facts that cannot be carried out while the claimant is at work. This has already been recognized by the respondent by the endorsement at Appendix EK4 suspending disciplinary action pending outcome of the criminal proceedings.

I further find that the court case even if successful would not warrant disciplinary action being taken against the claimant/applicant as the criminal charges are not connected with the claimant/applicant's employment. He would only be subject to disciplinary action if incarcerated for more than 14 days. I further find that the respondent failed to state the relevant provisions of the Constitution and the Public Officers Ethics Act that are alleged to have been infringed by the claimant/applicant or to demonstrate

how the charges relate to the claimant/applicant's obligations to the respondent. The cases cited by the respondent are not relevant to the facts of this case as disciplinary action in both **Prof. Gitile Naituli's** case and **Alfred Nyungu Kimungui's** case as well as in the case of **Ismail Hassan Abdullahi** were for wrongs committed directly against the employer or to the substantial detriment of the employer. The same was the case in **Dennis Nyagaka Ratemo's** case. I find the disciplinary proceedings against the claimant pre-mature.

For the foregoing reasons I allow the application and make the following orders:-

- 1. The disciplinary process against the claimant/applicant and the resultant suspension of the claimant/applicant is hereby lifted. The claimant/applicant is directed to resume duty at his station in Lamu within 7 days from the date of this ruling.**
- 2. The respondent is directed to release the claimant/applicant's emoluments withheld as a result of the suspension forthwith.**
- 3. The respondent shall pay the claimant's costs for this application.**

Orders accordingly.

Dated and delivered in Nairobi this 26th day of January 2015.

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)