



**REPUBLIC OF KENYA**

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

**CAUSE NO. 199 OF 2013**

**SAMUEL KIPCHUMBA KAPTOGE**

**CLAIMANT**

**v**

**MOI TEACHING & REFERRAL HOSPITAL**

**RESPONDENT**

**JUDGMENT**

1. Samuel Kipchumba Kaptoge (Claimant) was employed by Moi Teaching and Referral Hospital (Respondent) on 15 November 2001 as a Community Health Officer.
2. On 28 June 2007, the Respondent suspended him after unrest which occurred on 26 June 2007, pending further investigations. He was informed that during the suspension he would not be eligible for any salary.
3. The Claimant's suspension was lifted through a letter dated 19 December 2012 by the Respondent's Acting Director (some 5 years after the suspension). The letter lifting the suspension informed the Claimant that he would not be paid the salaries withheld during the suspension period.
4. On 27 March 2013, the Claimant wrote to the Respondent expressing his dissatisfaction with the decision not to pay salaries withheld during the suspension.
5. On 26 June 2013, the Claimant lodged legal proceedings against the Respondent. The gravamen of the Claimant's complaint was that he was not accorded the opportunity to be heard before the suspension and that on the lifting of the suspension, the Respondent refused to pay him wages for the period of suspension. This, he asserted was contrary to the Respondent's terms and conditions of service and therefore unlawful.
6. The Claimant therefore seeks all the salaries, allowances, privileges and benefits withheld during the suspension, exemplary damages and costs.
7. The Respondent in its Response denied the assertions by the Claimant and contended that the suspension was because investigations pointed at the Claimant as the ring leader of the unrest in 2007, that the Claimant was granted a hearing before suspension and that the suspension was lifted on condition the Claimant would lose salary during the suspension period because he did not work during the period. It was further contended that the suspension was lawful and proper.
8. The Respondent had also stated in paragraph 3 of the Response that it would raise a preliminary objection.
9. The Claimant's testimony was taken by Ongaya J on 26 May 2014, while I took the Respondent's case on 30 October 2014.
10. The Claimant stated in testimony that on 28 June 2007, he was given a suspension letter alleging that he had participated in some unrest on 26 June 2007. He stated that he was not given a chance to defend himself before the suspension. The suspension was lifted on 19 December 2012, with loss of salaries withheld for 5 years. He was not charged with a criminal offence.
11. The Claimant further stated that during the period of his suspension, the Respondent increased salaries for his grade to Kshs 69,580/- per month and that by time of hearing he would be earning

- Kshs 130,000/- per month.
12. During cross examination, the Claimant admitted that after the suspension, he and others sued the Respondent but the Court found in favour of the Respondent and they were ordered to pay costs and a portion of the costs was deducted from his wages.
  13. He further reiterated that he was not given an opportunity to be heard before suspension, but that he attended a disciplinary hearing on 11 December 2012, after an invitation dated 3 December 2012, after which he was reinstated and he accepted the reinstatement (the Court was told from the bar that the Claimant has since filing of the Cause been dismissed).
  14. The Respondent had indicated it would call two witnesses but it called one witness Francis Mose, a security officer (On 19 November 2014 when the Respondent's second witness was to testify, the witness was absent and Mr. Langat sought an adjournment. The adjournment was rejected and when the Cause was called after going through the cause list, there was no representation for the Respondent. In the event the Court ordered the Respondent's case to be closed. The Court finds such conduct unprofessional)
  15. The Respondent's only witness stated that there was unrest around midday at the Respondent's facility on 26 June 2007, and that intelligence indicated that the Claimant was among the organizers of the protest.
  16. The witness on cross examination stated that Dr. Akama was the Claimant's boss and that the said Dr. Akama had written a letter confirming that the Claimant was on duty until 1.00 pm on the material day.
  17. An extract of the Respondent's Terms and Conditions of Service was produced.
  18. The Court has considered the submissions filed by the Claimant and the decisions in Nairobi Cause No. 570(N) of 2009, *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers v Moi Teaching and Referral Hospital* and Nakuru Cause No. 2 of 2012, *Hosea Cheruiyot Maru v Moi Teaching and Referral Hospital*, which both arose out of the same events as the present Cause.
  19. The Court also notes that the Respondent did not file written submissions as directed at the conclusion of the hearing.
  20. The issues arising for determination do not really require any further detailed exposition of the testimony by the parties. The main issues are, *whether the Claimant was entitled to a hearing before suspension, whether the suspension without salary was unlawful and appropriate relief.*

### **The preliminary objection**

21. But before discussing the issues identified, a brief word about the preliminary objection adverted to by the Respondent in its pleadings. The preliminary objection was not raised either prior to the commencement of hearing or during the hearing.
22. The Court is therefore unable to make any determination on an objection which was not taken at an opportune time and considers it abandoned and dismisses it *suo moto*.

### **Right to a hearing before suspension**

23. Section 41 of the Employment Act, 2007 protects employees from termination without a hearing if the ground for termination is on one of the three listed grounds of *misconduct, poor performance or physical incapacity*.
24. The Constitution in Article 41 guarantees fair labour practices to employees.
25. The Employment Act, 2007 commenced on 2 June 2008, while the Constitution came into effect on 27 August 2010. The Claimant was suspended on 28 June 2007.
26. The Employment Act, 2007 and the Constitution cannot therefore be directly implicated on the question of right to hearing before suspension in June 2007. The Court must therefore resort to the statutory framework in place then, the common law and the contract between the parties.
27. The Employment Act, cap. 226 (repealed) and which was the statute of general application, did not provide for any right to a hearing before suspension or prior to termination of a contract of service or dismissal of an employee. The statutory framework obtaining then cannot assist him.
28. The Claimant was serving under a contract of service dated 15 November 2001. The letter made reference to other terms and conditions of service. An extract of the Respondent's Terms and

- Conditions of Service Booklet was filed in Court.
29. Generally under the common law, the principle has been that an employer cannot unilaterally suspend an employee unless there is some express or implied contractual provision allowing him to suspend the employee (see *McKenzie v Smith (1976) IRLR 345*).
30. The Claimant did not provide any evidence that he had a right to a hearing before suspension or that it is a right which could be implied into his contract. He did not cite any authority.
31. From the contract and the extracts of Terms and Conditions of Service, the Court is unable to decipher whether the Claimant was entitled to a hearing before suspension.
32. I am comforted in the conclusion reached in consideration of the persuasive authority of *McLory v Post Office (1993) IRLR 159* that

*it was not necessary to imply a term into a contract of employment that the employer had to give the employee the reasons for his suspension before suspending him.*

### **Whether the suspension without salary was unlawful**

33. Unlike the question of a right to hearing before suspension, the Claimant's suspension was lifted in 2012. A different Constitutional and statutory framework obtained and the sanction and or penalty of withholding salaries during the suspension must be examined within the current framework as well as the contractual and or common law framework as may be applicable to reach a fair conclusion. First, the contractual framework.
34. The Clause on suspension provided

#### **16.11.2 Suspension**

- i. Where an employee has committed a criminal offence, the Director shall order for his suspension from the exercise of his duties, pending consideration and determination of the case.
- ii) While an employee is under suspension, he will not be entitled to any salary but the Director may on application, grant an allowance as he may deem appropriate.

#### **16.11.3 Criminal Offence**

a) An employee who is convicted in any court of law of a criminal offence, which is in the opinion of the Director warrants (sic) disciplinary action, the Director may, upon receipt of the judgment, and of any order made on appeal, decide whether the employee is to be dismissed, or subjected to some lesser punishment.

#### **b) Employee acquitted on a Criminal charge**

If an employee who was previously arrested is acquitted of a criminal charge in any court of law, he may not be dismissed or otherwise punished on any charge on which he has been acquitted. However, nothing shall prevent his dismissal or other punishment for any other charge arising out of his conduct in the matter.

35. The Claimant's letter of suspension did not suggest that he had committed a criminal offence. It made reference to suspension pending further investigations.
36. The Court was not informed whether the investigations led to a conclusion that the Claimant had committed a criminal offence or had been charged in a court of law.
37. However clause 16.11.1 of the *Terms and Conditions of Service* provided for interdiction on account of an employee having committed a serious offence in breach of discipline. The interdiction would be on half salary.
38. The Court cannot speculate on why the Claimant was suspended instead of being interdicted pending investigations. What is clear from the suspension letter is that the Respondent had not

- established the full facts (whether there was a criminal offence) upon which to take disciplinary action against the Claimant.
39. The letter lifting the suspension shows that after a disciplinary hearing in 2012, some 5 years after the suspension, the Respondent decided to lift the suspension and reinstate the Claimant but with loss of withheld salaries, because *during suspension .. there were no services rendered*.
  40. Under the common law, the obligation of the employer has always been to pay wages but not to offer work (see *Employment and Discrimination Law, Middlesex University Business School London 2008/9*).
  41. It is the Respondent who took the decision to suspend the Claimant. It was not suggested that the Claimant had been unwilling to provide labour. He did not provide his services on the say so of the Respondent.
  42. The Court has not been shown any provision of the contract which allowed the Respondent to withhold salaries not paid during suspension as a form of sanction or penalty, on the lifting of suspension or even dismissal.
  43. The Claimant was further given a final warning. The letter lifting the suspension and giving the final warning did not even disclose unambiguously whether the allegations against the Claimant were proved as factual or correct.
  44. Further, by keeping the Claimant on suspension for 5 years the Respondent as an employer was in breach of the universally accepted implied term of trust and confidence. The Respondent's conduct in this regard was likely to destroy or seriously destroy the trust and confidence expected in employment relationships.
  45. The Respondent was under an obligation to deal with the allegations against the Claimant reasonably and promptly. 5 years was inordinately long and therefore not fair.
  46. The Court is both a Court of law and a Court of equity. The Claimant was on suspension for an inordinately long period of time. During the period of suspension, he was not earning a salary or any allowances. He could not look for or secure alternative employment because his fate had not been decided by the Respondent. But in all respects he had to make a living.
  47. The constitutional and statutory framework had changed in 2010, and 2008 respectively. The Respondent was under an obligation to take into account the constitutional imperative of fair labour practices, human dignity, economic and social rights and right to fair hearing.
  48. In the view of the Court, keeping the Claimant for 5 years on suspension and without salary was unconscionable and although the contract appeared to have been followed, this was unconscionable and unfair conduct on the part of the Respondent.
  49. Further, not concluding the process expeditiously and fairly considering the changed statutory framework was unfair labour practice.
  50. In this regard, I would approve and endorse as appropriate for our jurisdiction the observations by the Employment Appeal Tribunal in *W A Goold (Pearmak) Ltd v McConnel* (1995) IRLR 516

*that good industrial relations (I add **fairness** to good industrial relations) requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion..... that there was an implied term in the contract of employment that the Employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have..... the right to obtain redress against a grievance is fundamental...*

51. Fairness and equity cannot countenance such conduct of the Respondent as in the circumstances of this case within the prevailing constitutional and statutory regime.
52. The withholding of salaries on reinstatement and after the giving of a final warning was therefore unfair, inequitable and unlawful.

### **Appropriate relief**

#### ***Payment of withheld salaries***

53. The Claimant sought salaries, allowances and benefits withheld during the suspension. According to the Claimant's pay slip for April 2007, just before the suspension, he was earning a gross salary

of Kshs 33,513/- while in May 2013 he was earning a gross salary of Kshs 69,580/- (gross comprises basic pay, house allowance, medical allowance and risk allowance).  
54. Because of various unknowns which could have happened during the suspension, the Court finds that the Claimant is entitled to the gross salary and house allowance from July 2007 to November 2012 at the rate applicable in May 2007, which is Kshs 33,513/- multiplied by 65 months subject to applicable statutory deductions.

### ***Exemplary damages***

55. The Court is of the opinion that the award of withheld salaries would be equitable and fair and declines to award exemplary damages.

### **Conclusion and Orders**

56. In conclusion, the Court finds and holds that

- i. the Claimant was not entitled to a hearing before suspension
- ii. the suspension without salary was unfair, inequitable and unlawful.

57. The Court orders the Respondent to pay the Claimant

(a) Withheld salaries July 2007-November 2012      **Kshs 2,178,345/-.**

58. The Claimant to have costs of the Cause.

59. The head of claim for exemplary damages is dismissed.

**Delivered, dated and signed in open Court in Nakuru on this 23<sup>rd</sup> day of January 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ombati instructed by Ombati & Ombati Advocates

For Respondent Mr. Mbatia instructed by Mburu Maina & Co. Advocates