



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CAUSE NO. 2 OF 2014

(Before Hon. Lady Justice Maureen Onyango on 5th June, 2015)

TIMON OTIENO MBOGA CLAIMANT

-VERSUS-

KENYA FOREST SERVICE RESPONDENT

JUDGMENT

The claimant instituted this suit on 7th January 2014 through his Memorandum of Claim dated 16th December 2013. He seeks the following orders:-

1. An order declaring that the suspension is illegal, unlawful, null and void.
2. An order reinstating the claimant's salary and same to be paid in arrears as from February, 2013 at the rate of Kshs 134,800/= per month till payment in full.
3. General damages .
4. Interest on (b) and (c) as from February, 2013 till payment in full.
5. Costs of the suit.

The respondent replied to the claim vide the Reply Memorandum dated 25th February 2014 and filed on 3rd March 2014. The respondent denied that the claimant was unlawfully suspended or entitled to the prayers sought in the claim and averred that he was taken through the disciplinary process and accorded fair hearing. The respondent prayed that the claim be dismissed with costs.

The case was heard on 19th February 2015. The claimant testified that he was employed by the Kenya Forest Department (which later transformed to Kenya Forest Service) on 2nd June 1998. His last salary was Kshs 134,800. In May 2012 he was nominated to attend a group training in Japan for 3 months from 12th August to 17th November 2012. He was cleared to travel by letter dated 20th July 2012. Before travelling he was given leave to process a visa and other travel requirements. He travelled to Japan on 11th August and came back on 17th November 2012. He notified the respondent of his return by letter dated 23rd November 2012 and attached his certificate of completion of the training. He resumed duty immediately and was given several duties to undertake.

In February 2013 he was assigned duties by the Senior Deputy Director, Support Services to be part of a team to carry out capacity building on performance contracts as facilitator in Nanyuki, Kakamega and Mombasa. The first station was to be Mombasa.

While in Mombasa he was served with a letter of suspension in which it was alleged that upon expiry of his annual leave on 6th August 2012 to 18th August 2012 he absconded duty for 11 days. That he again absconded duty from 17th November 2012 when he reported back from training to 5th February 2013.

The letter required him to defend himself within 7 days. He responded on 19th February 2013.

From the date of suspension he did not receive any salary. He was never called for a disciplinary hearing. In November 2013 the claimant wrote a letter to the respondent raising concerns about the delay in concluding his case through his advocate. The suspension was never lifted. He resigned after he was offered employment by Busia County Government. The resignation was accepted by the respondent on 11th March 2014.

The respondent called two witnesses. RW1 Lucy Kiboi testified that she was the immediate supervisor of the claimant from October 2011 to 6th February 2013. In June 2012 the claimant went on leave and was expected back on 3rd August 2013. The claimant did not report back. RW1 received an SMS from the claimant on the day he was leaving for Japan on 11th August 2012. She learnt that he came back from Japan when she received a copy of his return letter from the Deputy Director on 29th November 2012. She proceeded for annual leave on 20th December 2012 and reported back on 7th February 2013. Her immediate supervisor informed her that the claimant reported back from leave on 6th February 2013 and had been given permission to attend to some personal issues. She reported the claimant's absence when he did not report back to her.

RW2 Juliana Okeno Ochieng testified that she was the head of Human Resources of the respondent from 16th April 2013. She did not meet the claimant but was aware he was on suspension when she was employed. From his file she was aware that a meeting was held and a recommendation made that the claimant be dismissed from employment.

The claimant was an Assistant Director in grade 5 and the only organ which could terminate his employment was the board which handled recruitment and termination of employees in grade 5 and above.

RW2 testified that the claimant was not paid salary during suspension. She also realized he was not paid house allowance when she looked at the file.

RW2 testified that the claimant's employment was never terminated. He tendered his resignation which was accepted. She also testified that employees were not allowed to resign while undergoing disciplinary process but the claimant's resignation was accepted as his case had taken too long. She testified that suspension should not go beyond 6 months including appeal period. That the claimant was suspended on 15th February 2013 and his resignation accepted in March 2014. That he was entitled to be paid salary only if his case was concluded.

In the written submissions for the claimant, it is submitted that it is obvious from the evidence that there was strained working relations between the claimant and RW1 Lucy Kiboi who was his immediate supervisor. The indefinite suspension of the claimant without pay which was only terminated by the claimant's resignation was illegal and inhuman and was intended to punish him. This entitled the claimant to damages as provided in Section 12(3) (vi) of the Industrial Court Act. It was submitted that claimant has proved that he is entitled to the withheld salary, damages of Kshs 2,000,000/=, costs and interest as prayed in the claim.

The respondent submitted that the claimant absconded duty for 46 days and was liable to dismissal under Clause 10.14 and 10.16.4 of the respondents Manual. The respondent further submitted that the claimant was subjected to a disciplinary process that was fair, just and lawful, that there is no statutory maximum period for suspension and the respondent's manual does not provide for a time limit either. It was submitted that the delay in implementing the decision of the disciplinary committee which met on 23rd April 2013 and considered the claimant's case was due to the fact that there was no board in place to process his case.

The respondent referred to the case of **Josephat Ngigi Ndegwa V Equity Bank Limited [2013] eKLR** where the claimant was on suspension for more than one year and the court did not declare the suspension unlawful.

On the prayers of the claimant the respondent submitted that having absconded duty the claimant is not entitled to full salary but only house and medical allowances. The respondent relied on **Bramwel Dibondo Musundi V Kenya Revenue Authority [2014] eKLR** in which the court confirmed that the claimant could be suspended without pay in accordance with the Code of Conduct that was binding on him.

The respondent further relied on the case of **Ndegwa V Equity Bank** where the court observed that the respondent acted within the law by enforcing the terms of the suspension letter which indicated the claimant would be on half pay and cease to draw other benefits and allowances.

The respondent further relied on the case of **Paul Ngeno V Pyrethrum Board of Kenya [2013] eKLR**. In this case the court held that the claimant was entitled to the half salary withheld during interdiction and to full salary during suspension.

On the issue of compensation the respondent relied on the case of **Catherine Kinyany V MCL Saatchi & Saatchi [2013] eKLR** where the court held that a claim for compensation can only be granted if the court finds that there was unfair termination or dismissal. The respondent submitted that the claimant did not prove his claim for general damages of Kshs 2,000,000/=.

I have considered the pleadings, *viva voce* evidence and the written submissions. I have also considered the cases referred to by the respondent. I will adopt the issues for determination as set out in the respondent's submissions as follows:-

1. Whether the claimant's suspension was illegal, unlawful and/or unjustified.
2. Whether the claimant is entitled to the prayers sought.
3. **Was the claimant's suspension illegal, unlawful and/or unjustified?**

The Employment Act, the Industrial Court Act or any other Labour Law for that matter, do not provide for suspension. The Employment Act however provides at Section 12 that every employer which employs more than 50 employees must have a statement on disciplinary rules which shall;

"(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) specify the person to whom the employee may apply—

(i) if dissatisfied with any disciplinary decision relating to the employee; and

(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) Where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps."

Issues such as interdiction and suspension therefore ought to be provided for in the statement of disciplinary rules.

In this case the respondent has attached a portion of Kenya Forest Service Human Capital Policy and Manual Section 10 dealing with employee's conduct. In the first place, no explanation was given why only a portion of the manual was attached. Secondly I have perused the same and have not come across any provisions for suspension. The only provisions relevant to discipline in the Manual 10.2 titled "Disciplinary Proceedings and paragraph 10.26". They provide;

"There shall be disciplinary proceedings which shall be in line with the disciplinary policy.

In accordance with the Kenya Forests Act, 2005, a disciplinary code shall be developed for disciplined officers to provide for the following matters:

- 1. the investigation of disciplinary offences and the hearing and determination of disciplinary proceedings,**
- 2. disciplinary penalties; and**
- 3. any other related matters."**

No disciplinary policy or code was availed to the court. RW2, Juliana Okeno Ochieng, respondent's head of HR alluded to some regulations requiring that suspension period should not exceed 6 months and further that the claimant's disciplinary proceedings should have been handled by the board which was not in place. No document was produced to support these contentions. Both section 10 and 12 of the Employment Act refer to a written policy that has been brought to the attention of all employees. Section 41 of the Employment Act provides for disciplinary process in board terms. These provisions must be met by any disciplinary policy failing which such policy is unlawful.

The foregoing being the case, I do not even have to consider whether or not the claimant was guilty of the misconduct he was accused of. The whole process having been unlawful, was a nullity.

I declare the suspension unlawful, null and void.

Is the claimant entitled to his prayers?

The claimant prayed for reinstatement of his salary from February 2013 till date of payment. The claimant however testified that he resigned after obtaining an offer of employment with Busia County Government where he was working at the time of hearing of the case. The resignation was accepted on 11th March 2014.

Since his suspension was unlawful, I award the claimant salary from February 2013 to 11th March 2014 when his resignation was accepted by the respondent. This amounts to Kshs 1,800,232.

The claimant also prayed for damages in the sum of Kshs 2,000,000. No submissions were made to justify the specific figure claimed.

As I have already found above, the claimant's suspension was unlawful. RW2 stated that during suspension the claimant should have been paid house allowance and medical allowance but this was not done. She further testified that the suspension period should not have exceeded 6 months. The claimant's suspension had gone on for more than one year by the time he opted to resign. He was thus condemned to an indefinite suspension.

The claimant's case was heard by an incompetent committee which called her accuser RW1 Lucy Kiboi as is evident from the minutes of the disciplinary committee but did not call him. This is contrary to the tenets of natural justice and a violation of the provisions of Section 41 of the Employment Act which require that an employee is present at a disciplinary hearing accompanied by a fellow employee of his choice or a union official if the employee wishes to do so, and to be given an opportunity to present his case.

It is also evident from the proceedings that there was obviously bad blood between RW1 and claimant.

The claimant's letter of suspension required him to be at his duty station without a salary. The last paragraph of the suspension letter reads;

"While on suspension you will not receive any salary and you should not leave your duty station without express permission of your supervisor."

The foregoing in my opinion is evidence of unfair labour practice for which the claimant would be

entitled to damages.

I therefore award the claimant damages equivalent to 12 months salary in the sum of Kshs 1,617,600.

The decretal sum shall bear interest at court rates from date of judgment.

The respondent will also pay the claimant's costs of this suit.

Orders accordingly.

MAUREEN ONYANGO

JUDGE

5/6/2015

Appearances:-

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache