



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 450 OF 2011

(Before D.K.N. Marete)

DR. SAMUEL KABERERE NJENGA.....CLAIMANT

Versus

THE ATTORNEY-GENERAL.....1ST RESPONDENT

THE PERMANENT SECRETARY MINISTRY OF MEDICAL

SERVICES (FORMERLY MINISTRY OF HEALTH)2ND RESPONDENT

JUDGEMENT

This matter was brought to court vide a memorandum of claim dated 20th March, 2011 and filed on 23rd instant. The issue in dispute is therein cited as;

1. ***Unlawful and wrongful dismissal of the Claimant.***
2. ***Non-payment of the Claimant's accumulated salary from June 2005 to 31st July 2008 of Ksh952,668.***
3. ***Non-payment of all the Claimants lawful Terminal Benefits and compensation for lack of Notice.***

The respondent, vide a Respondent's Memorandum of Response dated 20th November, 2012 and filed on 27th instant denies the claim and prays that the same be dismissed with costs.

The claimant's case is that as a Medical Doctor, he was employed by the Ministry of Health on permanent terms on 5th November, 2003 at a monthly salary of Ksh.26,463.00. On 19th July, 2005, he was suspended from duty by the respondent's agents without payment of his monthly salaries up to the 25th May, 2005 when his salary was stopped in writing.

The claimant further claims that he was wrongly and unlawfully dismissed from service vide a letter of dismissal dated 26th February, 2008 citing absconding duty with effect from the 1st November, 2008. It was further alleged that he had participated in an illegal civil service strike of May/June 2005 which fact is denied by his supervisor, Dr. Nzioka C.M., the Makueni District Medical Officer of Health. The said MOH had also advised him to await his letter of reinstatement but on reading about the general amnesty by the government on the eve of the 2005 National Referendum on the new constitution he reported to his work station at Makueni District Hospital in November, 2005.

He submits a case for unlawful dismissal and prays as follows;

- a. ***DECLARATION*** that the *Exparte* decision to dismiss the Claimant made on 28th September 2007 and the letter of dismissal dated 26th February 2008 WAS Null and void for breach of the Rules of Natural Justice and having been premised on false grounds.
- b. Orders that the Claimant should be paid all the accumulated unpaid monthly salary from June, 2005 to 28th February, 2008 totalling Kshs.820,353.
- c. Compensation for 18 months' Salary for lack of alternative job and lack of Notice.
- d. Costs of the suit and interest on (b) since 28th February 2008 to date of Judgement.

The respondent's case is that the claimant was employed on probationary terms and deployed to the Makueni District Hospital. He was deemed to have been confirmed on 28th September, 2007. The claimant participated in an unlawful strike on 1st June, 2005 and was lawfully charged with the offence of absence from duty without leave in contravention of the law and regulations of the Public Service as hereunder;

4. ***“Further and without prejudice to the foregoing, the Respondents aver that the Claimant participated in an unlawful strike on 1st June 2005 and was lawfully charged with the offence of absence from duty without leave in contravention of Regulation 28 of the Public Service Commission Regulations made pursuant to section 13 of the Service Commissions' Act Cap 185 of the Laws of Kenya as a result of which the claimant was suspended from exercising the functions of his office on 19th July 2005.”***

He was suspended from office on 19th July, 2005 but this was lifted in November, 2005 through an amnesty to all doctors who were required to go back to work.

The respondents aver that the claimant was sent a letter to his last known address but despite numerous calls by the MOH, Makueni, the claimant failed to report on duty in November, 2005. He was issued with a show cause letter requiring that he explains why disciplinary action should not be taken against him. Disciplinary action against the claimant was undertaken and he was dismissed from service without terminal benefits. The respondent's case is that the dismissal of the claimant was lawful and in compliance with the respondent's procedures as set out in the respondents code of regulations.

The matter came to court severally for hearing and on 15th July, 2013 the parties agreed to clear the issues by way of written submissions for the claimant. The respondent had opted not to call any witness or file submissions, essentially seeking to rely on his memorandum of response.

At the hearing of this suit on 2nd July, 2013, the claimant adopted his written witness statement dated 16th December, 2011 and list of documents and original documents as his final evidence. He, in his written submissions further reiterates the position of his employment, wrongful and unlawful dismissal. The said dismissal was vide a letter of dismissal dated 26th February, 2008 and received on 24th March, 2013. He submits that he was not awarded a hearing before dismissal, or at all. An appeal against dismissal by himself was not responded to by the respondent.

The issues for determination are therefore as follows;-

1. Was the dismissal of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st and fundamental issue for determination is whether the dismissal of the claimant by the respondent was wrongful, unfair and unlawful. The claimant insists that this was so whereas the

respondent denies the illegality of the same.

From the onset, the claimant lays down the background of a doctors' strike in mid-2005. The Government issued and implemented an amnesty involving all doctors, including the claimant, but this was not to be, in his case. He was dismissed purportedly on grounds of absconding from duty.

The claimant must have had a difficult time pursuing his case for pay and reinstatement. On 25th July, 2005, he does a clean letter to his employer explaining his conduct to duty during the period of the strike. The MOH, Makueni District, a Dr. Nzioki, C.M. confirms that despite the claimant's performance having been hampered by the civil servants strike, he had been out of the station with permission and did not participate in the civil servants strike and therefore recommended him for reinstatement.

It would appear that despite the above letters, the claimant was served with a letter dubbed "Absence from Duty" and asking him to show cause why disciplinary action should not be taken against him and dated 25th May, 2007 and another on "Confirmation in appointment/Dismissal" dated 25th February, 2008.

The respondent denies the claim and does not call any witnesses or file written submissions. The respondents' Memorandum of response is naked and does not in any way proffer any evidence on the mater. It is a mere denial. And the denial is not supported by any evidence to rebut the claim.

It would appear that this is another bungled attempt by a public body to sanitize a bad situation. And the claimant, a victim of inertia, bureaucracy and bigotry evident in public service where critical decisions affecting people's lives are made as recklessly. This is indefensible. It is not compliant with employment law or prudent industrial relations. It does not come out well.

From all fronts, there is no scintilla of evidence linking the claimant to any wrong doing as to warrant a case for dismissal, or at all. No wonder, the respondents find it impossible to make a tangible defence in the circumstances. I therefore find that the dismissal of the claimant was wrongful, unfair and unlawful and hold as such.

The next issue for determination is whether the claimant is entitled to the relief sought. He is. In a case for wrongful and unlawful termination, the claimant's case craves for redress and relief. I order relief as follows;

1. Unpaid salary from June, 2005 to

26th February, 2008 - Ksh.26,463 x 32 months = Ksh.846,816.00

2. Six(6) months compensation for

Unlawful dismissal - Kshs.26,463 x 6 months = Ksh.158,778.00

Less salary for February, 2006 = Ksh.26,463.00

Total = Kshs.979,131.00

3. The cost of this claim shall be borne by the respondent.

Dated, delivered and signed this 7th day of February, 2014.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Gitau instructed by Gitau J.H. Mwara Co. Advocates for the claimant.
2. Brenda instructed by the Attorney-General for the respondents.