



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 372 OF 2013

PETER BIRI.....CLAIMANT..

-VERSUS-

**KERIO VALLEY DEVELOPMENT
AUTHORITY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21st March, 2014)

JUDGMENT

The claimant **Peter Birir** filed the statement of claim on 28.10.2013 through Wambua Musembi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **A declaration that the respondent's order withholding the claimant's pay and allowances is illegal, inhuman, null and void.**
- b. **An order directing the respondent to immediately release the claimant's salary and allowances withheld since 1.07.2013.**
- c. **Costs of the suit.**
- d. **Any other and further relief the honourable court deems appropriate in the circumstances.**

The respondent **Kerio Valley Development Authority** filed the memorandum of defence on 11.02.2014 through the Federation of Kenya Employers and prayed that the court finds that the claimant's dismissal from employment as lawful and fair and uphold the respondent's decision to terminate the claimant and dismiss the claimant's claim with costs to the respondent.

The case was heard on 20.02.2014. The claimant gave evidence to support his case. The respondent's witnesses were its liaison officer at Lodwar Charles Munyesi Lomis (**RW1**) and its Human Resource and Administration Officer Elizabeth Kebenei (**RW2**).

The claimant was employed by the respondent in 1991 as a clerical officer. The claimant was promoted through the ranks to the position of a legal officer. By the letter dated 8.5.2012, the respondent commended the claimant for his good work. As legal officer, the claimant's job entailed advising the management which sits at the respondent's head office in Eldoret. He also advised the respondent's Board which meets at least 4 times per year at the head office.

By the letter dated 26.04.2013, the respondent transferred the claimant to its Lodwar station. The transfer letter stated as follows:

“RE: TRANSFER

As you are aware that the Authority is focusing on income generating activities and none of this is based in the head quarters, it has become necessary that we move staff to areas where the Authority is undertaking projects or income generation. The remaining staff will be reorganized for effective service delivery. In this regard, you have been transferred from Eldoret to Lodwar as Liaison Officer-Turkana Region.

The transfer takes effect from 29th April, 2013.

You will be reporting to the RM-Turkana Region.

You will be paid transfer allowance as applicable.

Your other terms and conditions of service remain the same.

Signed

David Kimosop

Managing Director”

The copy of the transfer letter is **exhibit 4** on the defence and it shows an endorsement by RW2 certifying that the claimant reported as transferred on 16.05.2013 and a further endorsement by another officer was that a pay change advice was to issue accordingly.

The claimant testified that his salary was withheld effective 1.7.2013 on account of alleged desertion of duty. The claimant denied that he was a deserter and he had never received communication about deserting duty. Thus, according to the claimant, the withholding of the salary was therefore unfair.

The claimant admitted receiving the show-cause letter dated 5.07.2013. The letter by the respondent’s managing director conveyed that a report had been received from the claimant’s duty station that the claimant had reported at the station on 16.05.2013 and requested for time off-duty to organise to report back but the claimant had failed to report back. The letter further conveyed to the claimant that such absence from duty without leave or lawful cause could lead to summary dismissal and the claimant was invited to show-cause why disciplinary action could not be instituted against him. In the meantime, his salary was withheld until the claimant made the relevant explanation. The claimant replied by his letter dated 11.07.2013 being **exhibit 8** on the defence. He stated that he reported and was to go back to Lodwar but instead, he applied for his due 30 days annual leave to commence on 24.05.2013 ending 4.07.2013. The controlling officer at Lodwar recommended the application for leave and forwarded it to the head office for approval. The claimant testified that he had not received any communication not approving his leave and it was therefore clear that he had not been absent from duty without permission as levelled against him.

The claimant denied ever receiving the summons to attend the ad-hoc committee on discipline being **exhibit 10** on the defence but that he had been telephoned to attend the meeting held on 21.08.2013 at 12.00 noon to answer the charges of desertion. The claimant testified that he did not attend the meeting but instead wrote **exhibit 12** being his advocates’ letter stating that the committee lacked jurisdiction to hear and determine the disciplinary case as per the terms and conditions of service.

The claimant stated that he was never suspended or interdicted by the respondent’s managing director. The claimant testified that the transfer had the effect of demoting him without due process and it contravened Article 236 of the Constitution. However, the claimant admitted that his salary did not

change or reduce but upon transfer, his position changed to liaison officer. The claimant further testified that he knew services had to be devolved under the new Constitution and so he reported to his new station within the stipulated time. The claimant admitted that he was petitioner No 6 in **High Court Petition No. 16 of 2013 at Eldoret** challenging the transfer but nevertheless he had reported as required by the respondent. He denied ever receiving the suspension letter dated 20.09.2013 (except in court) being *appendix 2* on the defence. The letter conveyed that at the meeting of the Finance and Establishment Committee of the respondent's board, it was contemplated to dismiss the claimant and the claimant was suspended effective 20.09.2013; the claimant was not entitled to any salary effective the date of the suspension; and the letter required him to appear for the ad-hoc discipline committee of the board on 26.09.2013 at 9.00 am to answer charges of absenteeism and failing attendance, the board would proceed and make a decision. The claimant admitted receiving a telephone call to attend the meeting of 26.09.2013 but he declined to attend because in his view, the ad-hoc committee lacked jurisdiction. He was also not aware of the board meeting of 18.12.2013 confirming the claimant's termination.

While on leave, the claimant admitted applying for further 40 leave days but he was not aware of approval of his leave. His testimony was that since May 2013, he was not at work because his salary had been stopped and the claimant stated that he was not aware of his termination by the respondent.

RW1 confirmed that the respondent reported upon transfer on 16.5.2013 and left Lodwar on 17.05.2013 to prepare to come back to work but had never come back to the station. RW1 stated that when the claimant left, he said he was going to process the transfer allowance. He wrote the report **exhibit 5** reporting about the claimant's absence.

RW2 testified that under *clause 10.2.3*, the respondent's managing director could dismiss an officer in any rank though 10.2.2, those in grade KV9 and above were to be taken to the respondent's board. She testified that the claimant was given chance to be heard but he refused to take up the chance. RW2 also testified that the claimant was suspended effective 20.09.2013; salary was stopped effective 1.07.2013; allowances were paid until stopped effective 1.09.2013; the ad-hoc disciplinary committee was involved because it was thought not to be such serious issue that would lead to dismissal; there were no minutes to show the board suspended the claimant; stoppage of salary was a punishment; and at time of suspension letter, the claimant had been absent from duty.

The court set out the following issues for determination:

- 1. Whether the respondent followed the agreed or prescribed procedures in suspending the claimant.**
- 2. Whether the withholding or stoppage of claimant's salary or allowances or both was legitimate.**
- 3. Whether the parties are entitled to the remedies as prayed for.**

For the 1st issue, the court has considered the respondent's terms and conditions of service. Regulation 10.2.1 provides that suspension is one of the disciplinary measures that the respondent can impose against its staff on account of unsatisfactory conduct. Under *clause 10.2.2*, the power to suspend staff in job group KV9 and above shall be "referred to the Board". *Clause 10.2.3* provides that the power to suspend any staff is vested in the managing director and if the staff is in job group KV 9 and above, the managing director will immediately after suspending inform the board. The court has considered the provisions and finds that the power to suspend was vested in the managing director with reference (information) to the board.

The next consideration is whether the relevant step by step process was invoked. The process is in *clause 10.3* of the terms and conditions of service. The disciplinary matters were to be referred to the disciplinary committee of 3 to 9 members appointed by the managing director. In this case, the managing director appointed the committee. It is clear that the claimant was called on telephone to attend the committee as appointed by the managing director but he failed to attend alleging that the committee lacked jurisdiction.

First, it was obvious that the claimant was misconceived in failing to attend as the terms and conditions of service are clear that the committee had jurisdiction. Secondly, even if the committee lacked jurisdiction, it was a legitimate preliminary or substantive issue for its determination before embarking on the inquiry or during the inquiry into the claimant's case, as the case may have been appropriate. The claimant was bound to attend and raise the jurisdictional objection at the hearing. It is the court's opinion that a person invited to appear before an inferior tribunal like the disciplinary committee in the instant case and his case, like the claimant's position, is that such inferior tribunal lacks jurisdiction, then the legitimate cause of action for such person is to appear at the hearing and raise the jurisdictional objection. Depending with the decision of the inferior tribunal, if the person is aggrieved, then the person could take advantage of the agreed or statutory appeal or revision mechanism, or institute appropriate court process.

In making the decision, the court holds that it is always prudent for an inferior tribunal to consider whether it has or lacks jurisdiction though the final determination in presence or absence of the tribunal's jurisdiction vests in the court. A person who fails to make the jurisdictional case before the inferior tribunal like the claimant risks the binding effect of the tribunal's decision if it turns out in the court's determination that the tribunal had jurisdiction.

In this case, the disciplinary committee as appointed by the respondent's managing director had the jurisdiction, the procedures were followed and the claimant's failure to participate as invited spelt irretrievable doom to his case. The court finds that the suspension and the resulting withholding of the claimant's salary and allowance was therefore lawful. In making the finding, the court has considered the claimant's testimony that he was not aware of the suspension. The court finds that the claimant cannot be believed on that account because in any event, he has not reasonably explained his absence from the work place. If he was not aware as alleged, then he would have been present at work in ignorance of the suspension but which was never the case.

The 2nd issue for determination is whether the stoppage of the claimant's salary and subsequently the allowances was legitimate. The claimant testified that he may have had a grievance about the deployment from the head quarters and the change in designation. However, he opted not to raise the grievance and he decided to condone the transfer and he testified he was willing to work as transferred. The court finds that the claimant did not complain despite having a legitimate complaint but he decided to condone the offensive redeployment and re-designation and he is stopped from going back to complain in that regard. The court further finds that having condoned the transfer and the re-designation, the claimant was bound to work and to discharge in his new capacity. He decided instead to go on a sham leave which he obviously knew had not been approved. In the circumstances of the case, the court finds that the respondent acted prudently to impose a stoppage of salary and to initiate disciplinary process. The court further finds that had the claimant rejected and objected to the redeployment and re-designation, it could be that he would be heard to say that the respondent's conduct was so offensive as to justify the claimant to consider himself terminated and therefore, a finding of constructive termination would have been founded. In this case, the court has found that the claimant condoned the transfer and the re-designation and he is bound by his actions.

In view of the findings on the 1st and 2nd issues, the court finds that the claimant is not entitled to the remedies as prayed for.

The respondent prayed for a finding that the claimant's dismissal was lawful and fair. The court finds that there was no substantive counter-claim and the claimant did not have an opportunity to deal with that issue of dismissal. In the circumstances, the court finds that the issue was not properly before the court in the case and the prayer will fail.

The court has considered the belated filing of the memorandum of defence and finds that it will be fair for each party to bear own costs of the suit.

In conclusion, the claimant's suit is dismissed with orders that each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at Nakuru this Friday, 21st March, 2014.

BYRAM ONGAYA

JUDGE