



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 181 OF 2013

(Before Hon. Justice Hellen Wasilwa on 22nd July, 2014)

AUGUSTUS WAFULA WAMBATI CLAIMANT

-VERSUS-

MOI TEACHING & REFERRAL HOSPITAL RESPONDENTS

JUDGMENT

The claimant herein Augustus Wafula Wambati filed his statement of claim against the respondents on 27.6.2013 through the firm of Peter M. Karanja Advocate.

There was proof that respondents were served and even filed their memo of response on 7.10.2013 through the firm of Mburu Maina and Co. Advocates. The case was thereafter set down for hearing. On 22.1.2014 both counsels were present in court. The claimant partly gave his evidence on this day and was stood down for further hearing at a later date. On the date set for further hearing on 23.6.2014 the respondents and his counsel failed to attend and this court ordered the hearing to proceed in their absence.

It is the claimant's case that he is a Nursing Assistant at respondent's hospital. He told court that he was employed on 14.6.2001 and was later confirmed in employment. His salary as at 28.6.2007 was Ksh 45,980/= as his payslip **AWW2**. He indicated that on 26.6.2007, there was some industrial arrest at the hospital after staff salaries were deducted based on the clocking system. A meeting was later called by the Ag. Director to discuss the issue. Following this meeting, he was suspended from duty on 29.6.2007 on allegations that he had taken part in industrial arrest. He denies taking part in any industrial action and stated that during the procession he was on duty at the Accident and Emergency Department. The suspension letter was signed by the Deputy Director of respondents. It is his averment that he was bound by terms and conditions of service of the respondents which are part of his supplementary list of documents and the disciplinary procedures are listed at page 107 of the booklet. This procedure states that disciplinary procedure is supposed to be instituted by the supervisor through a verbal warning of upto 3 times. After this, a written warning is given which should be received and signed for by the recipient. The claimant's case is that he was never warned by his supervisor before the suspension and further that interdiction is to be instituted by the director and suspension by the director where there is a criminal offence. He denies committing any criminal offence. The claimant stated that he fell under the middle level staff and the procedure for disciplining staff in this category was never followed.

Immediately he was suspended, the claimant told court that he took his letter and documents to show he was not absent but was in a seminar in Nairobi and so the surcharge was not proper. He also explained to the Director that on issue of procession, he never participated in it. He was told to go home and wait for

communication. He had not been sacked. Finally, on 28.11.2012 he was summoned to attend a disciplinary committee of the hospital on 3.12.2012 -**AWW4**. He attended the meeting and was asked to explain his case. He explained what had transpired. After this, the respondents wrote him a letter **App AWW5** stating that the suspension had been lifted. The suspension was however lifted on certain terms. He disputed the conditions of the suspension and on 7.6.2013 he was invited to yet another disciplinary committee meeting. He attended the meeting and was told that the conditions remain the same.

He decided to seek court's intervention. His claim is for payment of his salary since suspension and also a declaration that the suspension was illegal and unprocedural. He wants to be reinstated without any condition. He also seeks to be promoted to where his colleagues are. He resumed duty on 8.8.2013 and his colleagues are currently at Scale M6 whereas he is on Scale M9.

In submission, the claimant referred this court to other cases where staff were also suspended following the same industrial arrest. The court found that the Ag. Director had no power to suspend the employees in question and found the suspension null and void.

Upon considering the evidence of the claimant and submissions thereof, the issues for determination are as follows:-

1. **Whether the purported suspension of the claimant was lawful.**
2. **Whether the claimant is entitled to payment of salary arrears following the lifting of the suspension.**
3. **Whether the claimant is entitled to promotion to the Scale of other employees who were on his rank at the time of suspension.**

On the first issue, disciplinary procedures are provided for under Part VI of the respondents Terms and Conditions of Service Booklet. The process involves some investigations by the supervisor, discussion with the employee, verbal warnings, written warnings and final warnings before the stage of committee hearings. The claimant told court that he was in middle level cadre and therefore the procedure for his discipline was as found at page 112 of the manual. The committee shall be chaired by Assistant Deputy Director and other Deputy Director will be members. Upon this Committee hearing the case, it will forward it's findings to the Director with recommendations regarding the form of punishment if any or the Committees' opinion on how the case should be handled. The Director shall not be bound by the recommendations of the Committee.

Part XI deals with interdiction, suspension and criminal charges. Under this part at bullet 16.11.2;

“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.”

From the wording of this bullet, it is evident that suspension is only permitted in case where an employee has committed a criminal offence. In the same vein, it is only the Director who can order for this suspension.

In the claimant's case, there is no proof that he committed a criminal case. And even so it is only the Director who had power to suspend. These sentiments were expressed in a similar case:- **Hosea Cheruiyot Maru V Moi Teaching and Referral Hospital. Nakuru Industrial Court Case No. 2 of 2012**, where **Hon. J. Ongaya** found that the Ag. Director did not have powers to suspend an employee unless he could show that these powers had been delegated to him. I do agree with my learned colleague and do find that Dr. Omar Aly, the Ag. Director did not have powers to suspend an employee and he did not show that he had delegated powers to issue the suspension. The claimant was on suspension from 2007 to 2012 for a period of 5 years. This is also in contravention of Article 50(2)(e) of the Constitution which provides for conclusion of a trial without unreasonable delay. For an employee to remain on suspension for 5 years is an unduly long period.

From the above analysis, it is the finding of this court that the suspension of the claimant was unlawful.

By reason of this finding, any decision made by the respondents as a result of the unlawful suspension is also unlawful. By purporting to lift the suspension on certain conditions, the respondents are not acting in good faith. It is therefore this court's finding that the claimant is entitled to payment of all his salary arrears from the time of suspension to the time of its lifting.

One of the remedies this court can grant is to order reinstatement and under S.49(1) 3(a) of the Employment Act, where reinstatement is ordered, it will be such that the employee will in all respects be treated as if the employment had not been terminated. It is also important in this case that the employee be put in the same position he occupied before the illegal suspension. It is for this reason that I order that claimant be paid all his salary arrears from the time of suspension to the time of its lifting therefore.

In the same vein I order that the claimant be compensated without any loss of promotion/increment of salary to the position he ought to occupy to-date. The respondents shall meet costs of this case.

HELLEN WASILWA

JUDGE

22/7/2014

Appearances:-

Karanja for claimant present

N/A for respondents

CC. Wamache