REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2 of 2012

HOSEA CHERUIYOT MARU.....CLAIMANT

-VERSUS-

MOI TEACHING AND REFERRAL HOSPITAL....RESPONDENT

JUDGMENT

This is the judgment in the case of **Hosea Cheruiyot Maru**, the Claimant and the **Moi Teaching and Referral Hospital**, the respondent. The claimant filed the statement of claim dated 26.07.2011 through M/s. Andambi & Company Advocates. The claimant pleaded unlawful and unfair dismissal and prayed for orders that:

a) **the termination of the claimant be declared unlawful and illegal from the very beginning;**

b) **upon such declaration the respondent be ordered to reinstate the claimant to his job or equally suitable job, without loss of any salary or allowance from the date of the purported summary dismissal i.e., 29.06.2007;**

c) **the respondent to pay the claimant all allowances, privileges, benefits, including promotions and any other dues lost during the period of dismissal as soon as possible or as per the court's directions; and**

d) **the respondent to pay the claimant full costs incurred over the claim.**

The respondent filed the statement of defense on 16.09.2011 through **Onyinkwa & Company Advocates**. The respondent denied the claim and pleaded that the respondent had every justification to dismiss the claimant in view of the events leading to the dismissal.

The respondent prayed that the claimant's suit be dismissed or struck out with costs. On 22.02.2013, the respondent filed a list and copies of documents. The claimant filed additional list and copies of documents on 15.03.2013.

The case came up for hearing on 12.03.2013 and on 19.03.2013. The claimant gave evidence to support his claim and prayers. The respondent's witness was **Anne Chemwashi**, the respondent's Human Resource and Training Manager. The facts of this case are as follows.

The claimant was employed by the respondent on 20.03.2003 as an administrator. On 26.06.2007 many employees of the respondent went on a procession to protest against the respondent's decision to surcharge staff due to alleged failure to work as expected and in accordance with computation of working

time as per the checking in and out machine installed by the respondent. The claimant testified that he did not participate in the procession which seriously disrupted the respondent's service delivery. Nevertheless, the respondent's acting managing director one **Dr. Omar Aly** delivered to the claimant on 29.06.2007 a dismissal letter. The letter addressed to the claimant being appended on the memorandum of claim and dated 28.06.2007 stated as follows:

"RE: DISMISSAL

Reports reaching this office indicate that on 26th June, 2007, you participated in an illegal procession contrary to the expectations of an officer of your caliber. The Hospital Management has bestowed you with responsibility of ensuring that the delivery of health services is smooth and efficient.

Note that it is a serious offence of gross misconduct contrary to the Hospital Terms and Conditions of Service Sec.16.5.1 (10) to incite other employees to violence or disaffection against the Hospital Management.

Owing to the magnitude of the offence and taking cognizance of the fact that you had been served with a final warning for failing to perform your duties as expected, the management has decided to dismiss you from the service of this institution with immediate effect. You are expected to clear with the Hospital as required.

If you will be dissatisfied by this decision, you can appeal to the Chairman of the Board of Management within fourteen (14) days from the date of this letter.

Signed
Dr. Omar Aly
A G. DIRECTOR"

The claimant appealed by his letter of 27.05.2007. The acting director forwarded the appeal to the Chairman of the Board by the letter dated 16.07.2007 marked ***folio 79*** on the respondent's list of documents. The Chairman endorsed on the appeal on 24.07.2007 and marked to the director thus, **"Having considered the appeal duly, and taking into account his previous record which led to his issuance of a final letter of warning, the dismissal action should stand."** The chairman's decision was communicated to the claimant by the respondent's letter dated 19.03.2008 marked ***folio 84*** on the respondent's list of documents. The claimant decided to file this cause.

The issues for determination in this case are as follows:

1. **whether the acting director could validly exercise the delegated authority of the director in absence of the written delegation;**

2. **whether the dismissal was unlawful and unfair; and**

3. **whether the claimant is entitled to the prayers made.**

It was submitted for the claimant that the acting director could not initiate disciplinary action and dismiss the claimant because the respondent's Terms and Conditions of Service vested such power and duty in the substantive director. The respondent submitted that the director could delegate under *clause 1.8* of the Terms and Conditions of Service. The clause states, **"Delegation: The Board may delegate any of its functions and powers under these TCS to a Committee of the Board or to the Director. The Director may delegate his duties and powers under these TSC to any officer of the Hospital or a committee."** It was submitted for the claimant that there was no evidence of the delegation and the disciplinary proceedings failed *ab initio*for want of proper authority to initiate and continue the proceedings. The respondent referred to the decision in **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers –Versus- Moi Teaching and Referral Hospital** in which

the then Industrial Court Tribunal stated:

“This brings me to the critical and important question of competent authority to discipline or dismiss the grievant. A person who has got the power to appoint has also the power to take disciplinary action against or dismiss an employee. The exercise of disciplinary powers extends not only to appointment and dismissal but also to initiation of disciplinary action against an employee, and in absence of any provision permitting expressly or impliedly delegation of disciplinary powers, any authority other than the appointing authority has no power to discipline or dismiss an employee. The appointing authority in this case was the Director of the Hospital, Prof. H.N.K arap Mengich, but the Ag. Director, Dr. Omar Aly, purported to dismiss the grievant. There is no evidence on the record to show that Dr. Aly had delegated powers from Prof. Mengech, who was the appointing authority, to summarily dismiss the grievant from service.” [1]

The court has considered the submissions and finds that the director’s power to delegate was discretionary, exercisable generally or specifically and it was vital that the respondent provides the evidence of exercising of the power to delegate. The Terms and Conditions of Service did not prescribe the mode of exercising the discretion to delegate. It could be oral or in writing but the court’s considered opinion is that prudence demands that such delegation be done in writing. Thus, the court’s finding is that the acting director did not enjoy any delegated powers to initiate, continue and determine the disciplinary case against the claimant. Indeed, the acting director signed the correspondence in his individual capacity as acting director and not for the director. The court holds that persons discharging duties and powers vested in another office must sign documents for and in the name of the office vested with the duties and powers failing which, in the opinion of the court, the discretion to act is thereby irreparably shifted, null and void. In the circumstances, in the present case, the disciplinary proceedings were null and void *ab initio.*

The second issue for determination is whether the dismissal was unlawful and unfair. The court has already found that the disciplinary proceedings were null and void *ab initio.* Thus, the termination was unlawful for want of the rightful authority to act. Nevertheless, some pertinent issues need to be addressed. First is the issue whether the respondent has established a reason for dismissal as envisaged in section 43 of the Employment Act, 2007. The court finds that the respondent did not prove that the claimant participated in the procession as alleged. The respondent did not rebutt the claimant’s evidence that he did not participate and that he had not been surcharged with the consequence that he had no grievance to warrant his participation in the protest in issue. Secondly, the court has to address whether there was compliance with the rules of natural justice through affording the claimant a notice and a hearing as envisaged under section 41 of the Act and the provisions of the respondent’s Terms and Conditions of Service.

It was submitted for the respondent that a final warning had been served under ***clause 16.7.4*** and therefore the claimant was liable to be dismissed summarily without a notice and a hearing. The respondent also submitted that the Chairman had decided the appeal thereby curing any undue process that may have been involved. It was submitted for the claimant that section 41 of the Act had been breached as well as provisions of Part VIII of the respondent’s Terms and Conditions of Service which prescribed drawing of particulars of charges, serving of the notice of charges, inviting the claimant’s reply, investigations by the disciplinary committee and the appeals procedure under ***clause 16.10.4*** requiring the Chairperson to hear and determine the appeal.

The court finds that the warning regime was a mere preliminary process which did not ouster the statutory and agreed disciplinary process entailing notice of the alleged misconduct and the hearing of the claimant’s defense. The court upholds its earlier holding in **Shankar Saklani -Versus- DHL Global Forwarding (K) Limited,**this court stated thus,

“Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little

practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract."[2]

Accordingly, the court finds that the dismissal of the claimant by the respondent was unlawful and unfair.

The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The respondent did not advance any grounds to oppose the prayer for reinstatement. The respondent is a public body. It is bound by the statutory and constitutional provisions that govern public service. Article 236 of the Constitution protects public officers like the claimant from being dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The court finds that an order of reinstatement in this case shall serve the ends and purposes of that constitutional protection of public officers. The court further holds that consequential to the reinstatement, the claimant is entitled to full remuneration throughout the period he was unlawfully and unfairly kept away from work by the respondent. The court upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturing and Allied Workers – Versus – Timber Treatment International** where it was stated,

"In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, "(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;". The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged." [3]

The opinion of the court was also expressed in the earlier case of **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** where it was stated thus,

"The court considers that an employee on interdiction or suspension has a legitimate expectation

that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."[4]

It is the opinion of the court that the same enlightenment will apply to the period between the unlawful or unfair termination and the date the court makes the decision that the termination was unlawful or unfair.

In the current case, the claimant was unfairly and unlawfully dismissed effective 28.06.2007, being a total of 69 months as at the time of this judgment. The claimant's last gross pay was Ksh.40,599 per month and in view of the reinstatement, the court finds that the claimant is entitled to be paid **Ksh.2,801,331.**

In conclusion, judgment is entered for the claimant against the respondent for:

a) a declaration that the termination of the claimant was unlawful and illegal from the very beginning;

b) the claimant is reinstated in the employment of the respondent with effect from 29.06.2007 and to report for assignment of duties with effect from 1.04.2013;

c) the respondent to pay the claimant a sum of Ksh.2,801,331 plus interest at court rates from the date of this judgment till full payment being as a consequence of the reinstatement;

d) the respondent's director and Board members are severally and jointly responsible for implementation of this decision; and

e) the respondent to pay costs of the cause.

Signed, dated and **delivered** in courtat **Nakuru** this **Friday, 22nd March, 2013.**

BYRAM ONGAYA
JUDGE

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[1] Industrial Court Award in Cause No. 570N of 2009 at pg. 11 of the typed Award.

[2] Industrial Court Cause No. 562 of 2012 at Nairobi

[3] Industrial Court Cause No. 12 of 2012 at Nakuru at pg. 10-11

[4] Page 37 of court record of the Judgment, Industrial Cause No. 44 of 2011 at Nairobi