



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 39/2013

(formerly Nairobi No. 751/2011)

(Before Hon. Justice Hellen Wasilwa on 28th June, 2013)

JARED OMONDI OBER

JOHN OLUOCH ORINDACLAIMANTS

VERSUS

MUNICIPAL COUNCIL OF HOMABAYRESPONDENT

JUDGMENT

This is a claim by the claimants herein Jared Omondi Ober and John Oluoch Orinda against the respondents the secretary Homabay county. The claimants filed their claim in person on 17.5.2011. The respondents were finally served and they entered appearance and also filed their reply to the claim on 16.11.2011. However during the time set for hearing of this case, the respondents failed to appear and the matter proceeded in their absence. The issue in dispute is wrongful dismissal of the claimants by the respondents.

Facts of the case

The 1st claimant was employed by the respondents in 1993 as a Municipal Askari Scale 18 vide his appointment letter dated 24/8/1994 (APP JOO – 1(a)). He served in different capacities thereafter and between 1993 to 1997 he served as Mayor's Aid – de – Camp (ADC). He worked in several departments i.e enforcement on 7.1.2009 as per annex JOO – 2. He was however suspended without pay on 31.3.2009 as per annexure JOO 3 for reason of negligence of duty and failure to keep up his responsibilities of guarding the sewerage plant; insubordination by behaving in a manner insulting to his supervisor and further abscondment of duty on several occasions including 22 – 28th exposing the plant to risk of theft. He was asked to show cause why he should not be dismissed within 14 days. He was also asked to hand over all council property in his possession including fire – fighting tunic costing Kshs 10,000/=, Askari uniforms costing 2,000/= and boots costing 2,800/= within 48 hours failure of which the same was to be recovered from his March salary. It appears he did make some presentations and was given a hearing by the finance staff and general purposes meeting on 15.9.2009.

This committee reached a decision that he be summarily dismissed from council services with effect from the date of suspension on account of receiving three warnings on previous occasions, gross misconduct and abscondment from duty. The letter is dated 17.12.2009 App JOO – 4.

In respect of the 2nd claimant, his case is that he entered into the respondents employment in the year

2000 and was issued with a letter of employment on 16.1.2002 stating that his employment was with effect from 1.1.2002. He was deployed to enforcement section and later transferred to Town Hall to man the customer care desk on 15.5.2007 – JOL 1. On 7.1.2009 he was transferred to Education and Social Services Department as per Annex. JOL - 2 and assigned duties as contained in App JOL 3.

On 23.3.2009 he was served with a suspension letter Exh JOL 4. The letter indicated that he should show cause within 21 days, why he should not be dismissed from the respondent's employment on account of habitual absentism from duty without leave or lawful cause, willfully neglecting to perform his duties as assigned to him, using insulting language to his immediate supervisor, receiving council money amounting to 500/= to purchase white watch and failing to either purchase it or account for the money and exposing the council to financial loss by not carrying out their duties which led to damage to the stadium facility and careless dumping of waste by contractor.

During the period of suspension he was not entitled to payment of his salary. The 2nd claimant did respond to this notice to show cause letter. He made efforts to have the suspension lifted.

In both cases however, the suspensions were lifted with conditions that they write apology letters, that their emoluments during the period of suspension be without as provision of the Public Service Commission (Local Authority Officer) regulations 2007 Sec. 27 (a) and that they be demoted from Scale SS. 16 to SS. 18 as Labourers III and II respectively. This decision was communicated to them through App. 4(a) and 4(b) respectively.

The claimants did not seem to agree with the conditions set forth in these letters and so they came to court seeking orders declaring the actions of demoting them and suspending them without pay as illegal, null void. They also sought orders declaring that the period provided in law and CBA as maximum period of suspension lapsed and therefore any purported review of the suspensions after 3 months was illegal, null and void. They sought order compelling the respondents to unconditionally reinstate them to their original job group without loss of income, privileges and salaries. They also sought orders directing the salaries, allowances, leave amounts underpayments and any other dues due to them as from the date of suspension to the date of the order. They also want the court to order expunging of the warning suspension letters and dismissal letter from their records and personal files.

Having considered evidence of claimants the issues for determination are as follows:-

1. Whether the action of suspending the claimants without pay was justifiable.
2. How long should the claimants been on suspension and what is the maximum and what is the maximum period an employer in this category suspend an employee.
3. What prayers for reinstatement can be ordered at this stage.
4. If the claimants are entitled to any other remedies if at all.

In respect to the 1st issue the 1st and 2nd claimants were suspended without pay on 31/3/2009 and 23.3.2009 respectively. The letter suspending them indicated that while on suspension they would not be entitled to any payments. Under SS. 10 of Legal Notice No. 72, Public Service Commission (Local Authority Officers) Regulation 2007, the following matters are delegated to a local authority:-

a)” in respect of all local authority officers who have been assigned the salary Scale SS. 10 and below;

- i. the power of appointment including acting appointment, promotion and transfer.
- ii. The power to terminate the probationary appointment of any such public officer.

b) ---

c) In respect of local authority officers serving on written contracts or letters of temporary appointment, the powers to terminate, otherwise by dismissal, in accordance with the provision of a written contract or a letter of temporary appointment”.

The claimants being officers on Scale below SS.10 their issues were supposed to be handled by the respondents under Regulation 25(1) of the said Regulations, suspension of such an officer without pay is allowed where proceedings for dismissal have been taken if, as the result of these proceedings, it considers that the local authority officer ought to be dismissed.

The claimants have argued that the action of the respondents of suspending them without pay was null and void as their issues were supposed to be dealt with as provided in the CBA between The Association of Local Government Workers Union Clauses 14, 30, 32, 33 and 35. The CBA's contents was not brought to the attention of this court for consideration and therefore this court will be going on a fishing expedition if it was to guess the authenticity or otherwise of claimants allegation. He who alleges must prove but in this case, the claimants have failed to prove this assertion. I therefore find that the action of the respondents in suspending the claimants was within the Regulations cited herein and is therefore not unlawful or null and void.

On the 2nd issue, the period within which an officer should remain on suspension is not set. All that the regulation and rules of natural justice demand is that the officer should be accorded a right to be heard and within reasonable time and this was accorded to the claimants.

Under Regulation 26(1), one of the Regulation punishments that can be meted upon such an officer after the disciplinary proceedings is reduction in rank. This was one of the punishments that the respondents meted on claimants. The claimants declined to accept this punishment and now they seek to be reinstated. I do not find it prudent to order the claimants reinstated as prayed nor are they entitled to any of the remedies they sought to be paid their salaries during their suspension.

I find they have not established their case as demanded by law and I dismiss their case accordingly..

HELLEN WASILWA

JUDGE

28/06/2013

Appearances:-

Claimants both present

CC. Sammy Wamache.