



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 966 OF 2017

(Before Hon. Justice Ocharo Kebira on 24th February 2022)

CHARLES WANJEMA NJUGIA..... CLAIMANT

VERSUS

THE RAPHAELITES RESPONDENT

JUDGMENT

Parties pleadings and procedural history

1. Through a memorandum of claim dated 23rd May 2017, the Claimant sued the Respondent for the following reliefs:

- (i) *The sum of Kshs. 240,000 [Two hundred and forty] as particularized in paragraph 5 of the statement of claim.*
- (ii) *Costs of the suit.*
- (iii) *Interest on [i] and [ii] above.*
- (iv) *Certificate of service.*
- (v) *Any other relief as the court may deem just.*

The statement of claim was contemporaneously filed with the Claimant's witness statement and a list of documents dated 23rd May 2017 under which a letter of appointment dated 2nd May 2011, letter of termination dated 26th June 2014, confirmation letter dated 2nd October 2011, letter dated 5th November 2014 from B.M. Quandros Advocate, letter dated 8th December 2014 from Vusha Onsembe and Mamburi Advocates and a demand letter dated 14th March 2017 from Kituo cha Sheria.

2. In response to the Claimant's statement of claim, the Respondent filed a memorandum of reply dated 4th July 2017, denying the Claimant's claim and entitlement to the reliefs he sought in his stated statement of claim.

3. On the 11th September 2017, the Claimant filed a reply to the response to the statement of claim. He filed a more detailed witness statement on the 28th January 2019.

4. At the close of pleadings, the matter got destined for hearing *inter-partes* on merit. It got certified as ripe for hearing on the 20th March 2019. The matter came up for hearing on the 2nd November 2011, when the parties were heard on their respective cases.

5. At the close of the parties' respective cases, the court gave directions on filing of written submissions, directions which they have complied with.

The Claimant's case

6. It was the Claimant's case that through a letter of appointment dated the 2nd October 2011, the Respondent employed him as a counselor at a monthly gross salary of Kshs. 20,000.

7. He stated that he took up the position, diligently and with royalty served the Respondent until the 24th June 2014, when the Respondent

summarily dismissed him from his said employment.

8. The Claimant contended that prior to the summary dismissal, he was not given a chance to be heard. Further that the manner in which the summary dismissal was communicated was to say the least, traumatizing, undignified, irresponsible, shocking, careless, sudden and smacked ignorance and impunity.
9. The Respondent never invited him to any disciplinary hearing, prior to arriving at the decision to summarily dismiss him, contrary to the provisions of the Employment Act.
10. The Claimant further contended that the dismissal was out of *mal fides*, and ulterior motive. The Respondent wanted to create room to bring on board, another employee. The Respondent did not act honestly and in good faith.
11. The Respondent did not adhere to all that a fair termination process required of it, it did not consider any explanations from him before reaching the decision to summarily dismiss him from employment. He was not accorded the rights under section 41 of the Employment Act.
12. The Claimant contended that prior to the summary dismissal, he had been a higher performer who had immensely contributed to the growth of the Respondent. The Respondent never considered this fact.
13. He contended that the summary dismissal was without a valid reason, it was subjective and opaque, lacked transparency and accountability and therefore not in accord with the provisions of section 41 of the Employment Act.
14. The Claimant contended that he is entitled to reliefs *inter alia* a reinstatement with all consequential benefits including payment of basic salaries and in the alternative adequate compensation.
15. At the time of the dismissal, he had served the Respondent for 3 years, and his pay was Kshs. 2,000 per a month.
16. Cross examined by counsel for the Respondent, the Claimant stated that according to the letter of appointment, his appointment was to the position of a residential counsellor. That throughout, his designation never changed.
17. The Claimant stated that at no time did his designation change to a regular counsellor. He was not informed at any time that his duties had changed.
18. He testified that being a residential counsellor entailed that one had to live within the Respondent's premises. However, at some point, he was given permission to be operating from outside.
19. Asked whether he responded to the termination letter, the Claimant stated that it was not possible for him to respond to a thing that never occurred.
20. He contended that the allegation against him that he was giving banned substances to patients was never brought to his attention.
21. In his evidence in re-examination, he denied ever giving any patient banned substances.

The Respondent's case

22. The Respondent availed one Arlene Nduku to testify on its behalf. The witness presented herself as the CEO/Administrator of the Respondent organization. The witness asked the court to adopt her witness statement [amended] of 1st November 2021, as her evidence in chief. The Claimant did not object.
23. The witness stated that the Claimant was employed by a letter of appointment dated the 2nd October, 2011. That throughout his employment; the Claimant was in contravention of part 12 [ii] sub paragraph c, d, e, f and g of the letter of appointment and contract of employment.
24. The Claimant was summarily dismissed after receiving numerous verbal warnings over the course of his employment, all of which he ignored. This led to the summary dismissal.
25. The witness asserted that the due process contemplated in the Employment Act, 2007 was adhered to.
26. The witness alleged that the Claimant was given an opportunity to answer to the Respondent's claim that he had made available banned substances to the patients. He failed to satisfactorily answer to the claims. That the claims were made by the management and the clinical team. He was called to answer to them.
27. The Claimant was in gross violation of the terms and conditions of his employment. He put the lives of patients at great risk by making accessible banned substances rendering the progress of such patients worthless. He was supplying them with cigarettes.
28. The witness contended that due to the Claimant's unethical and unprofessional conduct, by his negligence and omissions while on duty, he caused a patient allocated to him as a primary counsellor to relapse immediately after discharge, constraining the guardians of the patient to admit him into another facility.

29. The Respondent rehabilitates drug addicts. It was everybody's duty to ensure that the premises were free of drugs, she stated.
30. She asserted that the Claimant was always informed of his misconducts and instances of insubordination which warnings he chose to ignore thereby posing a great risk to the lives of his patients and putting to risk the Respondent's operational ethos, duty of care to: NACADA: Ministry of Health, Kenya Dentists and Medical Board: NHIF, as well as the facility's licence and reputation.
31. The Claimant is not entitled to the reliefs sought, she contended.
32. The Claimant joined the Respondent as a residential counsellor, but due to his misconduct, the Respondent had to redesignate him to a regular counsellor.
33. The conduct of the Claimant warranted a summary dismissal, but the Respondent decided to pay him one month's salary, and gave him a certificate of service. At the instructions of the Claimant, the witness dropped the certificate at a pharmacy where the Claimant used to pick drugs from, for his picking.
34. Cross examined by counsel for the Claimant, the witness stated that she was not the supervisor of the Claimant. However, in her capacity she was directly working with him, as she was charged with overseeing whatever was being done on patients.
35. She stated that she severally warned the Claimant as the CEO and line manager. She however admitted that no warning letter was placed before court by the Respondent to demonstrate this. The warnings were verbal.
36. In her evidence under cross examination the witness stated that the Claimant facilitated cigarettes into the premises.
37. The witness contended that the Claimant appeared before a committee where he was accompanied by a colleague. However, there are no minutes to demonstrate this. The Claimant was given a right of appeal.
38. She stated that the Respondent organization did not have a manual detailing disciplinary procedure.
39. In her evidence in re-examination, the witness stated that the Respondent as a rehabilitation centre has its own rules aimed at ensuring that the patients are sufficiently rehabilitated.

The Claimant's submissions

40. Counsel for the Claimant addressed the court on two broad issues. The 1st one being whether the Claimant's employment was wrongfully and unfairly terminated, second, on the Claimant's entitlement under his claim.
41. It was submitted that the Claimant's evidence on how the termination occurred was not rebutted. The Respondent failed to accord the Claimant a hearing to establish the truthfulness of the allegations that were against him.
42. Citing the case of **Mary Matanu Mwendwa -vs- Ayuda [2013] eKLR**, counsel submitted that now there is firm jurisprudence, to the effect that the provisions of section 41 of the Employment Act are mandatory. An employer must hear the employee on any representation he has to make on the allegations facing him. He further submitted that in the case of **Kenya Union of Commercial Food and Allied Workers -vs- Meru North Farmers Sacco Limited [2013] eKLR**, the right to be accorded a hearing and an opportunity to be accompanied by a fellow employee or union representative during the hearing was pronounced a sacrosanct right.
43. On the reliefs, counsel submitted that the Claimant should be awarded a 12 [twelve] months' gross salary as compensation for wrongful and unfair termination, under section 49 of the Employment Act. Therefore, Kshs. 2,410,000.

The Respondent's submissions

44. It was submitted on behalf of the Respondent that at paragraph 12 [ii] of the letter of appointment it was provided that the Respondent would terminate the Claimant's employment without notice on any of the following events occurring:
- a) If he was guilty of serious and persistent misconduct.
 - b) The Claimant exhibits continuous and persistent neglect of duty.
 - c) The Claimant committed a breach of the provisions of the letter or any regulation of the Respondent.
 - d) Refused or failed to comply with any lawful order given by the Respondent.
 - e) The Claimant was guilty of any conduct tending to bring the Respondent into disrepute.
45. Counsel submitted that the events occurred. That the testimony of the Respondent's witness was clear, that the Respondent was a rehabilitation centre. Facilitation of cigarettes into its premises was prohibited. This notwithstanding, the Claimant put the lives of the Respondent's patients at risk by making accessible to them banned substances.

46. Counsel further submitted that the dismissal letter in part read:

“..... on several occasions you have been cautioned on your professional conduct with patients. Sadly, you have not heeded to any professional/correction/guidance that has been suggested to you by the management as well as the clinical team.”

47. That this is suggestive enough that the Claimant was called upon to answer to the Respondent’s claims of gross misconduct.

48. It was argued that the Claimant did not respond to the termination letter, thereby signaling that he was admitting the contents thereof.

49. Citing the case of **Pamela Nelima Lutta -vs- Mumias Sugar Co. Limited [2017] eKLR**, counsel submitted that it was duty upon the Claimant to prove that the reasons for his dismissal were not valid and that the dismissal was procedurally unfair.

50. It was argued that the Respondent managed to demonstrate that the reason for dismissal was valid. The Claimant provided a banned substance to patients and put the Respondent’s existence and obtaining licenses in jeopardy. The Claimant as a counselor had a duty of care to his patients as was set out in his letter of appointment. He breached the duty.

51. It was submitted further that the termination was procedurally sound. The termination letter is testament that the Claimant was called upon to explain himself before the clinical and management team.

Analysis and determination

52. From the material placed before me by the parties the following issues come up for determination.

- a) *How did the separation between the Claimant as an employee and the Respondent as the employer occur?*
- b) *Whether the summary dismissal of the Claimant from employment was procedurally fair.*
- c) *Whether the summary dismissal of the Claimant from his employment was substantively fair.*
- d) *What reliefs are available to the Claimant if any?*
- e) *Who should bear the costs of this matter?*

How did the separation occur?

53. From the Claimant’s pleadings and submissions, one gathers an impression that according to him, the separation came about as a result of poor performance. On the other hand, the Respondent took the position that the Claimant was summarily dismissed on account of a serious misconduct.

54. Section 44 [1] of the Employment Act stipulates when a summary dismissal shall be taken to have occurred, thus:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”

55. The letter of contract at its clause 2, provided for termination by notice as follows:

“The Raphaelites may terminate your employment by giving 7 days written notice or by paying you 7 days salary in lieu of notice as you are still under probation. You may terminate your employment by giving a written notice to the Raphaelites, or by paying to the Raphaelites 7 days salary in lieu of notice. In cases where payment in lieu of, notice is offered or requested then it is understood that this payment refers entirely to the basic salary content of the total remuneration at no account will the cash equivalent of any other privileges be paid.”

56. The contract does not provide for a post-probation period termination by notice. In absence of that, the provision of section 35 [1] of the Employment Act sets in. The contract of employment was one that was terminable by the notice contemplated under section 35 [1] [c], therefore, a twenty-eight days’ notice.

57. The employee-employer relationship that was between the parties herein was brought to an end through a letter dated 24th June 2014, the determination was to take effect immediately.

58. Consequently, it is not difficult to conclude that the separation occurred through a summary dismissal. There was no notice issued as contemplated under section 35 [1][c].

59. I do not agree with the Claimant that the separation occurred as a result of a termination on account of poor performance.

Was the summary dismissal procedurally fair?

60. There is now firm jurisprudence that section 41 of the Employment Act, 2007 provides for a statutory procedure that an employer intending to terminate an employee's employment or summarily dismiss an employee must adhere to. The procedure is mandatory. The section provides:

“1. Subject to section 42[1], an employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

[2]. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44[3] or [4] hear and consider any representations which the employee may on grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection [1], make.”

61. The Respondent's counsel submitted that the onus lies on an employee to prove that the termination or summary dismissal was procedurally fair. The contrary is true. Section 45 [2] [c] of the Act places upon the shoulders of the employer the burden of proving that the employment was terminated in accordance with fair procedures.

62. This court has stated before that where one asserts that a termination of an employee's contract of employment or summary dismissal of an employee was procedurally fair, it falls on the person asserting to prove presence of three components, the information component, the hearing component and the consideration component. The employee must be informed of the employer's intention to terminate his or her employment and the grounds forming basis of the contemplation, the employee must be given an opportunity to make a representation on the grounds in the manner contemplated under section 41 of the Act, and lastly before the employer makes a decision to terminate or summarily dismiss the employee, he/she must consider the employee's representation and or that of his fellow worker or union representative. The Court of Appeal decision in **Kenya Ports Authority -vs- Fadhili Juma Kisuwa [2017]**, is apt on the employer's duty.

63. The Respondent contended, and its counsel submitted that, the Claimant was invited for a disciplinary hearing, heard on the accusations that were levelled against him, and allowed to be accompanied by a colleague during the hearing. I find it difficult to accept that there were any disciplinary hearing or prior information to the Claimant of the accusations for the reasons here below.

64. The Respondent's witness clearly stated that there are no minutes to demonstrate that there was a disciplinary hearing and the happenings thereat, her evidence is silent on the date when the proceedings took place. The termination letter which would ordinarily refer to such a hearing and decision therefrom is silent too. The witness did not state how the Claimant was invited for the hearing, she just made a bald assertion that he was.

65. Counsel for the Respondent submitted that the termination letter dated 24th June 2014, will in its content help a discernment that the Claimant was invited for a hearing and heard while in company of a colleague. I see nothing in the letter that can form basis of such a discernment.

66. In the upshot, I am prepared to agree with the Claimant and I do that the summary dismissal was procedurally unfair.

Whether the summary dismissal was substantively fair.

67. Section 43 of the Employment Act places a burden upon an employer to prove the reason or reasons for termination, and that where the employer fails to do so, the termination shall be deemed unfair in terms of section 45.

68. The Respondent's witness in a bid to discharge this burden, provided the reason for the summary dismissal to court. The Claimant provided cigarettes, a banned substance, to patients. One would say that yes, a reason for the summary dismissal was given and therefore the burden under section 43 of the Act discharged.

69. However, there is a further burden under section 45 [2], which an employer must discharge before a termination can be found substantively fair, notwithstanding a discharge of the burden under section 43. The burden of proving that the termination was on an account of a valid and fair reason[s]. **Black's Law Dictionary, 12th edition** defines valid, thus:

“1. Legally sufficient; binding.

2. Meritorious [that is a valid conclusion based on the facts presented in this case].”

70. In order to determine whether the reason or reasons for summary dismissal was legally sufficient, one cannot afford to consider the provisions of section 44[3] and [4] of the Employment Act without weighing the same against the circumstances of the matter at hand.

71. Section 44[3] of the Act provides:

“Subject to provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.”

72. Section 44[4] provides for actions and inactions of an employee that may amount to gross misconduct so as to justify his/her summary dismissal. However, it is imperative to state that the list therein is not exhaustive.

73. The employment letter, in its clauses mentioned hereinabove, provided for events whose occurrence would attract the sanction of summary dismissal against the Claimant. True, the events considered against the catalogue provided for under section 44[4] of the Employment Act, would justify a summary dismissal.

74. However, as this court stated in the case of **Darius Kiseu Mwamburi -vs- Cooperative Bank of Kenya Limited, [2021] eLKR**, it is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44[4] of the Employment Act 2007, or its Human Resource Policy, or contract of employment as were in this matter. An employee's misconduct does not inherently justify a summary dismissal unless it is "so grave" that it intimates the employee's abandonment of the intention to remain in employment.

75. In **Laws -vs- London Chronicle Limited [1959] 2 ALL L.R. 285, the English Court of Appeal** stated:

"Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

76. Whether an employee's misconduct warrants dismissal requires assessment of its degree and surrounding circumstances, the contextual approach. In **Mckinley -vs- B.C. Tel** it was held:

"29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the content of the alleged insubordination. Within this analysis, a finding of misconduct does not by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist."

77. I have no doubt in my mind that had the Respondent went beyond citing that the Claimant violated the terms of the terms of the letter of employment and laid sufficient evidence before this court that indeed the Claimant misconducted himself in the manner alleged, I would find that the misconduct was one in the circumstances surrounding it, for instance the industry he was working in, the expectations of relevant Government agencies and the public of the Respondent in rendering the services it was, and the reputational implication that would be on the Respondent in the face of such misconduct, that would justifiably attract a summary dismissal.

78. One would expect some sort of record by the Respondent, for example warning letters, minutes where the conduct of the Claimant was discussed, specifics when the misconduct occurred, for instance on the allegation concerning the patient who relapsed. None was placed before this court. It is therefore difficult to state that the Claimant's account that he never misconducted himself as alleged or at all, was dislodged.

79. By reason of the above-stated premises, it is hereby concluded that the summary dismissal was substantively unfair.

The reliefs

80. Turning to the reliefs sought, the Claimant seeks for compensation pursuant to the provisions of section 49 of the Employment Act. Having found that the termination was unfair, I am inclined to award the compensatory relief contemplated under section 49 [1][c] of the Employment Act. I am cognizant of the fact that the grant of the same and the extent thereof are discretionary, dependent on the facts of each matter. Considering the Respondent's deviation from what the law expected of them in matters termination of an employee's employment, the profession of the Claimant, the fact that he did not contribute to the summary dismissal, and the length of time he was under the employment of the Respondent, I am of the view that an award of 6 [six] month's gross pay, therefore Kshs. 120,000 shall serve justice.

81. Entitlement to a certificate of service after an employee's termination is an unqualified right under section 51 of the Employment Act. The Respondent should issue the same in compliance with the provision.

82. In the upshot, Judgment is hereby entered for the Claimant in the following terms:

- a) **A declaration that the summary dismissal was substantively and procedurally unfair.**
- b) **Compensation pursuant to section 49[1][c] of the Employment Act, Kshs. 120,000.**
- c) **The Respondent to, within 14 days of this Judgment issue a certificate of service to the Claimant.**
- d) **Interest on [b] above, from the date of filing this suit, till full payment.**
- e) **Costs of this claim shall be in his favour.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF:

MS MAINA FOR THE RESPONDENT.

MR KUYO FOR THE CLAIMANT.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE