



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 129 OF 2009

DR. ELIAS ONDITI.....APPELLANT

VERSUS

MOI TEACHING AND

REFERRAL HOSPITAL BOARD.....RESPONDENT

(Appeal against the judgment and decree by Hon. W. N. Njage (SPM) in Eldoret CMCC No. 39 of 2005 delivered on 30th April, 2009)

JUDGEMENT

1. The appellant sued the respondent seeking the following orders:

a) An order of declaration that the Notice dated 6th December, 2004 was issued in violation of clause 6 (b) of Legal Notice No. 78 of 12th June, 1998 and in violation of the rules of natural justice and is therefore null and void.

b) An injunction to restrain the respondent from obstructing the appellant from carrying out his duties as lecturer Moi University at the Moi Teaching and Referral Hospital.

2. It was the appellant's case that he was at all times material to the suit a senior lecturer at the Faculty of Health Sciences, Moi University pursuant to an appointment made on 30th January, 1990. That by reason of Clause No. 5 Legal Notice 78 of 12th June, 1998, the Moi Teaching and Referral Hospital was set up to be managed by the respondent's Corporation Board. That by Clause 6 of the Legal Notice, the Hospital was formally created for purposes among others to provide facilities for medical education for Moi University and for research either directly or through other co-operation health institutions. That in furtherance of Clause 6, he was required by Moi University to conduct his teaching and research duties both within and without the Eldoret District Hospital, its successor, Moi Teaching and Referral Hospital and Moi University. That in addition to his teaching and research work, he was allowed by Moi University to offer, on honorary basis, clinical duties to Eldoret District Hospital later succeeded by Moi Teaching and Referral Hospital. He contended in view of the foregoing that he has never been an employee of the Moi Teaching and Referral Hospital managed by the respondent Corporation and that the respondent has not offered him any appointment under any terms as is contemplated by Clause 4 of Legal Notice No. 78 of 12th June, 1998. He alleged that on or about 6th December, 2004, the Director of the respondent corporation purported to issue a notice barring him from carrying out his duties at the Moi Teaching and Referral Hospital which will necessarily include the duty by the appellant to offer service to Moi University by conducting teaching and research programmes. He claimed that the notice is invalid, actuated by ill will and in violation of Clause 6 (b) of Legal Notice No. 78 of 12th June, 1998 which obliges the respondent corporation to avail the Moi Teaching and Referral Hospital as a teaching facility for Moi University. That the respondent not being his employer cannot purport to bar him from discharging his teaching and research duties at Moi Teaching and Referral Hospital while he remains a lecturer at the Faculty of Health Sciences, Moi University as this will not only inhibit him in discharging his duties but also infringe on Clause 6 (b) of Legal Notice No. 78 of 12th June, 1998. The appellant stated that he was answerable to Dr. Onchagwa who had stated that he was not aware of any misgivings on the appellant's part upon receiving an internal memo from the Director of the respondent complaining about him. He averred that the respondent issued the said notice arbitrarily and without affording him the opportunity to be heard or referring the matter to Moi University which is his employer hence the purported order is in contravention of the rules of natural justice.

3. In its statement of defence the respondent essentially denied the appellants claim. However the respondent admitted that the appellant was not its employee but that pursuant to the tacit understanding entered into by the respondent and the appellant's employer, the appellant was under obligation to offer other clinical services to the respondent thereby creating a contractual relationship. The respondent claimed that the notice was issued for the reason that the appellant abdicated his duties to the respondent, was in breach of the tacit agreement between the appellant's employer and the respondent, was misusing the respondent's facility and was acting in contravention of the Hippocratic oath. Dr. Omar Ali (DW1) who is the Deputy Director of the respondent gave evidence to the effect that doctors are bound by the Hippocratic oath and are therefore under duty to carry out clinical services. He stated that the said service was paid for thus, clinical allowance of \$ 800 per annum. He stated that the appellant was appointed as a honorary consultant because he was not on the respondent's payroll but that he was under duty to perform clinical services. He stated that Legal Notice No. 78 of 1998 mandates the respondent to carry out obligations to the

public therefore a doctor who fails to carry out clinical services goes against the object of the respondent and the Director or the Assistant Director of respondent would take disciplinary action against such a doctor. He stated that the appellant was not attending to his duties in the X-Ray Department. Dr. Silvester Kimaiyo (DW2) who was employed by Moi University in the year 1995 stated that he reported to the doctor roll of medicine and was assigned the duties to teach as well as treat patients. That he was a consultant physician for Moi Teaching and Referral Hospital and carries out teaching and research at the University. He stated that there is a daily duty roster for the department of medicine and that the doctors were under duty to offer clinical duties.

4. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion considering the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at pg. 429**). I have re-evaluated the evidence tendered and considered the submissions. The following issues fall for determination:

a) Whether or not the appellant abandoned his duties and misused the facility.

b) Whether or not respondent had disciplinary authority over the appellant, if this is answered in the affirmative whether or not the rules of natural justice was observed.

5. It is an uncontroverted fact that the respondent is not the appellant's employer and I shall therefore not delve into that issue. The letter dated 14th June, 1990 whose reference is Attachment of medical specialists from Faculty of Health Science Moi University to the District Hospital directed to the Medical Superintendent is clear to the fact that in addition to his teaching duties, he was also required to carry out clinical duties. It is with this letter that the appellant's employer sought for the Medical Superintendent's appointment of the appellant as a honorary consultant. It is therefore clear from the wordings of this letter that the appellant was under duty to offer clinical services within the terms set by the respondent. The appellant denied having abandoned his aforesaid duties. Dr. Omar J. Ali in his statement stated that the appellant absconded his duties and that the minutes exhibited in the case proved the same. Three minutes were exhibited by the respondent. The minutes for the meeting held on 18th March, 2004 in which the appellant was absent with apology and a duty roster for the radiologists was agreed upon, for 17th June, 2004 in which the appellant promised that he shall be seen much in the department and for 18th July, 2004 in which a Dr. Rytchko's duty was discussed among other issues. It is clear to me that the appellant was discussed in one minute only. In the circumstances on the issue of absconding duty, it is the appellant's word against Dr. Ali's. I note that it emerged from the appellant's evidence that the respondent's Director issued a memo complaining about his performance and that in response thereto Dr. Onchagwa whom he stated is the one he was answerable to as the head of radiology responded to the memo that he did not know of any misgivings on the part of the appellant. This fact was not rebutted by the respondent. The respondent failed to call Dr. Onchangwa as a witness to clarify the issue. Further, there was no indication from the respondent whether or not the said doctor was still in service. In the circumstances, an adverse inference is drawn against the respondent and find that the appellant did not abscond his duties. In this regard see **Kenya Akiba Micro Financing Limited v. Ezekiel Chebii & 4 others [2012] e KLR** where it was held:

“Section 112 of the Evidence Act Chapter 80 of the Laws of Kenya provides:

In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him...where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.”

6. On the second issue, Clause 5 (3) (c) of Legal Notice 78 of 12th June, 1998 provide that the powers and functions of the board are among others to promote the general welfare of the patients, trainees and the hospital. It is my considered view that the promotion of patients' welfare include ensuring that they received proper treatment to wit clinical duties. In the event that a doctor absconds the same, then the respondent's Director in his/her capacity as the respondent's administrator has the mandate to take disciplinary actions against such a doctor. The respondent herein however did not demonstrate that it accorded the appellant a hearing before taking disciplinary actions against him thereby breached the rule of natural justice. In the circumstances, this appeal has merit. The trial court's judgment is hereby set aside and this court makes orders that:

a) The Notice dated 6th December, 2004 was in violation of the rules of natural justice and is therefore null and void.

b) The Respondent is restrained from obstructing the Appellant from carrying his duties as a Lecturer of Moi University at the Moi Teaching and Referral Hospital.

c) The Appellant is awarded costs of the appeal and in the lower court.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 28TH day of November, 2018.

O. SEWE

JUDGE