



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 129 of 2007

P.C.E.A. CHOGORIA HOSPITAL APPELLANT

VERSUS

ELIZABETH KIRIINYA RESPONDENT

(From the judgment of the Hon. M.S.G. Khadambi S.R.M. Meru in CMCC No. 180 of 2004 delivered on 11th February 2009)

JUDGMENT

The respondent who was the plaintiff in CMCC number 180 of 2004 was employed by the appellant who was the defendant in the lower court. She was employed as a deputy matron by the date when her employment was terminated, that is, in February 2004. She had been employed by the appellant from 1989. The respondent's claim in the lower court was that the appellant "*illegally unjustifiably and with no apparent cause or reason terminated*" her services. The respondent alleged that she was not accorded a chance to be heard before her employment was terminated. She further claimed that the appellant had breached the terms of her contract of employment by failing to give her notice or to pay her in lieu of notice before the said termination. The respondent prayed for damages totaling Kshs. 703,780/= in the amended plaint. At this initial stage, I wish to comment on the amended plaint on record. The respondent failed to make payment which was due for that amended plaint. The lower court on 25th January 2006 granted leave to the respondent to amend her plaint and in so doing, the court ordered that the amended plaint annexed to the application for leave to amend be deemed as duly filed. The respondent, in my view, should have there after paid the requisite fee to the court for that amended plaint.

Failure to pay the court fee would lead the court not to act on the amended plaint. Section 71 of the Interpretation and General Provisions Act Cap 2 so says. It is in the following terms:-

“71. (1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.”

The amended plaint for the above reason is not properly before court and indeed was not properly before the lower court and the said court should not have entertained it. For that reason, as I consider this appeal, I will restrict myself to the original plaint. Going back to the respondent's case, it should be noted that the appellant denied her claim in the lower court. The appellant mainly stated in its defence that the respondent's employment was properly terminated. That her employment was terminated on the grounds of insubordination, misconduct, and acts that were irreconcilable with the dignity of her office. Further, the appellant, in its defence stated that the respondent was accorded a chance and an opportunity to defend herself. The evidence that was adduced in court on behalf of the respondent was by the respondent herself. She stated in evidence that at the time of giving evidence she was employed as a lecturer Kenya Methodist University (K.E.M.U.). That in 1989 she was employed at Aga Khan Hospital. In that year, she left that employment and joined the appellant as a nurse. She worked in that position for 6 months and was then promoted to the position of deputy matron for 2 years. The appellant had sent her to Scotland to do an advanced nursing and masters in public health course. In 1993 she was appointed the nursing officer in charge of Chogoria Hospital. She said that on 11th February 2004 she received a letter from the appellant terminating her services with effect from 16th February 2004. It is necessary to reproduce that letter in this judgment.

“February 11, 2004

E. Kiriinya, NOiC

PCEA Chogoria Hospital

Dear Mrs Kiriinya

RE: BUSINESS COMMITTEE REPORT

At its meeting on February 7, 2004, the Hospital Management Committee spent considerable time examining the Business Committee Report delivered to this hospital on November 6, 2003.

As a result, the Hospital Management Committee has decided to terminate your services with this hospital with effect from Monday, February 16, 2004.

Please hand over your office to the Deputy Matron.

Yours faithfully,

J.D. Potts, M.D.

Medical Officer-in-charge

The respondent stated that she was not present at the committee meeting that deliberated the allegations against her. However, later on, on being cross examined, she did accept that she was present in that meeting but stated that she had walked into the meeting towards the end of it. The respondent said that she had a contract with the appellant which was renewable after 3 years. This contract, she said, was dated on 1st January 1999. That although it was for 3 years period, it was renewable. This contract is at the heart of this appeal and for better understanding of this judgment, it is also necessary to reproduce it.

“AGREEMENT

AGREEMENT made the 1st day of January 1999 between the P.C.E.A. Chogoria Hospital (hereinafter called “the hospital”) of the one part and P.C.E.A. Chogoria Hospital (hereinafter called “the person engaged)” (sic) of the other part.

1. The person engaged agrees that he/she will diligently and faithfully perform the duties of N/O I/C for the term of his/her engagement and will act in all respects according to the instructions or directions given to him by the hospital through the Medical Officer in charge or other duly authorized officers. In the agreement the time being in charge of the hospital and includes any person for the time being acting as the Medical Officer in charge.

2. Subject to the provisions of clause 4 of the schedule hereto, the salary of the person engaged, which shall be payable monthly in arrears, shall be as follows:-

First 1st year pounds (K\$ 19,128) a year

Second year pounds (K\$ 19,692) a year

Third 3rd year pounds (K\$ 20,252) a year

Provided that his/her progress will be conditional upon the fulfillment by him of such conditions as may from time be in force for holders of similar posts in the hospital.

3. This agreement is subject to the conditions set forth in the schedule hereto appeared and other regulations in force from time to time applicable to the staff of the hospital which shall be read and construed as part of this agreement.”

The respondent did not exhibit the schedule to that agreement.

At her dismissal, the respondent said she was receiving a salary of Kshs. 53,050/= per month. She produced in evidence her payslips. She also stated that because of added duties that the appellant required her to undertake, she was paid an additional amount of Kshs. 5,000/=. In this respect, she referred to the letter dated 24th April, 2001. That letter is in the following terms:-

Mrs. Elizabeth Kiriinya

Nursing Officer in charge

CHOGORIA

Dear Mrs. Kiriinya

I am writing to inform you that the HMC sitting on 22nd March 2001 resolved to add you Kshs. 5,000 on top of your salary due to the added work and responsibilities since the departure of the MOIC in August 1999.

By a copy of this letter the salary supervisor is instructed to adjust your pay records with effect from 1st April, 2001.”

The respondent continued to state that at the time of termination, she was entitled to be given 3 months notice before termination of her employment. In this regard, I make reference to the contract of employment reproduced here before which clearly does not show that she was entitled to 3 months notice or salary in due of notice before termination. The respondent continued to state in evidence that the 3 months salary she was entitled to was Kshs. 159,150/=. She further said that she was entitled to gratuity calculated for 29 months. This, she said works out as Kshs. 307690/=. Further, that the appellant should have paid her an allowance for uniform for January 2003 which she did not receive. Her uniform allowance was Kshs. 1,800/=. She further stated that the appellant failed to pay her her increments for the months of June, August, November and December 2002 at the rate of Kshs. 1,055/= per month. The

respondent ought under this head of claim to have specifically proved the same. The respondent only produced payslips for June 2002 but failed to produce the ones for August, November and December 2002. I indeed note that the basic pay for April and May 2002 was Kshs. 41,855/=. The basic pay in the month of June 2002 is reflected as Kshs. 40,800/=. The difference for the month of June as compared to April and May was Kshs. 1,055/=. There being no payslip for the months of August, November and December 2002, the court cannot confirm that there was any difference in the pay that the respondent received for those months. It may well be that the respondent failed to produce those pay slips because she was paid the correct salary. The court will never know. I do however find that the respondent was entitled to Kshs. 1,055/= for the difference in the month of June 2002. The respondent continued in her evidence to state that she did not receive Kshs. 5,000/= for the months of June 2002 to February 2004 which she calculated to be 30½ months. For that she was claiming the total of Kshs. 152, 500/=. The respondent's claim over this head is based on the letter dated 20th April 2001. That letter has already been reproduced in this judgment above. Firstly, it should be noted that the respondent produced payslips of June 2002, February, March, October and November 2003 and January 2004. In all those payslips, there is an amount reflected of Kshs. 5,000/=. This is stated to be administrative allowance. The respondent did not produce all the payslips covering the 30 and ½ months she was claiming. It however should be noted that according to my calculation that June 2002 to February 2004 has 20 months and not 30 and ½ months as claimed. I am in agreement with the submissions made by the appellant's counsel when he stated that the respondent should have produced payslips before 1st April 2001 when the increment was allegedly effected so that the court could have compared that payslip with the subsequent payslips to confirm the increment made. The respondent in her further evidence stated that she was entitled to 30 days' leave pay. She stated that she has not taken that leave which she calculated to be Kshs. 24,315/=. Defence exhibit number 3 which is the respondent's leave application form shows that the respondent had nine days brought forward from the year 2003 to the year 2004. The respondent took those 9 days leave that is, from 19th January to 29th January 2004. The only leave therefore that was due to the respondent as at 16th February 2004 when her employment was terminated were 30 days leave divided by 12 months which comes to 2.5 days, times 1½ months which is equal to 3.75 days. That according to me, shows that the respondent was entitled to 4 days leave by the time her employment was terminated. The 4 days on the basis of the basic salary of Kshs. 53,050/= makes the amount payable for leave not taken to be Kshs. 7,073.33/=. This amount in my view was an entitlement due to the respondent as of right whether or not her termination was lawful or otherwise. In further evidence, the respondent stated that her letter of termination should have been written by the hospital health board and not by the management committee. Further, she stated that had she been guilty of gross misconduct the medical officer in charge should have asked her about the same. Thereafter, she would have been called by the management committee whose recommendations would have been forwarded to the hospital health board. This procedure she said, was not followed in her case. She ended her evidence in chief by saying that she had suffered damages as a result of the said termination of her employment because it occurred when her children were in school. She said that she suffered both mentally, physically and emotionally and had to fall back on her sisters who assisted her to educate her children. She said that she was unable to get another job because the appellant works in collaboration with other institutions. She however was employed by K.E.M.U after she explained circumstances of her termination with the appellant. On being cross examined, the respondent reiterated that her contract was the one dated 1st January 1999. She did acknowledge that another contract had been drawn by the appellant in January 2002 which she did not sign. The minutes of the management committee were put to her and she denied the allegations made against her in those minutes. On being further cross examined she said:-

“I did not have any personal grudge or differences with any of the people in the management committee.”

She denied in cross examination that she arbitrarily used to increase her own salary. She was cross examined on the issue of gratuity that she had claimed and in her response she said that it was calculated

at 20% of her salary. I have examined those payslips that were produced by the respondent and none of them reflect the gratuity the respondent claimed. Indeed, there is no documentary evidence to support the respondent's claim. On being re-examined by her counsel, in respect of whether or not she attended the management committee meeting, she stated that she walked into the meeting when the closing prayer was being made. The appellant called one of its employees as a witness. She confirmed in evidence that the respondent was a matron at the time of the termination of her employment. This witness referred to the minutes of the executive committee meeting which deliberated on the allegations against the respondent. The witness said that it was this committee that recommended the termination of the respondent's employment. That recommendation was passed on to the business committee. The minutes of the committee meeting were produced in evidence. And again for clarity, it is important to reproduce part of management committee meeting minutes that are pertinent to this court.

“.....the following individuals were implicated as being involved in a sabotage to cause problems in Chogoria Hospital:-

- Ø Former administrator – Mr. Festus Nkonge***
- Ø The Hospital Matron – Mrs. Elizabeth Kiriinya***
- Ø Rev. Elias Kabii who was mentioned had been questioned earlier.***

The committee questioned the matron on specific issue like:-

- 1) Misleading and contradicting HAT eg. On housing***
- 2) Misleading accounts clerks on her salaries and allowances***
- 3) Advising the striking anaesthetist to disobey HAT***
- 4) Withholding the contract forms from the year 2001 to November 2003.***
- 5) Misleading workers to ask for higher salaries and allowances while as HAT member she knows there was no money due to financial problems.***
- 6) Past salary increments that have caused financial constraints to the hospital.***
- 7) Relationship with Mr. Nkonge to disrupt the running of the hospital.***
- 8) Leaking HAT issues to the staff.***
- 9) Ordering kettles contrary to HAT arrangement.***

The matron respondent to some of the above questions. She denied contradicting HAT. About the salary increments and her own allowances she was aware that something was wrong. On relationship with Mr. Nkonge she said he is avoiding her now because of sabotage. She said she had misplaced her contract papers. On kettles, she said the administrator refused to sign order and she was annoyed. The matron also denied leaking information to staff. She denied most of the accusations.

The committee made it clear that most of the evidence on the above accusations was with the Business Committee and its Business Committee that wanted her response.”

The witness for the appellant continued by stating that the appellant did not owe the respondent any money. She further stated that the respondent was not entitled to payment in lieu of notice because she had been summarily dismissed. This witness further stated that at the time of her termination the respondent was indebted to the appellant as salary advance to the tune of Kshs. 30,000/=. The witness produced the respondent's request for her salary advance of Kshs. 60,000/= which was to be recovered in the months of January and February 2004. It is for that reason that the witness stated that no payment was due to the respondent in the month of February 2004. It should be noted, as clearly stated in the lower court's judgment that the appellant did not file a counter claim for amount allegedly owed by the respondent. Further, the witness said that the respondent was not entitled to gratuity because she had not signed the contract which would have entitled her to the same. On uniform allowance, the witness said it was paid at any time in the year and not necessarily in January. The witness also denied that the respondent was owed any increment which was not reflected in her payslip. On being cross examined, this witness stated that the respondent was present at the management committee meeting because her name was reflected in the minutes. The lower court in its judgment gave the respondent judgment for Kshs. 659,480/=. In the learned magistrate considered judgment in part stated:-

“..... The next issue to be resolved is whether or not the termination was lawful. The defendant (appellant) sought to rely on the minutes of 7th January 2004 but did not call any of the parties who were purportedly present in view of the plaintiff's insistence that she arrived after the meeting, and she never noted any deliberations. The gist of her claim is that she was never given any hearing, and she never got to know what mistake there was alleged against her.”

The said judgment provoked this present appeal. The appellant has brought 8 grounds of appeal reproduced hereof:-

- 1. The learned magistrate erred in law and fact in finding that the employment contract entered into between the appellant and the respondent on 1st January, 1999 had been renewed on expiry and the terms thereof were binding on the appellant.***
- 2. The learned magistrate erred in law and fact in finding that the appellant was obliged to give the respondent notice of three months or pay salary therefore before terminating her services.***
- 3. The learned magistrate erred in failing to find that the respondent's employment by the appellant was governed by the Employment Act and could be duly terminated under the provisions thereof.***
- 4. The learned magistrate erred in law and fact in failing to find that the respondent's employment was summarily terminated by the appellant and the dismissal was not wrongful.***

5. *The learned magistrate erred in replying on the provisions of the Employment Act relating to termination of employment notwithstanding her findings regarding the existence of a contract of employment.*

6. *The learned magistrate erred in law and fact in finding that the respondent was entitled to damages.*

7. *The learned magistrate erred in finding that the respondent had proved her case to the required standards.*

8. *The learned magistrate erred in finding that the respondent was entitled to various benefits set out in the amended plaint.*

I will consider all the grounds together. I however wish to begin by noting that the respondent's claim was essentially for special damages. The Court of Appeal in the case of **David Gavine Vrs Martin Bundi** Civil Appeal No. 283 of 1996 on the claim for special damages had this to say:-

“It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this court in the case of Mariam Maghema Ali Vs. Jackson M. Nyambu T/A Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Shabani Vs. City Council of Nairobi (1982 – 88) IKAR 681 “..... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter Vs. Hyde Park Hotel Ltd [1948] 64 TLT 177 thus “plaintiffs must understand that if they bring actions for damages it is for them to prove damages, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages’. They have to prove it.”

That indeed by and large is what the respondent did in her claim. She just threw the claim to the court without providing documentary evidence to her claim. The respondent claimed she was entitled to 3 months salary in lieu of notice but failed to prove that claim with documentary evidence. I have taken note of the authority cited by the respondent, that is, the case Nrb CA 314 of 2001 **Barclays Bank of Kenya Ltd Vs. Joseph Mwaura Njau**

“.....We do not understand that provision to mean that in all cases where no period of notice is provided, the courts must deem it that the period of notice must be one month. Such an interpretation would be unnecessarily restrictive and might well encourage employers not to provide for any period of notice in employment contracts so that irrespective of the circumstances surrounding any employee, the period of notice would and must be one month. Such an argument has never been raised in any of the previously decided cases and we would go along with decided cases which give the court a discretion to decide what the reasonable period of notice

ought to be in a particular case where such period is not provided for in the contract of employment between an employer and employee.”

In this case, the respondent did not prove that the contractual notice period was 3 months. In considering what ought to have been a reasonable period for the purposes of compensating the respondent, if I was to find her dismissal to be unfair, I would have awarded the respondent one month's salary in lieu of notice. Of course in making such an award I would have excluded the taxes that were payable on her salary. The reason why I would have merely awarded the respondent one month's salary is because she stated in evidence that when her employment with the appellant ended she got a job as a lecturer with K.E.M.U. Although in evidence she said after termination of her employment with the appellant she suffered and her children were educated by her sister, she failed to prove it with any document and she also failed to state the period of her unemployment. The impression one gets from her evidence is that she did not wait long before getting the job at K.E.M.U. In my view, she would therefore only have been entitled to one month's salary in lieu of notice. I am not in agreement with the learned magistrate's finding that the respondent contract after the 3 year period continued subsist. Evidence before the lower court show that there was another contract which the respondent refused to sign. That is a clear indication that the parties, that is, the appellant and the respondent knew that the initial contract of employment had ended after 3 years. The lower court in my view was not therefore entitled to assume that the initial contract continued to operate after the 3 years period. The appellant does in my view succeed on grounds 1, 2 and 3 of appeal. There being no subsistent contract between the appellant and the respondent, the operative instrument to govern their relationship was the Employment Act. The respondent claimed that her employment was unlawful because the appellant failed to give her opportunity to be heard before the termination of her employment. In her evidence in chief, the respondent stated she did not attend the management committee meeting. It was only later on being cross examined she accepted that she had attended but entered into the meeting when it was ending. That however was not supported by the minutes that were produced before court. The learned magistrate faulted the appellant's failure to have the minutes produced by a member of that committee. In my view, there was no objection raised by the respondent in the production of those minutes. That being so, they being before court show that the respondent attended the meeting. At that meeting, the allegations against her were put to her and she made specific response to the same. She did not deny making those responses. It ought to be recalled that the respondent had clearly stated that there was no grudge between her and the committee members. If that was so, there would be no reason for the committee members to fabricate those minutes. The minutes show that the committee was not satisfied with the responses made by the respondent. The allegations that were made against the respondent were serious and touched on her position at the appellant's employment. At that hospital of the appellant, she was the matron. The reason for the termination of the respondent's employment in my view was sufficient and the appellant was justified to summarily dismiss the respondent. The allegations against the respondent went to the core of her duties. Section 17 of the Employment Act Cap 226 which was applicable at the time, although that Act is now repealed, does not tabulate the conclusive grounds upon which an employee would be summarily dismissed. The close reading of that section reveals otherwise. I reproduce part of that section as follows:-

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not be precluded an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this Section, constitute justifiable or lawful grounds for the dismissal.” (Underlining mine)

Grounds number 4 and 5 of appeal must succeed. The only damages the respondent is entitled to was as provided in the agreement. This was clearly stated in the case **Barclays Bank of Kenya Ltd Vs. Joseph**

Mwaura Njau (supra) where the court stated:-

“Where the contract of employment embodies a notice period, then damages to a person dismissed unlawfully is to be worked out on the basis of the notice period. Where no such period is provided for in the contract of employment, as is the position in this appeal, then a reasonable period of notice is to be implied.”

If I had found that the dismissal of the respondent was unjustifiable and unlawful as stated before, I would have awarded the respondent one month's salary in lieu of notice since there was no contract produced to provide any other period of notice. I do not however in this judgment find that her dismissal was unjustifiable. The respondent in my view was entitled to an award of Kshs. 1,055/= which was due to miscalculation of her salary for the month of June 2003 and Kshs. 7,073.33/= representing her pay for leave due to her. The other claims that were entertained by the lower court, that is, uniform and gratuity ought to have been specifically proved by the appellant. There was no such proof and therefore grounds number 6, 7 and 8 of appeal do succeed. I cannot end this judgment without noting that the respondent did not pay the extra filing fees for the judgment entered in her favour by the lower court when the decree was drawn. Other than making that mention, I will not go further on that issue. In the end, the judgment of this court is as follows:-

- 1. The judgment in CMCC Meru number 180 of 2004 delivered on 6th December 2007 is hereby set aside and is substituted with judgment for the respondent for Kshs. 7,073 + 1,055 = 8,128/=.***

- 2. The respondent is awarded ¼ costs for the lower court case.***

- 3. The appellant is awarded ¾ costs in this appeal.***

Dated and delivered at Meru this 26th November 2009.

MARY KASANGO

JUDGE