



**Kisilu v Care Hospital Limited (Cause E058 of 2022)
[2024] KEELRC 957 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 957 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E058 OF 2022**

BOM MANANI, J

MAY 2, 2024

BETWEEN

SERAH KISILU CLAIMANT

AND

CARE HOSPITAL LIMITED RESPONDENT

JUDGMENT

1. According to the evidence on record, the Respondent engaged the services of the Claimant as a Pharmaceutical Technologist until 12th October 2021 when the contract between the two came to a close. Whilst the Claimant contends that her contract of service was terminated for no cause and without regard for due process, the Respondent avers that the employment relation between the two was terminated due to poor performance by the Claimant and only after she had been afforded a hearing.
2. According to the Claimant, the Respondent first engaged her services as a Pharmaceutical Technologist in November 2014. She was subsequently tasked to serve as the Respondent’s Pharmacy Manager.
3. The Claimant avers that in July 2021, she applied to attend an annual conference in her area of specialization in Mombasa which application was approved by the Respondent. However, the Respondent’s officials purported to rescind the approval after she had already incurred expenditure towards the event.
4. The Claimant contends that immediately after the conference, she resumed duty on 21st September 2021 but requested to be off duty for some time as she was not feeling well owing to her pregnancy condition. She avers that the Respondent’s doctor gave her bed rest for two weeks from 27th September 2021.
5. She avers that on 1st October 2021, she was summoned by the Respondent’s Human Resource Manager to pick a letter from the office. Since she was still on bed rest, she says that she requested that



- the letter be sent to her through email. However, the Respondent's management allegedly refused to accede to her request.
6. The Claimant avers that when she resumed duty on 12th October 2021, she was handed a letter terminating her services. She contends that this development caused her shock which led to loss of her pregnancy on 31st October 2021 through a miscarriage.
 7. It is her case that the decision to terminate her services was wrongful. She states that she was not served with notice to show cause in respect of the accusations against her. Neither was she issued with a formal invite for the disciplinary session that was held on 29th September 2021. In effect, it is her case that she was denied a fair disciplinary process before her contract was terminated.
 8. Conversely, the Respondent contends that the Claimant's work ethos were generally wanting. As a result, she was allegedly issued with several warning letters.
 9. The Respondent accuses the Claimant of a plethora of wrongdoings which include: procuring pharmaceutical products without the approval of its (the Respondent's) Therapeutic Committee; failure to procure cheaper pharmaceutical products in the market; failure to prevent pilferage from the pharmacy; failure to facilitate efficient service delivery to patients seeking the services of the Pharmacy; and poor temperament.
 10. The Respondent contends that it issued the Claimant with a letter dated 22nd September 2021 inviting her for a disciplinary hearing on 29th September 2021. The said invite allegedly notified the Claimant about the reason for the meeting and the infractions that she was accused of.
 11. The Respondent avers that the Claimant attended the session of 29th September 2021 at which she was accorded an opportunity to be heard. Thereafter, she was issued with a letter dated 12th October 2021 terminating her services. The Respondent has produced minutes for the session.
 12. On her part, the Claimant denies that she was issued with the letter dated 22nd September 2021. She contends that she only learned of the meeting scheduled for 29th September 2021 through a text message that was sent to her by the Respondent's Human Resource Manager on 28th September 2021 after 3.00 pm.
 13. She further denies that she was notified beforehand that the session of 29th September 2021 was meant to be a disciplinary hearing. She asserts that the reality that the session was a disciplinary meeting only dawned on her when it (the session) began around 4.00 pm on the material day.
 14. To support her aforesaid assertions, the Claimant produced copies of text messages between her and the Respondent's Human Resource Manager dated 28th September 2021. In the texts, the Respondent's Human Resource Manager was inviting the Claimant for a meeting scheduled for 29th September 2021 at 10.00 am.
 15. It's the Claimant's case that it would not have made sense for the Respondent's Human Resource Manager to send her a text message on 28th September 2021 inviting her for a meeting the following day at 10.00 am if it is true that the Respondent had already notified her of a disciplinary session scheduled for the same day (29th September 2021). According to her, the events of 28th September 2021 fortify her contention that the letter of 22nd September 2021 was not sent to her and that the text message from the Respondent's Human Resource Manager on that day (28th September 2021) was the one which was used to secure her attendance of the meeting of 29th September 2021 which was disguised as a work meeting only for it to turn out as a disciplinary meeting.



Issues for Determination

16. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues that fall for determination in the cause:-
 - a. Whether the Claimant's contract of service was unfairly terminated.
 - b. Whether the Claimant is entitled to the reliefs that she seeks through her Statement of Claim.

Analysis

17. Undoubtedly, the Claimant's performance at the workplace had become a matter of great concern for the Respondent. There is evidence that the Respondent had issued her with several warning letters which raised various work related issues. These include the letters dated 28th July 2020, 27th May 2021 and 3rd September 2021.
18. The letters accused the Claimant of a number of infractions including: engaging in altercations with her juniors; procuring pharmaceutical products which had not been approved by the Respondent's Therapeutic Committee; failure to ensure members of staff under her observed the Respondent's Code of Conduct; and turning a blind eye to fraudulent activities allegedly perpetuated by staff under her in the pharmacy department.
19. There is evidence that the Claimant received the warning letters. She appended her signature on the letters to signify their receipt.
20. The Claimant has not challenged the allegations leveled against her in the warning letters. Thus and in my view, the letters provide persuasive evidence that the Claimant had challenges in the management of her department. As such, it is apparent that the Respondent had valid reasons to consider terminating her services.
21. Despite the foregoing, the law obligated the Respondent to accord the Claimant due process before terminating her contract. Under sections 41 of the *Employment Act*, the Respondent was duty bound to notify the Claimant of the infraction that she was accused of and allow her a chance to be heard in her defense. Under sections 43 and 45 of the Act, the burden of demonstrating that due process was upheld in the steps leading to termination of the Claimant's contract lay with the Respondent.
22. Whilst the Respondent contends that it invited the Claimant for the disciplinary session scheduled for 29th September 2021 through its letter of 22nd September 2021, the Claimant denies getting this invite. She asserts that she was sent a text message on 28th September 2021 asking her to attend a meeting on 29th September 2021 and only learned that the meeting was a disciplinary session on 29th September 2021 after it (the session) had begun.
23. Given the contrasting positions expressed by the parties on the subject, the court has to determine whether the Claimant was invited for the disciplinary session scheduled for 29th September 2021 in good time and whether she was made aware of the infractions that she was to be charged with beforehand. The court will rely on the evidence on record to resolve this issue.
24. The Respondent has produced the letter dated 22nd September 2021 purporting to be the invite it sent to the Claimant to attend the disciplinary session that was held on 29th September 2021. In addition, the Respondent has produced minutes for the session. The Respondent relies on these two documents to argue that it adhered to due process by: notifying the Claimant of the accusations against her in good time; and inviting her for a disciplinary hearing.



25. It is to be noted that the letter of 22nd September 2021 was generated by the Respondent. The Respondent insinuates that the letter was handed to the Claimant on 22nd September 2021 whilst she was at the office. On the other hand, the Claimant denies receipt of the letter.
26. Apart from the Respondent's word, there is nothing on record to suggest that the Claimant acknowledged receipt of the impugned letter. She did not append her signature on the letter to signify receipt thereof. Importantly, during his oral testimony, the Respondent's witness could not confirm whether the letter was given to the Claimant on 22nd September 2021 or later.
27. The record shows that the Respondent had developed a practice of inserting an acknowledgement clause in the letters it issued to the Claimant and which it deemed significant. This is evident in the letters between the parties dated 28th July 2020, 28th May 2021 and 3rd September 2021.
28. It is therefore curious that it (the Respondent) failed to include the clause in the impugned letter notwithstanding that such clause would have been critical in demonstrating that the Claimant had indeed been issued with the letter. In the absence of express acknowledgement of the letter by the Claimant, it is not possible for the court to presume that she received it on 22nd September 2021 as asserted by the Respondent.
29. Similarly, the minutes of the meeting that was held on 29th September 2021 were not signed by the Claimant. The Claimant contends that the document filed by the Respondent purporting to be the minutes of the session are not a reflection of what transpired. She asserts that the fact that the instrument is not signed by her is evidence that it is one sided and not a true reflection of the proceedings of 29th September 2021. In response, the Respondent alleges that the Claimant refused to sign the minutes.
30. It was up to the Respondent to provide persuasive evidence to demonstrate that the letter dated 22nd September 2021 was given to the Claimant before 29th September 2021. As the record demonstrates, this evidence is lacking.
31. In the Claimant's list of documents dated 15th December 2021 which was served on the Respondent before it filed its defense, she attached extracts of short text messages between her and a person she describes as the Human Resource Manager of the Respondent. In the texts, there is a message by the Claimant dated 28th September 2021 asking that she be excused from reporting on duty because she was still in pain. In response, the Respondent's official is quoted as saying thus "Good evening [,] hope you are feeling better [,] you are required to come tomorrow for a meeting [,] kindly be here by 10.00am."
32. Although the Respondent attempted to dispute these texts during cross examination, it is noteworthy that it (the Respondent) did not dispute them (the texts) in its pleadings or the written statement by its witness. This is despite the fact that it (the Respondent) had been served with the documents containing the texts before it entered appearance in the cause. It is also noteworthy that the Respondent opted not to call its Human Resource Manager to speak to the Claimant's contention with respect to the impugned texts.
33. If it is true that the Respondent had written to the Claimant on 22nd September 2021 asking her to attend a disciplinary hearing on 29th September 2021, why did it (the Respondent) find it necessary to send her a text message on 28th September 2021 inviting her to attend a meeting on the same day at 10.00 am? If the Claimant was already in receipt of the letter of 22nd September 2021 inviting her for the disciplinary session on 29th September 2021, why was she texting the Respondent on 28th September 2021 to request for time off duty as if she was totally oblivious of the events that had been scheduled for 29th September 2021?



34. The foregoing leads me to the conclusion that as at 28th September 2021, the Claimant had not been notified of the disciplinary session that had been convened for 29th September 2021. She only came to learn of the meeting scheduled for 29th September 2021 through the text message that was sent to her on 28th September 2021. Further, she only became aware of the fact that the meeting was a disciplinary session after she was confronted with the charges against her during the session.
35. Sections 43 and 45 of the *Employment Act* place the burden of demonstrating compliance with fair procedure in the process of terminating an employee's contract on the employer. Therefore, it was up to the Respondent to convince the court that it had notified the Claimant of the disciplinary session that was scheduled for 29th September 2021 in good time to enable her prepare for it.
36. Going by the evidence on record, I am afraid that the Respondent has not discharged the aforesaid burden of proof on a balance of preponderances. As such, I arrive at the conclusion that the Respondent did not follow due process in releasing the Claimant from her employment.
37. The next question for determination is whether the Claimant is entitled to the reliefs that she seeks. According to the evidence on record, the Claimant substantially contributed to the decision to terminate her employment. There is evidence of a myriad infractions by her which resulted in several warning letters being issued to her.
38. Despite the warning letters that were issued to her, the Claimant kept committing other breaches. Evidently, she was not ready to learn from her past mistakes.
39. In the premises, can the Respondent be blamed for taking the decision to relieve her of her employment? I think not.
40. Employers are entitled to sever employment relations with employees who are evidently unable to meet their part of the bargain. In the premises and as had been observed earlier, the Respondent was entitled to terminate the Claimant's employment.
41. The only reason why the Respondent's decision has been faulted by the court is that it (the Respondent) did not notify the Claimant of the session that was held on 29th September 2021 in good time. As indicated earlier, the Respondent did not provide evidence to controvert the Claimant's contention that she did not receive the Respondent's letter dated 22nd September 2021 which purportedly notified her of the Respondent's session scheduled for 29th September 2021.
42. Having regard to the foregoing, it would be unfair for the court to disproportionately punish the Respondent by turning a blind eye to the Claimant's misconduct and awarding her damages as though she was without blemish. Balancing the scales of justice, I grant the Claimant damages that are equivalent to her salary for two (2) months in order to compensate her for violation of her right to due process. This works out to Ksh. 77,913 x 2 = Ksh. 155,826.00.
43. In the particulars of damages, the Claimant has set out a claim for house allowance. Yet, there is no substantive plea in the Statement of Claim to anchor this prayer. In my view and having regard to the foregoing, the Claimant's Statement of Claim in this respect is defective.
44. Further, the Claimant did not allude to this claim either in the witness statement that accompanied the Statement of Claim or in her oral testimony. For these reasons, I arrive at the conclusion that the claim for house allowance was neither properly pleaded nor made the subject of trial. As such, it is declined.
45. With respect to the claim for insurance premiums, there is no indication from the employment contract between the parties that this was one of the benefits that the Claimant was entitled to by virtue of her employment to the Respondent. Clause 16 of the contract suggests that the Respondent



had guaranteed some benefits to its employees. The schedule of these benefits was indicated to be in the Respondent's Employee Handbook and Human Resource Manual. The Claimant did not tender these documents in evidence to enable the court confirm that the insurance cover in dispute was one of these benefits.

46. As such, although the Respondent was paying premiums for the Claimant's insurance cover during her employment, I agree with its (the Respondent's) contention that this was ex-gratia. Consequently and absent evidence that the benefit was contractual, I decline to grant the prayer.

Determination

47. Having considered the evidence on record, I arrive at the following conclusions, declarations and findings: -
- a. That the Respondent had valid reasons to consider terminating the Claimant's employment.
 - b. That however, the Respondent did not observe due process in making its decision to sever the employment relation between the parties.
 - c. As a result, it is hereby declared that the decision to terminate the Claimant's employment was procedurally flawed.
 - d. The Claimant's conduct substantially contributed to the decision to terminate her contract of service.
 - e. As such, the Claimant is compensated minimally for the unfair termination of her contract by an award of damages that are equivalent to her gross salary for two months, that is to say, Ksh. 155,826.00.
 - f. The claim for house allowance is declined.
 - g. The claim for insurance premiums is declined.
 - h. This award is subject to the applicable statutory deductions.
 - i. The Claimant is granted interest on the sum awarded at court rates from the date of this decision.
 - j. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF MAY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the *ELRC Procedure Rules* which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



B. O. M MANANI

