



**Mboke & 2 others v Kenyatta National Hospital; Kenya Medical Practitioners, Pharmacists and Dentists Union (Interested Party) (Cause E022 of 2023) [2024] KEELRC 1879 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1879 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E022 OF 2023  
ON MAKAU, J  
JULY 19, 2024**

**BETWEEN**

**DR. JOSEPH ODWOR MBOKE ..... 1<sup>ST</sup> CLAIMANT**

**DR. BUNU RASHID BUNU ..... 2<sup>ND</sup> CLAIMANT**

**DR. ABDI MOHAMMED ABDULLAHI ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**KENYATTA NATIONAL HOSPITAL ..... RESPONDENT**

**AND**

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION ..... INTERESTED PARTY**

**JUDGMENT**

1. The claimants are Medical doctors formerly employed by the Public Service Commission under the Ministry of Health until 2020 when the respondent took over the Mwai Kibaki hospital Othaya and gave them three years contracts. The claimants protested the transfer of their services to the respondent and even appealed to the PSC. As a result, it is alleged that the claimants were marked for victimization.
2. On 14<sup>th</sup> September 2022, they were suspended for failure to report to work on diverse dates between 6<sup>th</sup> and 14<sup>th</sup> September 2022 and further for defying a duty Rota approved by the Management. Thereafter they were dismissed for the alleged offences vide letters dated 24<sup>th</sup> March, 2023. They brought this suit seeking the following reliefs:
  - a. That the Application herewith be certified as urgent, service of the same be dispensed with in the first instance and the same be heard ex-parte.



- b. That this Honourable court be pleased to issue a mandatory injunction against the Respondent directing it to immediately reinstate the claimants and assign them duties and a work station pending hearing and determination of this Application.
  - c. That this Honourable court be pleased to issue a mandatory injunction against the Respondent directing it to immediately reinstate the claimants and assign them duties and a work station pending hearing and determination of this Suit.
  - d. That this Honourable court be pleased to issue any further orders and directions as it may deem fit in the interest of justice.
  - e. That the cost of the application be in the cause.
3. The respondent denied liability for unlawful termination and averred that the claimants were dismissed for gross misconduct after according them fair hearing. It further averred that the claimants have failed to clear with the hospital in order to pave way for payment of their terminal dues. Therefore, it prayed for the suit to be dismissed with costs.

### **Evidence**

4. The 1<sup>st</sup> claimant testified as CW1. He stated that he was employed by the Ministry of Health in May 2019 and posted to serve at Mwai Kibaki Hospital-Othaya for a term of 3 years. In the year 2020, the respondent took over the management of the hospital and his services were transferred accordingly.
5. He was appointed the Deputy Medical Officer Coordinator while the 3<sup>rd</sup> claimant was the Medical Officers Coordinator in the Facility. Their duty as medical officers Coordinators included making monthly duty rota. They had made the duty Rota for September 2022 in August 2022 and distributed to all departments by 1<sup>st</sup> September 2022. However, on 6<sup>th</sup> September 2022, his colleagues were given letters deploying them to various stations and attaching new duty rota.
6. The rota was not the one prepared by him and the 3<sup>rd</sup> claimant. The new rota was not done in consultation with the Medical Officers Coordinators and it had gaps in the hospital coverage, had poor distribution of labour and it introduced a shift that ended at night. Accident and Emergency Section was overstaffed while only one officer was covering the wards all the week. Further, only half the officers were in the night duty and the officers were not assigned according to their competence.
7. The new rota brought confusion because as at the time it was introduced the medical officers were operating under the duty rota prepared by the 3<sup>rd</sup> claimant. HR Officers went around the hospital doing physical roll call and any officers who were not found in the new stations as per the new rota, were issued with show cause letters accusing them of absence from duty. His effort to sort the matter with the HR office was futile. As a result, all the medical officers signed a grievance letter addressed to the management on the said problem but no feedback was received. Two days later the 2<sup>nd</sup> and 3<sup>rd</sup> claimants were interdicted.
8. He was also given an interdiction letter accusing him of disregarding implementation of the new rota as a result of which smooth flow of clinical and ward operations were disrupted. It further alleged that his conduct exposed patients' lives to danger and suffering. However, he termed the said allegations as untrue and averred that the officers had done a group letter assuring the management that there was in place an arrangement to ensure coverage of all service delivery outlets in line with the existing policy guidelines.



9. He ever denied that he colluded with other officers to defy posting orders to new working stations. He further denied that he failed to report to work on 6<sup>th</sup> and 12<sup>th</sup> September 2022. He contended that he was in fact on duty on the said two days at the Accident and Emergency Section and the new posting had also retained him in that department. He maintained that on the said dates, he worked from 8am to 5pm. He therefore never received any show cause letter because he was on duty.
10. He further denied accusation that he failed to attend meeting called by the CEO and stated that the meeting was scheduled for 15<sup>th</sup> September 2022 and he travelled to attend the meeting only for it to be rescheduled to the following date when he was due for exams. Consequently, he excused himself from the meeting by notifying the Senior Director about the exams.
11. He testified that the meeting proceeded on 16<sup>th</sup> September 2022 and the contentious rota was dropped and the doctors were allowed to make their own rota in the same pattern as he used to do with the 3<sup>rd</sup> claimant. However, on 28<sup>th</sup> September 2022 he appeared before the Disciplinary Committee in Othaya where he was heard and continued with the interdiction until 1<sup>st</sup> March 2023 when he was called for a second hearing in Nairobi. In his view the hearing was not fair.
12. On 27<sup>th</sup> March 2023 he received a termination letter signed by the respondent's CEO. The reasons cited were gross misconduct and loss of trust. He appealed on 13<sup>th</sup> April 2023 but the same was rejected vide a letter dated 27<sup>th</sup> June 2023. He maintained that the reasons for dismissal were not valid as there was no supporting evidence.
13. He faulted the employer for not paying him all his allowances during the interdiction and only paying him half basic pay and half house allowance while all other allowances were withheld. He was only paid Kshs.62,890 out of Kshs.224,000 and the outstanding allowances remains unpaid to date.
14. On cross examination he maintained that he was not given any show cause letter like his colleagues in respect of the disputed duty Rota. He further maintained that he was on duty on 6<sup>th</sup> September 2022 when the said rota was released. He confirmed that he received interdiction letter on 14<sup>th</sup> September 2022 but he never received deployment letter. The interdiction letter accused him of insubordination and misbehaviour. He then went to see the HR officer to protest that the HR policy provided for payment of half basic salary plus all allowances during interdiction. However, he confirmed that the payslip for July 2022 and February 2023 indicated that he was paid half basic salary and house allowance only.
15. He admitted that he went through disciplinary hearing and the charges were given to him including insubordination. The same offence was also cited for his dismissal but the letter did not state whether he was dismissed by the respondent or as a civil servant. He maintained that he had appealed to the PSC against transfer of his services to the respondent which is still pending determination. He also appealed against the dismissal but the same was rejected.
16. He reiterated that he was initially employed by the Ministry of Health but later he received a letter of appointment from the respondent. By a letter dated 9<sup>th</sup> November 2020, he, together with other medical officers protested to the CEO about the transition from the Ministry to the respondent.
17. He also reiterated that he was on duty on 12<sup>th</sup> September 2022 at the casualty section when he received a call to collect a deployment letter. Since 13<sup>th</sup> September was a public holiday and therefore he went to pick the letter on 14<sup>th</sup> September 2022 before starting work. He contended that the management prepared a duty rota without participation of the doctors and it was not possible to implement. As a result, the doctors signed a joint letter requesting for a participatory meeting to discuss duty rota.



18. The request was granted and a new duty rota was prepared after his interdiction. He admitted that despite protesting the transfer of his services to the respondent, he was appointed Deputy Coordinator of Medical Doctors by the respondent and he did decline. He further admitted that he was undertaking part-time studies and had even notified the respondent and sought scholarship but he received no response.
19. The 2<sup>nd</sup> claimant testified as CW2. He also adopted his written statement dated 24<sup>th</sup> July 2023 and produced a bundle of documents as exhibits. His evidence echoed that of the CW1 but admitted that he was served with a show cause letter on 14<sup>th</sup> September 2022, the same day he received interdiction letter. He further admitted that he never attended work on 6<sup>th</sup> September, 2022 because he received the redeployment letter too late since it was sent via his personal email address. Nevertheless, he called a colleague to stand in for him.
20. He testified that he was on duty on 12<sup>th</sup> September, 2022 dealing with emergencies but there was confusion due to a new duty Rota prepared by the respondent. He was also on duty on 14<sup>th</sup> September, 2022 when he received the two letters accusing him of insubordination by failing to report to a new station after redeployment on 6<sup>th</sup> September, 2022 and being absent from work. There was no clocking Register at the hospital to provide the alleged absence from work.
21. He responded to the show cause letter and later he was invited to a hearing on 27<sup>th</sup> September 2022 through a phone call and a second hearing on 1<sup>st</sup> March 2023 through an SMS Text invitation. Thereafter his services were terminated by a letter citing three reasons: -
  - a. Failure to adopt Duty Rota prepared by the Hospital.
  - b. Failure to attend duty on 6<sup>th</sup> September 2022 and 14<sup>th</sup> September 2022.
  - c. Failure to attend a meeting with the CEO concerning Duty Rota.
22. He contended that the third reason was never raised in the interdiction letter. He also faulted the respondent for not paying all his allowances during the interdiction period but only paying him KShs.67,021 only.
23. On cross examination he admitted that his appointment letter dated 30<sup>th</sup> November 2020 was signed by the CEO. He further stated that he received interdiction letter on 14<sup>th</sup> September 2022 via email then he went to pick the hard copy from the office the same day. He stated that he was on duty according to the Duty Rota prepared on 5<sup>th</sup> September 2022 but he did not report on 12<sup>th</sup> September 2022 due to confusion caused by the new Duty Rota.
24. He admitted that the interdiction letter indicated the cause of action contemplated. It also notified him of the right to attend hearing in the company of a colleague. He denied being absent from work on 6<sup>th</sup> and 14<sup>th</sup> September 2022 and contended that during the hearing the panel did not listen to his defence that he was on duty. He also denied that he failed to attend any meeting called by the CEO.
25. He admitted that the reason for his dismissal was gross misconduct and loss of trust. He reiterated that he was taken through disciplinary hearing. He appealed but he was not heard as the appeal was rejected by a letter stating that no new evidence was availed. He stated that the respondent was just sabotaging his standing.
26. The third claimant testified as CW3. He also adopted his written statement dated 24<sup>th</sup> July 2023 and produced a bundle of documents as exhibits. He was the coordinator of Medical officers with mandate to prepare monthly duty rotas. He was interdicted on 14<sup>th</sup> September 2022 for the reason that he was



- absent from work on 12<sup>th</sup> and 14<sup>th</sup> September 2022. He denied the offence and contended that he was on duty on both dates. He further stated that there was no clock in register to prove that he was absent. He contended that he was given a show cause letter to respond within seven days but the letter did not indicate the days he was allegedly absent. Before the 7 days given to respond lapsed, he was interdicted.
27. His salary was then reduced to half and all the allowances withheld during interdiction. He was called for two hearings on 28<sup>th</sup> September 2022 and 1<sup>st</sup> March 2023, and on 24<sup>th</sup> March 2023 he was dismissed. He denied ever being given communication directing him to implement the new Rota which he saw on 6<sup>th</sup> September 2022 when he was given a personal copy. The duty Rota was signed on 5<sup>th</sup> September 2022 and did not indicate his shift but just notified him to cover surgical department. The interdiction letter never indicated when he was not at work on 12<sup>th</sup> and 14<sup>th</sup> September 2022.
  28. He contended that he had earlier prepared another duty rota with the CW1 which started on 1<sup>st</sup> September 2022 and indicated day and night shifts clearly. He had the mandate to prepare monthly duty Rotas. According to his duty Rota, he was supposed to be on duty between 5<sup>th</sup> and 9<sup>th</sup> September 2022. He also contended that the duty Rota by the Management was ambiguous and incapable of being implemented. He sought clarification from the management but nothing was given. He then wrote a letter with other doctors dated 12<sup>th</sup> September 2022.
  29. On cross-examination he reiterated that he and his deputy had prepared a duty Rota four days before 1<sup>st</sup> September 2022 and it took effect from 1<sup>st</sup> September 2022. He was not on duty on 1<sup>st</sup> September 2022 but he was on duty on 6<sup>th</sup> September 2022. He was on duty on 12<sup>th</sup> September 2022 and he never received any show cause letter on that day. He received an interdiction letter on 14<sup>th</sup> September 2022 and show cause letter on 15<sup>th</sup> September 2022. The show cause letter did not indicate the shift he had missed.
  30. Thereafter, doctors met and requested the management to withdraw disciplinary process against the claimants vide Exhibit 17. The management was not represented in the meeting. He maintained that the duty rota prepared by the management was not clear when he should attend work.
  31. The Respondent's Senior HR Officer Ms Jane Akunda testified as RW1. She relied on her written statement dated 17<sup>th</sup> October 2023 and produced a bundle of documents as exhibits. In brief he stated that the claimants were employed by the respondent for contracts of three years each. On 17<sup>th</sup> August 2022, the management of Mwai Kibaki Hospital met with all the medical officers to discuss duty management. It was resolved that medical officers were to be attached to departments and be answerable to the Heads of Departments on six months rotational basis. The effective date was 1<sup>st</sup> September 2022 when redeployments were done and September duty rota availed to each and every medical officer of the hospital.
  32. The claimants failed to report to their respective stations without any official communication and they were issued with letters of abscondment by the head of department. An inspection of the clocking register confirmed that the claimants never reported to work in various dates of September 2022 and they could not be traced through phone call or text messages. They also failed to collect their respective show cause letters issued by the HR office. Their conduct was considered as abscondment of duty and insubordination which amounted to gross misconduct.
  33. As a result, the claimants were interdicted and informed of their entitlement to half of their basic salary, house allowance and medical allowance pending investigations into the conduct. They were also barred from leaving the work station without permission from Head of the HR and Administration and they were to report to the HR Office once every week on Wednesday between 9.00am and 12 noon until their cases were heard and determined.



34. On 26<sup>th</sup> October 2022, the claimants were accorded a disciplinary hearing before the Hospital's HR Management Advisory Committee and a decision to dismiss them was reached on grounds of gross misconduct and loss of trust. They appealed the decision and on 16<sup>th</sup> June 2023, the respondent's Board upheld the dismissal but the Advisory committee resolved that their salaries be released to the claimants upon clearance. They have not yet cleared with the Institution. They also appealed to the Public Service Commission but the commission is awaiting for the court's decision in this matter.
35. On cross examination, RW1 confirmed that she is stationed at the respondent's Nairobi Hospital. She further admitted that there is HR Officer at the Othaya hospital. She further admitted that she never attended the Management's meeting with doctors at Othaya on 17<sup>th</sup> August 2022 but she stated that Agenda 4 for the meeting was re-organisation of duties by medical officers. She also admitted that she had not filed the minutes of the meeting and had nothing to prove the matters discussed in the meeting.
36. She stated that the claimants failed to report to work on 12<sup>th</sup> and 15<sup>th</sup> September 2022. She maintained that there is a clock in register but she never inspected the same. She further admitted that the register is not in court and there is nothing else to prove that the claimants failed to report to work.
37. She admitted also that she never contacted the claimants and she did not have evidence that they were contacted. She further admitted that the claimants collected show cause letters late but she could not confirm when they were collected. She confirmed that the 1<sup>st</sup> claimant's interdiction letter stated that he was absent on 12<sup>th</sup> September 2023 and then interdicted immediately. The same was repeated for the 2<sup>nd</sup> and 3<sup>rd</sup> claimants.
38. She confirmed that clause 11.12 (2) provides that an interdicted officer is entitled to half salary, full allowances and medical allowance but the claimants were paid only half salary and all allowances were withheld. She further confirmed that the Divisional HR Management Advisory Committee (DHRMAC) recommended for a final warning but the HR Management Advisory Committee (HRMAC) at the Headquarters is not bound by the decision of DHRMAC and as such it can accept, vary or reject the same. In this case the reasons for enhancing the punishment from warning to termination was provided in the minutes.
39. She reiterated that the claimants have not been paid their dues as they have not cleared with the institution. She stated that Clause 14.7.1 of the HR Manual provides that an employee must complete clearance and obtained a clearance certificate. However, she admitted that she was not aware whether the claimant had not been issued with any assets but contended that such information could only be ascertained after clearance.
40. In re-examination, she stated that the claimants were absent from work from 12<sup>th</sup> to 14<sup>th</sup> September 2022 and the HRMAC found the infraction grievous and recommended for termination. The claimants were heard by the HRMAC before the termination was decided.

## **Submissions**

41. The Claimants submitted that the reason for terminating their employment was not valid because RW1 admitted that she is not stationed in Othaya and consequently her entire testimony was hearsay because it was not based on events she was not privy to. Further, she was not present and could not adduce minutes of the alleged meeting between the Management and the doctors purportedly held on 17<sup>th</sup> August 2022 and the alleged resolution passed concerning the old and new duty rota. Further that, the respondent did not produce a clocking register to prove that the claimants were absent from work as alleged. They also blamed the respondent for introducing a second duty rota that was in conflict with the one already prepared by the CW1 and CW3 according to their work procedures and



- policy. Consequently, the claimants argued that the respondent has not proved a valid reason for the termination as required under Section 43 of the *Employment Act*. For emphasis, reliance was placed on *Cooperative Bank of Kenya v Banking Insurance & Finance Union (2017) eKLR*.
42. They further submitted that fair procedure was not followed before the termination since the process was prolonged and indecisive one. They contended that the delay caused them mental suffering and anguish especially from the time of the decision of the DHRMAC to the time of the decision of the HRMAC to dismiss them.
43. They further faulted the respondent for holding a second disciplinary hearing before another committee after the first hearing yielded a sentence of final warning. They submitted that the second hearing was abrupt and they were not given adequate time to prepare. There was also no justifiable reason for substituting final warning with a termination. For emphasis, reliance was placed on *Anthony Mkala Chitavi V Malindi Water & Sewerage Co.Ltd (2013) eKLR*.
44. In view of the foregoing matters, they submitted that they are entitled to the reliefs sought. They urged that a restatement is practicable because three years have not lapsed since the termination, and further that the termination was not due to incompetence or inability to perform their work. They also urged for payment of 12 months salary as compensation for unlawful termination because it was not based on justifiable reason but malice. They also prayed for costs of the suit.
45. The respondent, on the other hand submitted that its internal disciplinary procedures were properly adhered to before the termination of the claimant's employment. It served the claimants with show cause letters after they defied directive of the Management to report to new work station as issued on 17<sup>th</sup> August 2022. The claimants were then heard by the DHRMAC on 28<sup>th</sup> September 2022, just 14 days after the interdiction and thereafter they appeared before the HRMAC on 26<sup>th</sup> October 2022 as per Exhibit D.5. It relied on *Thomas Sila Nzivo v Bamburi Cement Limited (2014) Eklr*, to emphasize that fair procedure was followed.
46. It further submitted that the testimony by RW1 was not hearsay because she sat in the HRMAC hearing and heard the evidence of the claimants. It urged that, even if there is not a clock-in-register, there existed formal communication which has clearly demonstrated that the claimants did not report to their work stations after redeployment by the management. For emphasis, reliance was placed on *Peter Asuka v Mutungati Farmer's Cooperative Union (2015) eKLR* where the Court held that failure to report to work was breach of a fundamental obligation.
47. In view of the foregoing matters, it was submitted that the termination was lawful and the entire suit should be dismissed with costs.

### **Issues for determination and analysis**

48. There is no dispute that the claimants were employed by the respondent as Medical Officers under three years contract starting 1st October 2020. There is also no dispute that the respondent terminated the said contracts on account of gross misconduct. The issues falling for determination are: -
- a. Whether the termination of the contracts was unlawful and unfair.
  - b. Whether the claimants are entitled to the reliefs sought.

### **Unfair termination**

49. Section 45 (1) & (2) of the *Employment Act* provides that: -
- ” (1) No employer shall terminate the employment of an employee unfairly.



- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - i. related to the employee’s conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

### **Reasons for termination**

50. Section 43 of the *Employment Act* provides that: -

- “ 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

51. In the instant case, the termination letters captured the reason for termination as follows: -

“...you are therefore deemed to have insubordinated the authority by declining to implement directive regarding the new Rota and further absented yourself from duty without approval from your HOD. Your behaviour is a serious breach of discipline. The same constitutes gross misconduct that cannot be condoned in the service.

In view of the above and considering the seriousness of the offence, it has been decided that: -

- a. The interdiction hitherto imposed on you with effect from 14<sup>th</sup> September 2022 should be lifted without loss of the half (1/2) salary withheld during the period of interdiction; and
- b. Your contract of employment should be and is hereby terminated on account of gross misconduct and loss of trust.”

52. During the hearing RW1 testified that the claimants insubordinated the respondent by failing to implement/adopt the Rota prepared by the management and shared with all the medical officers. Further that the claimant absented themselves from work on diverse dates between 6<sup>th</sup> and 14<sup>th</sup> September 2022.

53. The claimants denied the said allegations and maintained that they attended work according to a duty Rota prepared by the 1<sup>st</sup> and 3<sup>rd</sup> claimants (coordinators of medical officers) before the management prepared a second rota. They contended that the Rota prepared by the 1<sup>st</sup> and 3<sup>rd</sup> claimants covered the whole month of September 2022 and took effect from 1<sup>st</sup> September 2022. Further, it clearly indicated the time, date and the work station for each medical officer. They also averred that the 1<sup>st</sup> and 3<sup>rd</sup> claimants had the lawful mandate to prepare monthly duty Rota.



54. The claimants maintained that the disputed Rota was prepared by the Management on 5<sup>th</sup> September 2022 to take effect from 6<sup>th</sup> September 2022 and it was not clear on the time for the respective officer. They contended that they attended work as per the Rota prepared by 1<sup>st</sup> and 3<sup>rd</sup> claimant but the respondent did roll calls based on the new Rota and whoever was not found in his new work station as redeployed on 6<sup>th</sup> September 2022, was marked absent. The claimants averred that attempts to resolve the confusion caused by the new Rota was turned down by the respondent only for it to withdraw the Rota after interdicting the claimants.
55. I have considered the evidence by both sides. The dispute revolves around two conflicting duty Rotas for September 2022 prepared by two centres of power. The first Rota was prepared by the 1<sup>st</sup> and 3<sup>rd</sup> claimants in August 2022 and shared among the Medical officers and it took effect on 1<sup>st</sup> September 2022. The two claimants were duly appointed as coordinators of the medical officers and had the full mandate from the respondent to prepare the said duty Rota.
56. The second Rota was prepared by the Management on 5<sup>th</sup> September 2022 and took effect on 6<sup>th</sup> September 2022. There is no doubt that the respondent had the Managerial prerogative to reorganise its staff. However, such reorganisation ought to be done in a lawful and fair manner. In this case the new duty rota and the redeployment of medical officers was not done fairly in as far as the claimants are concerned. The respondent did not first relieve the 1<sup>st</sup> and 3<sup>rd</sup> claimants of the mandate to prepare the monthly duty rotas before introducing a conflicting one.
57. Although RW1 alleged that there was a meeting held on 17<sup>th</sup> August 2022 between the Management and the doctors where reorganisation of duties was discussed, the said allegation was hearsay because she was not in attendance. Further she did not produce any minutes of the said meeting or any other evidence to confirm the said allegations. Consequently, I reiterate that the 1<sup>st</sup> and 3<sup>rd</sup> claimants lawfully prepared the duty rota for September 2022 with the full authority from the employer and it was never revoked.
58. In addition, the claimants fully complied with the said Rota by attending work as scheduled but when roll call was done in their new station without notice they were marked as absent. They further stated that there was no clock in register to prove that they did not attend work. The said evidence was not rebutted by the respondent.
59. The claimants are public officers and Article 236 of *the Constitution* of Kenya, 2010 provides that: -
- “ A public officer shall not be-
- a. victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
  - b. dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”
60. As already observed above, the 1<sup>st</sup> and 3<sup>rd</sup> claimants did their duty of preparing a duty Rota for medical officers lawfully and in good faith and as such they are protected by the law from victimization. The said rota was never revoked and therefore the disciplinary action against them amounted to victimization for doing their duties. They sought to resolve the matter of the two Rotas but respondent declined. All the doctors raised their concerns about the new Rota but the respondent remained adamant only to withdraw it after interdicting the claimants and leaving the other doctors working.
61. As regards the failure to report to work, I reiterate that no clock in register was produced to prove the alleged absence from work. No officers from KNH Othaya were called to give evidence to prove the



alleged absence from work. It follows that the alleged absence from work by the claimants was not proved on a balance of probability.

### Procedure followed

62. Section 41 of the [Employment Act](#), 2007 provides that: -

“(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 the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

63. The claimants faulted the procedure followed for being lengthy and uncertain since they were made to undergo two disciplinary hearings at their Hospital and at the Headquarters. I have considered the disciplinary procedure. The respondent’s HR Manual Clause 11.9.10 provides for issuance of a show cause to the culprit and require a written response.

64. Clause 11.9.15 provides for investigations by an ad hoc committee. Clause 11.10.1 provides that the investigation committee has to give the affected officer a chance to be heard, present documents and even call witnesses. The committee then prepares a report and presents to the HRMAC but the Report should not contain any recommendation in the form of punishment to be inflicted on the officer.

65. Clause 11.9.14 provides that disciplinary hearing for job Grades KNH 4 to KNH 14 shall be done by the HRMAC. Clause 11.9.17 then provides that disciplinary hearing shall be conducted expeditiously, efficiently, lawfully, reasonable and in a procedurally fair manner in accordance with Article 47 of [the Constitution](#) and the Fair Administrative Actions Act. In this case the claimants were served with a show cause letter except the 2<sup>nd</sup> claimant whose work station was not changed by the new Duty Rota. On 27<sup>th</sup> September 2022 they appeared before DHRMAC which I believe was the investigations committee. Thereafter they appeared before the HRMAC on 1<sup>st</sup> March 2023 for disciplinary hearing and a verdict was given on 24<sup>th</sup> March 2023.

66. Having considered the material before the court, it is clear that the claimants were afforded a hearing before the termination for misconduct as required under Section 41 of the [Employment Act](#) and the respondent’s HR Procedure Manual. However, I find that the process took about six months to end which by all standards was unreasonable for an internal disciplinary case where an employee is working under a fixed contract of three years. It violated clause 11.9.17 of the respondent’s HR Manual and Article 47 of [the Constitution](#) which entitled the claimants to administrative action that is expeditious.

67. Having found that the respondent has not proved that the termination was grounded on valid reason and further having found that the procedure was in breach of clause 11.9.17 of the HR Manual and Article 47 of [the Constitution](#), I find and hold that the termination of the claimants’ employment contracts was unfair and unlawful within the meaning of section 45 of the [Employment Act](#). I gather



support from the case of Kenfreight (E. A) Ltd v Benson K.Nguti (2019) eKLR where the Supreme Court held that:-

“ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

### **Reliefs**

68. In view of the foregoing, I find that the claimants are entitled to declaration that the termination of their employment contracts was unfair. They are also entitled to relief under section 49 of the [Employment Act](#). However, I do not find the prayer for reinstatement suitable considering that their contracts were to lapse on 30<sup>th</sup> November 2023.
69. They are therefore awarded compensatory damages of two months gross salary considering that they served for about two years and they expected to continue working for eight months before the lapse of their contract. I have further considered that the respondent has already offered to pay them one-month salary in lieu of notice, the half salary and allowances withheld during interdiction plus service gratuity.

### **Conclusion**

70. I have found that the respondent terminated the claimants' employment unfairly. I have further found that the claimants are entitled to relief. Consequently, I enter judgment for them as follows: -
- a. A declaration that the termination of their contracts was unfair and unlawful.
  - b. Each claimant is awarded Kshs.636,578.00 as compensation for unfair termination less statutory deductions.
  - c. Costs and interest from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.**

**onesmus n makau**

**judge**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.

**ONESMUS N MAKAU**

**JUDGE**

