

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT

ELDORET

CAUSE NO. E007 OF 2024

(Before Hon. Lady Justice Maureen Onyango)

JAPHET CHESEREK KAMUREN.....

CLAIMANT

VERSUS

MOI TEACHING AND

REFERRAL HOSPITAL

BOARD RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 15th March 2024, alleging that his employment with the Respondent was unfairly terminated. He sought various remedies including a declaration of unlawful termination, payment of salary in lieu of notice, compensation for unfair termination, withheld salary, service pay, and costs of the suit.
2. The Claimant averred that he was employed by the Respondent on 1st June 2004 as Senior Principal Registered Nurse under the department of Nursing on permanent and pensionable terms of service and was earning a gross salary

of Kshs 197,542 as at the time he was terminated from employment on 1st April 2021.

3. The Claimant contended that he received a show cause/interdiction letter dated 24th December 2020 from the Respondent alleging that on 22nd December 2020, the Claimant was found in a compromising position with S.V, a caretaker of a patient who was taking care of her mother T. M admitted at Amani Isolation Ward in the Respondent's hospital.
4. The Claimant avers that as per the said Notice to Show Cause letter, the said S.V. stated in her written statement that the Claimant had conducted blood tests and palpated her private parts.
5. The Claimant stated that he was interdicted with effect from 24th December 2020 pending the determination of his case and was required to respond to the NTSC within 7 days of the date of the show cause letter.
6. The Claimant faulted the Respondent for suspending him from service and in the same letter requiring him to show cause before any investigation was carried out over the alleged offence.

7. The Claimant states that he responded to the show cause letter and addressed all the issues raised therein vide his letter dated and received by the Hospital on 30th December 20. He thereafter received a letter from the CEO dated 15th March 2021 referring the matter to the hospital Human Resource Management Advisory Committee (HRMAC) for disciplinary hearing scheduled for 23rd March 2021 and inviting him for the disciplinary hearing.
8. The Claimant asserts that although the disciplinary hearing happened on the 23rd March 2021, the same was just a formality as the decision to terminate his employment had been predetermined. He contends that he was not accorded fair hearing as envisaged by law as his request to have the said S.V. attend the disciplinary hearing for him to cross examine her on the allegations and his application to be supplied with her written statement and other evidence to be relied upon by the Respondent during the hearing be supplied to him was not allowed by the Respondent.
9. The Claimant maintained that on 1st April 2021, he received a letter of termination of his employment which was

backdated to run as from 24th December 2020 with loss of salary withheld during the period he was on interdiction.

10. According to the Claimant, the termination was unfair and without any valid reason since no meaningful investigations were carried out to establish the allegations leveled against him.

11. Owing to the alleged unfair termination of his employment, the Claimant prayed for compensation and terminal benefits which he itemized as hereunder: -

- a) One month salary in lieu of notice Kshs 197,542
- b) Compensation for unfair termination Kshs 2,370,504
- c) Withheld salary from the month of
December 2020 to April 2021 Kshs 790,168
- d) Service pay Kshs 2,051,397
- Total claim Kshs 5,409,611

12. The Claimant prayed for judgment against the Respondent for:

- a. A declaration that the action of the respondent to terminate the Claimant's employment was unlawful, unfair and without any reason or justification

- b. Payment of the sums of money and prayers as claimed above.
 - c. Costs of the claim and interests at court' s rate.
 - d. In the alternative to the prayers in a) and b) above, this Honourable Court do order for the reinstatement of the Claimant to his previous immediate position without any loss of benefits and payment of his full salary and allowances from the month of December 2020 to date.
 - e. Any other relief the Honourable Court may deem fit to grant.
13. The Respondent filed a Statement of Response dated 3rd May 2024 in which it denied that it unfairly and unlawfully terminated the Claimant's employment. According to the Respondent, the Claimant breached its Human Resource Policy and Procedure Manual by engaging in sexual misconduct and prescribing medical test contrary to his job description.
14. It is the Respondent's case that investigations were conducted and the investigation report recommended disciplinary action be taken against the Claimant.

15. The Respondent asserted that it subjected the Claimant to a fair disciplinary process by inviting him to a disciplinary committee where his case was deliberated on by an impartial disciplinary committee as a result of which the Claimant's employment was terminated on grounds that he had breached the Respondent's human resource and procedure manual.
16. Further, the Respondent averred that the termination of the Claimant's employment took effect from the date of the suspension having been given notice of impending disciplinary action.
17. It is the Respondent's case that the Claimant was not a disciplined employee as evidenced by the series of verbal and written warnings.
18. The Respondent maintained that the Claimant's services were terminated because he was found guilty of the offence of sexual misconduct and harassment against a caretaker in isolation ward and negligence in attending to a distress call from a needy patient.
19. In the end, the Respondent contended that the Claimant is not entitled to the reliefs sought since he was subjected to

a fair disciplinary hearing and the reasons for his termination were fair and valid.

20. The Respondent urged the court to dismiss the Claimant's suit with costs.

The evidence

21. The Claimant testified on 5th March 2025 as CW1. He adopted his witness statement recorded on 15th March 2024 as his evidence in chief and relied on the documents he filed in court in support of his case.
22. The Claimant told the court that as at the time of termination of his employment, he had worked for the Respondent for about 18 years. He stated that the reason given for his termination from employment was that he had sexually harassed a caretaker of a patient who was admitted in Isolation ward which the Claimant was manning.
23. The Claimant explained that on 22nd December 2020 when he is accused of sexually harassing S.V. he reported on duty at 6pm and the said S.V. told him that she was not feeling well. The Claimant avers that he immediately took blood samples of S.V. and while in the process, his

colleague Dennis Mongare came and started accusing the Claimant of sexually harassing the caretaker.

24. The Claimant avers that he was issued with a show cause letter over the incident on 24th December 2020 which notice also served as an interdiction letter.
25. The Claimant testified that he wrote a letter dated 30th December 2020 in response to the show case letter and was subsequently invited to a disciplinary hearing on 23rd March 2021, that he attended the disciplinary hearing but S.V. the caretaker he was accused of sexually harassing was not present.
26. The Claimant denied that he sexually harassed the caretaker, and sought to be granted the reliefs he is seeking in his claim.
27. On cross examination, the Claimant told the court that during his interdiction, he was paid half basic salary and allowances. He stated that in his statement to the Respondent regarding the incident, he wrote that he took blood samples but did not state that he took vaginal swabs of the caretaker.

28. The Claimant explained that ordinarily, when a patient visits the hospital even under emergency situations, a file is opened and after seeing a medic, in case of an emergency the responsive team takes the specimen. The Claimant admitted that the hospital lost money in the test that was done on S.V unnecessarily.
29. The Claimant admitted that he attended the disciplinary hearing accompanied by a union representative.
30. The Respondent called Iscar Anyango Owino, its Senior Human Resource Officer who testified as RW1. RW1 adopted her witness statement recorded on 3rd May 2024 as her evidence in chief and also relied on the documents filed in court by the Respondent in response to the claim.
31. RW1 testified that on 22nd December 2020, the hospital management received a report that the Claimant was found in a compromising position with a caretaker, by the name S.V.
32. RW1 stated that upon investigations, the caretaker wrote a statement alleging that the Claimant took her blood samples and palpated her private parts. RW1 stated that the said caretaker was not a patient of the Respondent.

33. According to the Respondent's witness, the proper procedure when attending to a patient is that the patient is first sent to the clerical officers, who register the patient and open a file after the applicable fee has been paid. Thereafter, the patient's vitals are checked, and the patient is then sent to a medical officer, who prescribes any necessary tests. RW1 explained that laboratory tests are conducted by phlebotomists, while swabs are taken by medical or clinical officers. In the instant case, RW1 stated that both the blood tests and the vaginal swabs were taken by the Claimant.
34. RW1 maintained that the Claimant's response to the show cause letter was unsatisfactory, which warranted his invitation to the disciplinary hearing. RW1 further testified that during the hearing, the Claimant was not honest in his defence.
35. Additionally, RW1 stated that while the Claimant was in a "compromising position" with S.V. on 22nd December 2020, a patient named John Ngetich passed away as a result of not being attended to by the Claimant.

36. In response to the allegation by the Claimant that he was not allowed to call S.V. RW1 maintained that the Respondent has its own internal regulations which do not allow calling witnesses from outside.
37. Upon cross-examination, RW1 stated that the caretaker, S.V recorded her statement before a Mr. Barno, the investigating officer and that in the statement, the said S.V did not indicate that there was an act of sexual harassment.
38. RW1 stated that the Claimant was required to respond to the show cause notice and, at the same time, was suspended in accordance with the Human Resource Manual to allow investigations to take place. RW1 further stated that the CEO recommended the Claimant's interdiction after the investigations were concluded. She clarified that the disciplinary process had not been conducted at the time of interdiction and that the disciplinary committee based its recommendation on the investigation report and the evidence presented at the hearing.

39. RW1 reiterated that, as stated in the Respondent's response to the Statement of Claim, the Claimant was not a formally disciplined employee, but conceded that no written warnings had been issued to him.
40. On re-examination, RW1 stated that, in her statement, S.V. averred that the Claimant had taken a blood sample from her arm and then palpated her vagina, asking her to remove her pants, which she complied with. According to RW1, these actions constituted sexual harassment.
41. RW1 further stated that the minutes of the disciplinary hearings reflected that the Claimant had prior warnings.
42. At the close of the hearing, parties were directed to file written submissions. The Claimant's submissions are dated 2nd April 2025 while the Respondent's submissions are dated 27th May 2025.

The Claimant's submissions

43. The Claimant identified the issues for determination to be:
 - i. Whether the dismissal of the Claimant was unfair, unlawful without justification and amounted to unfair labour practice

- ii. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in the statement of claim
 - iii. Who should pay costs and interest of this claim
44. On the first issue, the Claimant submitted that, from the evidence presented, his termination was predetermined and scripted to suit a particular narrative. He averred that the allegation of sexual harassment leveled against him was merely a smokescreen intended to facilitate his removal from employment.
45. The Claimant contended that the Respondent's Human Resource Policy and Procedure Manual of August 2018, at clause 11.5.1(vi), provides that a thorough investigation of an alleged offence must be undertaken before any disciplinary action is taken against an employee. He argued that in his case, no such investigation was conducted.
46. Further, the Claimant submitted that the complainant, S.V., was never called to present her case during the disciplinary hearing, thereby denying the Claimant an opportunity to cross-examine her on a serious allegation.

According to the Claimant, there was nothing that clearly implicated him in the alleged sexual harassment.

47. The Claimant submitted that no evidence was led by the Respondent to justify the termination of his employment as required by law.
48. In addition, the Claimant submitted that the disciplinary hearing purportedly conducted by the Respondent was, in the Claimant's view, a red herring as no CCTV footage was presented to corroborate the alleged offence, despite the facility being equipped with numerous, high-quality surveillance systems.
49. With regard to the minutes of the Respondent's HRMAC disciplinary hearing on 23rd March 2021, the Claimant submitted that the minutes were never made available to him for reading, signing, or confirming that they accurately reflected the proceedings of that day. He submitted that the minutes were instead signed off by the chairperson and secretary on 26th March 2021, days after the hearing had concluded. The Claimant contended that the minutes were doctored against him. In support of his contention that the minutes reflected procedural

unfairness, the Claimant cited the case of ***Charles Kinyua & Another v Meru Central Cooperative Union Limited, ELRC Cause No. 144 of 2014.***

50. It is the Claimant's further submission that withholding his salary from the date of interdiction to the date of termination was unjustified. According to him, withholding his salary amounted to punishing him unheard. He thus submitted that he was entitled to receive his salary while awaiting the conclusion of the disciplinary process.
51. Regarding the suspension/interdiction on the day he was served with the show cause letter, the Claimant submitted that this action was contrary to the provisions of the Respondent's Human Resource Policy and Procedure Manual of August 2018. He asserted that suspension pending investigation should only be invoked where there is a reasonable apprehension that the employee may interfere with the investigation.
52. In conclusion, the Claimant submitted that his termination was unfair, unlawful, and unjustified and amounted to unfair labour practice.

53. On the second issue whether the Claimant is entitled to compensation for unlawful, unprocedural, and unfair termination he submitted that the evidence he presented established that he is entitled to the remedies sought in his Claim.
54. Lastly, the Claimant prayed to be awarded a proper certificate of service and the costs of the suit.

The Respondent's submissions

55. On its part, the Respondent framed the issues for determination to be:
- i. Whether the termination of the Claimant's employment was procedurally fair
 - ii. Whether the termination was valid
 - iii. Whether the Claimant is entitled to the reliefs sought?
56. On the first issue, the Respondent submitted that it received an investigation report laying bare the alleged actions of gross misconduct committed by the Claimant. The Respondent submitted that upon its management receiving the report, it issued a show cause/interdiction letter to the Claimant on charges that he had conducted unauthorized tests contrary to hospital protocols and

taking advantage of interactions with clients to engage in demeaning sexual acts.

57. The Respondent contended that the show cause letter informed the Claimant that due to the serious nature of the offences, he would be interdicted from performing the functions of his office with effect from 24th December 2020.
58. According to the Respondent, the Claimant was interdicted in accordance with section 11.12.1 of the Respondent's Human Resource Policy and Procedure Manual.
59. It is the Respondent's submission that the Claimant responded to the show cause letter and was informed via a letter dated 15th March 2021 to appear before the Human Resource Advisory Management Committee on Discipline (HRMAC) on 23rd March 2021. Further, that the Claimant was informed of his right to be accompanied by a Union Representative or fellow employee. That the Claimant attended the HRMAC meeting in the company of a union official by the name Daniel Osoro. The Respondent maintained that the Claimant was cross-examined and he

stated his case before the committee after which the committee made its observations and recommended the termination of the Claimant's services.

60. The Respondent asserted that the Claimant's services were subsequently terminated vide a letter dated 1st April 2021 by which the Claimant was also informed of his right to appeal to the Respondent's board. The Claimant appealed via a letter dated 27th April 2021 but the Board upheld the decision of the Respondent's Management HRMAC.
61. On the issue whether the termination was valid, the Respondent submitted that the Claimant committed acts of gross misconduct against a caretaker by conducting unauthorized tests contrary to the hospital's protocol specifically palpating the private parts of a client in the pretext of conducting a Corona Virus 2019 test and taking blood samples. These offences, according to the Respondent, constitute not only sexual harassment and breach of protocol but also ethics.
62. The Respondent submitted that by palpating the private parts of the caretaker, the Claimant breached section 2.0

Part II of the Respondent's Anti-Sexual Harassment Policy and several sections of the Respondent's Human Resource Policy and Procedures Manual 2018 namely section 10.11.1(i), 10.11.1(ii), 11.7.1(i) and 11.7.1.1(iii), (ix).

63. Additionally, the Respondent contended that the Claimant's job description did not authorize him to take any samples or conduct tests of any nature and that the Claimant failed to present any evidence to demonstrate that such tests were prescribed.
64. The Respondent submitted that it had valid reasons for terminating the Claimant's employment on account of gross misconduct and that a reasonable employer, in similar circumstances, would have taken the same action.
65. Regarding whether the Claimant is entitled to the reliefs sought, the Respondent submitted that the Claimant was lawfully terminated and therefore is not entitled to any of the remedies claimed.
66. The Respondent maintained that it had accorded the Claimant a fair disciplinary process and had valid reasons for terminating his employment.

67. The court was thus urged to dismiss the Claimant's suit with costs.

Analysis and Determination

68. From the pleadings on record, the evidence of the parties and the submissions filed, the issues that arise for determination in this case are as follows: -

- a) Whether the termination of the Claimant's employment was justified
- b) Whether the procedure followed was in accordance with the Employment Act
- c) Whether the reliefs sought are merited.

Whether the termination of the Claimant's employment was justified

69. Under Sections 43 and 45(2) of the Employment Act, an employer bears the evidentiary burden to demonstrate valid and fair reasons for terminating an employee's employment.

70. The Claimant was suspended and subsequently terminated from employment on allegations that he had conducted unauthorized tests on a person who was not a

patient, contrary to hospital protocols, and that he had taken advantage of interactions with clients to engage in demeaning sexual acts. The Claimant was further accused of neglecting a patient, one John Ngetich, who is alleged to have passed on after the Claimant failed to attend to him despite a distress call being made at a time when he was allegedly with the caretaker in a compromising position.

71. The Claimant admitted during the disciplinary process that he conducted tests on the caretaker without prior authorization from a clinician, which was contrary to established hospital procedures. This admission, coupled with the Respondent's evidence regarding the compromised interaction with the caretaker and the alleged neglect of a patient during a critical moment, provided the Respondent with reasonable grounds to question the Claimant's adherence to professional and ethical standards expected in a healthcare environment.
72. In disciplinary matters, the employer is not required to prove the allegations to the standard of a criminal trial. It is sufficient that the employer demonstrates it had a

genuine and reasonable belief, based on the material before it, that misconduct had occurred. In this case, the Respondent relied on witness statements, internal reports, and the Claimant's own admission regarding unauthorized procedures, all of which formed a reasonable factual basis for its belief.

73. I therefore find that the Respondent has demonstrated that it had valid reason to terminate the Claimant's employment hence the suspension and subsequent termination of employment was for valid reason

Whether the procedure followed was in accordance with the Employment Act

74. Section 41 of the Employment Act provides: -

"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.”

75. The Claimant averred in his claim that due process was not followed in the termination of his employment. From the record and particularly the minutes of the disciplinary hearing serial No. HRMAC-DISC. 23/03/2020-2021, it is evident that the Claimant attended the disciplinary hearing on 23rd March 2021 with a union representative.
76. The Claimant however contended that he was not allowed to present his case nor cross examine the person he was accused of sexually harassing. He further stated that he was not allowed to present his case at the disciplinary hearing.
77. On the other hand, the Respondent through its witness RW1 explained that its internal regulations and HR Manual do not permit calling external witnesses to disciplinary hearings. RW1 testified that the disciplinary committee relied on the investigation report and the Claimant’s response to the show cause notice to arrive

at the decision to terminate the Claimant from employment.

78. I agree with the Respondent that in a hospital institution, calling patients or caretakers as witnesses in an internal disciplinary process involving an employee may compromise confidentiality, patient privacy, and the sensitive nature of medical environments. The law requires fairness and not strict adherence to courtroom-style procedures. What section 41 demands is that an employee is notified of the allegations, is heard, and is allowed to represent his case.
79. The Claimant was issued with a notice to show cause, responded to it in writing, and was invited to appear before the HRMAC, where he attended with a union representative. The minutes reflect that he was accorded an opportunity to give his account and respond to questions posed by members of the panel.
80. The Court is therefore satisfied that the procedure adopted met the requirements of Section 41 of the Employment Act. As such I find and hold that the

Respondent substantially complied with the procedural fairness requirements under the law.

Remedies

81. Although the Court has found that the Claimant's employment was terminated for valid reasons and that fair procedure was substantially followed, the Claimant is nevertheless entitled to all terminal dues lawfully accruing to him as his employment was terminated. It is only in the case of summary dismissal that an employee loses the right to pay in lieu of notice.

82. In his Statement of Claim, the Claimant prayed for various reliefs which I address as hereunder in separate heads.

i. A declaration that the action of the respondent to terminate the claimant's employment was unlawful, unfair and without any reason or justification.

The Court finds that the Claimant was not unlawfully terminated. The termination of the Claimant's employment was based on valid reasons, and fair procedure was substantially followed.

ii. One-month salary in lieu of notice

The Claimant was lawfully terminated in accordance with the Employment Act and the Respondent's disciplinary procedures. The termination letter however does not state that the Claimant was summarily dismissed. The Respondent having elected to terminate and not to summarily dismiss the Claimant, he is entitled to pay in lieu of notice which I award him in the sum of Kshs. 197,542.

iii. Compensation for unfair and unlawful termination

Having found that the termination of the Claimant's employment was lawful and that fair procedure was substantially followed, the Claimant is **not entitled** to any compensation for unfair or unlawful termination.

iv. Withheld salary from the month of December 2020-April 2021

The Respondent's Human Resource Policy and Procedures Manual of August, 2018 provides for interdiction as follows:

11.12.1 An officer may be interdicted to allow investigations to be conducted in a case where proceedings may lead to dismissal

11.12.2 An officer who is interdicted shall be eligible for half (1/2) of his/her basic salary with full allowances and medical benefits

11.13.4 Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under these provisions, the whole or any salary withheld shall be restored to him upon the termination of such proceedings with effect from the date the salary was stopped.

83. The Claimant was not dismissed. His employment contract was terminated. The Respondent's Human Resource Policy and Procedures Manual does not provide for termination with loss of benefits. In fact, the Manual does not specifically provide for termination of employment on disciplinary grounds. A termination is

deemed to be normal where it is resorted to in circumstances where the employee ought to have been summarily dismissed with the intention that the employee is paid full terminal benefits.

84. The Claimant having been terminated and not dismissed, is entitled to full benefits including salary withheld during suspension. The Claimant is therefore awarded salary withheld during suspension in the sum of Kshs. 790,168 **or the exact amount withheld if it is different from this figure.**

v. Service pay

From the Claimant's salary slip for November 2020 annexed to the Claimant's list of documents, it is clear that the Claimant was a member of NSSF and deductions were made to the statutory body. He was also a member of the Respondent's staff pension scheme. He is therefore not entitled to this relief.

85. Consequently, judgment is entered for the Claimant in the following terms:

i. Pay in lieu of notice Kshs. 197,542

- ii. The Claimant is awarded salary withheld during suspension
 - iii. The Respondent is directed to issue the Claimant with a certificate of service in terms of section 51 of the Employment Act if the same has not already been issued.
86. The court wishes to clarify that termination of employment can only take effect from the date of termination and not the date disciplinary action commences as stated in the Respondents letter terminating the employment of the Claimant.
87. Given that the Claimant has partly succeeded in his claim only to the extent of being paid the salary withheld during suspension, each party shall bear its own costs.
88. Orders accordingly.

**DATED, DELIVERED AND SIGNED
THIS 20TH DAY OF NOVEMBER, 2025.**

**M. ONYANGO
JUDGE**