

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E368 OF 2023**

**MILLICENT ACHIENG ONYANGO.....CLAIMANT**

**VERSUS**

**KENYATTA**

**NATIONAL**

**HOSPITAL.....RESPONDENT**

**JUDGMENT**

1. It is undisputed that the Claimant was employed by the Respondent vide a letter of appointment dated 20<sup>th</sup> January 2003 as a Nursing Officer II. The Claimant rose through the ranks and, at the time of her termination from employment in March 2023, she held the position of Assistant Chief Nurse in charge of Ward 7A.
2. The Claimant asserts that she served the Respondent diligently and faithfully for over 20 years, during which the Respondent achieved significant progress attributable to her dedication and hard work.
3. The Claimant contends that her termination was unfair and unlawful and therefore seeks the following reliefs against the Respondent:

- a) A declaration that the Respondent threatened and violated the Claimant's rights and fundamental freedoms as secured in the Bill of Rights under Articles 10, 27, 41, and 47 of the Constitution of Kenya.*
- b) A declaration be issued that the Respondent violated the Employment Act.*
- c) An order be made directing the Respondent to pay the Claimant a sum of Kshs. 924,000 being payment in respect of withheld salaries and allowances during the period of the Claimant's interdiction.*
- d) An order be made directing the Respondent to pay the Claimant a sum of Kshs. 524,976 being payment in respect of unpaid full salaries and allowances from March 2023.*
- e) An order be made directing the Respondent to pay the Kshs.3,149,856 to the Claimant being the 12 month's salary compensation of unlawful and unfair termination.*
- f) An order be made directing the Respondent to immediately reinstate the Claimant to her employment as Assistant Chief Nurse in charge of Ward 7A or a position of similar status that the Claimant held immediately prior to her unlawful termination.*

*g) Exemplary and general damages in the sum deemed fit by this Honourable Court.*

*h) Service pay.*

*i) General damages.*

*j) Punitive damages*

*k) Costs of the suit be borne by the Respondent.*

*l) Interest on the above all till payment in full.*

4. The Respondent opposed the Claim through its Statement of Response dated 18<sup>th</sup> December 2023, asserting that the reasons provided in the termination letter justified the Claimant's dismissal. The Respondent further contends that due process was followed and that the Claimant was accorded a fair hearing prior to termination. Accordingly, the Respondent has asked the Court to dismiss the claim with costs.

5. The matter proceeded for hearing on 19<sup>th</sup> February 2025 and 24<sup>th</sup> June 2025, during which both sides called oral evidence.

### **Claimant's Case**

6. The Claimant testified in support of her case as CW1 and, at the outset, sought to adopt her Memorandum of Claim, witness statement, and the list and bundle of documents filed on her behalf as her evidence in chief.
7. The Claimant testified that on 23<sup>rd</sup> May 2022, she received an interdiction letter from the Respondent, suspending her from duty based on allegations of being absent without permission.
8. The interdiction letter stated that she had been granted 15 days of annual leave from 2<sup>nd</sup> March 2022 and was expected to resume duties on 22<sup>nd</sup> March 2022, but allegedly did not return until 5<sup>th</sup> May 2022. The Respondent further alleged that she falsified official documents to justify her absence, thereby committing gross misconduct.
9. Her interdiction became effective on 23<sup>rd</sup> May 2022, with half of her basic salary pending the outcome of the investigation, and she was directed to show cause why disciplinary action should not be taken against her.
10. The Claimant averred that on 31<sup>st</sup> May 2022, she responded to the show-cause notice, explaining that she had fallen sick while on duty, suffering from severe anaemia due to excessive bleeding from uterine fibroids since 2017. She further stated that the condition had caused her disorientation and depression. She

explained that she had been admitted to the Respondent's clinic on 11<sup>th</sup> March 2022 and discharged on 16<sup>th</sup> March 2022 after her condition worsened. The attending doctor granted her 10 days of sick leave, which was subsequently extended by 14 additional days from 28<sup>th</sup> March 2022.

11. The Claimant averred that she expressed remorse and attributed her lawful absence to her medical condition, requesting the Respondent to consider her over 20 years of diligent service without any prior misconduct. She undertook to seek proper treatment.

12. On 5<sup>th</sup> August 2022, the Respondent required her to appear before the Human Resource Management and Advisory Committee (HRMAC), where she submitted written submissions on 10<sup>th</sup> August 2022, noting that she had handed over responsibilities during her absence to Ms. Jane Murunga, Assistant Chief Nurse in charge of Ward 7A. On 28<sup>th</sup> November 2022, the Respondent informed her that it was constituting a medical board to review her condition and advise on her suitability for continued service.

13. The Claimant averred that she attended the disciplinary hearing conducted by HRMAC, bringing a representative. She contended that her representative appeared compromised, proposing admission of guilt in exchange for clemency from the Respondent.

14. She averred that on 16<sup>th</sup> March 2023, the Respondent arbitrarily dismissed her despite the lack of concrete evidence of gross misconduct.
15. The Claimant contended that the Respondent alleged she absconded duty for 43 days without justification. She explained that her 15-day annual leave was set to commence on 2<sup>nd</sup> March 2022, with an expected resumption on 23<sup>rd</sup> March 2022; however, her shift calendar was amended by her supervisor, preventing her from taking the leave as scheduled.
16. She continued to work until 11<sup>th</sup> March 2022, when her health deteriorated significantly, necessitating admission to the Respondent's in-patient private wing, Ward 10B, where she was discharged on 16<sup>th</sup> March 2022 and granted 10 days' sick leave.
17. According to the Claimant, the initial 10-day sick leave was to end on 26<sup>th</sup> March 2022, and she was expected to report on 28<sup>th</sup> March 2022, a Monday. Upon resuming, a medical review determined she was not fit to return to duty, leading to an extension of sick leave by 14 days, ending on 11<sup>th</sup> April 2022.

18. The Claimant averred that since her 15-day annual leave was still pending and required to be used before 30<sup>th</sup> June 2022, she duly notified the Respondent and commenced her annual leave on 11<sup>th</sup> April 2022, excluding public holidays.
19. During her annual leave, several days were declared public holidays: 15<sup>th</sup> April 2022 (Good Friday), 18<sup>th</sup> April 2022 (Easter Monday), 29<sup>th</sup> April 2022 (State Funeral for Former President Mwai Kibaki), 2<sup>nd</sup> May 2022 (Labour Day), and 3<sup>rd</sup> May 2022 (Eid ul-Fitr), which naturally extended her leave period.
20. According to the Claimant, her 15-day leave was therefore set to end on 6<sup>th</sup> May 2022 (Friday), with an expected resumption on 9<sup>th</sup> May 2022 (Monday). However, she resumed duty earlier, on 4<sup>th</sup> May 2022.

#### **Respondent's Case**

21. The Respondent presented oral evidence through **Jane Akunda**, who testified as RW1. Ms. Akunda introduced herself as the Respondent's Senior Human Resource Officer and likewise adopted her witness statement, together with the list and bundle of documents filed on the Respondent's behalf, as her evidence in chief.

22.RW1 testified that sometime in April 2022, the Respondent discovered that the Claimant had been absent from duty without permission or any official communication.

23.She further stated that upon additional inquiry, the following matters emerged:

- i. *The Claimant took a 15-day leave running from 2<sup>nd</sup> March 2022 to 23<sup>rd</sup> March 2022.*
- ii. *The Claimant fell ill during her leave and secured sick offs that extended her stay at home.*
- iii. *The Claimant called the Respondent and indicated that she was booked for surgery at the Agakhan Hospital on 11<sup>th</sup> April 2022 but forwarded a discharge summary from Bushraa Medical Centre.*
- iv. *The Respondent contacted the Claimant on 11<sup>th</sup> April 2022 and 12<sup>th</sup> April 2022 through phone number but was unreachable.*
- v. *The Claimant sent a WhatsApp message to the nurse in charge of ward 7A on 14<sup>th</sup> April 2022 and indicated that she had been booked for surgery and had been given 5 days sick off. She however, failed to send a sick sheet despite promising to do so.*
- vi. *The Claimant was expected to report to work on 15<sup>th</sup> April 2022 after factoring in the leave days and sick offs.*

vii. *The Claimant reported to work on 5<sup>th</sup> May 2022.*

24. RW1 further testified that **Carilus Mc’Affulo** contacted Bushraa Medical Center, Hola, to verify the Claimant's assertion that she had been treated at the facility, and confirmed that the centre does not handle surgical cases and refers such patients to county or sub-county hospitals. It was also established that the Claimant had never been admitted there.

25. RW1 added that a review of the Claimant's NHIF records revealed that the individual admitted at Bushraa Medical Centre was actually the Claimant's husband, Mr. Gabriel Ochieng’.

26. Following these revelations, RW1 stated that the Respondent suspended the Claimant from duty through a letter dated 23<sup>rd</sup> May 2022 on grounds that included desertion of duty and falsification of official documents.

27. The Claimant responded to the show cause notice by her letter dated 31<sup>st</sup> May 2022 and admitted to the allegations contained in the suspension letter.

28. RW1 testified that although the Respondent reviewed the Claimant’s explanation, it was found insufficient to stop the disciplinary process. Consequently, a disciplinary committee was constituted to examine her case.

29. The Claimant appeared before the Divisional Human Resource Management and Advisory Committee (DHRMAC) on 5<sup>th</sup> August 2022, accompanied by a representative. The Committee deliberated on the matter and made several recommendations.

30. The DHRMAC resolutions were subsequently forwarded to the HRMAC for further consideration. Upon reviewing the recommendations, the HRMAC resolved that the Claimant be referred for medical assessment to determine her recovery status and suitability for continued service, after which her case would be resubmitted to the committee.

31. RW1 further stated that the Respondent convened a Medical Board as directed. The Claimant appeared before the board on 11<sup>th</sup> January 2023 and explained that she had fallen ill while on leave, sought an extension due to her condition, and had traveled to Nigeria for prayers, where she believed she received healing.

32. The Medical Board conducted its assessment and concluded, among other findings, that the Claimant was well, had no record of illness since April 2022, and appeared ready to resume her duties.

33. Based on the Medical Board's report, the HRMAC invited the Claimant to appear before it again, which she did on 1<sup>st</sup> March 2023.

34. RW1 testified that upon reviewing her representations, the HRMAC noted that the Claimant had undergone surgery at KPCC and not at Bushraa Medical Centre as she had claimed, and that she had presented forged medical documents to support her alleged admission at Bushraa.

35. The Committee further observed that the Claimant had failed to produce documents evidencing admission at Aga Khan Hospital; had been absent from duty from 15<sup>th</sup> April 2022 to 4<sup>th</sup> May 2022 without permission; had travelled outside the country without the requisite approval under Public Service Commission Guidelines; and had admitted to conduct amounting to gross misconduct.

36. In light of these findings, the HRMAC resolved to lift the Claimant's suspension of 23<sup>rd</sup> May 2022 without loss of the withheld half salary, and to dismiss her from service on grounds of desertion of duty and loss of trust.

37. In RW1's view, the reasons for the Claimant's suspension and subsequent dismissal were valid, fair, and justified.

### **Submissions**

38. The Claimant submitted that the chronology of events clearly demonstrates that she did not abscond duty. Rather, during the entire period in question, she was

either on duty, on certified sick leave, or under medical care. She maintained that her absence was lawful, medically justified, and fully protected under Section 30 of the Employment Act.

39. In the same breath, the Claimant argued that the Respondent's failure to recognise this sanctioned leave period, and its decision instead to allege misconduct for a time when she was legally excused from work, amounts to deliberate mischaracterisation and bad faith. She contended that this conduct contravenes Section 28 of the Employment Act, which safeguards the right to annual leave and prohibits penalising an employee for exercising that right.

40. The Claimant further submitted that the glaring inconsistencies in the Respondent's records undermine the credibility of the allegations against her. To support this position, she relied on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

41. The Claimant further contended that her immediate supervisor, Ms. Murunga, sat on the Departmental Disciplinary Committee that initially recommended her dismissal. In her view, this constituted a clear breach of the rule against bias, *nemo iudex in causa sua*. She argued that Ms. Murunga's involvement in the

process rendered the entire disciplinary proceedings tainted and inherently unfair.

In support of this argument, the Claimant cited the decision in **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR**.

42. The Claimant maintained that the disciplinary proceedings leading to her dismissal were fraught with procedural irregularities and violations of natural justice, thereby rendering the process fundamentally defective and incapable of producing a fair outcome. She further asserted that the conduct of her own representative, who she believes undermined her defence, served only to reinforce the absence of procedural fairness.

43. The Respondent, on its part, contended that although there may have been differing computations of the Claimant's absence days during the investigative and review stages, the central issues of absence without authorization and the submission of falsified documents remained unchanged.

44. The Respondent maintained that the Claimant absented herself from duty without permission or lawful cause, contrary to Section 44(4)(a) of the Employment Act.

45. Relying on the decision in **Charles Aput Otieno v Telkom Kenya Limited [2017] KECA 696 (KLR)**, the Respondent submitted that it had reasonable

grounds to believe that the Claimant had forged or presented falsified medical documents from Bushraa, and had unlawfully earned a salary from public funds for days not worked.

46. The Respondent further asserted that it had adhered to the principles of natural justice and due process as required under Sections 41 and 45 of the Employment Act as well as Article 47 of the Constitution.

47. To reinforce its position that due process was duly observed, the Respondent highlighted the structured disciplinary procedure undertaken and relied on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR)**.

#### **Analysis and Determination**

48. Having considered the parties' pleadings, the documentary evidence on record, and the rival submissions, the following issues stand out for determination: -

- i. Whether the Respondent had a valid and fair reason for terminating the Claimant's employment;**
- ii. Whether the Claimant was accorded procedural fairness prior to the termination;**
- iii. Whether the Claimant is entitled to the remedies sought.**

### **Valid and fair reason for termination of employment?**

49. The starting point in determining this issue is Section 43(1) of the Employment Act, which requires an employer to prove the reasons for termination, failing which the termination is deemed unfair. In addition, Section 45(2)(a) and (b) of the Act provide that a termination is unfair if the employer fails to prove the following:

- 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; ...**

50. In the instant case, the record bears that the Claimant's employment was terminated on the grounds of absence from duty without official authorization, falsification of medical documents, and loss of trust.

51. The Claimant has disputed the allegations of absenteeism, asserting that she was scheduled to commence her 15-day annual leave on 2<sup>nd</sup> March 2022 and was therefore expected to resume duty on 23<sup>rd</sup> March 2022. She states that her immediate supervisor amended her shift calendar, preventing her from

proceeding on leave, and that she continued working until 11<sup>th</sup> March 2022, when she fell ill and was admitted to the Respondent's in-patient private wing, ward 10B. She was discharged on 16<sup>th</sup> March 2022 and granted a 10-day sick off.

52. According to the Claimant, she was still unwell and unable to resume duty on 26<sup>th</sup> March 2022 when her initial sick off expired, prompting an extension of a further 14 days.

53. She further states that, with her 15 days of annual leave still pending and required to be taken before 30<sup>th</sup> June 2022, she duly notified the Respondent and commenced her annual leave on 11<sup>th</sup> April 2022, excluding public holidays.

54. The Claimant states that during her annual leave, five days were gazetted as public holidays, which meant she was expected to resume duty on 9<sup>th</sup> May 2022. Nevertheless, she returned to work on 4<sup>th</sup> May 2022, well before her leave period had lapsed.

55. The Respondent concedes that the Claimant's 15-day annual leave was scheduled from 2<sup>nd</sup> March 2022 to 23<sup>rd</sup> March 2022, and that due to her illness during this period, her leave was extended, with an expected return to duty on 15<sup>th</sup> April 2022.

56. It is therefore undisputed that the Claimant was initially granted 15 days' leave from 2<sup>nd</sup> March 2022 to 23<sup>rd</sup> March 2022, fell ill during this period, and was subsequently granted 10 days' sick leave from 16<sup>th</sup> March 2022, which was later extended by 14 days.

57. The dispute centers on whether the Claimant was required to resume duty on 15<sup>th</sup> April 2022 or 9<sup>th</sup> May 2022.

58. While the Claimant asserts that she did not commence her annual leave as scheduled due to her supervisor amending her shift calendar and hence she worked until 11<sup>th</sup> March 2022 when she fell ill, she did not adduce evidence to substantiate this claim.

59. In the absence of evidence from the Claimant to substantiate her claim that she did not commence her annual leave as scheduled due to the shift change, the Court finds no reason to doubt that she began her annual leave as planned and that the sick-off was granted prior to the commencement of her leave period.

60. The next logical issue for consideration is whether the Claimant's sick off, which was granted on 16<sup>th</sup> March 2022, served to suspend her annual leave.

61.To address this question, it is essential to examine the purpose and nature of sick leave.

62.Sick leave, as provided under the Employment Act, entitles an employee to take time off to rest and recover from illness, provided a certificate of incapacity issued by a qualified medical practitioner is submitted. Sick leave is intended for periods when the employee is expected to be at work. Accordingly, sick leave is not applicable during periods when the employee is on annual leave and is not expected to be at work.

63.It thus follows that in the present case, the Claimant's annual leave was not suspended due to her sick leave. As such, the sick off could only cover any additional absence from work due to the Claimant's illness after the expiration of her annual leave.

64.Even if the Claimant's version that her annual leave commenced on 11<sup>th</sup> April 2022 and was due to end on 9<sup>th</sup> May 2022 is accepted, prudence required that she notify her employer so that the leave could be properly rescheduled.

65.Further to the foregoing, it is notable that in her response to the show-cause letter, the Claimant made no mention that, at the time she fell ill on 11<sup>th</sup> March 2022,

her annual leave was yet to commence or that the period from 12<sup>th</sup> April to 5<sup>th</sup> May 2022 was meant to account for the originally approved 15 days' annual leave. In this regard, the Claimant only referenced the 10 days and subsequent 14 days of sick leave in her response to the show cause.

66. It is also noteworthy that in the same response, the Claimant acknowledged that she did not report to work promptly and apologized, attributing the delay to stress and confusion resulting from her illness. She did not mention the 15 days annual leave.

67. In addition to the foregoing, the Respondent exhibited a message sent by the Claimant to her immediate supervisor on 14<sup>th</sup> April 2022, in which she stated that she had checked into Aga Khan Hospital for surgery on 11<sup>th</sup> April 2022 and was seeking donors. In the same message, the Claimant promised to submit the sick sheet once she had undergone the procedure.

68. The Claimant, however, did not provide any medical documentation to confirm her admission to Aga Khan Hospital on 11<sup>th</sup> April 2022.

69. What's more, the Claimant's message sent on 14<sup>th</sup> April 2022, conflicted with the discharge summary she submitted from Bushraa Medical Centre, which indicated that she was admitted on 11<sup>th</sup> April 2022 and discharged on 28<sup>th</sup> April 2022.

70. It is evident from the foregoing that the Claimant's absence from work between 12<sup>th</sup> April 2022 and her resumption on 5<sup>th</sup> May 2022 remains unexplained and unaccounted for.

71. Accordingly, the Claimant's absence from duty without formal approval from the employer was improper and constitutes absence from work without lawful authority.

72. Under Section 44(4)(a) of the Employment Act, absence from work without leave or lawful cause constitutes a valid ground for summary dismissal.

73. Consequently, the Claimant's absence from work without leave or lawful authority provided the Respondent with a valid and fair reason to commence termination of the Claimant's employment.

#### **Procedural fairness?**

74. The obligation on the part of the employer to follow a fair procedure in terminating an employment contract is set out under Section 45(2)(c) of the Employment Act, with the specific requirements for a fair hearing detailed in

Section 41(1) of the Act. In this context, an employer must notify an employee of the intended termination in a language the employee understands and provide an opportunity for the employee to make representations in the presence of a fellow employee or a union representative of their choice.

75. In the present case, the disciplinary process commenced with a letter dated 23<sup>rd</sup> May 2022, whereby the Claimant was suspended from duty and requested to show cause within seven days why disciplinary action should not be taken against her.

76. The Claimant responded to this show-cause notice via a letter dated 31<sup>st</sup> May 2022. She subsequently appeared before the Divisional HRMAC on 10<sup>th</sup> August 2022. Following the Committee's recommendations, the HRMAC resolved on 21<sup>st</sup> November 2022 that the Claimant be referred to a medical board for assessment.

77. Following the medical assessment, the HRMAC resolved that the Claimant be dismissed from service on the grounds of desertion of duty and loss of trust.

78. In interpreting the provisions of Section 41 of the Employment Act, the Court of Appeal observed in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** as follows:

*“Four elements must thus be discernible for the procedure to pass muster:-*

*(i) an explanation of the grounds of termination in a language understood by the employee;*

*(ii) the reason for which the employer is considering termination;*

*(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;*

*(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”*

79. Applying the above binding precedent to the present case, the Court is satisfied that the Respondent complied with the requirements of Section 41 of the Employment Act, having adhered to both the letter and the spirit of the provision.

80. In the circumstances, the Court finds that the Claimant was afforded procedural fairness, having been notified of the allegations against her and given the opportunity to respond. Further to this, she was also informed of her right to appeal.

81. On the basis of the procedure followed, the Respondent cannot be faulted.

82. Ultimately, the Court finds that the Claimant's termination from employment was not unfair and unlawful.

### **Reliefs?**

83. Having found that the Claimant's termination from employment was based on a valid and fair reason and that she was afforded procedural fairness, the claim for compensation on the grounds of unfair and unlawful termination fails.

84. The claim for service pay is dismissed, as the Claimant's pay slip confirms her membership in the National Social Security Fund, bringing her within the scope of Section 35(6)(d) of the Employment Act.

85. The singular claim that succeeds pertains to the Claimant's half ( $\frac{1}{2}$ ) salary and allowances that were withheld during her suspension period.

### **Orders**

86. In the final analysis, the claim for unfair termination is dismissed, with no orders as to costs.

87.The Respondent is directed to release to the Claimant the half (½) salaries and allowances that were withheld during her suspension period within 30days from the date of this judgment. In the event of default, interest shall accrue from the expiry of the 30-day period at court rates until full payment is made.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>st</sup> day of December, 2025.**

.....

**STELLA RUTTO  
JUDGE**

**In the presence of:**

No appearance for the Claimant

Mr. Oange for the Respondent

Mohammed Court Assistant

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules,**

which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**