

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC NO. 42 OF 2020

(Before D. K. N. Marete)

PETERSON KAHUTHIA MAINA.....CLAIMANT
VERSUS
FAMILY DENTISTRY NAIROBI.....RESPONDENT

JUDGMENT

This matter came to court vide a Memorandum of Claim dated 27th January, 2020. It does not disclose any issue in disputes on its face.

The Respondent in a Amended Reply to the Memorandum of Claim Response amended on 24th March, 2025 denies the claim and prays that it be dismissed with costs.

The Claimant’s case is that he was employed by the Respondent as a dental surgeon on 1st July, 2019 on a fixed term contract for two years. He earned Kshs.250,000.00 per month.

The Claimant’s further case is that he worked diligently for the Respondent until 23rd December, 2019 when the Respondent unceremoniously terminated his services via a text message and an email. This was unlawful and without any colour of right. At such time of termination, the Respondent was and still is indebted to the Claimant in the sum of Kshs.8,062,580.00 particulars of which are as follows;

- (i) *Compensation for unfair/unlawful terminationKshs.3,000,000/=*
- (ii) *Salary for the remaining term of the agreement that is 19 months.....Kshs.4,750,000/=*

- (iii) One month pay in lieu of noticeKshs.250,000/=
- (iv) Pay for work done for the week ending 21st December.....Kshs.62,500/=
- (v) Immediate remittance of all unremitted statutory deductions
- (vi) General damages for breach of contract.
- (vii) Certificate of service.

He claims as follows;

- (i) Compensation for unfair/unlawful terminationKshs.3,000,000/=
 - (ii) Salary for the remaining term of the agreement that is 19 months.....Kshs.4,750,000/=
 - (iii) One months pay in lieu of noticeKshs.250,000/=
 - (iv) Pay for work done for the week ending 21st DecemberKshs.62,500/=
 - (v) Immediate remittance of all unremitted statutory deductions.
 - (vi) General damages for breach of contract.
 - (vii) Certificate of service.
- TotalKshs.8,062,500/=

He prays thus;

- a. Compensation for unfair/unlawful terminationKshs.3,000,000/=
- b. Salary for the remaining term of the agreement that is 19 months.....Kshs.4,750,000/=
- c. One month pay in lieu of noticeKshs.250,000/=
- d. Pay for work done for the week ending 21st DecemberKshs62,500/=
- e. Immediate remittance of all unremitted statutory deductions.
- f. General damages for breach of contract.
- g. Certificate of service.
- h. Interests on a, b, c, and d above.

- i. Costs of the suit with interests.*
- j. Any other or further relief as this court may deem fit to grant.*

The Respondent admits the contents of paragraph 3 of the claim and adds that the claimant's summary dismissal was lawful and fair in the circumstances. They add that at the time of such dismissal all owing to the claimant were settled. It is their further case and averment that the claimant has failed to establish for the relief sought and therefore is not entitled to any.

The Respondent further posits the termination of the claimant from employment was lawful and fair. The claims laid out in their pleading are therefore unfounded, misplaced and without any basis and do not lie given the circumstances belying the nature of the claim and reasons for termination.

The issues for determination therefore are;

1. Whether the claimant's summary dismissal by the Respondent was wrongful, unfair and unlawful.
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of this cause?

The 1st issue for determination is whether the claimant's summary dismissal by the Respondent was wrongful, unfair and unlawful. The claimant in his written submission dated 30th September, 2025 reiterates his case and posits that he was dismissed from employment via a text message and an email at night and instructed not to report to work. This was on allegations of acting in conflict of interest and sabotaging the Respondent's operation in breach of their mutual contract. It was on allegations of poaching patients from the Respondent's hospital to another competing private clinic with the Respondent.

The Claimant further submit that these allegations were never demonstrated in evidence or proof tendered to show how such allegation affected the finances of the Respondent as claimed. Besides the employees alleged to have alerted the Respondent on these allegations were never called to or file witness statement at trial substantiating such allegation. The claimant on this seeks to rely on authority of Article 47(2) of the Constitution of Kenya, 2010 which provides that whenever a right or fundamental freedom of a person is likely to be affected by administrative action, such person is entitled to be given reasons for the action. This is besides section 41 of the Employment Act, 2007 which provides for adherence to substantive and procedural fairness in the event of termination of employment. Employees must at all-time be heard before termination of employment.

The Claimant in all submits that the nature of termination of his employment was irregular and based on an email that communicated his termination. This comes out thus;

The claimant was terminated through an email from the director sent on 23rd December, 2019 at 09:52:52 PM from one oliverwala@gmail.com who wrote "the cameras the clinic send a live feed to me on my phone and iPad. You are in breach of your contract due to your actions. You are sabotaging us and are now in conflict of interest, please do not report to work "In the case of Danish Jalang's & Another v Amicabre Travel Service provided that substantive and procedural jurisdiction are required to distinguish between what constitutes a fair from unfair termination; substantive jurisdiction requires the employer to show the validity, correctness or existence of the reason of termination,

This disparages the provisions of section 43 and 45(2) of the Employment Act which provides as follows.

...substantive jurisdiction requires the employer to show the validity, correctness or existence of the reason of termination, Section 43 of the Employment Act reads "Proof of reason for termination (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.

The Respondent submits a case of lawful termination of employment in that there existed valid reason for such termination and also that the claimant had engaged in exercises that were a breach of his fiduciary duty and trust besides directly harming his employer's business. This was dishonest and deceptive abuse of office for personal gain. The Respondent in further justification of the summary dismissal seeks to rely the authority of **Nicholas Otinyu Miruka v Equity Bank Limited [2013] ECLR, Cause 125 of 2013** where the court emphasized that acts of a criminal nature justify summary dismissal subject to section 41 of the Act in the event of a context.

The Respondent further submit that the evidence of the Claimant's misconduct by poaching patients is sufficient and discharges their burden under section 47(5) of the Employment Act, 2007 and is *prima facie* evidence of misconduct thereby shifting the burden to disapprove the allegation to the employee. Besides, all employment contracts, by whatever nature comprise express and implied terms requiring the employee to;

- a. Act in good faith toward and the employer*
- b. Not compete with the employer during employment*
- c. Not undermine the employer's business interests*

d. *Maintain loyalty and fidelity*

The Respondent's case carries the day. This is because instead of the Claimant clearing doubt as to his involvement in misconduct ruining and *in toto* decimating the Respondent's business, he rushes to seek legal loopholes to sustain his case. This is not sustainable. The Application of the provisions of the Employment Act, 2007, to wit, sections 41,43,44 and 45 on unlawful termination or dismissal and issues of fairness must at all times be applied in context. Employees must not be allowed to get away with atrocious activities, some bordering on criminality to the detriment of the employer. Inasmuch, a case of unlawful termination of employment ensues on the prompting of lack of procedural fairness as envisaged by section 41 of the Employment Act, 2007.

The 2nd issue for determination for termination is whether the Claimant is entitled to the relief sought. He is. Having lost on a case of unlawful termination of employment, he becomes entitled to relief.

However, the conduct of the Claimant in the saga and the Respondents case and submission on this makes the claimant disentitled to relief as sought. Throughout their case, the claimant does not come out to shed light on the serious and disastrous allegations of poaching patients from the Respondents clinic thereby disabling the business. The claimant instead chooses to deny this and rely on the technical aspects of the law to sustain a case of lawful termination of employment. This is not permissible.

Compensation in employment causes is intended to cater for the economic loss incurred by the employee in the event of unlawful termination of employment. This must be demonstrated in evidence and is dependent and determinable by the conduct of the parties in the scenario culminating

in the act of unlawful termination of employment. In the circumstances of this case, the conduct of the Claimant, on which he chooses to be silent is all telling. He was not an asset to the establishment and chose to sabotage its operations thereby grounding it. Any serious award would be tantamount to rewarding an aggressor. It is also this courts view and feeling that the Claimant did not suffer any economic loss and if he did, it was their doing. The Respondent should not be subjected to double jeopardy in sustaining the claimant with any substantial award. This court therefore prefers a peppercorn award in the circumstances.

I am therefore inclined to allow the claim and order relief as follows;

- (i) The Respondent be and is hereby ordered to meet and pay the claimant Ksh.10.00 as compensation for unlawful termination of employment.
- (ii) Each party bears their cost of this cause.

Delivered, dated and signed this **25th** day of **February** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Muthee instructed by Gitonga Muthee and Company Advocates for the Claimant.
2. Miss Oganda instructed by Ochieng Ochieng Advocates for the Respondent.