

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO. 234 OF 2020

KEPHA ONYANGO AWINO.....CLAIMANT

VERSUS

KENYA HOSPITAL ASSOCIATION T/A
THE NAIROBI HOSPITAL.....RESPONDENT

JUDGMENT

The suit was filed by the Claimant vide a statement of claim dated 10/6/2020 seeking judgment against the Respondent as follows:-

- a) A declaration that the Claimant's dismissal by the Respondent was wrongful;
- b) General damages for wrongful dismissal from employment;
- c) Reinstatement of the Claimant to his former employment and position without any loss of benefit and or seniority and continuity of service;
- d) One month's salary in lieu of one month's termination notice;
- e) 12 months' salary as compensation for wrongful dismissal from employment;
- f) Full pension fund benefits from October 2010 to March 2020;
- g) Payment of full retirement benefits contribution to the National Social Security Fund (NSSF) from January 2014 to March 2020;
- h) Terminal dues and benefits;
- i) Interests on (b) to (f) above at court rates;
- j) Costs of this claim;

k) Any other relief this court may deem fit to grant in the circumstances.

CW1, the Claimant testified under oath and adopted a witness statement dated 10/6/2020 as his evidence in chief. CW1 also produced exhibits '1' to '13' in support of his case.

CW1 testified that he was employed by the Respondent as a Laboratory Technologist III in Job Group 4 on 1/4/2020 at a monthly salary of Kshs. 40,680.00. That the terms of employment were permanent and pensionable with a retirement age of 60 with an option of early retirement at 55 years of age.

That he worked diligently and his salary was increased to Kshs. 118,048.00. That NSSF and NHIF contributions were deducted and remitted. However, NSSF dues ought to have changed with effect from the year 2015 from Kshs. 400 per month to Kshs. 2160 but the Respondent failed to implement the change.

That by a notice to show cause dated 4/2/2020 the Claimant was asked to explain why on 28/1/2020; 29/1/2020; and 30/1/2020 he performed unauthorised laboratory tests.

That the Petitioner requested for Reagent, Consumption Audit Report and the Biochemistry CCTV Footage relied upon to charge him be availed to him but had not been given. That he was suspended on 4/2/2020 before he

had responded to the charges and before proper investigations were conducted.

That the Claimant responded to these charges on 5/2/2020 denying the same stating that on 27/1/2020 he was off duty and does not know what happened; on 28/1/2020 he was at work at 1:00 a.m. as P2 until 7 p.m. when he left his shift; and on 29/1/2020 he reported to work at 10:00 a.m. as C2 and he has well explained his duties in his duty roster.

That he was not aware of the alleged clients as indicated in the list of evidence, has never met them by name or face as alleged or at all. That he has never received payment from the said clients since, that is done at the cashier's office. Samples are extracted from the parties' end and prove of payment is taken to the laboratory where the Petitioner was stationed and would then perform the intended test. That at no time did the Petitioner interact with the clients to either receive payment or extract a sample for testing.

On 14/2/2020, the Petitioner was invited to a disciplinary hearing without being supplied with any evidence the Respondent had relied on. That there was no evidence at all against him and was victimized wrongly. That the Respondent violated sections 41, 43 and 45 of the Employment Act, 2007. That he was not allowed an employee of choice to accompany him. That the dismissal was unlawful and unfair.

That his terminal benefits were not properly computed.

On 10/3/2020, the Claimant appealed the dismissal. Appeal hearing was conducted on 7/4/2020. The appeal was not allowed. That the suit be allowed.

Under cross-examination, the Claimant said the Reagent Consumption Audit Report and CCTV Footage allegedly relied on were not availed him to mount a credible defence to the charges. That he only saw the CCTV Footage at the hearing. That he had written a demand letter before the invitation to the hearing dated 26/5/2020.

It was put to the Claimant that tests were done not on 27/1/2020 when he was away but on 28th, 29th and 30th as per the notice to show cause but he said that the credentials used in the tests conducted were not his. That each laboratory technician had own log in credentials to access the common platform.

The Claimant stated that he did not give his explanation in the response to the notice to show cause. Claimant insisted that the documents he requested for to defend himself were not availed to his detriment. CW1 admitted that the invitation to the hearing indicated the right to be accompanied by a colleague but did not go with one. Claimant insisted that the dismissal was based on no evidence at all hence the suit.

Response

The Respondent called one Joan Wanjiku Chege (RW1) in defence against the case. RW1 adopted witness statement dated 4/12/2023 as her evidence in chief and produced exhibit '1' to '6' dated 4/12/2023 in support of the defence case. RW1 said she worked at the Human Resource Department of the Respondent.

RW1 said that from the records, the Claimant on 28/1/2020; 29/4/2020 and 30/5/2020 conducted tests using fictitious sample numbers belonging to other patients. That this was discovered by section supervisor Mr. John Mugo.

That these actions were identified and mapped to the Claimant using machine print out time against CCCTV Footage time that captured him on the specified equipment at the same time. That this misconduct was detected on routine check of tests performed the previous day as per equipment backup data obtained from the equipment.

That the fraudulent tests were done by getting a sample number already used in laboratory information system (LIMS) and allocating the same number, less one last digit to a sample unknown to the official samples for paid up patients. (Emphasis added)

That the action related only to 28th, 29th and 30th January 2020 and not 27th January 2020, when Claimant stated he was not at work.

That the tests were detected on the equipment (C18200) but reagent consumption audit captured the tests that had been detected.

That the conduct by the Claimant amounted to an offence violating the hospital policy.

That the Claimant was furnished with copies of machine database print out that had been detected from the operator's interface and were only available in the data obtained by the help of equipment's manufacture engineer. These copies were retrieved with the help of the system engineer (Mr. Robert Njako) since they had been detected, which explains why the reports for the tests the Petitioner performed, as captured on the CCTV video footage, could not be generated or retrieved from the system.

That the said copies were provided to the Claimant prior to the disciplinary hearing as admitted by the Claimant in his response letter dated 5/2/2020.

(Emphasis added)

That the log in for 27/1/2020 was given to him by mistake as he was not at work on that date. That Petitioner was not charged with any event of 27/1/2020. This was just an error.

That the Claimant was given adequate time to view and review the CCTV Video Footage both during his main hearing and the appeal. On both occasions the Claimant recognised and acknowledged that he was indeed the person shown performing the laboratory tests which could not be retrieved from the system.

That the CCTV camera was placed at the laboratory long time ago to capture suspicious activities.

That the Respondent had a valid reason to summarily dismiss the Claimant and a fair procedure was followed in arriving at that decision.

RW1 under cross-examination admitted that she relied on the record, was not at the disciplinary hearing but was consistent and credible.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with evidence by CW1 and RW1.

The issues for determination are:-

- (a) Whether the dismissal of the Claimant was for a valid reason following a fair procedure.
- (b) Whether the Claimant is entitled to the reliefs sought.

In the case of **Mbugua v Kenya Power and Lighting Company Ltd (Employment and Labour Relations Court No. 1060 of 2018) [2025] KEELRC 1520 (KLR (26th May 2025 (Judgment))** the court cited a Court of Appeal decision as follows:

“The court relies on the Court of Appeal decision in Kenya Revenue Authority v Reuwel Waithaka Gitahi and 2 others [2019] eKLR where the court stated that an employer only needs to show that it had

reasonable grounds to link an employee to misconduct. The court stated:

-We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof and certainly not the one provided for under section 43(1) of the Act. It is improper for a court to expect that an employer could have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in the criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the Respondent had committed gross misconduct in the employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own reasonable grounds for those of the employer.”

Having carefully considered the evidence adduced by CW1 vis a vis that adduced by RW1, the court is satisfied that the Respondent summarily dismissed the Claimant for performing unauthorised tests which led to loss of hospital revenue.

The CCTV Video Footage, undeniably placed the Claimant at the testing equipment on 28th, 29th and 30th January 2020, when the detected, fraudulent tests were conducted using credentials from previous tests done on other persons.

The evidence adduced by the Respondent was not sufficiently rebutted by the Claimant. The Claimant had been given adequate information and humble opportunity to defend himself contrary to his assertions before court.

There is evidence sufficient to satisfy the dictates of section 43(1) and (2) of the Employment Act 2007, read with section 45(1) and (2) and 47(5) thereof that the summary dismissal of the Claimant was for a valid reason.

The court is also satisfied that the Respondent followed the dictates of section 41 of the Employment Act by issuing notice to show cause to the Claimant and invited him to a disciplinary hearing upon being supplied with the CCTV Footage that incriminated him. The Claimant failed to rebut the evidence adduced by the Respondent. The gross misconduct by the Claimant was proved on a balance of probability.

The court relies on the reasoning of the court in **Moreno v Credit Bank Limited (Cause 1366 of 2018) [2024] KEELRC 237** (Judgment) in this respect, in which the court held as follows:

“The concern of the court should be whether the charges against the employee have been clearly communicated to such employee and any additional information sought is provided and further if the employee has been given adequate time to respond to the allegations against him. A physical hearing would not be necessary if it is clearly discernible that the employee was clear in his mind about the charges against him, was furnished with all the necessary information in support of the charges and he has comprehensively responded to the charges without raising any issue about any inadequacy of information provided on any of the charges he is facing. Of paramount concern should be: was reasonable degree of fairness appropriate in the circumstances achieved.”

The circumstances of this court mirror the test set out by the Court of appeal and in the final analysis, the summary dismissal of the Claimant was lawful and fair the Respondent having satisfied the requirements of section 41, 43, 44, 45 and 47(5) of the Employment Act, 2007.

Terminal Benefits

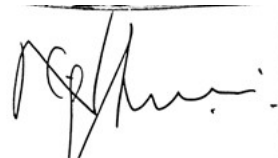
The issue of payment of pension is triggered by separation of an employee and payment is determined by the pension rules applicable, a matter not fully placed before this court. The Respondent is however mandated to make appropriate communication to the pension fund covering the claimant, to trigger calculation and payment of any pension dues to the

claimant for the period October 2010 to March 2020. Furthermore, the Respondent is mandated to remit all NSSF contributions and deductions made and not remitted to the Authority for the period January 2014 to March 2020 to enable the claimant access the same. The Respondent did not rebut this claim and the court finds in favour of the claimant in respect thereof.

Accordingly, the court makes the following final orders: -

- (a) the suit is dismissed with respect to the claim for unlawful and unfair summary dismissal and reliefs sought in that regard lack merit and are not granted.**
- (b)The Respondent to cause payment of the pension dues to the claimant for the period October 2010 to March 2020.**
- (c)The Respondent to remit all NSSF contributions and deductions not remitted to the Fund in respect of the claimant for the Period January 2014 to March 2020.**
- (d) The Respondent to pay half the costs of the suit.**

Dated at Nairobi this 20thth day of April 2026



**Mathews Nduma
JUDGE**

Dated, signed and delivered in open court at Nairobi this 22nd day of April 2026

**Dr. Gakeri J.
JUDGE**

Appearances:

Mr. Omoiti for Claimant

Mr. Keino for Respondent

Mr. Kemboi – Court Assistant

ORIGINAL