

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. E621 OF 2022

DR. JOHN OUMA NANGURI.....CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

JUDGMENT

By a statement of claim dated 5th September 2022, the Claimant sued the Respondent seeking the following reliefs: -

- a) A declaration that the purported termination of the Claimant by the Respondent was unfair, wrongful and unwarranted.
- b) A reinstatement order directing the Respondent to reinstate the Claimant in the position of Pharmacist I in the Pharmacy Department, Kenyatta Prime Care Centre, with full prevailing benefits with effect from 21st December 2020.
- c) In the alternative, the Claimant prays for:
 - i. Payment of all salary and allowances withheld since 21st December 2020 to 29th December 2021 at an aggregate sum of Kshs. 3,706,377/- ($302.150.05 \times 12 \text{Months} + (8 \text{ days} \times \text{Kshs. } 10,072/\text{- daily rate})$).
 - ii. 12 Months Pension Contributions between 21st December 2020 to 29th December, 2021 in the sum of Kshs. 52,248/-.
 - iii. 12 Months Union contributions between 21st December 2020 to 29th December 2021 in the sum of Kshs. 15,600/-.

- iv. 12 Months NSSF Contributions between 21st December 2020 to 29th December 2021 on unpaid Salary in the sum of Kshs. 2,400/-.
 - v. 12 Months NHIF Contributions between 21st December 2020 to 29th December 2021 on unpaid Salary in the sum of Kshs.20,400/-.
 - vi. One (1) month's salary in lieu of notice being the sum of Kshs.302,150.05/-
 - vii. Twelve (12) months' salary of Kshs. 3,625,801/- being compensation for unfair dismissal.
 - viii. Payment in lieu of leave days (45days) not taken in the sum of Kshs.453,240/-.
- TOTAL Kshs. 8,178,266.05/-
- ix. General Damages for violation of the Claimant's rights by the Respondent.
- d) Certificate of Service.
 - e) Costs of this claim.
 - f) Interest at court rates.
 - g) Such orders and directions as this Honourable Court may deem fit to meet the ends of justice.

Claimant's Case

The Claimant testified under oath and adopted witness statement dated 5/9/22 as his evidence in chief. The Claimant also produced exhibits '1' to '18' in support of the case.

The Claimant's case is that he was employed by the Respondent on 22nd March 2018 as a Pharmacist I in the Pharmacy Department, Kenyatta Prime Care Centre (KPCC), vide a letter of appointment dated 22nd March

2018. The Claimant's terms of employment were that he was on probation for an initial 6 months following which he would be confirmed to his position; he would earn a salary of Kshs. 302,150.05 per month comprised of a basic salary and various allowances; he would be entitled to medical benefits for inpatient and outpatient treatment for himself and his family; and he would be entitled to 30 days' annual leave, among other terms, set out the said letter of appointment, guidelines issued by the Respondent from time to time, and the Respondent's Human Resource Employee Handbook/Manual.

The Claimant's duties included coordination of daily activities for all pharmacies (inpatient, staff and COC pharmacy), overall supervision of staff and activities to ensure smooth running of the KPCC pharmacy, and the management of duty rota and offs for staff.

After completing his probationary period, the Claimant's employment was confirmed as permanent and pensionable on 23rd April 2019, with effect from 2nd November 2018. The claimant stated that as part of the Respondent's administrative procedures, a staff attendance register was maintained which was a record of the respective staff members' attendance. The Claimant, in his supervisory and coordination role of the inpatient, staff and COC pharmacies, would consult with staff members and allocate leave days to them early in the year to ensure that the pharmacy department was at all times adequately staffed.

The events that led to the dispute between the Claimant and Respondent were that on 21st February 2020, the Claimant submitted to the Respondent the 2020 KPCC Pharmacy staff leave rota for the year, which indicated that his total leave balance was 39 days, and specified the dates when he intended to take his leave, in comparison with other staff.

That on 30th November 2020, in anticipation of his annual leave which was to commence on 1st December 2020 and end on 8th January 2021, the Claimant submitted a rota for staff who were going to be on duty for the month of December 2020, together with a handover report to one of his colleagues, Mr. Ephraim Karanja who would handle his duties while he was away. However, on 1st December 2020, the Claimant received an email from the Deputy Chief Pharmacist raising concerns with the staff rota he had submitted for the period he would be away on his annual leave, and denying his request for leave on grounds of operational workload. In light of the email, the Claimant states that he subsequently re-submitted a revised staff rota for the month of December 2020, and withdrew his handover report.

It is the Claimant's case that due to extreme emotional, physical and mental exhaustion occasioned by prolonged working hours over the course year 2020, the Claimant suffered severe burnout, leaving him with no option but to give written notice to the Respondent on 21st December 2020, of his intention to resign with effect from 4th January 2021.

Vide a letter dated 22nd January 2021, the Respondent refused to accept the Claimant's resignation, and instead took him to task over purported unauthorised absence from duty. He was directed to show cause why disciplinary action should not be taken against him for gross misconduct. The Claimant responded to the notice to show cause vide a letter dated 22nd March 2021 explaining that his absence from duty was caused by fatigue and mental breakdown, which impaired his judgement. Further, he apologised for the absence, and requested to be allowed to resume his duties. As the Claimant was not certain of his employment status, he did not return to work and awaited the Respondent's decision.

The Claimant narrates that on 20th May 2021, he received a warning letter from the Respondent indicating that his representations had been given due consideration and he had been granted another chance to improve his conduct.

He was ordered to resume duty immediately upon receipt of the said letter. On 8th June 2021, following his resumption of duty, the Claimant received an internal memo indicating that he would be temporarily posted to pharmacy 40 from 8th June 2021 to 9th July 2021.

The Claimant states that he reported for duty at pharmacy 40 on 8th of June 2021, despite the effect of the posting being a demotion of rank and job title within the Respondent's organisational hierarchy.

At pharmacy 40, the Claimant reported to the In-Charge Pharmacy 40, who reports to the Section Head (Inpatient Pharmacies) who in turn reports to Dr. Alfred Birichi, the Respondent's director of Pharmaceutical Services. Prior to his posting to pharmacy 40, the Claimant reported directly to Dr. Alfred Birichi, the Respondent's director of Pharmaceutical Services, in the position of Pharmacist I in the Pharmacy Department, Kenyatta Prime Care Centre. The Claimant complains that the abrupt change of his reporting structure amounted to a forced demotion as he was now reporting to his contemporaries and juniors.

On or about 15th June 2021, having only worked for about one (1) week at pharmacy 40, the Claimant states that he received verbal instructions from Dr. Birichi, the Respondent's director of Pharmaceutical Services, to the effect that the Human Resources department had ordered that he should not report to work.

On 16th June 2021, the Claimant was requested to collect a letter from Dr. Birichi's secretary. He collected the letter dated 13th June 2021, on 17th June 2021. The letter stated that the issue of his prior absenteeism had not been fully concluded, with the Respondent claiming that the Claimant absconded duty from 21st December 2020 and only later surfaced and resumed duty on 8th June 2021 in the Pharmaceutical Division instead of his original station of duty in KPCC.

In the letter, the Respondent further indicated that a decision had been made to subject the Claimant to a disciplinary process to establish the circumstances around his desertion. The Claimant was finally restricted from transacting any hospital business until the matter was resolved.

On or about 26th November 2021, the Claimant received a letter dated 15th September 2021 from the Respondent's director of Human Resources notifying the claimant that the Human Resource Management and Advisory Committee (HRMAC) had held a meeting on 3rd September 2021 where it was resolved that the Claimant should avail himself for possible medical assessment on his mental health before his case was finally determined and concluded. The Claimant states that the insinuation by the Respondent that he was suffering from a mental health disorder and unilateral resolution that he needed a medical evaluation was derogatory, highly prejudicial, dehumanising & patronising considering that the claimant and a majority of staff are medical health professionals.

The Claimant obliged by reporting to the Respondent's Mental Health Department for the assessment, which was carried out on 1st December 2021. However, the Claimant was never furnished with the report following the mental health assessment. The Claimant takes issue with the failure to avail the report to him for the reason that it is a personal health record which ought to be availed to him as the patient.

The Claimant states that on 29th December 2021, the Respondent terminated the Claimant's employment on grounds of purported desertion from duty from 21st December 2020.

The Claimant discloses that he lodged an appeal before the Chairman of the Respondent's Human Resource Committee of the Board on 17th June 2022, but the appeal is yet to be determined by the Respondent to date. He states that he is yet to receive his terminal benefits to date, despite the termination of his employment.

The Claimant is emphatic that the termination of his employment by the Respondent was unjustified, unfair and unlawful and that he be granted the reliefs sought

Respondent's case

The Respondent called Ms. Jane Akunda (RW1) in defence of the case who adopted a witness statement dated 6/4/23 as her evidence in chief and produced exhibits "1" to "23" in support of the defence case.

The Respondent concedes that the Claimant was its employee in the position of Pharmacist stationed in the Pharmacy Department of Kenyatta Prime Care Center (KPCC). He was employed vide a letter of appointment dated 22nd March 2018, containing various terms and conditions of employment which he duly accepted.

According to the Respondent, the facts that led to the present dispute are that the Claimant expressed his intention to proceed on his annual (30 day) leave with effect from 21st December 2021, and submitted a request to that effect to the Respondent's Manager Kenyatta Prime Care Center (KPCC) together with a handover rota.

That the Claimant's request to proceed for a 30-day leave was not convenient to the Respondent since the Claimant had knowingly approved other requests for leave from members of staff in his department and was therefore aware that his department was short staffed during the period when he proposed to go on leave. The Respondent admits that it declined his request to go on annual leave, due to operational requirements at that time and because the Claimant had a number of pending assignments that were due.

Respondent testified that the Claimant, aggrieved by the Respondent's decision, failed to report to work on 21st December 2020 and instead wrote an email to the Manager-Nursing and Clinical Services communicating his intention to resign with effect from 21st January 2021.

The Respondent states that the Claimant's purported resignation was in breach of his employment contract which provided that either party was at liberty to terminate the contract by giving one month's notice or paying one month's salary in lieu of notice.

The Respondent testified that following the Claimant's failure to report to work from 21st December 2020, the Respondent's Manager-Nursing and Clinical Services vide a letter dated 24th December 2020 reference number KNH/KPCC/HR-AD/06/VOL.1 notified the Respondent's Human Resource Office KPCC of the Claimant's absence. The said Human Resource office made several attempts to contact the Claimant to no avail. Upon his return, he was informed that his resignation letter was unsigned and his failure to give the requisite notice or make payment in lieu of notice brought to his attention. The Claimant's response was that his resignation was a spur of the moment decision made while he was undergoing emotional distress.

The Respondent states that the Claimant essentially insinuated that he wasn't in his right mind. The Claimant and the Respondent agreed that the Claimant would be permitted to proceed on his annual leave with effect from 31st December 2020 after he had completed all pending assignments and/or handed over to a rightful nominee. Additionally, it was also agreed that the Claimant would submit a fresh leave application form to effect the change in dates, with this second formal request for leave serving as part of the documentation required by the Respondent's Human Resource Department. Further, the Claimant received a verbal caution against his behaviour.

The Respondent is vehement that it did not oppress the Claimant but rather tried its best to reason with him and maintain his employment despite his

decision to resign. That contrary to the agreement between the parties, the Claimant failed to return to work and/or submit the amended leave form. The Claimant instead absented himself from work from 21st December 2020 to 22nd January 2021, a period of 30 days. The foregoing prompted the Respondent to issue the Claimant with a notice to show cause dated 22nd January 2021 which required a response within 14 days.

The Claimant responded to the show cause letter 2 months after receipt of the same, on 22nd March 2021, stating that he had experienced a mental breakdown due to the fatigue caused by his workload; that his resignation was a result of confusion and impaired judgment; and that he was aware his desertion caused a great disturbance to his duties which he regretted. The Claimant requested to be pardoned for his actions and committed not to desert work again. The Respondent issued the Claimant with a warning letter dated 20th May 2021. Additionally, it was agreed that the Claimant's salary for the period he had absconded duty was to be recovered. Thereafter, the Claimant was requested to report to the Director, Pharmaceutical Services to facilitate the release of his salary.

That despite the grace that the Respondent had extended through the issuance of the warning letter dated 20th May 2021, the Claimant did not return to work and had continuously absconded work for a period of 169 days. The Human Resource Office learned of this continuous absence after it was brought to light by the Claimant's supervisor when he was issued with a letter for onward transmission to the Claimant.

The Claimant returned to work on or about 8/6/21 and was assigned Pharmacy 40. Due to the confusion surrounding the Claimants unauthorized absence and his refusal to fill in and submit the required leave forms which amounted to insubordination, the Respondent's Management did not approve the Claimants resumption of duty.

The Respondent discloses that it issued the Claimant with another show cause letter dated 13th June 20 which called upon the Claimant to account for the 169 days that he was unlawfully absent from work covering the period 21st December 2020 to 7th June 2021, and cautioning him from transacting any business on behalf of the Respondent (Hospital) until his case had been conclusively dealt with. The Claimant was further directed to appear before the Human Resource Management and Advisory Committee (HRMAC) for a disciplinary hearing and was also directed to attend a mental health check since he had raised the issue of his unstable mental status. The Meeting was Scheduled for 2/9/21 but claimant failed to attend and two union representatives indicated that they attempted to persuade him to attend the disciplinary meeting, but he did not agree to do so.

The report by the Psychologist indicated that the Claimant had exhibited symptoms akin to severe burn out and depression and requires psycho-social support which was underway and the claimant was doing much better and the claimant's mental and physical examination indicated that he was fit to resume duty and the Claimant had been equipped with skills on

how to identify his triggers from the onset and cope, or in the alternative seek medical intervention should the symptoms recur; and it was suggested that the Pharmaceutical Division(among others) be sensitized on the recognition and prevention of stress related burn out.

The Psychiatrist's report was submitted to the Human Resource Management & Advisory Committee (HRMAC) and a resolution was passed to hold a meeting with the Claimant on 16th December 2021. The Claimant failed to attend the meeting despite efforts to trace his whereabouts and notify him of the scheduled meeting. That the claimant had confirmed by telephone on 15/12/21 that he would attend the meeting.

In light of all the above, the Respondent decided to terminate the Claimant's employment. The termination decision was communicated to the Claimant vide a letter dated 29th December 2021 reference number KNH/535734/A/20. The Claimant was also informed of his right to appeal against the termination within 21 days, via the same letter. The Claimant lodged his appeal vide a letter dated 17th June 2022, 6 months after the termination, but it was noted by the Respondent's management that he had not raised any new issues to warrant a review of his case. The Respondent indicates that at the time of termination, the Claimant earned a basic salary of Kshs. 69,876/- excluding allowances.

DETERMINATION

It is the Claimant's case that due to extreme emotional, physical and mental exhaustion occasioned by prolonged working hours over the year

2020, the Claimant suffered severe burnout, leaving him with no option but to give written notice to the Respondent of his intention to resign from employment on 21st December 2020, with effect from 4th January 2021. This followed a refusal by the respondent to approve his proceeding on annual leave.

Vide a letter dated 22nd January 2021, the Respondent refused to accept the Claimant's resignation, and instead took him to task over purported unauthorised absence from duty. He was directed to show cause why disciplinary action should not be taken against him for gross misconduct. The Claimant responded to the notice to show cause vide a letter dated 22nd March 2021 explaining that his absence from duty was caused by fatigue and mental breakdown, which impaired his judgement. Further, he apologised for the absence, and requested to be allowed to resume his duties. As the Claimant was not certain of his employment status, he did not return to work and awaited the Respondent's decision.

The Respondent admits that it declined the claimant's request to go on annual leave, due to operational requirements at that time and because the Claimant had a number of pending assignments that were due.

The Respondent's case is that there was a valid reason for the termination of the Claimant's employment since he had committed acts of gross misconduct against the Respondent, and they also followed due process prior to the termination by inviting the Claimant to at least two disciplinary hearings, which he failed to attend of his own volition. They deny the alleged breaches of the Employment Act, principles of natural justice and/or

basic tenements of good labour practice, and the Claimant's fundamental rights and freedoms. The Claimant is accused by the Respondent of approaching the court with dirty hands and being guilty of material non-disclosure of facts.

The fact of the matter is that the respondent denied the claimant annual leave and the Claimant responded by tendering his letter of resignation. There was no obligation for the Claimant to serve any notice on the respondent since the contract of employment provided for payment in lieu of notice and the Respondent held terminal benefits from which they could deduct one month's salary in lieu of notice. (Emphasis made)

There is sufficient evidence from the Claimant himself and the Respondent that the Claimant had suffered burn out, was suffering emotional stress and needed rest and psycho-social support. This was confirmed by a medical examination commissioned by the respondent itself. Instead of the Respondent acting responsibly upon receipt of that report by allowing the Claimant to go on leave, the Respondent insisted on the claimant going on with work and not taking the leave he had already applied for.

The Respondent aggravated the situation by not treating the Claimant with empathy upon revealing that he had suffered burn out and emotional stress and was not in a position to make a rational decision at the time he tendered his resignation. The Respondent went ahead to give the Claimant

a warning letter followed by a further disciplinary hearing in a situation which called for medical treatment, and rest.

The respondent which is a medical facility was best suited to know and understand the best practice of dealing with a medical staff who clearly was sick and needed treatment and not harassment and punishment including demotion and unlawful transfer. Even an apology from the sick Claimant was not enough to summon reason, common sense, empathy, kindness and parental care from an employer who ought to know better.

The Claimant like every other employee is entitled to annual leave. The right to leave under section 28(1) of the Employment act 2007, though to be taken upon application to the employer cannot be withheld unreasonably and least of all in circumstances in which medical examination indicated dire need for rest and appropriate treatment. **See the case of Standard Bank of South Africa v Commission of Conciliation, Mediation & Arbitration and others (JR662/06) 2007 ZALC94; 4BLLR356(LC).**

Also see the case of **Eddie Mutegi Njora v Mega Microfinance Co. Limited [2015] KEELRC 238 (KLR)** where the court said the following about need for employees to take leave: -

“Leave is a legal entitlement. It should be taken when due. This enables an employee to rest as such rest cannot be postponed

and to do so only creates burnout and less productivity from such an employee. I find the notice issued to the Claimant in April and May 2011 best practice as the employer noted the employee had accumulated leave days and should take such leave immediately. The employer in this case was the Respondent and not MIWS. The Claimant cannot thus say that he was directed to take leave by the employer but did not take such leave as he was seating in his office doing work for a third party. The contract of employment is clear to this extent. The Respondent was the employer and could legally direct him to take leave, which the Respondent did. From 21st April, 2011 the Claimant had such notice and despite his protests that he had a lot of work to do before his contract lapsed, such work was for and for the benefit of the Respondent/employer and such an employer directed him to take his leave days.”

In the circumstances of this case the Respondent denied leave to the Claimant in an irrational manner not expected of a fair employer. The conduct admitted by the Respondent here is callous and is a gross violation of the Claimant's rights protected under Articles 27, 28, 41(1) and 47(1) and (2) of the constitution of Kenya 2010. The Conduct was akin to subjecting the claimant to indignity, forced labour, unfair labour practices and unfair administrative action.

This case is a serious indictment on the conscience of the top management of the Respondent. The Supreme Court in the case of Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) held as follows: -

“From the above definition unfair labour practice encompasses all conduct prior to, in the course of employment, during and after determination of employment. The provisions of Article 41 therefore encompass the full spectrum of labour practices. The provisions of Article 41 are borne from the realization that employment and/or right to work is a human right. The right is also linked to other rights in the bill of rights more so the protection of life and the dignity of a person. The right is therefore a principle with legal obligations.”

The Supreme Court, in providing an expanded definition of the term “unfair labour practice”, considered the definition provided at **page 1,667** of the **Black’s Law Dictionary (9th Edition)** which states as follows:

“Any conduct prohibited by statute or federal law governing the relations among employers, employees and labour organisations. Examples of unfair labour practices by an employer include (1) interfering with protected employee rights, such as the right to self-organisation, (2) discriminating against employees for union related activities, (3) retaliating against employees who have invoked their rights, and (4) refusing to engage in collective bargaining. Examples of unfair labour practices by a labour organisation include causing an employer to discriminate against an employee, engaging in an illegal

strike or boycott, causing an employer to pay for work not to be performed (i.e. featherbedding), and refusing to engage in collective bargaining...”

The disciplinary process the Claimant was subjected to was unlawful, unfair, gross, unconstitutional and in violation consequentially of sections 5, 28,36, 41, 43, 44, and 45 of the Employment Act 2007 and violated all the human rights of the Claimant set out in this petition aforesaid. The Claimant is entitled to the reliefs sought as we consider below:

- (a) The Claimant is entitled to payment in lieu of 45 days not taken in the sum of Ksh. 453,240 and is granted accordingly.
- (b) The Claimant is entitled to and is granted arrear salary deducted by the Respondent before the date of termination from 21/12/2020 to 29/12/2021 in the sum of Ksh 3,706,377.
- (c) The Claimant is granted 12 months Pension Contributions in the sum of Ksh. 52,248; Ksh 15,600 Union contribution; Ksh. 2,400 NSSF contributions and Ksh. 20, 400 NHIF contributions for the period stated in (b) above.
- (d) The Claimant is granted one Month salary in lieu of notice in the sum of Ksh. 302,150.05
- (e) Certificate of service within 30 days of the Judgment

Compensation

The circumstances of this case point to untenable relationship between the Respondent and the Claimant and the court considers the prayer for reinstatement inappropriate. The Court however takes into account the

good service the claimant had rendered to the Respondent; the denial of basic human rights by the Respondent narrated in this matter, the curtailment of a very promising career in Pharmacy in the prime medical facility in the Country; unlawful deduction of salary and failure to pay terminal benefits to the claimant; failure to give certificate of service to the claimant; that no compensation has been paid to the claimant for the loss and damage suffered and the indignity suffered by the claimant at the hands of the Respondent and award him the equivalent of 10 months salary in compensation for the unlawful and unfair termination of his employment in the sum of Ksh.3,021,500.00.

The Compensation awarded herein serves also to vindicate the violation of the Claimant's rights enumerated in this judgment by the respondent and the court shall not award any further general damages in this respect.

In the final analysis judgment is entered in favour of the claimant against the respondent as follows: -

- (a) payment in lieu of 45 leave days not taken in the sum of Ksh. 453,240.**
- (b) Payment of arrear salary deducted by the Respondent before the date of termination from 21/12/2020 to 29/12/2021 in the sum of Ksh 3,706,377.**
- (c) Payment of 12 months Pension Contributions in the sum of Ksh. 52,248; Ksh 15,600 Union contribution; Ksh. 2,400 NSSF**

contributions and Ksh. 20, 400 NHIF contributions for the period stated in (b) above.

(d) Payment of one Month salary in lieu of notice in the sum of Ksh. 453,240

(e) Grant of certificate of service within 30 days of the Judgment

(f) Award of the equivalent of 10 months' salary in compensation for the unlawful and unfair termination of his employment in the sum of Ksh. 3,021,500.5.00

(g) Interest at court rates from date of judgment till payment in full.

(h) Costs of the suit

Dated at Nairobi this 27th day of April 2026



Mathews Nduma

JUDGE

Dated, signed and delivered in open court at Nairobi this 29th day of April 2026

Dr. Gakeri J.

JUDGE

Appearance:

Mr. Mwale for Claimant

Ms. Wagasa for Respondent
Court Assistant Mr. Kemboi

ORIGINAL