



REPUBLIC OF KENYA



**Musege v Moi Teaching and Referral Hospital Board (Cause E024 of 2023)  
[2025] KEELRC 630 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 630 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E024 OF 2023  
MA ONYANGO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**JULIUS JOSEPH WAMBAYI MUSEGE ..... CLAIMANT**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL BOARD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Statement of Claim dated 7<sup>th</sup> December 2023 against the Respondent alleging that his employment was unfairly terminated.
2. The Claimant avers that he was employed by the Respondent in the position of Senior Principal Chemical Technologist under the Department of Pharmacy and Nutrition on permanent and pensionable terms of service and was earning a gross salary of Kshs 200,952 at the time of termination of his services.
3. It is the Claimant's case that he received a Show Cause/Suspension letter from the Respondent through the CEO dated 2<sup>nd</sup> February 2023 alleging that on 31<sup>st</sup> January 2023, the Claimant was intercepted by a security officer having stolen hospital drugs.
4. 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.
5. The Claimant states that he responded to the show cause letter and addressed all the issues raised therein on the charge of "Stealing Hospital Drugs" vide his letter dated and received by the Hospital on 10<sup>th</sup> February 2023. He thereafter received a letter from the CEO dated 17<sup>th</sup> February 2017 referring the matter to the Hospital Human Resource Management Advisory Committee (HRMAC) for disciplinary hearing.



6. The Claimant was issued with a letter dated 29<sup>th</sup> June 2023 from the CEO inviting him to the Disciplinary Hearing scheduled for 7<sup>th</sup> July 2023.
7. The Claimant averred that although the Disciplinary Hearing proceeded as scheduled, the same was just a formality as the decision to terminate his employment had been predetermined. That he was not accorded a fair hearing as envisaged by the law.
8. The Claimant contended that on 24<sup>th</sup> July 2023, he received a letter of termination of his employment dated 21<sup>st</sup> July 2023 which letter had two additional grounds to wit: unauthorized absence from work and failure to submit annual Practicing License despite constant reminders.
9. 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.
10. The Claimant took issue with the Certificate of Service issued to him by the Respondent alleging that it was maliciously drawn and aimed at blocking him from seeking and acquiring employment elsewhere despite his advanced knowledge and experience in his field.
11. The Claimant also faulted the backdating of his termination from 27<sup>th</sup> July 2023 to 1<sup>st</sup> February 2023 with loss of salary withheld for the period he was on suspension and contended that it is not only prejudicial but also an unfair labour practice.
12. Owing to the alleged unfair termination of his employment, the Claimant prayed for compensation and terminal benefits which he itemized as hereunder: -
  - i. One-month salary in lieu of notice ..... Kshs. 200,952/=
  - ii. 12 months' compensation for unfair and unlawful termination ..... Kshs. 2,411,424/=
  - iii. Withheld salary from the month of February 2023-July 2023 ..... Kshs. 1,205,712/=
  - iv. Service pay .....Kshs. 2,318,676/=
13. The Claimant avers that the termination was unfair, unprocedural and wrongful as the Respondent did not follow the right procedure. He 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 under paragraph 12 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 February to date.
  - e. Any other relief the Honourable Court may deem fit to grant.

### **The Respondent's case**

14. The Respondent filed a Response to the Statement of Claim dated 25<sup>th</sup> January 2024 in which it denied that it unfairly and unlawfully terminated the Claimant's employment. According to the Respondent, the Claimant stole the Respondent's pharmaceutical drugs and was found in possession of the said drugs. The Respondent contended that the Claimant's was captured on CCTV stealing the drugs.



15. It is the Respondent's case that while the Claimant was on his way home at about 7.30 pm on 31<sup>st</sup> January 2023 from the Respondent's Riley Mother and Baby Hospital, he was intercepted by the security personnel carrying an envelope with the stolen drugs and was asked to go back to the pharmacy.
16. That when the security officers asked the Claimant to reveal the contents of the envelope, the Claimant was reluctant but he eventually tore the envelope open and attempted to throw the contents onto the shelves. According to the Respondent, the envelope contained drugs worth Kshs 3730/- in total.
17. The Respondent stated that immediately after the incident, investigations were done and the Claimant together with other staff members were requested to write statements. Thereafter, an investigation report was compiled and forwarded to the Respondent's Chief Executive Officer for further action.
18. The Respondent avers that according to the findings in the investigation report, the Claimant had stolen the Respondent's pharmaceutical drugs contrary to its Human Resource Policy and Procedures Manual, 2018. The report recommended that stern action be taken against the Claimant. As a result, the Claimant was issued with a show cause letter which he responded to.
19. The Claimant was subsequently invited to appear before the Respondent's Human Resource Management Advisory Committee- Discipline (HRMAC - Discipline) to present his case and be heard. It is the Respondent's case that the Claimant failed to exonerate himself from the charges levelled against him at the disciplinary hearing as a result of which his employment was lawfully terminated vide a termination letter dated 21<sup>st</sup> July 2023. The grounds of termination were that the Respondent had lost trust and faith in him to continue working for it and had therefore decided to terminate his services.
20. In response to the allegation by the Claimant that the loss of salary withheld for the period he was on suspension amounted to unfair labour practice, the Respondent averred that its Human Resource Policy and Procedure Manual, 2018 provides that in the event an employee is exonerated then the withheld dues shall be paid but if the employee is not exonerated, he/she will lose the amount withheld during suspension.
21. The Respondent asserted that it had valid reasons to terminate the Claimant's employment on grounds of stealing hospital drugs and he was subjected to a fair disciplinary process.
22. It was the Respondent's position that the Claimant is not entitled to the reliefs sought in his claim. The Respondent urged the court to dismiss the Claimant's suit with costs.

### **The evidence**

23. The Claimant testified on 6<sup>th</sup> May 2024 as CW1. He adopted his witness statement recorded on 7<sup>th</sup> December 2023 as his evidence in chief and relied on the documents he filed in court in support of his case. In his testimony, the Claimant stated that on 31<sup>st</sup> January 2023, he left work at 7:30pm with an envelope containing a school admission letter, manuals and a booklet with family documents which was meant to be sent to Nairobi to his spouse. He testified that while on his way out of the hospital, he was approached at the gate by a security guard who told him that he wanted to know what was in the envelop. The Claimant stated that they went back to the pharmacy where he worked and the guard asked him to open the envelop but he was reluctant as the contents in the envelop were his personal documents.
24. The Claimant stated that the show cause letter dated 2<sup>nd</sup> February 2023 issued to him cited 3 charges namely stealing drugs, resisting arrest and absenteeism. He stated that he denied the allegations made against him in the show cause letter and was later invited to a disciplinary hearing in July 2023 which



- he attended and defended himself. The Claimant denied that he admitted in the disciplinary hearing that he stole the drugs.
25. On being cross examined by Mr. Oduor for the Respondent, the Claimant denied that he obstructed the CCTV camera with the box in order to steal the drugs. He also denied that he threw the drugs on to the shelves as alleged by the Respondent. The Claimant contended that the disciplinary proceedings were unfair as he was not heard.
  26. The Respondent called Iscar Onyango Owino, its Human Resource Officer in charge of discipline section who testified as RW1 and adopted her witness statement filed in court on 25<sup>th</sup> January 2024 as her evidence in chief. She also relied on the documents filed in court in response to the claim.
  27. It was the evidence of RW1 that the Claimant was not paid salary for January 2023, but he appealed against his salary being withheld and he was paid. She also stated that the Claimant did not appeal against the termination of his employment to the Respondent's board.
  28. On cross examination by Mr. Kirui, counsel for the Claimant, RW1 told the court that the suspension letter had three charges while the termination letter introduced a different issue accusing the Claimant of practicing without a license. RW1 stated that during the disciplinary hearing, the Claimant was asked to produce a practicing license which was a requirement before he handled chemicals since he was employed in the pharmacy but it emerged that he had not submitted a license for the year 2023.

### **The Claimant's submissions**

29. The Claimant identified the issues for determination to be:
  - i. Whether such dismissal of the Claimant was unfair, unlawful, without reason/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; and
  - iii. Who should pay costs and Interest of this claim.
30. On the first issue for determination, the Claimant submitted that from the evidence presented by the Claimant it is clear that the alleged offence of stealing hospital drugs was never investigated, that the investigation and arresting officer was in a rush to fix the Claimant and to have him sacked from his position.
31. According to the Claimant, the Respondent's Human Resource Policy and Procedure Manual of August 2018 at page 64 of the Respondent's bundle, paragraph 11.5.1(vi) provides for thorough investigations of an alleged offence to be undertaken before any disciplinary action is taken against an employee, which was not done in this case.
32. It is the Claimant's submission that no evidence was adduced by the Respondent to justify the termination of his employment as required by law. The Claimant submitted that the disciplinary hearing purported to have been conducted by the Respondent was just a red herring as the CCTV footage relied on by the Respondent to support its case against the Claimant does not implicate him in commission of the alleged offence. It is submitted that there is no footage showing the Claimant wrapping the hospital drugs or tearing up the envelope as alleged by the Respondent.
33. The Claimant submitted that the Respondent did not lead any plausible evidence to prove that the offence(s) levelled against the Claimant were committed by him.



34. The Claimant further submitted that the disciplinary hearing and other procedures did not meet the standard set by the law. The Claimant submitted that the minutes in respect of the Respondent's HRMAC disciplinary hearing on 7<sup>th</sup> July 2023 were never availed to him to read, sign and confirm that they reflected the proceedings of that day and that the court should not rely on the same. In support of this position, the Claimant cited the case of Howard Andrew Nyerere v Kenya Airways Ltd (2014) eKLR.
35. It is the Claimant's submission that the Respondent failed to comply with the dictates of section 41(1) and (2) of the Employment Act and did not accord to the Claimant fair hearing. That his dismissal was therefore procedurally unfair.
36. On the second issue for determination whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination of his employment as prayed for in the Statement of Claim, the Claimant submitted that from the arguments and evidence he presented in court, the matters of facts as pleaded by the Claimant have not been rebutted by the Respondent hence the Claimant is entitled to the reliefs he is seeking.
37. For these reasons the court was urged to make a declaration that the Claimant was unfairly, unprocedurally and unlawfully terminated by the Respondent and make awards as prayed for in the Statement of Claim totaling Kshs. 6,136,764/= or in the alternative to order for reinstatement of the Claimant to his immediate position without any loss of benefits.
38. The Claimant further prayed for a proper certificate of service. He also prayed for costs and interest of this suit.

### **The Respondent's submissions**

39. On its part, the Respondent framed the issues for determination to be:
  - i. Whether the termination of the Claimant from employment was procedurally fair
  - ii. Whether the termination was valid.
  - iii. Whether the Claimant is entitled to the reliefs sought
40. On the issue whether the termination of the Claimant's employment was procedurally fair, the Respondent submitted that from the pleadings, documentary evidence on record and the testimony of the Claimant, the Claimant was subjected to a fair disciplinary procedure which began with initiation of investigations, followed by recommendations that the Claimant be issued with a show cause letter; that he responded to the allegations but his response was not sufficient to vindicate him and was subsequently invited to appear before the Respondent's Human Resource Management Advisory Committee on Discipline.
41. According to the Respondent, the Claimant confirmed during the hearing that he recorded a statement with the Respondent and that he was issued with a show cause letter which he responded to. The Respondent further submitted that the Claimant was invited to appear before the Committee vide a letter dated 29<sup>th</sup> June, 2023 and was informed of his right to be accompanied by a union representative, that the Claimant confirmed that he would be accompanied by Amon Kiplimo. It is submitted that the Claimant attended the Committee meeting on 7<sup>th</sup> July, 2023 and was given an opportunity to offer his mitigation.
42. It is the Respondent's submission that during his mitigation after being shown the CCTV footage, the Claimant admitted that he made a mistake and stated that the CCTV footage could not lie. He



further stated "sometimes people take things simple". According to the Respondent, as a consequence of his own admission, the Committee made its findings and recommended that the Claimant's services be terminated since the employer had lost faith and trust in him in discharging its services.

43. The Respondent submitted that in the letter communicating the decision of the disciplinary committee, the Claimant was informed of his right of appeal but he chose not to exercise that right of appeal.
44. The Respondent submitted that the process leading to termination of the Claimant's employment was procedurally fair.
45. On the second issue whether the termination was valid, the Respondent submitted that theft of hospital drugs falls within the ambit of offences of gross misconduct as per section 44 of the Employment Act and sections 10.11.1(ii, iii), 10.14.1, 10.17.1(ii), 10.26.1, 11.7.1(iii, iv, vii, xii) of the Respondent's Human Resource Policy and Procedures Manual.
46. It is the Respondent's submission that it had valid reasons for terminating the Claimant's employment on account of gross misconduct.
47. On the issue whether the Claimant is entitled to the reliefs he sought in his Statement of Claim, the Respondent submits that the Claimant misappropriated the Respondent's property contrary to its Human Resource Policy and Procedure Manual. The Respondent submitted that the reliefs sought by the Claimant cannot be granted.
48. With regard to the prayer by the Claimant that the termination of his employment was unlawful, unfair and without any reason or justification, the Respondent submitted that the Claimant stole the Respondent's drugs contrary to the Respondent's Human Resource Policy and Procedures Manual and had failed to prove that the termination of his services was unlawful, unfair and without any reason or justification.
49. On the claim for salary in lieu of notice, the Respondent submitted that the Claimant is not entitled to the same because he was not subjected to summary dismissal and was given sufficient notice of impending disciplinary action through the show cause letter.
50. On the prayer for 12 months' compensation for unfair and unlawful termination, the Respondent submitted that the Claimant is not entitled to the same because he did not prove that his employment was unfairly terminated. According to the Respondent, the Claimant was subjected to a lawful, valid and procedurally fair disciplinary process.
51. On the claim for the withheld salary from the month of February 2023, the Respondent submitted that Courts have held that it would be unfair labour practice for the employer to pay an employee if ultimately, he/she is found guilty of the charges and similarly, it would be unfair labour practice not to pay the employee if he/she is exculpated of the charges. According to the Respondent, the Claimant was under suspension in accordance with its Human Resource Policy and Procedure Manual, was found guilty of stealing the Respondent's drugs and as per the provisions of section 11.13.4 of the Human Resource Policy and Procedure Manual and is not entitled to payment of withheld salary.
52. On the claim for service pay, the Respondent submitted that as per section 35(5) read with section 35(6) of the Employment Act, the Claimant is not entitled to service pay since he was a member of the Respondent's pension scheme and National Social Security Fund (NSSF).
53. Lastly on the prayer for reinstatement, it is the Respondent's submission that an order of reinstatement cannot be issued in this case as the Claimant was found guilty of the offence of stealing drugs from its pharmacy by the Respondent. The Respondent submitted that an order for reinstatement would not



be practical as the relationship between the Claimant and the Respondent is irretrievably broken due to loss of faith, trust and confidence in the Claimant.

### **Analysis and Determination**

54. 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: -
- i. Whether the termination of the Claimant's employment was justified.
  - ii. Whether the procedure followed was in accordance with the Employment Act.
  - iii. Whether the reliefs sought are merited
55. On the first issue, Section 45(2) of the Employment Act prohibits an employer from termination the contract of an employee except for valid reason and upon compliance with fair procedure.
56. Section 43 of the Employment Act provides that in a claim arising out of termination of contract of employment 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 be unfair within the meaning of section 45(2) of the Act. Subsection 43(2) further provides that the reasons must be those that the employer genuinely believes to exist at the time of termination.
57. The Claimant was suspended and subsequently terminated from employment on suspicion of having been found guilty of theft of hospital drugs at the Respondent's premises. The Respondent produced the CCTV footage which showed that the Claimant used a box to block the CCTV camera at the time the offence was committed. The evidence adduced was that the Claimant was intercepted by the Respondent's security personnel when he was leaving the hospital and found in possession of the drugs.
58. The Claimant on the other hand denied stealing the said drugs and averred that the CCTV footage produced by the Respondent did not implicate him at all as he was not captured taking the drugs.
59. I have had the advantage of viewing the CCTV footage and in as much as I agree with the Claimant that he was not captured directly stealing the drugs, from the material before me it is evident that the Respondent had reason to suspect the Claimant stole the drugs found in his possession after deliberately and strategically blocking the CCTV camera so that he would not be captured taking the drugs.
60. This is further corroborated by the fact that the Claimant was found in possession of drugs.
61. 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.
62. On the second issue regarding procedural fairness, 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.”
63. 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 titled HRMAC-



DISCIPLINE 2022-2023 FY MIN. 006, it is evident that the Claimant attended the disciplinary hearing on 7<sup>th</sup> July 2023 with a union representative, was given an opportunity to present his case and was subsequently terminated from employment vide the termination letter dated 21<sup>st</sup> July 2023.

64. However, from a perusal of the termination letter, I have noted that the Respondent included an additional ground to wit; failure to submit annual practicing license despite constant reminders which ground was not in the suspension letter. The Claimant's suspension and disciplinary hearing was for, stealing hospital drugs, non-cooperation during your arrest and investigation and absenting yourself from work without permission from hospital management. The suspension letter is reproduced below:

Moi Teaching And Referral Hospital

Ref: PF/No.3622/2023 2<sup>nd</sup> February, 2023

Julius Joseph Wambayi Musebe

(Senior Principal Chemical Technologist)

Through: Director, Pharmacy and Nutrition

Show Cause/suspension

Report reaching Moi Teaching And Referral Hospital (MTRH) Management indicates that your attitude towards work is wanting. You have exemplified lack of commitment and integrity in the performance of your duties by stealing Hospital drugs, non-cooperation during your arrest and investigation; absenting yourself from work without permission from Hospital Management.

A case in point is on 31<sup>st</sup> January, 2023 at around 7:00pm while leaving your workstation Riley Mother and Baby Hospital (RMBH) pharmacy; you were intercepted by a Security Officer outside RMBH gate. It is noted that you were about to board a motorbike, the Security Officer stopped the rider and inquired from you what you were carrying in the parcel. You claimed that it was your personal stuff.

The security Officer asked you to walk back to RMBH Pharmacy which you first resisted but later on agreed was escorted back. While at Pharmacy, you were asked to open the parcel but you insisted that "hii ni mali yangu"

Later you agreed and the following drugs were in the parcel:

s/no	Name	packets	quantity	Total Cost
	Augmentin 1 gm	five	70 tablets	1,750.00
	Zinnat 500mg	Three	30 tablets	1,260.00
	OsteoMed-forte	One	30 tablets	720.00
Total Amount				3,730.00

It is further noted that while opening the parcel in the presence of two (2) security officers and your colleague, you attempted to throw the drugs back to the shelves but the security officers stopped you; this is a clear indication of guilt.



You claimed that the parcel was to be delivered through North Rift Transport Services for Mercylin Nafula Saratuki mobile number 072669xxxx, your spouse as per MTRH Personal File records.

Mercylin informed the Investigation Team she was not aware of the incident. It was found out individual to be sent the parcel was one Jackson Mbugua Mobile number 2021143190. Mr. Mbugua was unaware of all this.

Upon review of the CCTV Camera, it is noted that you blocked the camera inside the Pharmacy to conceal your underhand-stealing and packing of the drugs, hence defrauding MTRH.

It is sad to note that while writing your statement, you deliberately avoided mentioning the stolen drugs, You portrayed arrogance, entitlement, was obviously rude and condescending to the Investigating Team.

Furthermore, you did not report on duty Wednesday 1st February, 2023.

Consequently, the following charges have been preferred against you as provided in the Moi Teaching and Referral Hospital (MTRH) Human Resource Policy and Procedures Manual August, Section: 10.11.1 (ii, iii), 10.141, 10.17.1, 1026.1, 11.7.1 (i) and 11.7.1 iii (iv, vii, xii) and Penal code CAP.63 Section 281 that states;

- (i) All employees shall seek to improve the standards of performance and level of professionalism in the Hospital.
- (ii) All employees shall observe the ethical and professional requirements of a professional body of which they are members.
- (iii) All employees will be expected to portray utmost respect for one another, irrespective of seniority or personal status.
- (iv) Employees are expected to ensure that assets entrusted to them are adequately protected and not misused or misappropriated.
- (v) An employee shall not absent himself/herself from duty during working hours, leave his/her appointed place of work or proceed to a place other than which he/she is usually employed, without due permission of his/her immediate supervisor.
- (vi) Dishonesty reflecting adversely on the honesty and moral integrity of an employee's duties.
- (vii) Insubordination.
- (viii) Making a false statement or declaration in any matter in which he is required to respond to by the Hospital.
- (ix) Misappropriation and theft of Hospital's Property.
- (x) If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven (7) years.

The above offences are sufficiently serious to warrant your dismissal. However, before the intended action is taken, you are required to Show Cause why you think the above charges do not constitute justifiable or lawful grounds for your dismissal.

In view of the serious nature of the offences, it has been found necessary that you be suspended from the services of this institution with effect from 1st February, 2023 pending determination



of your case. You are therefore required to surrender your nametag to the Agg Deputy Manager, Security Services and report to Director, Pharmacy and Nutrition once a week, While on suspension you will be eligible to House Allowance and access Hospital Medical Cover as appropriate.

Your representation if any, should reach the undersigned within seven (7) days from the date of this letter. On expiry of the same and if no defence has been submitted in mitigation, this office will proceed to take any disciplinary action as provided for in the MTRH Human Resource Policy and Procedures Manual August, 2018 without any further reference to you.

Signed

Dr. Wilson K. Aruasa, Mbs, Ebs

Chief Executive Officer

Copy to: Senior Director, Administration Finance

Senior Director, Clinical Service

Director, Human Resource Management and Development

65. The termination letter listed the grounds for termination to be stealing hospital drugs, non-cooperation when summoned to explain what you were carrying away from the Hospital, unauthorized absence from work and failure to submit annual practicing license despite constant reminders. A copy of the termination letter is reproduced below.

Moi Teaching And Referral Hospital

Ref: PF/No.3622/2023

Julius Joseph Wambayi Musebe

(Snr. Principal Chemical Technologist)

Through: Director, Nutrition and Pharmacy

Termination Of Services

This is to convey the recommendations of Hospital Human Resource Management Advisory Committee (HRMAC) - Discipline which met on Friday 7<sup>th</sup> July, 2023 to deliberate on your case and subsequent decision by Moi Teaching and Referral Hospital (MTRH) Management on offence of stealing Hospital drugs, non-cooperation when summoned to explain what you were carting away from the Hospital, unauthorized absence from work and failure to submit annual Practicing License despite constant reminders.

Upon consideration of all facts submitted before it including your cross examination, Hospital Management found you guilty of breaching the following clauses of MTRH, Human Resource Policy and Procedures Manual August, 2018:

- i. Section 10.11.1 (ii) that states: All employees shall seek to improve the standards of performance and level of professionalism in the Hospital.
- ii. Section 10.11.1 (iii) that states: All employees shall observe the ethical and professional requirements of a professional body of which they are members.



- iii. Section 10.17.1 that states: Employees are expected to ensure that assets entrusted to them are adequately protected and not misused or misappropriated.
- iv. Section 10.26.1 that states: An employee shall not absent himself/herself from duty during working hours, leave his/her appointed place of work or proceed to a place other than which he/she is usually employed, without due permission of his/her immediate supervisor. Section 11.7.1(ii) that states: Dishonesty reflecting adversely on the honesty and moral integrity of an employee's duties.
- v. Section 11.7.1 iii (iv) that states: Insubordination.
- vi. Section 11.7.1 iii (vii) that states: Making a false statement or declaration in any matter on which he is required to respond to by the Hospital.
- vii. Section 11.7.iii (xii) that states: Misappropriation and theft of Hospital's property.

In view of the above, hospital Management has lost trust and faith in you to continue working and therefore decided your services be Terminated with effect from 1<sup>st</sup> February, 2023 with loss of salary withheld during suspension period.

Further, note that your terminal dues will be paid upon clearance with the Hospital inline with the existing procedures.

Should you be dissatisfied with this decision, you have the right to appeal to the Chairman, MTRH Board through the Chief Executive Officer within six (6) weeks from the date of this letter.

Signed

Dr. Wilson K. Aruasa, MBS, EBS

Chief Executive Officer

Copy to - Senior Director, Administration & Finance

Senior Director, Clinical Services  
 Director, Human Resource Management and  
 Development  
 Manager, Pension Services  
 HRO, Discipline  
 Resourcing (file)

66. It is common ground that the Claimant was not given an opportunity to defend himself against the ground of failure to submit annual practicing license despite constant reminders listed in the termination letter. He was thus terminated without a hearing on this specific ground in the letter of termination as he did not defend himself against this specific allegation. Based on the foregoing, I find that the Claimant was not subjected to a fair procedure prior to the termination of his employment. The termination was therefore unfair due to the inclusion of a ground in respect of which the Claimant did not have an opportunity to defend himself.

#### **Whether the reliefs sought are merited?**

67. 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.



I declare the termination of the Claimant's employment unfair in view of the of the introduction of a new charge in the termination letter which the Claimant did not have an opportunity to defend himself in respect of.

ii. One-month salary in lieu of notice

Having found that the termination of the Claimant's employment was unfair, he is entitled to pay in lieu of notice. I therefore award the Claimant Kshs.200,952/= under this head

iii. Compensation for unfair and unlawful termination

The Claimant sought a maximum compensation of 12 months' salary. However, taking into consideration the circumstances of this case, I do not think the Claimant deserves to be paid any compensation as there were valid reason for termination of his employment and he was subjected to a fair disciplinary process save for the inclusion of a charge he was not given an opportunity to respond to.

iv. Withheld salary from the month of February 2023-July 2023

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

11.12.1 An officer may be suspended from duty under the following circumstances:

- i. When disciplinary proceedings have been instituted against the officer as a result of which, the CEO through the advice of HRMAC considers that the officer ought to be dismissed; or
- ii. when he has been convicted of a serious criminal offence.

11. 13.2 Where an officer is suspended from the exercise of the functions of his public office, he shall be entitled to only house allowances and medical benefits but not basic salary.

11. 13.4 where disciplinary or criminal proceedings have been taken or instituted against an officer under suspension 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.

68. 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 lenient 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.

69. 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. 1,205,712 or the exact amount withheld if it is different from this figure.

v. Service pay

From the Claimant's salary slip for December 2022 annexed to the Respondent'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.



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

- i. A declaration that the Claimant's termination from employment was unfair due to the inclusion of a ground that he was not given an opportunity to defend himself in respect of.
- ii. The Claimant is awarded the following:
  - a. One-month's salary in lieu ..... Kshs.200,952
  - b. Salary withheld during suspension .... Kshs. 1,205,712
- iii. The Respondent is directed to issue the Claimant with a certificate of service strictly in terms of section 51 of the Employment Act.
- iv. The Respondent shall meet the costs of this suit.
- v. Interest shall accrue from date of judgment unless payment of decretal sum is made within 30 days from date of judgment.

71. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025**

**MAUREEN ONYANGO**

**JUDGE**

