



REPUBLIC OF KENYA



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**Ongeri v Moi Teaching and Referral Hospital (Employment and Labour Relations Cause E018 of 2023) [2025] KEELRC 916 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 916 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE E018 OF 2023**

**MA ONYANGO, J**

**MARCH 21, 2025**

**BETWEEN**

**ROSE MORAA ONGERI ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. Vide her Statement of Claim dated 28<sup>th</sup> July 2023 and filed in court on 1<sup>st</sup> August 2023, the Claimant avers that the Respondent unfairly and unlawfully terminated her employment.
2. The Claimant avers that she was employed by the Respondent on the 13<sup>th</sup> March 2002 as a Patient Attendant III and was promoted to Patient Assistant 1 on 15<sup>th</sup> July 2016.
3. It is her case that on 17<sup>th</sup> February 2023, the Respondent served her with a show cause letter alleging that she had stolen from the hospital. The Claimant contends that she responded to the show cause letter and on 23<sup>rd</sup> February 2023, the Respondent informed her that she would be facing a disciplinary meeting.
4. The Claimant avers that she was invited to a disciplinary hearing on 7<sup>th</sup> July 2023 which meeting she attended. She avers that the disciplinary hearing was biased as she was not allowed to call an advocate nor witnesses as required by law.
5. The Claimant states that through a letter dated 21<sup>st</sup> July 2023, the Respondent proceeded to unprocedurally and unfairly terminate her employment with effect from 17<sup>th</sup> February 2023, the date when the Claimant was sent on suspension.
6. According to the Claimant, the reason given for the termination of her employment was that she stole hospital property. That this being a serious allegation, the matter ought to have been subjected to an investigation and if found culpable, she should have been charged for the offence of stealing by servant.



7. It is the Claimant's case that the basis for the allegation of theft was pegged on a CCTV footage which she was not shown during the disciplinary hearing.
8. The Claimant asserted that her unfair and unlawful termination violates International Labour Laws and practices and constitute a major violation of the constitution, the employment laws and the employment contract entered between the Claimant and the Respondent.
9. The Claimant states that her claim against the Respondent is for unpaid wages and an order directing the Respondent to reinstate her and provide a conducive working environment.
10. In the alternative to the order for reinstatement, the Claimant prays for payment of her terminal dues by the Respondent, which she particularized as hereunder: -
  - i. Withheld monthly salary from the month of February 2023 to date
  - ii. Payment in lieu of notice ..... Kshs. 115,000
  - iii. Compensatory damages for unfair unlawful termination paid at 12 months wages ..... Kshs. 1,380,000
  - iv. Service pay for the remaining years to retirement ... Kshs. 15,180,000

Total.....Kshs. 17,365,000
11. The Claimant sought the following reliefs: -
  - a. A declaration that the termination of the Claimant's employment was preconceived actuated by malice, bad faith and contravened the law, the Respondent's employment policy and procedures and therefore unlawful, unprocedural, unfair, invalid, null and void.
  - b. Damages as particularized in paragraph 10 above
  - c. A declaration from the court that the Claimant is still an employee to the Respondent
  - d. A declaration from the court that the Claimant has been discriminated in employment
  - e. An order directing/compelling the Respondent to reinstate the claimant to her position before termination and provide a conducive working environment.
  - f. General damages for the psychological and mental anguish that she had been subjected to as a result of the Respondent's action
  - g. Costs of this suit with interests thereon at court rates.
12. In response, the Respondent filed an Amended Statement of Response dated 25<sup>th</sup> October 2023 denying the averments made by the Claimant in her Amended Claim. According to the Respondent, the Claimant knowingly stole Hospital property which was found in her possession while she was leaving for home way past her working hours.
13. The Respondent avers that the Claimant was granted an opportunity to substantiate the claims that she lawfully acquired the detergent in question but failed to provide credible explanation nor provide the person who purportedly sold the detergent to her.
14. The Respondent contended that the Claimant was seen by its Security Officer, Mr. Patrick Turunya carrying a heavy green carrier bag while exiting the Respondent's premises and after interrogation by the said officer, the Claimant was ordered to open the paper bag where it was discovered that she was carrying a green liquid detergent branded "stalite" similar to what is used in the hospital for cleaning.



15. The Respondent stated that the Claimant in her defence gave different versions of how she got the liquid, stated that a patient sold her the said liquid detergent. It is the Respondent's contention that upon investigations and review of the CCTV camera footage, it was established that the said patient came to Hospital without any detergent but was only carrying clothes in a handbag.
16. In response to the allegation by the Claimant that the disciplinary hearing was biased as she was not allowed to appear with a representative, the Respondent stated the Claimant was accompanied by a union representative, one Mr. Andrew Chemwor at the disciplinary hearing and was also given the opportunity to provide oral defense which she did.
17. It is the Respondent's case that the termination of the Claimant's employment took effect from the date of suspension having been given notice of impending disciplinary action.
18. The Respondent asserted that the termination of the Claimant's employment was procedural and substantively lawful.

### **Claimant's Case**

19. The Claimant testified on 26<sup>th</sup> February 2024 as CW1. She adopted her recorded witness statement filed in court on 1<sup>st</sup> August 2023 as her evidence in chief. She also relied on the documents she filed in support of her case.
20. It was the Claimant's testimony that she was invited to a disciplinary hearing meeting on 7<sup>th</sup> July 2023 by the Respondent which she attended unrepresented although she had a witness. The Claimant stated that she was issued with a suspension letter on 17<sup>th</sup> February 2023 with instructions to stay away from work but report to the Director Nursing every week, that during the period she was on suspension she was paid only house allowance of Kshs. 5000 which was subjected to deduction of NSSF and NHIF.
21. The Claimant told the court that her employment was terminated on 21<sup>st</sup> July 2023. That the termination letter issued to her by the Respondent indicated that the termination was effective from the date of the show cause letter.
22. The Claimant explained that she bought the detergent she was accused of stealing from a patient (CW2) and was apprehended by the security officer as she was leaving the hospital premises in the company of the patient and her child. According to the Claimant, the Respondent keeps its supplies in the stores and there are staff members in charge of the supplies stores. It was the Claimant's averment that there is an inventory book where staff record the items they require before they are issued at the stores.
23. On cross examination by counsel Owino for the Respondent, the Claimant conceded that she was represented by a union official at the disciplinary hearing. She also stated that she was a member of NSSF and NHIF.
24. The Claimant called Justine Nelima Walekhwa who testified as CW2. She testified that she is the patient who sold the to the Claimant the detergent which was alleged to belong to the Respondent. It was her testimony that on the material day, she had gone to the hospital where she met the Claimant and sold her the soap to get fare to go back home.

### **Respondent's Case**

25. The Respondent called Iscar Owino, the Respondent's Human Resource Officer who testified as RW1. She adopted her witness statement recorded on 25<sup>th</sup> October 2023 as her evidence in chief and relied on the documents filed by the Respondent in support of its case.



26. RW1 testified that the Claimant attended the disciplinary hearing accompanied by Mr. Andrew Chemor, a union shop steward.
27. According to RW1, the CCTV footage showed that the patient (CW2) entered the hospital at 11:56 am with a child and was not carrying anything. She testified that the Claimant was seen by one of the security officers carrying a green paper bag and when asked, she said she was carrying ‘mursik’ milk which she was given by a nurse. That when she was told to open the container, the contents therein were found to be liquid detergent belonging to the Respondent.
28. On cross examination, RW1 stated that when the patient entered the hospital, she was carrying a bag which was big enough to carry a 5-liter jerry can. She also contended that patient’s bags are not checked by the security personnel when they check in.

### **Analysis and Determination**

29. From the pleadings on record, the evidence of the parties and the submissions on record, the issues that arise for determination in this case are as follows: -
  - i. Whether the Claimant was terminated from employment on a valid and fair reason
  - ii. Whether the termination of the Claimant from employment was procedurally fair
  - iii. Whether the reliefs sought are merited

### **Whether the Claimant was terminated from employment on a valid and fair reason**

30. 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. It provides as follows:

“Unfair termination

45(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

- 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; and
- c. that the employment was terminated in accordance with fair procedure.”

31. 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.
32. In the instant case, the suspension letter dated 17<sup>th</sup> February 2023 disclosed the reason for the termination of the Claimant’s employment as theft. According to the Claimant, the termination of her employment was unfair as no proof was provided that she was involved in the alleged theft. It is the Claimant’s case that the allegation against her being a criminal allegation, a high standard of proof was



required to establish that indeed she was involved in stealing the Respondent's property. The Claimant contended that she was not charged with the offence of stealing by servant after the incidence to prove her guilt. The Claimant averred that she bought the soap from a patient who needed fare to travel back to her home.

33. On its part, the Respondent maintained that its CCTV camera footage captured the movements of the Claimant with regard to the theft and confirmed that indeed the Claimant stole the liquid soap and was nabbed by one of the Respondent's security officers as she left the hospital in the company of a patient and her child.
34. The Respondent in support of its case produced photos from the CCTV camera footage showing movements of CW2 in the hospital as evidence that she was not carrying any liquid detergent when she entered the hospital. The Respondent further contended that the liquid found in possession of the Claimant was green in colour and was in a branded container similar to the liquid detergent used in the hospital. That this is the same container found in the custody of the Claimant at the time of search.
35. In the statement filed for CW2 she stated that the liquid soap she sold to the Claimant was in a plain white jerrycan.
36. In her response to the show cause letter the Claimant stated that what she was found with was green liquid soap. That at that time the Hospital was using blue liquid soap.
37. The CCTV clips and photos do not clarify these discrepancies that are material to the determination of this suit. The CCTV clips are further not clear on whether or not CW2 had the liquid soap in her possession at the time she arrived at the Hospital.
38. The Respondent had the opportunity of calling the investigating officer who would perhaps have clarified these issues but did not. RW1 relied on the evidence before the court which is inconclusive on the source and identity of what was found in the Claimant's possession.
39. The foregoing raise reasonable doubt as to whether the liquid soap found in the possession of the Claimant was the property of the Hospital or was purchased by the Claimant from CW2.
40. Section 43 of the Employment Act places the burden of proving the reason for termination on the employer while section 45(2) states that failure to prove the reason for termination would lead to a finding of unfair termination of employment.
41. Section 47(5) also places the burden of proof of reason for termination on the employer. The section reads:
  - “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
42. Based on the foregoing, it is my finding that the Respondent did not prove the validity of the reason for termination of the Claimant's employment on a balance of probabilities. The termination was therefore substantively unfair.
43. 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.”

44. The Claimant averred in her claim that due process was not followed in the termination of her employment as the disciplinary hearing was marred with biasness. I have perused the minutes of the disciplinary hearing titled HRMAC-Discipline 2022-2023FY MIN. 006, attached to the Respondent’s documents at length. From the minutes of the disciplinary hearing held on 7<sup>th</sup> July 2023, the Claimant was represented by a union representative and she was given an opportunity to present her case before. I have not found any evidence of bias as alleged by the Claimant in the disciplinary hearing. Further, the Claimant did not explain what constituted the alleged bias.
45. It is therefore the court’s finding that the Claimant was taken through a fair process before she was terminated from employment.
46. The Claimant raised an issue about not having been charged with the offence of stealing from her employer. The employer is under no obligation to pursue criminal charges against an employee and failure to report a criminal offence by an employer against an employee is irrelevant in a suit for unfair termination of employment. An employer has no control of criminal cases and does not decide whether or not an employee should be criminally charged.

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

47. In her Statement of Claim, the Claimant prayed her unpaid wages and an order directing the Respondents to reinstate her and provide a conducive working environment.
48. In the alternative, the Claimant prayed for payment of salary withheld during the period of suspension from the month of February 2023, payment in lieu of notice, maximum compensation for unfair termination and service pay.
49. On the claim for reinstatement, Section 12(3)(vii) of the Employment and Labour relations court provides “that a court shall have jurisdiction to order for reinstatement of an employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law”
50. Under Section 49(4) of the *Employment Act*, reinstatement is to be ordered only in very exceptional circumstances, being an order for specific performance of personal services. The Claimant has not demonstrated any exceptional circumstances to entitle her to an order of reinstatement. The prayer is accordingly declined.
51. Going back to the alternative reliefs sought by the Claimant, on the prayer for payment of the withheld monthly salary from the month of February 2023 to date, 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.
52. In the case of Julius Joseph Wambayi Musege vs Moi Teaching and Referral Hospital Board, Eldoret ELRC Cause No. E024 of 2023, this court while dealing with a similar issue where the Claimant's employment was terminated and he sought to be paid withheld salary during the period of his suspension held as follows:
- “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, he 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.”
53. Noting that the Claimant was terminated from employment and not dismissed, it follows that she is entitled to payment of the withheld salary from the time she was suspended until the date of termination of her employment, that is, from February 2023 to July 2023.
54. It is important to add that termination of employment takes effect on the date of termination and not on the date of suspension. Suspension is for purposes of removing an employee from the workplace pending investigations and/or while disciplinary process is ongoing and it is not desirable for the employee to be at work. An employee continues to be in employment during suspension until the date of termination of employment.
55. There is no dispute that the Claimant was paid her house allowance during the suspension period as shown by the pay slips she filed. The Claimant is awarded the withheld salary during the period of suspension less the house allowance paid.
56. On the claim for payment in lieu of notice, the Claimant is entitled to as the court has found that the termination of her employment was unfair (that is if the same has not already been paid).
57. From the Claimant's pay slip for January 2023 attached to the Respondent's documents, the Claimant was earning a Basic salary of Kshs. 60,348, House Allowance Kshs. 5,000, Heath Workers Allowance of Kshs 20,000, Risk Allowance of Kshs 2000, Commuter allowance of Kshs 4,000 and Extraneous Allowance of Kshs 15,000
58. In the case of Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR the Court of Appeal held that: -
- “Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary.”



59. The Claimant is therefore entitled to a gross salary of Kshs 106,348.00 as notice pay.
60. On the prayer for compensation for the unlawful termination, the Claimant sought maximum compensation. From the evidence on record, the Claimant had worked for over 22 years for the Respondent. In view of the fact that the termination of her employment was unfair, she is entitled to compensation. It is my view that 8 months salary is reasonable in the circumstances. I have taken into account her length of service and the fact that she had a clean record which works in her favour. I have further taken note of her contribution to the events that led to the termination of her employment and the fact that the only reason I found the termination of her employment unfair was the failure of the Respondent to clear the doubts raised in the evidence before the court in respect of the identity and ownership of the soap found in her possession. I thus award her Kshs. 850,784.00.
61. The Claimant also prayed for service pay for the remaining years due to retirement totaling Kshs. 15,180,000. This is an alien prayer as it combines service pay and salary for the remainder of the Claimant's service to the date of retirement.
62. Suffice that neither is payable. The prayer for payment of salary to the date of retirement cannot be paid as the Claimant would not have earned it. Secondly there is no evidence that she would not be able to work and earn an income for herself for the remainder of her working life. Section 49(4) (l) of the Act requires an employee to mitigate the consequences of an unfair termination.
63. I have also considered the Claimant's pay slips filed by the Respondent which confirm that she was a member of NSSF and the Respondent's staff retirement scheme of NSSF. As per section 35(5) read with section 35(6) of the Employment Act, she is therefore disqualified from claiming service pay. I dismiss the claim for service pay.
64. Consequently, judgment is entered for the Claimant in the following terms:
- i. The Claimant is awarded salary withheld during suspension less house allowance paid.
  - ii. The Claimant is awarded notice pay of Kshs 106,348.00.
  - iii. The Claimant is awarded 8 months' salary as compensation for unfair termination of Kshs. 850,784.00 as compensation.
65. The Respondent shall meet the costs of this suit.
66. Interest shall accrue from date of judgment unless payment of decretal sum is made within 30 days from date of decree.
67. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21<sup>ST</sup> DAY OF MARCH 2025**

**MAUREEN ONYANGO**

**JUDGE**

