



REPUBLIC OF KENYA



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**Waweru v Vanmed Limited (Cause 856 of 2019)
[2024] KEELRC 97 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 97 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 856 OF 2019
J RIKA, J
JANUARY 31, 2024**

BETWEEN

NJENGA WAWERU CLAIMANT

AND

VANMED LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, dated 31st October 2019.
2. He avers that he was employed by the Respondent on 14th January 2016, as a Medical Representative, on a monthly salary of Kshs 200,000.
3. The Respondent terminated his contract in February 2019. He avers that termination was unfair and unlawful. He was continuously frustrated by the Respondent. The Respondent created a hostile work environment, demonstrated biasness against the Claimant, and gave him no valid reason, to justify termination.
4. The Claimant avers that consequently, he suffered mental anguish, inconvenience and psychological injury, warranting aggravated damages. He was an exemplary Employee, who always exceeded expectations.
5. He prays for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 12 months' salary in compensation for unfair termination at Kshs 2,400,000.
 - c. Punitive and aggravated damages.
 - d. Costs.



- e. Certificate of Service.
6. The Respondent filed a Statement of Response, dated 25th February 2020. It is conceded that the Claimant was employed by the Respondent, as pleaded. On various occasions, he reported for duty under the influence of alcohol. He failed to report to work altogether, on other occasions. He was issued warnings. He did not meet his sales targets.
 7. He was required to attend a theatre procedure at Aga Khan Hospital, on 17th February 2019, at 9.00 a.m. He arrived at work late and intoxicated, compromising his ability to work.
 8. On 19th February 2019, he was issued a letter to show cause why he should not face disciplinary action. He was suspended and invited for disciplinary hearing on 25th February 2019. He was advised to attend hearing in the company of a colleague of his choice.
 9. He attended disciplinary hearing, but without a colleague or other representative. He told the disciplinary committee that he had gone for a drink on 16th February 2019 until midnight. His duty at theatre was scheduled for the morning of 17th February 2019. The Doctor who performed the procedure, confirmed to the disciplinary committee that the Claimant arrived late, occasioning delay in commencement of the procedure.
 10. A decision was made to terminate the Claimant's contract. He cleared with the Respondent. He was paid terminal dues amounting to Kshs 402,170, including notice pay equivalent of 1-month salary. He acknowledged receipt and signed discharge on 8th March 2019.
 11. The Respondent urges the Court to dismiss the Claim with costs.
 12. The Claimant gave evidence, and rested his Claim, on 22nd November 2022. Chandni Ratilal Shah, Respondent's Operations Manager, gave evidence for the Respondent on 20th September 2023, closing the hearing. The Claim was last mentioned on 17th November 2023, when the Parties confirmed filing and exchange of the Closing Submissions.
 13. The Claimant relied on his Witness Statement and Documents [1-4], in his evidence-in-chief. His work entailed assisting Consultant Surgeons. He told the Court that he did not know who the complainant or the complaint was, leading to termination of his contract. He learnt about the complaint in Court.
 14. Cross-examined, he restated that his duty entailed working with Consultant Surgeons in different Hospitals. It involved being in theatre for surgical procedures. There was allegation of misconduct raised against him by the Respondent. He rejected the allegation. There were warning letters in the past. He was given room to improve. He was issued letter to show cause. He replied. He was invited for disciplinary hearing. He was not advised to take along a colleague. Shown the notice to the disciplinary hearing, the Claimant conceded that he was advised to take along a colleague of his choice. He was heard. He received the letter of termination. The reason for termination was stated. He was issued computation of terminal dues. He received payment. He executed acknowledgement and discharge. He was issued Certificate of Service.
 15. Shah relied on his Witness Statement dated 16th March 2020, and Documents filed by the Respondent [1-14], in his evidence-in-chief. Cross-examined, he told the Court that the Respondent issued the Claimant a letter to show cause. He replied, saying he had not slept enough, and was fatigued. The Claimant was heard by a committee consisting 5 persons, including Shah. Redirected, Shah told the Court that the Claimant conceded he had taken alcohol late in the night, on the eve of a scheduled surgery.



16. The issues are whether termination was carried out fairly under Sections 41 and 45 of the *Employment Act*; whether it was based on valid reason under Sections 43 and 45 of the *Employment Act*; and whether the Claimant merits the remedies sought.

The Court Finds

17. The Claimant's employment history with the Respondent, his terms and conditions of service, are not contested. It is not contested that his contract was terminated by the Respondent, and that he was paid terminal benefits in the sum of Kshs 402,170, which he acknowledged receiving and discharged the Respondent against all actions, proceedings, or claims.

Procedure

18. The Claimant conceded that he was issued a letter to show cause. The allegations against him were clearly stated. He replied to the letter to show cause, explaining that he was fatigued on the date of a scheduled surgical procedure.
19. It is common ground that he was invited to a disciplinary hearing. He did not register any objection on the composition of the 5-man disciplinary committee. Although the Claimant initially denied that he was advised to have the company of a colleague at the hearing, he quickly recanted this assertion upon being shown the letter inviting him to the hearing, which clearly advised him on his right to be accompanied.
20. He was heard and did not dispute that he was late for the surgical procedure. A decision to terminate his contract was made, and communicated to him. The Court does not find a single fault with the procedure employed by the Respondent, in terminating the Claimant's contract. Procedure was fair, in accordance with Sections 41 and 45 of the *Employment Act* 2007.

Reason

21. The reason given in the letter of termination, that the Claimant negligently performed his duties on 17th February 2019, was valid reason.
22. The Claimant took his alcohol late on the night of 16th February 2019. His explanation was that he was fatigued in the morning of 17th February 2019, which is another way of saying, that he was nursing a hangover, from his late night alcoholic indulgence. The surgical procedure at Aga Khan was scheduled for 9.00 o'clock. He kept the Surgeon waiting as he nursed his hangover. The Claimant reported late at Aga Khan Hospital, and the procedure did not take off, until after 10.00 a.m. This was confirmed by the Surgeon, to the disciplinary committee.
23. He occasioned delay in a surgical procedure, which would inconvenience the Surgeon, the Patient, other Patients and the Hospital. The Court agrees that the Claimant was employed to a position which required him to perform his role carefully and properly. Arriving late for a scheduled surgical procedure, while nursing an alcohol-induced fatigue, did not amount to careful and proper discharge of his role, as an Assistant to a Surgeon.
24. Section 44[4][c] of the *Employment Act* regulates the employment offence of negligence. It refers to wilful neglect to perform any work which was the duty of the Employee, to perform, or if the Employee performs any work carelessly and improperly, which from its nature, was his duty under his contract to have performed carefully and properly. Surgical work, no doubt imposed on the Claimant, an obligation to perform his duty carefully and properly. The Respondent could have justified its decisions on other grounds under Section 44[4] of the *Employment Act*, such as being absent from



the place appointed for his work, or even insubordination for failing to follow instructions on the beginning hour, for the surgical procedure. It suffices that the Respondent concluded the Claimant was guilty of negligence, an act of gross misconduct justifying termination, under Section 44[4] of the *Employment Act*.

25. The Claimant pleaded that he was subjected to a hostile work environment by the Respondent. There was no evidence of a hostile work environment, given by the Claimant. What were the acts of hostility? He did not contextualize his claim concerning hostile work environment, by relating such environment to the reasons he left employment. He made this bare pleading, without evidence.
26. Termination was based on valid reason under Sections 43, 44[4] and 45 of the *Employment Act*.

Remedies

27. Termination was fair both on procedure and substantive justification. The declaratory, compensatory, and punitive orders sought against the Respondent are wholly unmerited. Certificate of Service was issued to the Claimant.
28. He was paid terminal benefits. He received the sum of Kshs 402,170, acknowledged payment and discharged the Respondent. Discharge was unequivocal. The Claimant stated “ I hereby release and discharge Vanmed Limited [Respondent], the Vanguard Group of Companies, and any other associated organisation, from and against all actions, proceedings, claims or demands whatsoever arising out of, or in connection with my final dues.” The discharge was executed freely and willingly, and no form of coercion has been suggested to have been exercised by the Respondent upon the Claimant, throughout the Claimant’s pleadings and evidence.
29. In *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR, the Court of Appeal upheld the sanctity of discharge vouchers in termination of employment contracts, stating that giving effect to the parties’ intention on execution of discharge, means that the Court cannot entertain the Claim filed by an Employee who has executed discharge. This is because such an Employee is deemed to have waived his right to make further claims, in relation to termination of his contract. Going by the authority of the Court of Appeal above, this Court could indeed have declined to entertain the Claim, had the discharge been argued preliminarily.

It Is Ordered

- a. The Claim is declined.
- b. Costs to the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA
JUDGE

