



**Gitari v Kenyatta National Hospital (Cause E6556 of 2020)
[2024] KEELRC 31 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 31 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6556 OF 2020
L NDOLO, J
JANUARY 25, 2024**

BETWEEN

KATHOMI KAGENI GITARI CLAIMANT

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Kathomi Kageni Gitari is an employee of Kenyatta National Hospital, currently working in the position of Supplies and Procurement Officer, Main Store B. On December 22, 2020, the Claimant filed a Memorandum of Claim challenging the decision by the Respondent to surcharge her for the sum of Kshs. 2,501,433.
2. Alongside the Memorandum of Claim, the Claimant filed a Notice of Motion under Certificate of Urgency seeking an interim order of injunction restraining the Respondent from effecting the surcharge. The Claimant also sought an order directing the Respondent to refund the sum already recovered from her.
3. By an *ex parte order* issued by Nduma J on December 23, 2020, the Respondent was restrained from effecting the surcharge against the Claimant.
4. The Respondent opposed the Claimant's claim by a response dated February 22, 2021.
5. The Respondent also filed a Notice of Preliminary Objection of even date challenging the competence of the Claimant's claim on account of limitation of time.
6. The matter came up for directions on May 27, 2021 before Makau J who directed that both the Claimant's Notice of Motion and the Respondent's Preliminary Objection be subsumed into the main claim.



7. The matter was subsequently referred to Court Annexed Mediation but was unresolved at that stage. I therefore heard the parties on October 7, 2023, with the Claimant testifying on her own behalf and the Respondent calling its Human Resource Officer, Peris Nyawira Ndung'u. The parties further filed written submissions.

The Claimant's Case

8. The Claimant states that she was employed by the Respondent as a Supply Chain Management Assistant, earning a monthly salary of Kshs. 105,895.
9. She adds that on August 12, 2015, she appeared before the Respondent's Board of Inquiry, where she was advised of surplus and deficiencies in her store amounting to Kshs. 2,501,433.
10. The Claimant further states that on August 17, 2015, she wrote to the Respondent asking for access to the ledger cards and bin cards from the laboratory stores and a copy of S16 forms in order for her to ascertain which items had surpluses and deficiencies.
11. The Claimant wrote another letter to the Respondent dated September 16, 2015 attaching copies of S5 cards and some S3 cards as supporting documents to verify her explanation.
12. The Claimant claims that she was not offered a chance to be heard nor was she subjected to the existing staff disciplinary procedures.
13. The Claimant avers that in spite of her explanation, the Respondent went ahead to commence a surcharge against her, indicating the intention to surcharge the sum of Kshs. 2,501,453.
14. The Claimant's case is that the decision to surcharge her was arbitrary, unfair, in violation of natural justice and an infringement of her right to fair labour practices for the reasons that:
 - a. The decision was arrived at without subjecting the Claimant to the documented disciplinary process in the Respondent's Human Resource Policy and Procedure Manual;
 - b. The decision was arrived at without granting the Claimant an opportunity to be heard by a Divisional Disciplinary Committee as stipulated in Section 10.9 of the Respondent's Human Resource and Procedure Manual, 2013;
 - c. The Claimant was never taken before the Surcharge Committee, whose duty is to decide the amount of money the Claimant was to be surcharged, if any;
 - d. The decision was made without granting the Claimant an opportunity to be heard and to explain her case before a fair and properly constituted disciplinary tribunal;
 - e. The Claimant had never been informed that she owes the Respondent the sum of Kshs. 2,501,433;
 - f. The only store keeping issues raised in the year 2011-2012 were responded to in writing and no other disciplinary proceedings were carried out;
 - g. The decision to surcharge the Claimant was not subjected to the Surcharge Committee to enable her give an explanation in a fair process; and
 - h. The sum of Kshs. 2,501,433 is not supported by any documentary or other evidence.
15. The Claimant states that the decision to surcharge her will occasion her untold economic hardship and distress.



16. The Claimant asserts that flowing from the Respondent's illegal, unlawful and irregular actions, a total sum of Kshs. 850,476 has been deducted from her salary up to December 2020.
17. Overall, the Claimant seeks the following remedies:
 - a. A declaration that the decision to surcharge her the sum of Kshs. 2,501,433, without granting her a fair hearing is unlawful;
 - b. A permanent injunction restraining the Respondent from surcharging her the sum of Kshs. 2,501,433, without subjecting her to a fair disciplinary process;
 - c. An order directing the Respondent to reimburse to the Claimant the sum of Kshs. 850,476, with interest thereon at commercial rates from the date of filing suit;
 - d. General damages for breach of employment contract and unfair disciplinary process;
 - e. Costs plus interest.

The Respondent's Case

18. In its Response dated February 22, 2021, the Respondent states as follows:
 - a. The Claimant was the stockholder at the Respondent's laboratory and cold room stores during the period in which the incident complained of took place;
 - b. As a stockholder, the Claimant was in charge of stock management, keeping up to date all records and/or inventory of supplies and consumables within her area of designation;
 - c. By practice and as a vital part of inventory control, the Respondent periodically conducts stocktaking and/or stock counting to check and record all the inventory in hand by the end of each financial year to determine losses and malpractices;
 - d. Any stock discrepancy discovered during stocktaking would reveal either more or less stock in hand;
 - e. In the event of a discrepancy, the first thing the Respondent does is to uncover the cause;
 - f. Once the cause of discrepancy is identified, steps are taken to ensure that it does not happen again. To this end, the Respondent regularly conducts stocktaking at the end of every financial year;
 - g. During the stocktaking conducted at the laboratory and cold room stores, which were under the Claimant during the financial year 2010-2011, it was noted that there were discrepancies. There were stocks worth over Kshs. 2,501,453.37 missing and could not be accounted for. As a result, the Claimant was required to explain the discrepancies.
19. The Respondent states that it has an established independent committee known as the Board of Enquiry, whose mandate is to enquire into the conduct of stockholders and officers involved, and seek answers to the discrepancies leading to losses.
20. The Respondent avers that following the Claimant's appearance and representations before the Board of Enquiry, a finding was made that the Claimant was negligent in the performance of her duties, thereby exposing the Respondent to losses. As a result, the Board of Enquiry recommended that the Claimant be surcharged to recover the losses incurred by the Respondent.



21. Being aggrieved by the decision of the Board, the Claimant appealed to the Board of Enquiry Appeals Committee.
22. The Respondent states that its Chief Executive Officer appointed the Board of Enquiry Appeals Committee to review the Claimant's appeal, alongside others.
23. The Claimant is said to have appeared before the Board of Enquiry Appeals Committee twice, where she made both oral and written representations against the surcharge.
24. The Respondent avers that the Appeals Committee noted that the Claimant was unable to explain all the discrepancies and the decision to surcharge her was upheld.
25. The Respondent defends its administrative action against the Claimant, which it terms as fair, just and expeditious.
26. The Respondent states that the surcharge had been effected over seven (7) years before and adds that as at October 2020, the outstanding balance was Kshs. 1,659,295.15.
27. The Respondent concludes that the Claimant's claim is statute barred by dint of Section 90 of the [Employment Act](#).

Findings and Determination

28. The first question for determination in this case is whether the Claimant's claim is statute barred. By its Preliminary Objection, the Respondent asserts that the Claimant's claim is statute barred by dint of Section 90 of the [Employment Act](#). The said Section provides as follows:
 90. Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#), no civil action or proceeding based or arising out of this [Act](#) or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
29. In the submissions filed on behalf of the Respondent reference was made to several decisions of this Court (variously constituted) where it was held that there is no room for extension of time under Section 90 of the [Employment Act](#) (see [Joyce Wanjiku Muchiko & another v Telkom \(K\) Limited](#) [2014] eKLR and [Nicodemus Marani v Timsales Limited](#) [2014] eKLR).
30. For some reason that was not clear to the Court, the Claimant chose not to submit on the issue of limitation of time as raised by the Respondent in its Notice of Preliminary Objection.
31. The Claimant's cause of complaint as stated in her Memorandum of Claim is the Respondent's decision to surcharge her for the sum of Kshs. 2,501,433. Reading from the documents filed in court, the impugned decision was made sometime in August 2015, which constituted the accrual date of the cause of action.
32. According to the court record, the Claimant's claim was filed on December 22, 2020, more than five (5) years after the accrual date. This being the case, the claim was filed out of time and the Court has no jurisdiction to entertain it.
33. The only thing to do is to strike out the claim, which I hereby do. For the reason that the interim order granted on December 23, 2020 was based on an incompetent claim, the said order is vacated.
34. Each party will bear their own costs.



35. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY 2024

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JUDGE

Appearance:

Mr. Mwinzi for the Claimant

Mr. Nyachoti for the Respondent

