



Githu v PCEA Kikuyu Hospital (Employment and Labour Relations Cause 404 of 2016) [2024] KEELRC 252 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 252 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 404 OF 2016
AN MWAURE, J
FEBRUARY 13, 2024**

BETWEEN

FRANCIS MBUGUA GITHU CLAIMANT

AND

PCEA KIKUYU HOSPITAL RESPONDENT

JUDGMENT

Introduction

1. The claimant filed is memorandum of claim dated 12th February 2016 and amended claim dated 7th July 2017.

Claimants case

2. The claimant claims he was unlawfully terminated by the respondent and has suffered loss of terminal benefits and anticipated remuneration under the contract.
3. He states that he was employed by the respondent as a clinical officer on a three year contract at a monthly salary of kshs 42,313/-. His contract was from 1st October 2010.
4. He says in 2014 his contract was renewed for another period of 5 years.
5. He avers he served the respondent with diligence and integrity but however on 16th February 2016 he was suspended indefinitely on account of loss of equipment of rehabilitation theatre.
6. He says he went to Kikuyu police station to record a statement and he stayed away from the place of work to allow investigations. He says he was eventually absolved from any wrong doing.
7. He says on 27th May 2015 he was invited to a disciplinary hearing which he attended. On 1st October 2015 he was terminated from employment.



Respondent's case

8. The respondent filed a response to the amended claim dated 21st February 2019. He averred that the respondent is not a legal entity and is not capable of being sued or suing.
9. It also denies it employed the claimant as alleged and states he did not terminate him unlawfully.

The claimant's evidence

10. The claimant gave his sworn evidence on 26th January 2023 and he said he was employed at Kikuyu PCEA hospital as a clinical anaesthetist for 3 years. He says his contract was then renewed but he was thereafter implicated for theft of theatre equipment and was arrested and charged. He says he was suspended for 7 1/2 months without pay but was found not guilty.
11. He says he was then invited for a disciplinary hearing but was not allowed to have his witness. He says he had invited his brother and his advocate and so was alone at the hearing. He says he was then terminated on 1st October 2015. He says he was not paid his dues.

Respondent's evidence

12. The respondent witness is Jamhuri Joel who says he is the chief executive officer of the respondent. He says he wrote a suspension letter dated 6th February 2015 for theft of hospital goods. He says one Catherine Asumwe informed them claimant had stolen the equipment. The said lady was the one captured on CCTV taking away some items. He also says claimant was terminated and was paid his dues but not the pension.

Submissions

13. The court considered the claimant's submissions dated 19th October 2023. The respondent's submission dated 6th November 2023 were well considered by the honourable court.

Analysis and determination

14. The claimant was terminated from his employment allegedly for theft of theatre equipment from his employer. The main issue for determination is whether the termination of the claimant's contract was fair and lawful. The second issue of course is whether the claimant is entitled to the reliefs sought.
15. The *employment act* 2007 section 45 provide that the employer must provide a valid reason for terminating an employee's contract. The said section 45(1) of *employment act* provide as follows:-

“No employer shall terminate the employment of an employee unfairly. “
16. The respondent suspended the claimant on 16th February 2015 and the reason was to allow for investigations for lost equipment in the Rehab theatre. There was no period given for suspension nor was claimant informed of any remuneration during that period of suspension.
17. On 16th April the claimant's advocate wrote to the respondent being a complaint against that suspension.
18. In the meantime, the respondent did not give any specific details of items allegedly stolen or evidence of investigations to prove how the claimant was implicated in the said loss of it. It was in other words mere allegations without any substitution.



19. On 16th May 2015 claimant was invited for a disciplinary hearing to be held on 27th May 2015 and was advised to be accompanied by another fellow employee as his witness.
20. The claimant admits he attended the disciplinary hearing in the company of his advocate and his brother. He says he was however not allowed to have the two attend and so he was alone. After the disciplinary hearing he was served with a termination letter dated 1st October 2015. The claimant was dismissed with immediate effect.
21. The respondent did not therefore table evidence to support his allegation that the claimant was guilty of stealing the said equipment. It is noteworthy that even the police who investigated the case found the claimant was innocent of the said theft.
22. In the case of *Kenfreight EA Limit v Benson K. Nguti* (2016) eKLR the court held “ Apart from issuing proper notice according to the contract for payment in lieu of notice an employer was duty bound to explain to an employee in the presence of another employee or a union official in a language the employee understands the reason or reasons for which the employer was considering termination of the contract.
23. The court is not satisfied the respondent gave a valid proven reason for terminating the claimant.
24. Furthermore there is no documented evidence of the proceedings of the disciplinary hearing to demonstrate the claimant was given a fair hearing as provided in section 41 of the *employment act*. Section 41(1) of the *employment act* states:
 41. (1). 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.
25. In the case of *Loice Otieno v Kenya Commercial Bank* cause no 1030 of 2011 the court held “ summary dismissal even in the face of fundamental breach of the employment contract obligation or gross misconduct must not be resorted to without complying with procedural fairness and natural justice. An employer who summarily dismisses an employee without a hearing will be falling a foul of section 41(2) of the *employment act*.
26. The claimant attended the disciplinary hearing but there are no minutes or documents to demonstrate the same was fairly conducted. That together with the fact that the respondent did not give a proven reason of terminating the claimant's contract makes the court reach the inevitable conclusion that the claimant was unfairly terminated.
27. The respondent raised the issue of double employment in two distinct hospitals by the claimant. That however can only be regarded as an afterthought as it was not part of the reasons given during the disciplinary process and was not raised in the pleadings.
28. The respondent in his submissions and response to the claim claims the entity sued is a non legal entity. The court would not put a burden on an employee as to the legal status of an employer as that is not in the domain of an employee. The court finds that is not a valid defence for an employer since an employee may not have evidence of the employer's registration status.
29. In view of the foregoing the court finds the claimant was unfairly terminated. Judgment is therefore entered in his favour.



30. He is awarded the following reliefs:-

1. One month pay *in lieu* of notice kshs 42,413/-
2. Compensation for wrongful termination equivalent to 5 months' salary considering the period he worked for the respondent being kshs 212,065.
3. The court has already made orders for payment of pension from the pension fund.
4. Costs are awarded to the claimant
5. Interest to be calculated at court rates from date of judgment till full payment.
6. Total award is kshs 254,478/-

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

