Nyamongo v Board of Management, St Claire Kaplong Mission Hospital (Cause E017 of 2022) [2024] KEELRC 141 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 141 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE E017 OF 2022

HS WASILWA, J

FEBRUARY 6, 2024

BETWEEN

BEATRICE BOSIBORI NYAMONGO ..... CLAIMANT

AND

BOARD OF MANAGEMENT, ST CLAIRE KAPLONG MISSION HOSPITAL ..... RESPONDENT

JUDGMENT

1. The claimant herein instituted this suit vide a memorandum of claim dated 2nd November, 2022, claiming to have been wrongfully summarily dismissed and the Respondent refused to pay him his terminal dues; She sought for the following reliefs; -

    1. That the Honourable Court be pleased to declare the Respondent's summary dismissal and or termination of the claimant's employment unlawful and illegal.

    2. That the Honourable Court be pleased to issue and order the Respondent to pay to the claimant Kshs 1,111,913.20 being; salary in lieu of notice, unpaid salaries for the months of August and September, 2020, unpaid leave allowance, service gratuity, underpayment and compensation under section 49(1) of the *Employment Act*.

    3. That the Honourable Court be pleased to issue and order directing the Respondent to issue a letter or certificate of service to the claimant.

    4. That the Respondent to meet he interest at Court rate.

    5. The costs of this cause be paid by the Respondent.

    6. The Honourable Court does issue such orders as it may deem fit and just to grant.

Claimant's case

2. The claimant stated that she is a member Kenya Union of Domestic Hotels, Educational Institutions and Hospital Worker(KUDHEIHA) and a former employee of the Respondent, while the Respondent is a private Mission Hospital which is operated by the Catholic Diocese of Kericho.

3. She stated that at all material times, she was employed by the Respondent on 17th July, 1996 as a general worker and served diligently for 24 years until 24th September, 2020 when she was suspended for a month without pay and on 1st November, 2020 she was terminated and the termination communicated by the letter dated 5th November, 2020.

4. Upon the termination, the claimant reported the dispute to her Union, who tried resolving the dispute unsuccessfully, causing the Union to report the trade dispute to the cabinet secretary of Labour who appointed I.K Chepcheng as a conciliator.

5. The conciliator invited both parties for a meeting, however the parties could not agree and the certificate of disagreement issued on 22nd June, 2021, leading to the filling of this suit.

6. The claimant maintained that the termination was unfair as it did not follow the law under sections 17,18,35,36,41,43,45,46 and 49 of the *Employment Act* as no procedure was followed before the termination.

7. It is her case that the Respondent upon termination did not pay her terminal dues such as salary and house allowance for the month of August and September, 2020, Notice pay, gratuity or public holidays worked. She also prayed to be issued with a certificate of service.

8. During hearing the claimant testified as CW-1 and adopted her witness statement and produced the documents filed as her exhibits. In addition, she stated that she was employed by the Respondent in 2003 as a general cleaner and terminated for no reason. She denied ever carrying out any business at her place of work. She told this Court that she was suspended for 30 days. That she was subjected to disciplinary hearing but that she did not have any representative of the Union. She testified that she was not given an invitation letter for the disciplinary hearing rather that she was called one morning and directed to the administration office and later dismissed.

9. It is her case that she worked for the Respondent for 24 years without any disciplinary concerns as such the termination was not justified. she prayed to be paid her terminal dues as particularized in the claim.

10. Upon cross examination she testified that she was not employed on contract as alleged. She stated that she signed a contract in 1997 and in 1998 she was retained on permanent and pensionable terms. However, in 2011 she was returned to contract terms by the new management that took over the running of the Hospital.

11. On the letter admitting to hawking some clothes, the claimant stated that she was forced to write the said letter in the said terms, however that she was not found holding any clothes but some clothes were found in the cupboard, which she did not know who had placed them in the said cupboard. She admitted being asked questions by the administrator before the dismissal. She also admitted to writing an apology letter for being away without permission. The witness admitted to receiving leave allowance as appearing in pages 23 and 24 of the Respondent's documents. She then admitted to receiving money for leave not taken. Finally, she admitted receiving Kshs 50,959 as gratuity.

12. On re-examination the claimant testified that she received gratuity for 1 year and 11 months when she had worked for the Respondent for 24 years as such the balance is still owing. On the appraisal form,

she testified that appraisals were done in 2007 and from then to 2020 there were no appraisals done. On the clothes found at the cupboard, the claimant testified that she did not own those clothes but was directed by the nurse to give them to a patient who did not have any clothes.

Respondent's case

13. The Respondent entered appearance on the 23rd February, 2023 through the firm of Mutai Oduor & Company Advocates (MOCA) LLP and filed a response to claim on the same day denying the entire claim especially on allegations that the claimant was a member of KUDHEIHA. He stated that there is an active case before this Court serialized as Petition E013 of 2022; KUDHEIHA Vs Kaplong Mission Hospital and Kenya Catholic Secretariat, in which the Union is seeking for recognition, and therefore it is not possible that the claimant was a member of the Union, when the Union is not recognized yet by the Hospital.

14. The Respondent denied the terms of employment indicated by the claimant and instead stated that the claimant was employed on a one-year contract renewable depending on performance.

15. On the the reason for termination, it is averred that on the 24th September, 2020, the claimant was found hawking food and clothes in the maternity and female wards, causing the Respondent to immediately suspend the claimant from office, because the actions of the claimant breached her contract of employment and Covid-19 containment measures in place at the time being the height of the pandemic.

16. It was stated that upon suspension, the claimant wrote a letter on the same day, 24th September, 2020, admitting to engaging in selling clothes in the hospital and hawking food as such had violated the hospital's rules and regulations.

17. The Respondent stated that despite admitting to breaking the rules and regulations of the Hospital, the claimant was afforded an opportunity to defend herself in a disciplinary hearing, however that the explanation she gave was unsatisfactory and therefore she was dismissed on the 5th November, 2020.

18. The Respondent maintained that the claimant's conduct was a gross violation of the the rules of conduct governing the employees in the Hospital especially because she went against the Covid-19 containment measure put in place by the Government especially in Hospital, a fact which the Court should take judicial notice.

19. It is the Respondent's case that the dismissal was lawful and followed due procedure set out in the law as such the suit is not merited and ought to be dismissed with costs.

20. During hearing, Lily Koskei, the Respondent's Human Resource manager testified as RW-1 and adopted her witness statement of 27.3.2023 and produced the respondent's documents dated 4.4.2023 as exhibits in support of their case.

21. Upon cross examination, the witness testified that she is a registered Human Resource practitioner and was employed by the Respondent in November, 2020. She told this Court that the Respondent is not anti-Union but that the claimant was not a member of the Union and thus not subject to the parties CBA. she admitted that the claimant was employed in 1996 and clarified that though the document produced in court shows she was employed on 1.9.1998, the employment was with effect from 17.7.1996.

22. On re-examination, she testified that she was not aware that the Secretariat of Kenya Catholic signed a CBA with the Union. She stated that the claimant was dismissed for hawking clothes at the Hospital during working hours. She also stated that the claimant was evaluated on 3.12.2007 and a report on the

evaluation written on 31.3.2007, however the results were discussed with the supervisor on 17.4.2008. she maintained that the report came first before the evaluation.

Claimant's Submissions.

23. The claimant submitted that the Respondent herein signed a recognition agreement with Kenya Union and Domestic, Hotel, Educational Institutions and Hospital workers through their umbrella body called Kenya Catholic Secretariat on 7th June, 1990 and they have a current active CBA signed on 5th December, 2019.

24. It was submitted that the claimant herein was summarily dismissed from employment for allegedly hawking assorted clothes within the Hospital premises and during working house and on strength of the the provisions for summary dismissal as provide for under section 44 (4)(e) of the *Employment Act*. However, that the Respondent did not demonstrate to this Court the particular act which the claimant failed and or refused to obey. Additionally, that RW-1 did not affirmed the allegation of finding the claimant hawking assorted clothes as alleged but confirmed that the claimant worked throughout that fateful day of 24th September, 2020. Based on this, it was submitted that the reason for termination was not demonstrated as such the termination was unfair.

25. The claimant submitted that Kenya Catholic Secretariat, being the umbrella body governing all Catholic Churches and the administrator/ owner of the Respondent hospital, entered into a CBA with the Union as such there was an Active CBA which bound the Respondent and all members of the Union.

26. The Claimant submitted that even though, there was an active CBA, the letter of employment issued to the claimant indicated clearly that the claimant was prohibited from joining the Union, which employment contract was in clear violation of the claimant's rights under Article 40 of *the Constitution* as such the clause is null and void.

27. On the warning letter issued to the claimant, it was submitted that clause 18(c) of the CBA, provides that if any employee completes 270 days without committing any offense, all warning recorded on his/ her file will be canceled, Accordingly, that since the claimant was issued with a warning letter on the 20th December, 2010 and never committed any offense for 10 years till the 2020, the respondent was wrong in using the said warning letter to allege that the claimant is a serial offender.

28. The Claimant faulted the process adopted in the disciplinary hearing and argued that it was not fair because the claimant was not accompanied by another employee or Union representative in to the disciplinary hearing meeting.

29. In conclusion, the claimant submitted that the Respondent did not demonstrate the lawful command that the claimant failed to obey, failed to accord the claimant due process under section 41 of the *Employment Act*, therefore that the termination was unfair.

30. The claimant maintained that it was a member of the Union, which had an active CBA with the Respondent as such her terminal dues ought to be calculated as per the CBA.

Respondent's Submissions.

31. The Respondent submitted from the onset that it's not in dispute that the claimant was employed by the Respondent till 5th November, 2020 when she was summarily dismissed for hawking clothes at the Hospital premises during the height of Covid-19 restriction on 24th September, 2020, an act which amounts to gross misconduct under Section 44(4) of the *Employment Act*. That indeed the claimant admitted to hawking the said clothes by her apology letter dated 24th September, 2020, which

caused her suspension and later she was invited for disciplinary hearing, where her explanation was unsatisfactory, leading to her dismissal.

32. Based on the above background, the Respondent submitted on two issues; whether the Respondent has established grounds to warrant the summarily dismissal and whether the claimant is entitled to the relief sought.

33. On the first issue, it was submitted that summary dismissal is governed by Section 44 of the *Employment Act* that lists the grounds that warrant summary termination, which was also elaborated by the Court in the case of Pheoby Aloo Inyanga Vs Stockwell One Homes Management Limited & Another[2022] eklr where the Court relied on the case of n Mckinley vs BC Tel, [2001] 2 SCR 161,2001 SCC 38 [CanLII], and held that:

> " 29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of alleged insubordination. Within this analysis a finding of misconduct does not by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behavior was such that the employment relationship can no longer viably subsist...To summarize, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behavior. In this respect, courts have held that factors such as the nature and degree of misconduct, and whether it violated the essential conditions of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause."
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> The Court went and stated that " I have considered the circumstances of this matter, including but not limited to the industry that the Claimant was working in, the nature of the relationship between her and the Respondents, the alleged conduct of the Claimant and find that the dismissal on the account given by the Respondents was valid and fair. Consequently, I find that the dismissal was with a valid and fair reason. The dismissal was substantively fair."

34. On substantive and procedural fairness, it was submitted that the claimant was caught red-handed hawking clothes in the hospital premises and even wrote the letter of 24th September, 2020 admitting to engaging in business of selling clothes, which was in violation of her employment contract and in breach of Covid-19 containment measures that had potential of endangering the lives of patients in hospitals, a clear indication that the reason for dismissal was justified.

35. On the process, it was submitted that based on the acts of the claimant, she was suspended on 24th September, 2020 and invited for disciplinary hearing where she was heard on her defence and since the explanation was not satisfactory, she was dismissed on the 5th November, 2020. Therefore, due process was also followed, Hence the termination of the claimant's services was justified and lawfully done.

36. The Respondent submitted further that due process was indeed confirmed by the ministry of labour office, who after perusing the files and getting all facts, ascertained the same and only made recommendation for the termination to be converted to normal termination so that the claimant could be paid terminal dues.

37. On the remedies sought, the Respondent submitted that the 4 months' notice pay is not justified especially because it is not provided in the contract and that only one month's notice pay is provided

for and justified under section 35 of the *Employment Act*, therefore that if notice pay was to be paid, the claimant could have received only one months' notice pay. In any event that notice pay is normally tied to notice period as held in the case of Kiptum Nyaoke Vs Kenya Post Office Savings Bank [2022] eklr.

38. The Respondent submitted that the claimant has not laid basis for the underpaid house allowances and wages and the reliance of the CBA at page 30-34 is misplaced because the Respondent has not signed any Recognition agreement with KUDHEIHA and in fact the said Union are in this Court under ELRC No. E013 of 2022, seeking for this Court to compel the Respondent to recognize it, confirming that indeed there is no CBA between KUDHEIHA and the Respondent Hospital, as such the claimant cannot claim for reliefs under a non-existent CBA. To support this position, the Respondent relied on the case of Said Ndege Vs Steel Makers Ltd [2014] eklr where the Court held that;-

> " In my view, a reading of section 59(1)(b) of the *Labour Relations Act* and the definition of unionisable employee in section 2 of the Act leads to an inescapable conclusion that the terms of a collective bargaining agreement bind and are incorporated into the contract of all unions members and unionisable employees of a particular employer who has entered into a recognition agreement with a union and concluded a collective bargaining agreement."

39. Accordingly, that since there is no Recognition Agreement with the Union, there is no CBA between the parties and the claimant cannot claim any benefits from a non-existent CBA.

40. On service gratuity, it was submitted that gratuity is only awarded if its provided for under the contract of employment. In any case that the claimant was employment on yearly contracts, therefore that there was no basis for asking for 24 years' gratuity.

41. On compensation for unfair termination, the Respondent submitted that the termination was justified as such compensation is not warranted. Similarly, that the claim for leave should be disregarded because the claimant admitted during hearing to taking her leave days when she applied for leave and for the leave not taken the Respondent paid on yearly basis.

42. In conclusion, the Respondent submitted that the claimant has not proved her case on a balance of probability and the same should therefore be dismissed with costs.

43. I have examined all the evidence and submissions of the parties herein.

44. From the evidence presented by the claimant, she was terminated by the respondent for reason of hawking clothes within the hospital.

45. This reason was communicated to the claimant by the respondent through a letter dated 5/11/2020.

46. The respondents averred that the claimant had admitted to hawking clothes through her letter dated 24th September, 2020 which letter was produced as an exhibit by the respondents.

47. The claimant on her part denied doing any business within the hospital premises.

48. She denied accepting to hawking within the hospital premises.

49. The respondents also aver that the claimant was given a fair disciplinary process.

50. The claimant on her part told court that she was called to go and see the HR and when she did she was served with a letter of dismissal.

51. She denies being given a fair hearing.

52. She told court that she reported the dismissal to the labour office and some conciliation proceeded but there was no agreement.

53. There is no evidence from the respondent that the claimant was subjected to any internal disciplinary process.

54. It is therefore apparent that the dismissal of the claimant was unfair and unjustified as provided for under Section 45 (2) of the *Employment Act* 2007.

55. On the remedies sought the claimant sought to be paid her terminal dues including gratuity, notice pay, underpayments, unpaid leave and compensation for unlawful termination.

56. The claimant testified before this court and when she was cross-examined, she admitted to being paid for her leave allowance and kshs.50,959/= for gratuity.

57. What therefore remains is the claim for underpayment and which the claimant has demonstrated was payable as per the CBA and wages order.

58. The claimant however has not explained which wages order she made reference to nor pointed out what portion of the CBA was not adhered to.

59. The claim for underpayment therefore remains not proved.

60. As for notice pay, I agree that the claimant is entitled to it at 4 months notice as per the CBA Section 16 = 16,463 x 4 = 65852.

61. I note that the claimant is also entitled her unpaid salary of August and September 2020 as prayed = 16,463 x 2 = 32,926/=

62. I also award the claimant 8 months salary as compensation for unfair termination = 16,463 x 8 = 13,704/=

    Total Awarded = 230,482/=

    Less statutory deductions

63. The respondent should pay cost of this suit plus interest at court rates with effect from the date of this judgment.

DATED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oduor for Respondents - present

Onwonga for claimants – present

Court Assistant – Fred