



Imbali v Kenya Hospital Association t/a the Nairobi Hospital (Cause E899 of 2021) [2024] KEELRC 678 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 678 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E899 OF 2021
SC RUTTO, J
MARCH 20, 2024

BETWEEN

GEOFFREY AHINDUKA IMBALI CLAIMANT

AND

**KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI
HOSPITAL RESPONDENT**

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent as a Plant Supervisor with effect from January 2018. The point of divergence is the manner in which the Claimant was terminated from employment and the grounds thereof. Whereas the Claimant has termed his termination from employment unfair, the Respondent holds that the termination was fair and that there was a valid reason for the termination.
2. The Claimant's claim against the Respondent is for a declaration that the termination was unfair, maximum compensatory damages, unpaid house allowance, interests at court rates as well as the costs of the suit.
3. On its part, the Respondent has asked the Court to dismiss the suit with costs.
4. During the hearing which proceeded on 26th October 2023, the Claimant testified in support of his case while the Respondent elected not to call oral evidence.

Claimant's Case

5. At the outset, the Claimant sought to rely on his witness statement to constitute his evidence in chief. He proceeded to produce the list and bundle of documents filed alongside his Memorandum of Claim as well as the supplementary list and bundle of documents filed on his behalf, as his exhibits before Court.



6. The Claimant stated that his duties generally included maintenance of the Respondent's mechanical engineering process; the boiler, air conditioning, industrial compressed air and mechanical workshops.
7. He averred that he had seven permanent and pensionable non-medical staff and technicians, reporting to him. There were also a number of outsourced technicians from an outsourced services provider known as Sheer Logic.
8. It was the Claimant's case that sometime in the course of his employment, he was verbally asked by the Hospital Engineer, Mr. Silas Mutuerandu, to assist in making reorder levels and receiving medical gases.
9. This assignment involved ensuring that there was enough stock of medical gas cylinders in the hospital, making orders for the same and ensuring delivery to the Respondent. He would also ensure the cylinders are put securely as a safety measure.
10. The Claimant stated that on 30th June 2021, over 50 cylinders of gas were delivered from BOC, on the basis of an order he had made the previous day.
11. He mobilized procurement, finance and security department representatives, as required by the Respondent's mandatory procedures and successfully received the cylinders outside the cage.
12. Thereafter, he left the cylinders outside to attend to other equally pressing duties as he awaited to mobilize manpower later in the evening to roll the cylinders into the cage.
13. According to the Claimant, it was not generally possible to roll the cylinders which weighed an average of about 80 kgs into the cage due to shortage of manpower following some restructuring that had taken place in April, severely reducing the workforce.
14. He averred that this had been the situation since the restructuring and the Respondent was aware of it. Further, there was no risk of theft as there was adequate security and CCTV cameras.
15. The Claimant further stated that he left the keys to the external cage in his office. There was a total of three copies of the key, one held by the bio-medical department, another by the electrical workshop, and the plant workshop. He averred that it is the key designated to the Plant workshop that was in his custody.
16. The key should ordinarily be kept at the plant. However, he carried it with him to the office due to some other urgent matters that required his attention. He had hoped to return the key after attending to the other matters.
17. At around 3:40 pm when he went back to the maintenance department, he was informed by the help desk attendant that there had been an issue of an oxygen supply problem to the main hospital, but the same had been stabilized by the biomedical team.
18. He averred that the biomedical team had their copy of the key and it struck him as curious why they were looking for the workshop key. Further, no one called him to ask for the key when they could not find it in the workshop.
19. It however did not bother him unduly as in any case, the matter had been sorted out.
20. The Claimant further stated that on 9th July, he was informed that he was required at Kilimani Police Station to record a statement on the matter together with Mr. Silas Mutuerandu and the help desk assistant Mr. John Chege. He went on 20th July 2021, to the said Police Station and recorded a statement.



21. On 14th July, he was surprised to receive a notice to show cause why disciplinary action should not be taken against him by the Respondent.
22. The notice to show cause related to a purported switching off of pressure lines to the main Hospital Oxygen Plant. It was alleged that he had failed to secure all gas cylinders received from BOC and had failed to return the keys at the required place.
23. The Claimant stated that he had absolutely no role in switching off the pressure lines in the main oxygen plant. The Oxygen plant is managed by the Biomedical team. He would only access the plant when checking the reorder level, which he had done the previous day.
24. He only accessed the oxygen plant when he was receiving the cylinders for purposes of removing the empty cylinders. Further, the Respondent had not accused him of shutting down the plant.
25. He further stated that failure to roll in the cylinders was not an act of negligence, but an act of prudent management of the resources availed to him by the Respondent.
26. The general handling of medical gases, including oxygen, is a specialist role that is handled by the biomedical department. He did not have any academic training or professional experience in that role. His role was strictly the ordering of the gas and facilitating its storage.
27. He replied to the notice to show cause on 16th July 2021 and he was then invited for a disciplinary hearing on 13th August 2021 and a further disciplinary hearing on 7th September 2021. He attended the hearings as required, answered all the questions and pleaded his innocence.
28. On 1st October 2021 he was served with a termination letter by the Respondent.
29. He appealed against the termination on 12th October 2021 but the same was declined by the Respondent on 14th October 2021.
30. According to the Claimant, he had faithfully served the Respondent for 3 years and did not have any disciplinary issues whatsoever before the unfortunate incident. He feels that the Respondent acted out of proportion in dismissing him considering that he was innocent.
31. He is also apprehensive that there is a real and present danger that his records in his file with the Respondent are very adverse and may affect any future references and hamper any efforts to secure further employment.

Respondent's Case

32. As stated herein, the Respondent elected not to call oral evidence hence its case was as per its Response.
33. In the said Response, the Respondent avers that it has under its care, fragile lives who are under round-the-clock care and lapses, carelessness, negligence and irresponsibility could at a stroke cost lives and livelihood of thousands.
34. According to the Respondent, the Claimant's duties included but were not limited to maintenance of its mechanical engineering process, boiler, air conditioning, industrial compressed air and mechanical workshops.
35. The Respondent further avers that the Claimant was charged with the obligation of developing specifications for equipment to be purchased, receiving purchased equipment, ensuring that they were of the expected quality and facilitating the safe storage of the received equipment.



36. The Respondent further avers that the Claimant was assigned to his team and department enough casuals and that the Respondent has enough casuals within its employ.
37. In the Respondent's view, the Claimant's conduct amounted to gross misconduct, was slothful and unprofessional. That further, he failed to perform his duties to the required standards.
38. Further, it was appalled by the Claimant's casual attitude towards his role and duties, his hands-off approach to his work, and his obsession with pointing fingers, deflecting blame, and delegating critical duties without supervision.
39. According to the Respondent, the reason for the termination was fair and justified.
40. That further, it followed the requisite termination procedure.

Submissions

41. It was the Claimant's submission that the Respondent only elected to file a Defence hence its effect is that it chose not to defend itself. In this regard, the Claimant argued that the Respondent's Defence cannot be considered, since in the absence of evidence, the averments remain mere allegations. In support of this position, the Claimant placed reliance on the case of Netah Njoki Kamau & another v Eliud Mburu Mwaniki (2021) eKLR.
42. The Claimant further submitted that the Respondent was the author of its own misfortune as it reduced its manpower, hence it was a natural and direct consequence that workflow is affected and where negatively so, it cannot turn around and blame him. On this score, the Claimant cited the case of Charles Ooko Maganda v South Nyanza Sugar Co. Ltd (2018) eKLR.
43. The Claimant contended that looked holistically, the Respondent was the author of its misfortune by taking away the manpower necessary for the effective carrying out of its activities. He pleaded that in the circumstances, his decision was only an act of prudent management and not negligence.
44. It was the Claimant's position that the process was lacking in substantive fairness as provided for under Section 43 of the *Employment Act*.
45. On the other hand, the Respondent submitted that the duty, role and mandate of the Claimant as a plant operator was not to be taken lightly. With respect to this, the Respondent maintained the issue of replacement of the gas cylinders in the oxygen plant was a mandate placed upon the Claimant.
46. It was the Respondent's further submission that it was well justified in terminating the employment as the Claimant conceded on the lapses involving the receiving and handling of oxygen cylinders, failure to properly supervise the replacement of the cylinders which led to low supply, as well as failure to ensure that the keys to the oxygen plant/gas cylinder cage were not at the designated place.
47. The Respondent stated in further submission that the Claimant having failed to discharge his duties which entailed ensuring that the hospital plant's operations were optimal, amongst other breaches, and having been invited to a disciplinary proceeding, his termination from employment was substantively and procedurally fair.

Analysis and Determination

48. Having evaluated the issues arising from the pleadings filed by both parties, the evidentiary material on record and the rival submissions, the issues falling for the Court's determination can be condensed as follows: -



- a. Whether the Claimant's termination from employment was unfair and unlawful;
- b. Is the Claimant entitled to the reliefs sought?

Unfair and unlawful termination?

49. To prove that an employee's termination from employment was fair, an employer is required to satisfy two requirements, being that there was substantive justification to warrant such termination and that termination was in accordance with fair procedure. Such was the determination in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. That said, I will proceed to apply the two tests to the instant case.

i. Substantive justification

50. Pursuant to Section 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for termination of employment, and in default, such termination is deemed to be unfair. Further, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
51. The aforesaid position was reiterated by the Court of Appeal in the case of *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others*, (2019) eKLR.
52. Turning to the instant case, the record reveals that the Claimant was terminated on grounds of negligence. This is discernible from the Claimant's letter of termination which is partly couched:

“Ref: Termination

Reference is made to the disciplinary hearing meeting held on Tuesday 7th September 2021 regarding the allegations that on 30th June 2021, you failed to secure gas cylinders received from BOC thereby leaving them exposed outside the cage. You also failed to return keys at the required place hence they could not be traced during the emergency when the oxygen levels at the plant were down.

During the disciplinary hearing, the panel noted that there was negligence on your part as the supervisor and that had the incident not been resolved quickly by the biomedical team, patients' lives would have been lost, tarnishing the hospital's brand as a world-class healthcare institution and even possibly lead to litigations(sic).

In view of the above, management deems your actions as negligence that directly contravenes the organisation policies and procedures...”

53. The Claimant admitted that over 50 cylinders of gas were delivered from BOC on 30th June 2021 and that he mobilized the procurement, finance and security department representatives and the cylinders were successfully received outside the cage. It was his testimony that he left the cylinders outside to attend to other equally pressing duties as he awaited to mobilize manpower later in the evening to roll the cylinders into the cage.
54. According to the Claimant, it was not possible to roll the cylinders into the cage due to shortage of manpower following some restructuring that had taken place in April, severely reducing the workforce.



55. It is noteworthy that the Claimant maintained the same line of defence during the disciplinary hearing and added that it was not part of his job description to receive the gas cylinders. He contended that he only performed the said task as he found his predecessor doing it.
56. In its Response, the Respondent stated that it was the mandate of the Claimant to receive gas (oxygen) cylinders, inspect them, ensure they met the required standards and ensure their safe custody.
57. The Respondent further averred that the Claimant was assigned enough casuals and that he had enough room to mobilize or otherwise make arrangements for the manpower or casuals needed to roll the cylinders to safety.
58. In support of his case, the Claimant exhibited his job description which detailed his duties and responsibilities, as follows:
- a. Ensuring that all plant and machinery within the hospital are in a proper state to deliver safe and optimal output;
 - b. Implementing effective planned preventive maintenance;
 - c. Implementing calibration of equipment;
 - d. Carrying out routine inspections to identify repair and maintenance needs;
 - e. Coordinating daily checklist updates to facilitate timely repairs and maintenance;
 - f. Developing a bill of quantities for works to be contracted;
 - g. Ensuring that work delivered by contracted external parties conforms to the required standards;
 - h. Developing specifications for equipment to be purchased;
 - i. Processing job requests to completion;
 - j. Providing baseline data for daily/weekly reports;
 - k. Ensuring that the materials being received in the department are of the expected quality;
 - l. Monitoring stock levels and ensuring timely order for consumables;
 - m. Promptly raising requisitions for required spares;
 - n. Ensuring compliance with environment, health, safety policies and procedures;
 - o. Any other duties as may be assigned from time to time.
59. Revisiting the reasons for the Claimant's termination from employment, it is evident that the same was pursuant to Section 44(4)(c) of the Act which provides as follows:
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause...
-
- (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;



60. From the foregoing statutory provision, it is unequivocal that an employee is liable for summary dismissal on account of negligence where he willfully neglects to perform any work which it was his duty to perform.
61. It thus follows that the Claimant cannot be deemed to have been negligent in the performance of his duties if the duty in question was not part of his job description.
62. Back to the Claimant's duties and responsibilities, it is evident that receiving and securing the gas cylinders was not part of his job description. Further, there is no evidence that the said duty had been assigned to the Claimant in addition to his duties and responsibilities as set out in his job description.
63. It is also notable that despite the Respondent's assertions that the Claimant had enough manpower needed to roll the cylinders to safety, it failed to lead evidence to that effect. This is further noting that the Respondent elected not to call evidence hence its assertions to that effect were unsupported.
64. In further support of his case, the Claimant exhibited a copy of an email dated 6th August 2021 from Mr. Shammah Kiteme to Mr. Arnold Mwanzia and Mr. Evans Okuku in which he stated as follows:

“Dear Team,

Please transfer all the biomedical gases roles to Arnold Mwanzia with effect from today Friday 6th August 2021 and by the end of Monday 9th August 2021. These include;

1. Operations at our medical gases plant.
2. Procuring and receiving of medical gas cylinders including medical air, oxygen e.t.c.
3. Distribution of all medical gas cylinders in the wards and OPCs.
4. Determination of demand and supply issues for all medical gases in main hospital and OPCs.
5. All pending orders and deliveries for medical gases.

It is a patient safety issue that medical gases are handled by Biomedical team who are trained to handle them and who understand the gases better.”

65. Responding to Mr. Shammah's email, Mr. Mwanzia wrote:

“Dear Eng. Shammah

Have noted your guidance with concerns.

1. Notice given is very short.
2. I have no staff to manage transportation of gases.
3. You will have to give us time for discussion before implementation of this. Note that we are managing oxygen plants and we are overwhelmed.”

66. The foregoing email correspondence confirms the Claimant's assertions that there was a shortage of manpower to handle the storage of the gas cylinders in record time.
67. What's more, Mr. Shammah confirms in his email that medical gases are to be handled by the Biomedical team who are trained to handle them and who understand gases better. This further



- confirms the Claimant's assertions that management and storage of gases was outside his job description and that he lacked professional experience in that role.
68. With regards to the allegation of failing to return the keys to the external cage in the required place, the Claimant stated in his testimony that he left the keys in his office. He further contended that he was not the only person who had custody of the key to the cage.
 69. According to the Claimant, there were three copies of the key, one held by the bio-medical department, another by the electrical workshop, and the plant workshop.
 70. In its Response, the Respondent refuted the Claimant's position specifically, that the biomedical team had their own copy of the key.
 71. Despite its assertions, the Respondent did not lead evidence to prove its assertion that the Claimant was the sole custodian of the said key and that the biomedical team did not have a copy of the key. Again, its assertions were not supported by evidence.
 72. Revisiting the provisions of Sections 43 and 45(2) (a) and (b) of the Act, an employer is required to prove that there was substantive justification to warrant termination of an employee from employment. Essentially, an employer must prove by way of evidence that the reasons for the termination of employment were fair and valid.
 73. As stated herein, the Respondent did not adduce evidence to back up its allegations that the Claimant was negligent in the performance of his duties in that he failed to secure the gas cylinders. Simply put, the allegations against the Claimant were not grounded in evidence hence were unsubstantiated.
 74. To this end, I cannot help but find that the Respondent has not satisfied the requirements of Section 43 as read together with Section 45(2) (a) and (b) of the Act in that it had a valid and fair reason to terminate the Claimant's employment on account of negligence.

(ii) Procedural fairness

75. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. With respect to this, Section 41 of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations, in the presence of another employee or a shop floor union representative of his or her choice.
76. In this case, the Claimant admitted that he received a notice to show cause detailing the allegations against him. He responded to the same and he was invited for a disciplinary hearing. From the record, the Claimant was heard on 13th August 2021 and later on 7th September 2021.
77. The record of the disciplinary hearing bears that the Claimant was given an opportunity to defend himself. He confirmed as much during cross-examination.
78. In light of the foregoing, it is apparent that the Respondent substantively complied with the requirements under Section 45(2) (c) as read together with Section 41 of the Act in effecting the Claimant's termination from employment.
79. Be that as it may, the Court returns that the Claimant's termination was ultimately unfair as the Respondent has failed to prove that it had a valid and fair reason to terminate his employment.



Reliefs?

80. As the Court has found that the Claimant's termination was substantively unfair, he is entitled to compensation under Section 49(1) of the Act. To this end, he is awarded compensatory damages equivalent to six (6) months of his gross salary. This award takes into account the length of the employment relationship as well as the fact that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant from employment.
81. The Claimant has further sought to be paid the sum of Kshs 655,506.90 being unpaid house allowance for the period he was in service with the Respondent.
82. A perusal of the Claimant's contract of employment reveals that his salary was consolidated. In this regard, Section 31(2) of the Act, envisages such consolidation where then, the employer is not expected to pay a separate amount as house allowance. For this reason, the claim for house allowance is declined.

Orders

83. It is against this background that I enter Judgment in favour of the Claimant in the following manner: -
- a. A declaration that the termination of the Claimant's employment was unfair.
 - b. The Claimant is awarded compensatory damages in the sum of Kshs 570,006.00 being equivalent to six (6) months of his gross salary.
 - c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
84. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2024

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Githinji

For the Respondent Mr. Kairu

Court Assistant Millicent Kibet

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 had 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 *Civil 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.

STELLA RUTTO



JUDGE

