



Mwonzu v Kenyatta National Hospital (Employment and Labour Relations Cause E380 of 2020) [2024] KEELRC 1692 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1692 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E380 OF 2020**

AN MWAURE, J

APRIL 26, 2024

BETWEEN

KENNEDY MUTEMBEI MWONZU CLAIMANT

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

JUDGMENT

Introduction

1. The claimant filed a statement of claim dated 11th august 2020

Claimant's case

2. The claimant was employed by the respondent and had a letter of appointment. He rose over the ranks to become a billing clerk.
3. He says he worked diligently for over 15 years and continued to be promoted.
4. However on 9th September 2016 he received an interdiction letter with accusation that he cleared bills of a prisoner on ward 4C and failed to forward invoices to 1B Revenue as required. He was told the said prisoner was to be cleared in ward 3.
5. He was also informed the patient was not a prisoner.
6. On 27th March 2017 he received another letter alleging he cleared a deceased in ward 4C and had accumulated a bill of Kshs 117,043. He was issued with a notice to show cause why he should not be interdicted.
7. He says he responded to the same on 7th April 2017 and explained he discharged the prisoner in accordance to the procedure. On 17th October 2017 he was accused of releasing 14 patients un procedurally.



8. He says he did respond to the allegation and said the billing officer relied on documents availed to them by the prison wardens and he had always followed that procedure.
9. The claimant says he requested for documents to prove he was culpable or witness who had evidence against him or cloaking register to prove if he was on duty that time but was not availed any. He also says his witness who accompanied him to the hearing was not allowed to speak and whenever he tried to speak he was told to sit down.
10. On 14th November 2018 the respondent was summarily dismissed even though there was no evidence to prove him culpable.
11. He now prays the court to find he was unfairly terminated and his rights under employment act were violated. He prays to be paid compensatory damages as set out in prayers A-J of his claim.

Respondent's case

12. The respondent filed his memorandum of response dated 1st February 2021.
13. The respondent admits claimant worked for the respondent in various sections and was dismissed on 12th November 2018 on account of gross misconduct and loss of trust.
14. The respondent states that a deceased in ward 4C had a bill of Kshs 117,043 and claimant was trying to help the family to have the body discharged and Cpl Mwinzi and PC Kipkoech were intercepted trying to pay kshs 6,950/- for the deceased. The respondent says Cpl Mwinzi attempted to bribe the guard with Kshs 5,000/- but he used the money as exhibit. The invoice had no prisoner's number. Claimant was in the billing office on 28th August 2016 from 830 to 5 pm.
15. The suspects were then arrested and wrote statements. They were later released. The claimant went missing for five days and he said he was on his normal weekend outing.
16. The claimant was alleged to have cleared 14 patients who were non prisoners and the hospital lost revenue amounting to kshs 2,845,123. There was evidence that other patients were cleared by the billing clerks.
17. There is allegation that prison officer were using fraud together with security personnel to defraud the hospital and claimant was not a billing clerk.
18. There is also allegation that claimant asked the relatives of deceased Boniface Njage to go for billing on ground floor where he was stationed though billing used to be done on level 3 billing office.
19. In clearing prisoners a Prisoner officer deployed to KNH should sign the invoice to assist hospital generate a clearance certificate. In this case this was not done.
20. Claimant in the disciplinary hearing said he received the prisoner's invoices and he relied on prison wardens information to clear the patients. He says he did not clear the 14 prisoner's physically. He said over the weekend there was no register for the prisoners.
21. After listening to the claimants presentation in the disciplinary hearing the committee concluded the interdictions against accused from 9/9/2017 should be lifted and salary withheld be paid. They also concluded the claimant should be dismissed for gross misconduct and so he was dismissed on 12/11/2018.
22. The claimant appealed the summary dismissal but there was no new evidence produced and his dismissal was upheld.



23. The respondent in conclusion urges the court to dismiss the claimant's claim with costs.

Claimant's evidence in court

24. The claimant gave his evidence in court on 26th April 2023 and he said on 28th August 2017 he was on duty and he cleared one Boniface Njage. He said he followed the procedure for clearing patients in the hospital. He said he cleared the patient on ground floor which is a normal practice of special cases even though clearance are usually cleared on level 4. He admits he is aware of documents 39 and 40 but not 45 and 46.
25. He says at the disciplinary meeting he did not understand the charges against him and furthermore his witness was not allowed to speak.
26. As for patient Njage he says he produced the invoice but did not clear him but prison wardens cleared him.
27. Claimant says he was not supplied with invoices and clearance documents at the disciplinary hearing even though he asked for them several times.

Respondent's evidence in court

28. On 2nd October 2023 the respondent witness Carlus Mcaffeuula gave his evidence in court. He explained how claimant cleared 14 patients unprocedurally and was invited for a disciplinary hearing. He also took his witness and after the disciplinary hearing he was found culpable and was dismissed from his employment. Even though he appealed still his dismissal was upheld.
29. The witness says the billing clerk produces the invoices but there is clearances by the nurse, finance and security. In this the billing was done by the claimant. He however says he does not know who signed for the finance or nurse.
30. He also admitted the claimant was not the only one to sign the clearance form. He says he does not recall claimant requesting for invoices and clearance form. The witness admits that on page 36 of the investigations report there is confirmation that the offence cannot be connected to claimant directly but action should be taken against him for illegal conduct.
31. Witness also says there are no clearances signed by the claimant. He also admits that they did not produce a register of staff who were to work when the 14 patients were cleared. None of the suspects were reported to the police. The witness in re examination says the patient's clearance certificate between 28/8/2016 to 31/8/2016 show the officers who cleared them.

Submissions

32. The claimants submissions dated 10th January 2023 were considered by the court and so were the respondents submissions dated 26th February 2024.

Analysis and determination

33. After considering the pleadings and the evidence adduced as well as the submissions the court considers the following issues for determination.
- a. Was claimant's termination from employment lawful and fair?
 - b. Should the court grant the reliefs sought



Issue 1

34. Employment laws provide clearly the processes and laws to be followed in terminating an employee from employment. Section 45(1) provide that an employer must give a valid reason for terminating an employee. The said section 45(1) specifically provides:

No employer shall terminate the employment of an employee unfairly.

35. Claimant's dismissal letter dated 14th November 2018 the charges against claimant was unprocedurally clearing bills of Boniface Ngage and 14 other patients and failure to exonerate himself substantially. He is accused of using fraudulent means which cost the hospital to lose kshs 2,964,166/-. He was dismissed with effect from 12th November 2018.
36. The claimant was accused of clearing the patients unprocedurally and as a result was interdicted from 9th September 2017 to when he was dismissed on 14th November 2018. During interdiction he was to earn ½ salary and house allowance and medical cover as well as transport allowance.
37. After claimant wrote his response to the show cause letter he was invited for a disciplinary hearing. His response is dated 9th November 2017. He was invited for a disciplinary meeting by a letter dated 30th August 2018 and the meeting was on 7/9/2018. He however says he requested for some documents including the invoices of Boniface Ndege (the deceased) and list of staff who were on duty on 28th August 2016 and statements of the wardens who were investigated in the matter but was not supplied with the same. He also says he went with his witness a Mr Kimalo but he was not allowed to speak.
38. After the disciplinary meeting the committee noted that none of the witnesses or suspects mentioned the claimant as having been involved in fraudulent activity and none were called to testify. His name did not feature anywhere except in the clearing document.
39. Further, in the recommendations the committee observed that the claimant's direct involvement in this fraudulent activity cannot be fully established but they recommended appropriate administrative or disciplinary action be taken against him.
40. The disciplinary meeting took place on 7th September 2018 and the court is not aware any other disciplinary or administrative process was taken except that on 14th November 2018 he was dismissed from employment.
41. The court is not convinced the respondent showed a valid reason to connect the claimant to fraudulent activities that made the respondent lose kshs 2,847,123/- as alleged. The security officers Cpl Stephen Mwinzi and PC Kipkoech admitted they were trying to assist the family of the deceased to get the body released but they did not implicate the claimant.
42. These officers were merely transferred and restricted from accessing hospital premises. Further the respondent witness admitted that the claimant was not the only one responsible for clearing patients. The nurse and the finance department and the security department all had to clear a patient once the billing clerk raised the invoice before a patient would be released.
43. The court finds there are many gaps in the evidence by the respondent that makes it clear there was no valid reason to implicate the claimant alone and to dismiss him summarily. That was very punitive.



44. Section 43 of the *employment act* 1 and 2 provide as follows:

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

45. The case of Pius Machafu Isindu vs Lavington Security Guards Limited (2017) eKLR the court held:

“there can be no doubt that The act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminations/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate processes then set up under section 41 requiring notification and hearing before termination. The act also provies for most of the procedures to be followed thus obviating reliance on the *evidence act* and the *civil procedure act*/rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object to the act as appears in the preamble. To declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.”

46. The court finds the respondent grounds for dismissing the claimant were to say the least unsubstantiated and speculative and are not sufficient to establish substantial justification to have him summarily dismissed.

47. The respondent invited the claimant for a disciplinary hearing but again failed to provide him with the documents which he could have relied on to prepare his case. The law is mandatory that a valid reason must be established before an employer can consider dismissing an employee from employment.

48. The employee also says even though he had a witness accompanying him in the disciplinary hearing however the witness was not allowed to speak.

49. The findings of the disciplinary committee did not implicate the claimant to the alleged fraudulent activities. In summary the court finds the respondent has failed to establish a case on balance of probability to nail the claimant on charges of fraud and use of un procedural means to clear patients.

50. The court therefore finds the claimant’s rights were violated by the respondent under the *employment act*.

51. He will be awarded reliefs to be determined by the court subject to the parties confirming to the court

a. His basic salary at the point of termination.

b. How many months he was on interdiction.

The same to be availed to court by 15/5/2024 for final award and so case will be mentioned on 15/5/2024.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF APRIL, 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

