



Kiilu v Kenya hospital Association Ltd t/a The Nairobi Hospital (Cause E494 of 2020) [2024] KEELRC 1020 (KLR) (15 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E494 OF 2020
NZIOKI WA MAKAU, J
APRIL 15, 2024**

BETWEEN

MICHAEL KYULI KIILU CLAIMANT

AND

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

JUDGMENT

1. Through a Statement of Claim dated 7th September 2020, the Claimant instituted this suit against the Respondent seeking damages for unfair dismissal and three (3) months' pay in lieu of notice. The Claimant averred that the Respondent employed him as a Senior Accountant on 23rd December 2015 and the contract ran for a probation period of six months before he was thereafter confirmed in employment. He worked for the Respondent for an interrupted period of 4 years, 2 months and that prior to the unlawful termination of his employment, his salary was Kshs. 164,976/- per month. It was the Claimant's averment that on 15th January 2020, the Respondent, without lawful and justifiable cause or reason, issued to him a letter of suspension and disciplinary hearing that cited alleged poor management of cashiers leading to fraudulent transactions and uncleared pending invoices. That in the end, the Respondent unlawfully and unfairly terminated his services on 28th February 2020 after subjecting him to a disciplinary process whose result was pre-determined. The Claimant stated that the grounds of alleged misconduct namely, lack of effective supervision of subordinates, poor management of the dispatch process and pending invoices leading to fraudulent transactions and loss of hospital revenue, were not within his job description and that he could not thus be held liable for the said actions. That in addition, neither was he issued with a copy of the disciplinary rules nor warning letters in accordance with the law and that the Respondent did not give him a chance to appeal. The Claimant thus prays for a declaration that his dismissal from employment by the Respondent was unlawful, unfair and hence null and void and that the Respondent be ordered to pay him notice pay and damages for unfair dismissal with interest at court rates.



2. The Claimant also filed a Witness Statement wherein he asserted that he accepted and signed his Appointment Letter and job description on 28th December 2015 and reported for duty on 1st February 2016. He noted that supervision of cashiers was under senior cashiers and a chief cashier who all reported to him as the senior in charge of the Cashiering Unit. On the allegation of his poor management of the dispatch process, the Claimant stated that the dispatch process was under the supervision of the Receivables Department that reported directly to the Chief Accountant. He further stated that for pending invoices, the Dispatch Department directly did the clearing of credit invoices at the end of duty and that cashiers were only allowed to leave when they satisfied the responsible dispatch officer/senior cashier that they had provided all the documentation. That therefore, any pending invoice would be because of non-compliance by the Dispatch Department and senior cashier and at no point was he directly involved with the same.
3. Respondent's Case
The Respondent filed a Statement of Response dated 1st February 2021 averring that the Claimant was employed for a period of 4 years and 1 Month. That it was entitled to suspend the Claimant after considering his response dated 9th January 2020 to the Show Cause letter dated 9th January 2020. According to the Respondent, it followed the legal due process before summarily dismissing the Claimant and that vide the said Show Cause letter, it duly notified him of its intention to terminate his services. It explained that the Claimant was granted a hearing on two occasions to make representations and defend himself on why disciplinary action should not be taken against him and he was accorded the opportunity to be accompanied to the hearing by an employee of his choice. That the decision to dismiss the Claimant summarily was therefore not predetermined as the Disciplinary Committee considered his representations, gave recommendations and the alleged misconduct on his part was proved.
4. The Respondent's case was that as per the Claimant's job description and the policy in place, the Claimant was charged with the responsibility of monitoring all cashiers' daily transactions to ensure there were no pending invoices at the end of each shift. That due to his own negligence to perform his duties, a fraud took place under the Claimant's watch to the detriment of the Respondent. That when the Claimant failed to explain how the fraud involving two amounts of Kshs. 646,844/- and Kshs. 1,316,747.54 respectively took place considering the Respondent's guidelines, he was dismissed. While maintaining that the Claimant was accorded a disciplinary hearing, the Respondent also asserted that the Claimant was well aware of his right to appeal under its Discipline Management Policy. It averred that the Claimant had a history of poor performance that was brought to his attention through a Warning on 28th November 2016 and that a recommendation that he be put under Performance Enhancement Plan (PEP) for 90 days was duly effected on 22nd February 2017. The Respondent notified this Court that it duly issued the Claimant with a Certificate of Service and prays that the Claimant's suit against it be dismissed with costs to the Respondent.
5. In support of its case, the Respondent also filed a Witness Statement made by Mr. James Chomba Irungu on 26th October 2023. Mr. Irungu stated that the Claimant was reporting to the Chief Accountant and used to supervise accountants and account assistants who included the senior cashiers and cashiers. That the Claimant's main responsibilities and duties included inter alia, providing leadership to the Treasury team on all functional matters and staffing matters, participating in reviewing accounting systems and procedures to increase efficiency and complying with any new guidelines issued through statutory, internal and external audit reports. That as the Senior Accountant Treasury, the Claimant was responsible for clearing cashiers at the end of their shift in order to prevent fraud and loss of revenue by the Hospital and that he was also supposed to assess, monitor, plan and



manage efficient collection of cash. Mr. Irungu further stated that the Claimant had also received a final warning letter from his supervisor on 9th March 2017 and on 13th February 2020, the Claimant was informed of an extension of his suspension to 29th February 2020. He also noted that the Claimant was invited for second disciplinary hearing on 17th February 2020 vide a letter dated 14th February 2020, which second hearing the Claimant attended and was later dismissed summarily for improperly performing his duties.

6. Claimant's Submissions

The Claimant submitted that it was incumbent upon the Respondent to file documentary evidence to prove the grounds and reasons for his summary dismissal set out in his termination letter. That however, the Respondent never filed and produced any documentary evidence to prove gross negligence and gross misconduct on the part of the Claimant and had as such not proved the validity of the reason for the termination of the Claimant's employment. That the Respondent's witness merely relied on hearsay and could not substantiate the reasons for the dismissal having not been one of the panelists at the time of the dismissal but a junior officer at the Respondent's Kiambu Branch. He questioned why the first disciplinary panel exonerated him and the Respondent then went ahead to form another panel to dismiss him if indeed the reasons for the termination were valid. The Claimant asserted that no revenue was lost by the Hospital and that no amount was deducted from the purported final dues and neither was a counterclaim proffered against him.

7. On due process and fairness, it was the Claimant's submission that this Court should give meaning to the provisions of the law as per Article 41 of the [Constitution](#) and sections 41, 43 and 45 of the [Employment Act](#). That since the Respondent failed to discharge the burden of proving that the termination of his employment was fair and justified, his summary dismissal was indeed unfair, unlawful and inhumane and this Court should find so. As regards the reliefs sought, the Claimant submitted that he has proved his case to the required standard and is thus entitled to the prayers he sought. That he is entitled to notice pay pursuant to section 36 of the [Employment Act](#) and further because parties are bound by their contractual obligations. He asserted that having served the Respondent diligently without blemish yet it summarily dismissed him in the most inhumane way, it can only be concluded that the Respondent had set out to terminate his employment. Furthermore, he abruptly lost income and was traumatized as his source of income had come to an abrupt close just before the Covid-19 Pandemic hit the country and the universe. The Claimant further submitted that this is a typical case where the full 12 months' award in damages is most deserving in accordance with section 49 of the [Employment Act](#). In support of his submissions, the Claimant relied on [Freddy Kipkorir Lang'at v Co-operative University of Kenya](#) [2021] eKLR and [Abisalom Ajusa Magomere v Kenya Nut Company Limited](#) [2014] eKLR.

8. Respondent's Submissions

The Respondent submitted that the [Employment Act](#) of 2007 requires an employer to follow the correct procedure in terminating an employee and to ensure that the employee has been terminated for valid reasons. It asserted that the provisions of section 41(1) of the Act are thus couched in mandatory terms in that in effecting termination of employment on the grounds of misconduct, poor performance or physical incapacity, an employer should duly explain to the employee the reason for the intended termination and in the presence of another person of the employee's choice. The Respondent noted that as per the Claimant's job description and the Respondent's policy in place, the Claimant was responsible of monitoring all cashiers' daily transactions to ensure there were no pending invoices at the end of each shift and that in essence, his role was supervisory. It argued that the Claimant was negligent in performing his duties leading to the fraud that took place under his watch to the detriment of the Respondent and his subsequent dismissal. That in addition, the Claimant was unable to explain why



he allowed the cashiers to report to their work stations with pending invoices contrary to the policy. It was the Respondent's submission that it therefore had a valid reason to take disciplinary action against the Claimant and to terminate his services.

9. As regards whether the termination was in accordance with fair procedure, the Respondent submitted that the Court in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR stated that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. The Respondent maintained that it complied in procedure with section 45 of the *Employment Act*. In that regard, it reiterated that its Chief Accountant issued the Claimant with a Warning of Non-Performance on 28th November 2016, his supervisor then reviewed his performance for the period between February and December 2016 and recommended that he be put under PEP to review his leadership skills for the treasury team. Moreover, it duly notified the Claimant of its intention to terminate his employment and he was heard on two occasions. It was the Respondent's submission that it has demonstrated that the Claimant was terminated after due procedure was followed and for a valid reason while the Claimant has not established any basis why this Court should order any compensation. It thus submitted that the Claimant's claim be dismissed with costs.
10. The Claimant's services were terminated after a second disciplinary hearing, the first having cleared the Claimant. The Claimant asserts the termination was pre-determined and that the same was thus unfair and unlawful. In the case of *Walter Ogal Anuro v TSC* (*supra*) cited by the Respondent, it was held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. In order to satisfy the fairness test, it must be demonstrated that there was cause to terminate. It was alleged the Claimant was responsible for supervision of cashiers. In the job description of the Claimant signed on 20th December 2015, there was no reference to supervision of the cashiering services of the Respondent. Neither was there any indication the Claimant was responsible for the matters he was accused of. His role was to assess, monitor, plan and manage efficient collection and utilization of cash and financial services in line with hospital and divisional objectives. He also was responsible for forecasting cash flow positions, related borrowing needs, and available funds for investment.
11. Granted that the Claimant was not responsible for the supervision of cashiers, it defeats logic to hold the Claimant accountable for any actions of miscreants in the department. Whereas the Claimant was accused of negligence, it was clear he was the one who was a whistle-blower and caused the Respondent to save money it could have lost had he not noticed the fraudulent cheque issued by one of the culprits in the cashiering department. The Respondent had weak systems in place permitting the thefts to take place. The Respondent was therefore culpable for the termination. The Claimant sought the maximum compensation and relied on the case of *Abisalom Ajusa Magomere v Kenya Nut Company Limited* (*supra*). In the case which was the only relevant one cited by the Claimant in relation to his termination, Ndolo J. held that the termination of the claimant in that case contrary to procedure under section 41 of the *Employment Act* rendered the termination unfair and unlawful. The Claimant herein was similarly dismissed without regard to procedure. However, unlike Mr. Magomere, the Claimant had not served the Respondent for such a long period of time and therefore in my considered view a compensation equivalent to 6 months would suffice in terms of section 49 of the *Employment Act*. The Claimant also sought three (3) months' pay in lieu of notice. In my considered view, the contract of employment having made provision for only two months notice. The Claimant is therefore only entitled to only 2 months salary as notice. In the final analysis I enter judgment for the Claimant against the Respondent for:-
 - a. A declaration that the Claimant's termination from employment was unfair and unlawful.



- b. Compensation in terms of section 49 capped at 6 months salary – Kshs. 989,856/-
- c. Kshs. 329,952/- being 2 month's notice.
- d. Costs of the suit.
- e. Interest on the sums in (b) and (c) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL 2024

NZIOKI WA MAKAU

JUDGE

