



**Otieno v Penda Health Limited (Cause E424 of 2023)  
[2024] KEELRC 1468 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1468 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E424 OF 2023  
NZIOKI WA MAKAU, J  
JUNE 13, 2024**

**BETWEEN**

**SOCRATES OUMA OTIENO ..... CLAIMANT**

**AND**

**PENDA HEALTH LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his claim vide a Statement of Claim dated 10<sup>th</sup> May 2023. In it, the Claimant averred that he was employed by the Respondent on 27<sup>th</sup> May 2019 as a clinical officer and that his diligence and hard work enabled him get promotion to position of branch manager on 7<sup>th</sup> May 2021. He averred that upon promotion his salary was increased to ksh 83,497/- a month. That in March 2023 he was served with a notice to show cause and/or invitation to a disciplinary hearing. That the hearing took place on 28<sup>th</sup> March 2023 and that at the said hearing, the following persons were the attendees; Beatrice Moraa — HRM, Caroline Irungu- HRBP Associate and the Claimant. The Claimant averred that he had no representative at the said meeting. That subsequently on 30<sup>th</sup> March 2023 the Claimant was issued with a termination letter dated the same day. The said termination letter was effective 30<sup>th</sup> March 2023 which meant therefore the Claimant was not issued with the requisite notice and in lieu of the notice he was not paid as required under the *Employment Act*, 2007. The Claimant averred that the reason for termination was poor performance and that the facets of poor performance in the said letter were as follows:
  - a. Poor work ethic
  - b. Dishonesty
  - c. Negligence
2. The Claimant who had initially been hailed as good performer was now being accused of executing his duties poorly. The Claimant averred that the same was done without a performance appraisal and



that proper procedure once poor performance of an employee is noted was not adhered to by the Respondent. The Claimant averred that the Respondent did not justify terminating the Claimant's employment on the account of poor performance hence rendering the said termination unfair. The Claimant was also not allowed to have a representative during the hearing of his disciplinary case contrary the mandatory dictates of the Employment Act 2007 thus rendering the procedure unlawful. The Claimant avers he was a victim of unfair labour practices. The Claimant averred that after termination he was only paid his March salary together with pending leave days as his terminal dues. The Claimant thus prayed for:

- a. A declaration that the Respondent's act of terminating the Claimant's employment was unfair and unlawful
  - b. ksh 1,085,461/- as damages and notice
  - c. Costs of the suit
  - d. Interest on (b) and (c) above
  - e. Any other relief as this Honourable Court may deem fit
3. The Respondent filed a memorandum of defence denying the averments in the Claimant's claim. It averred that the Claimant, despite being notified of his right to have a representative at the Disciplinary hearing, elected not to have a representative appear with him for the Disciplinary Hearing. The Respondent denied that the Claimant was summarily dismissed and that no notice of termination of the employment contract was issued to the Claimant. The Respondent averred that upon the termination of the Claimant's employment contract, it paid ksh93,408.88/- to the Claimant in terminal dues which amount included one month's salary being payment in lieu of notice of termination of contract.
4. The Respondent further averred that the Claimant's employment contract was terminated for cause the said cause being the Claimant's gross misconduct as indicated in the Termination Letter. The Respondent avers that the Claimant was at all material times well aware of the allegations leveled against him and in fact responded to the Show Cause Letter which response he relied on throughout the disciplinary process. The Respondent averred that the reason for terminating the Claimant's employment contract was his deliberate negligent and unethical execution of duties and dishonesty during the disciplinary process which amounted to gross misconduct on his part. The Respondent states that the decision to terminate the employment contract of the Claimant for gross misconduct was justified and was reached following strict adherence to the law, procedural fairness and the rules of natural justice. The Respondent avers that it was justified in terminating the employment contract of the Claimant as the Claimant not only engaged in gross misconduct and negligence in the execution of his duties but he was also dishonest and unremorseful throughout the disciplinary process despite the Respondent tabling evidence demonstrating that the Claimant had knowingly engaged in gross misconduct and been negligent in the execution of his duties.
5. The Claimant submits that the issues for determination are
- a. Whether the Claimant's employment was unfairly and unlawfully terminated
  - b. Whether the Claimant is entitled to reliefs sought.

As to the first issue, the Claimant submits that the case before this court is one where an employee was deemed not to perform well or executing his duties to the required standard. The Claimant submits he was terminated on the account of poor performance and that there was need to answer whether the said termination was lawful and fair. The Claimant cites Articles 41 (1) and 47(1) of the Constitution



as the first port of call in determining the fairness of termination as an employee is entitled to right to fair labour practices and administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Claimant submits that on the issue of poor performance, the Court of Appeal stated as follows in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR:-

The reason advanced by the Bank for terminating the respondent's employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial* Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;

- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

6. The Claimant relied on the cases of *Daniel Mbuthi v Express Automation Limited* [2014] eKLR and *Maina Mwangi v Thika Coffee Mills Limited* [2012] eKLR on the need for the employee to be placed on performance improvement programme prior to a determination being made on poor performance. The Claimant submitted that the employer failed to demonstrate the steps taken to check the performance of the employee. The Claimant submitted that from testimony adduced, it is obvious no law was followed in the termination, and that where there was an attempt to do so, it was just cosmetic compliance. The Claimant submitted that the provisions of the law have been couched on mandatory terms and it gave no room for discretion to the Respondent. The Claimant submits that therefore, this court must return an adverse finding that the Claimant was unfairly and unlawfully terminated. The Claimant submitted that having demonstrated that the Respondent disregarded the law, there was basis for grant of relief. The Claimant submitted that because he was dismissed both unfairly and unlawfully, he is therefore entitled to compensation pursuant to section 49 (1)(c) of the *Employment Act*. The Claimant submitted that the court should exercise its discretion and award maximum compensation. He submitted that he believed that would be justifiable on the grounds that this court should take judicial notice of the fact that unemployment is general a serious problem in this country and that the Claimant has little chance, if any of securing alternative employment. Further,



the Respondent had no regard to the law, and proceeded to terminate Claimant without any cause and the same should be punitive. The Claimant submitted that the amounts pleaded should be awarded and costs be paid by the Respondent.

7. The Respondent submits that the issues that have crystallized for determination by this Honourable Court are:
  - I. What was the Respondent's reason for terminating the Claimant's employment contract and was it a valid and fair reason?
  - II. What procedure should the Respondent have adhered to in taking disciplinary action against the Claimant and did it adhere to that procedure?
  - III. Does the claim as prosecuted by the Claimant have merit to warrant the awarding of the reliefs sought?
8. The Respondent submitted that it is an agreed fact that the Respondent served upon the Claimant a Notice to Show Cause dated 21<sup>st</sup> March 2023. The Respondent submits the Notice to Show Cause invited the Claimant to show cause as to why disciplinary action should not be taken against him for gross misconduct. The Respondent submits the Notice to Show Cause detailed the grounds of the accusation of gross misconduct against the Claimant as negligent failure to adhere to the Respondent's Standard Operating Procedure of documenting the services rendered to the Respondent's patients. It was submitted that in particular the Claimant was asked to respond to the allegation that on 7<sup>th</sup> February 2023 he failed to ensure that information regarding a patient who was brought in to the facility lifeless was recorded/documented. It was submitted that it was also noted that the incident of 7<sup>th</sup> February 2023 was not the first incident where the Claimant had failed to ensure strict adherence to the Respondent's Standard Operating Procedures. The Respondent submitted that the Claimant was aware that the disciplinary hearing was a serious matter and that he admitted not knowing the SOP yet the same was available on the Respondent's intranet. The Respondent submitted that despite the claim that he was not aware of the SOP on 'brought in dead patients' the Claimant stood by his decision to issue his subordinate with a warning letter on the basis of the incident of 7<sup>th</sup> February 2023. The Respondent submitted that the disciplinary action of issuing a warning letter was appealed by the Claimant's subordinate and during the appeal proceedings the Claimant did not mention nor express that he was not familiar with the relevant SOP. It was submitted that on being questioned on what basis he had issued the warning letter to his subordinate the Claimant stated that "When being handed over by Jacinta the case and being explained to properly the procedure that is when I agreed that Mary deserves a warning letter." The Respondent submitted that when the same question was posed to the Claimant in the disciplinary meeting of 28<sup>th</sup> March 2023 he stated "So I gave the provider the warning letter knowing the right process and I felt she deserved it because she was the first point of contact with the patient." The Respondent submitted that on the basis of the responses, the Claimant was aware of the SOP.
9. In the final disciplinary hearing of 30<sup>th</sup> March 2023 the Claimant was presented with proof in the form of an email correspondence demonstrating that he not only knew of the SOP for brought in dead patient's but had in fact applied it in September of 2021. The Respondent submitted that the Claimant's employment contract was subsequently terminated vide a termination letter dated 30<sup>th</sup> March 2023 in which the reasons for termination of the employment contract were summarized as gross misconduct amounting to breach of contract. It was submitted that from the body of the text of the termination letter it is evident that the issues detailed therein are those outlined in the notice to show cause and discussed in the disciplinary hearings.



10. The Respondent cited the case of *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR where Kebira J. held that whether an employee's misconduct warrants dismissal requires assessment of the degree of the misconduct and the surrounding circumstances, a contextual approach. The Respondent submitted that it is evident that the neglect by the Claimant was willful and/or careless as he was aware of the particular Standard Operating Procedure, that all SOP's were available on the Respondent's intranet, the Respondent had provided fora where the Claimant and his peers could appraise themselves on the SOP's and share experiences and the Claimant had recently received written feedback from his supervisor on the same issue imploring him to ensure that SOP's were being adhered to in the branch.
11. The Respondent cited the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage co. Limited* [2013] eKLR where the court made the following observation:
  - “ 63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.
  64. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
  65. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
  66. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”
12. The Respondent submitted that it has demonstrated that it terminated the Claimant's employment contract for gross misconduct on a valid and fair reason after according him a just and equitable disciplinary hearing and that the Claimant has not discharged its burden of proving that the termination of his employment contract was unfair as alleged. The Respondent submitted that the Claimant was not therefore entitled to any of the remedies he had sought in his claim as there was reason for termination. It urged the dismissal of the suit with costs.
13. The Court has considered the pleadings, the evidence adduced both oral and documentary as well as the lengthy submissions of parties and the law cited together with authorities in coming to this decision. The Claimant's employ was terminated for alleged failure to observe standard operating procedures. It is common ground that the Claimant was given a show cause notice after the incident on 7<sup>th</sup> February 2023. In the SOPs relating to a patient who is 'brought in dead' there is a protocol on how to deal with such a scenario. The Claimant demonstrated awareness of the same when he took disciplinary action against the staff who was the first point of contact with the patient. The Respondent indicated that the SOPs were in the Respondent's intranet for ease of access. It however failed to demonstrate this had been brought to the attention of all staff by way of sensitization etc. However, that does not detract from the Claimant's tacit admission in the manner he dealt with his subordinate who had flouted the standard operating procedure. It is clear therefore that the Claimant was aware of the same and failed



to apply it and only did so after prompting by a fellow manager. He had no basis filing a claim against the Respondent as he flouted the terms of his engagement with the Respondent to his detriment. As the dismissal was warranted due to the misconduct of the employee and because the Claimant was given the Constitutional safeguards in Article 41 and 47 by being given a hearing and administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair, the Claimant's case is not merited and only fit for dismissal. As costs are at the discretion of the Court in labour matters, I decline to award any costs to the Respondent. Suit dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE 2024**

**NZIOKI WA MAKAU**

**JUDGE**

