



**Muthengi v Kenyatta National Hospital Board (Cause 384 of 2018)  
[2024] KEELRC 2139 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2139 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 384 OF 2018**

**L NDOLO, J  
JULY 31, 2024**

**BETWEEN**

**JOHN MULI MUTHENGI ..... CLAIMANT**

**AND**

**KENYATTA NATIONAL HOSPITAL BOARD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. John Muli Muthengi, the Claimant in this case, was a long serving employee of Kenyatta National Hospital, having been employed as a Security Guard effective 1994 until 17<sup>th</sup> July 2015, when his employment was terminated.
2. Muthengi brought this claim alleging unlawful and unfair termination of his employment by the Respondent. The claim is contained in a Memorandum of Claim dated 20<sup>th</sup> February 2018 and amended on 10<sup>th</sup> August 2021. The Respondent filed a Memorandum of Response dated 31<sup>st</sup> May 2019 and amended on 19<sup>th</sup> April 2022.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Senior Human Resource Officer, Justus Kinyua Muriuki. Both parties also filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent in October 1994 as a Senior Security Guard, at an entry monthly salary of Kshs.3,284 which was progressively increased to Kshs.49,682 as at the time of separation on 17<sup>th</sup> July 2015.
5. On 13<sup>th</sup> November 2013, the Claimant was suspended from duty on allegations of assisting a patient to abscond from the ward on 29<sup>th</sup> October 2013, without settling an accrued bill.



6. On 15<sup>th</sup> May 2014, the Claimant was issued with a notice to show cause, to which he responded on 23<sup>rd</sup> May 2014. While denying the allegations levelled against him, the Claimant stated that he was not on duty on the date he was alleged to have assisted a patient to abscond from the ward.
7. By letter dated 20<sup>th</sup> August 2014, the Claimant was invited to appear before the Staff Disciplinary and Advisory Committee (SDAC). He appeared on 26<sup>th</sup> August 2014 and on 17<sup>th</sup> July 2015, he was issued with a termination notice. He appealed against the termination but he did not receive a response.
8. The Claimant contends that the SDAC had no legal mandate to discipline him as he was an employee of the Respondent. He states that only the Respondent's Board could exercise disciplinary control over him in accordance with the Kenyatta National Hospital Board Order, 1987 and Section 5(3) of the [State Corporations Act](#).
9. The Claimant further complains that he was denied an opportunity to peruse and examine the evidence intended to be relied upon at the disciplinary proceedings.
10. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore claims the following:
  - a. A declaration that the termination of his employment was unlawful and unfair
  - b. A declaration that any decision by the SDAC was unlawful
  - c. Unpaid salary for November 2013-July 2015..... Kshs.710,682
  - d. Severance pay for 22 years..... Kshs.734,303
  - e. 12 months' salary in compensation..... Kshs.572,184
11. In the alternative, the Claimant seeks the following:
  - a. An order of reinstatement with payment of his salary from November 2013 to the date of reinstatement;
  - b. An order that any bad record that may have been placed in his file in relation to the interdiction be expunged from his employment records.
12. Finally, the Claimant asks for a certificate of service, costs plus interest.

### **The Respondent's Case**

13. In its Memorandum of Response dated 31<sup>st</sup> May 2019, the Respondent admits having employed the Claimant on 21<sup>st</sup> October 1994. According to the Respondent, at the time of his dismissal the Claimant was earning a basic monthly salary of Kshs.33,842.
14. The Respondent states that the allegations levelled against the Claimant were thoroughly investigated and he was found to have put the Hospital into disrepute. The Respondent denies receiving any appeal from the Claimant.
15. The Respondent defends the disciplinary proceedings conducted by the SDAC, pointing to Section 9 of the [State Corporations Act](#), which empowers the Respondent to establish committees to deal with specific matters. The Respondent maintains that the SDAC had the legal mandate to undertake disciplinary action against the Claimant, including terminating his employment.
16. The Respondent maintains that the Claimant's dismissal was justified and that he was subjected to due process. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.



## Findings and Determination

17. There are two (2) issues for determination in this case:
- a. Whether the Claimant's dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

## The Dismissal

18. The Claimant was dismissed by letter dated 17<sup>th</sup> July 2015 stating as follows:

“Dear Sir

Re: Dismissal From The Service

Further to this office letter Ref: KNH/530463/A/26 dated 15<sup>th</sup> May 2014 and your subsequent appearance before the Staff Disciplinary and Advisory Committee (SDAC) on 26<sup>th</sup> August 2014, your representations have been given due consideration.

The Hospital Management has established that on 29<sup>th</sup> October 2013 at around 6.30 p.m, you aided a mother to patient Keyra Mwende (minor) IP/No: 1607703 to abscond from Ward 3B without paying due Hospital revenue amounting to Kshs. 52,511.00. Further, it has been established that at the time of committing the offence, you were on your annual leave which commenced on 16<sup>th</sup> September 2013 to 1<sup>st</sup> November 2013. You were spotted while walking away with the mother and the patient on the pretext that you were escorting them to clinic No. 23 and you promised to escort them back to the Ward.

Management further established that you did not escort the mother and the patient back to the Ward as you had promised. You are therefore deemed to have used your position as an employee to facilitate the abscondment of patient Keyra Mwende IP/No: 1607703 without payment of the due Hospital bill indicated above. Your behaviour is a contravention of the *Public Officer Ethics Act* (2003) Part III section 9(a) & (g) and the *Employment Act* 2007 Section 44 clause 4(g). The same is a serious breach of discipline and constitutes gross misconduct that cannot be condoned in the service.

In view of the above and considering the seriousness of the offence, it has been resolved that;

- i. The suspension hitherto imposed on you with effect from 13<sup>th</sup> November, 2013 should be lifted without loss of the withheld salary during the period of suspension.
- ii. You should be and are hereby dismissed from the service with effect from the date of this letter on account of gross misconduct and loss of trust.

On dismissal and upon your written request, you have the option to be paid an actuarially determined fraction of your withdrawal benefits in line with the pension rules. You are however, required to indicate how you will offset any Hospital liabilities that may be outstanding and/or established. You are required to return the attached Clearance Certificate duly completed and signed by the relevant Hospital authorities. Also, sign the attached *Official Secrets Act* Declaration Form for officers leaving the service in the presence of a witness and the Declaration of Income, Assets and Liabilities and return the same to this office for record purposes.



You have the option to appeal against this decision through this office to the Chairman, Human Resource Committee of the Board within a period of twenty one (21) days from the date hereof.

Yours faithfully,

(signed)

For: Chief Executive Officer”

19. In faulting his dismissal, the Claimant begins by questioning the mandate of the SDAC to exercise disciplinary control over him. In his written submissions dated 15<sup>th</sup> April 2024, the Claimant cites the decision in *Stephen Kaburia v Kenyatta National Hospital Board & another* [2016] eKLR where Ongaya J held that the Kenyatta National Hospital Board must be involved in disciplinary cases touching on employees deployed at the Hospital.
20. In its defence, the Respondent states that it is empowered under Section 9 of the *State Corporations Act*, to establish committees for specific purposes, and SDAC ought to be viewed as one such committee. My reading of the Respondent’s response in this regard is that in dealing with the Claimant’s case, SDAC was exercising delegated authority specifically conferred upon it by the Respondent. I am persuaded by this argument and will therefore proceed to examine the disciplinary process and resultant action on merit.
21. By letter dated 13<sup>th</sup> November 2013, the Claimant was suspended indefinitely, without salary, pending investigations into allegations that he had aided a patient to escape from the Hospital without paying an accrued bill. The next letter to the Claimant was a notice to show cause, issued six (6) months later, on 15<sup>th</sup> May 2014.
22. The Claimant responded to the show cause notice by his letter dated 23<sup>rd</sup> May 2014 after which there was another lull of close to three (3) months until 20<sup>th</sup> August 2014, when the Claimant was issued with a letter inviting him to a disciplinary hearing on 26<sup>th</sup> August 2014. The Claimant was dismissed close to a year later on 17<sup>th</sup> July 2015.
23. The effect of the foregoing narration of events is that the Claimant stayed on suspension without a salary for one (1) year and eight (8) months. The Respondent did not bother to explain this inordinate delay, leaving the Court to draw a negative inference.
24. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2015] eKLR this Court stated its view on prolonged disciplinary proceedings as follows:

“...To have disciplinary proceedings hanging over the head of an employee for close to a year much like the sword of Damocles or the tongue of an unforgiving spouse, amounts to an unfair labour practice within the meaning of Article 41(1) of *the Constitution*. Disciplinary proceedings should not be allowed to persist so as to acquire the character of an employer’s core business. They must be dealt with expeditiously to allow both the employer and the employee to move on.”
25. In the present case, the aggravating factor is that for the whole period he was on suspension, the Claimant did not earn a salary. In its decision in *Kefa Omae Obiri v Marianist Organization* [2018] eKLR this Court stated thus:

“...suspension is ordinarily a neutral action by which an employee is allowed to step aside to allow for unfettered investigations into allegations facing them. Suspension should not



therefore attract any adverse action against the employee such as withholding salary, unless there is a statutory basis for such adverse action.”

26. I need to add that suspension is not the same as interdiction, which, in certain cases, is recognised as a complete form of disciplinary action. The Respondent did not advance any basis to support its decision to withhold the Claimant’s salary during suspension. I therefore have no difficulty in reaching the conclusion that the suspension slapped on the Claimant was a disguised termination of employment, which flew in the face of due process.
27. I will now examine the proceedings before the SDAC. The Claimant testified that he was not given an opportunity to cross-examine his colleagues who are said to have implicated him and from the record, there is no evidence of any such opportunity. Indeed, the record produced by the Respondent is no more than a litany of statements allegedly made by the Respondent’s employees. Significantly, none of these employees was availed for examination by the Claimant either during the internal disciplinary proceedings or at the hearing before the Court.
28. Additionally, the Court was unable to understand why the Claimant was not stopped at the time he was allegedly spotted escorting the patient away. It is on record that the passage taken by the Claimant out of the Hospital was manned by qualified security personnel. Yet, there is no evidence of any alarm being raised by any of these personnel.
29. Ultimately I find and hold that the charge levelled against the Claimant was not proved at the shop floor as required by law. Further, by keeping the Claimant on suspension without a salary for a period well in excess of one year, the Respondent was in breach of the Claimant’s right to fair labour practices.

## **Remedies**

30. Pursuant to the foregoing findings, I award the Claimant twelve (12) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s long service, spanning over twenty-one years. I have also considered the Respondent’s mishandling of the Claimant’s case, with particular focus on the inordinate delay in concluding the case, leading to the Claimant being on suspension, without a salary, for an unusually long time. I have further taken into account the Respondent’s failure to allow the Claimant an opportunity to cross-examine its witnesses, thus compromising his right to be heard.
31. By the dismissal letter issued to the Claimant, the Respondent communicated that the Claimant’s suspension had been lifted without loss of the withheld salary. This claim is therefore admitted and is payable.
32. No basis was established for the claim for severance pay, which therefore fails and is dismissed.
33. The alternative prayer for an order of reinstatement is disallowed on account of the time lapse post separation.
34. Finally, I enter judgment in favour of the Claimant in the following terms:
  - a. 12 months’ salary in compensation..... Kshs.572,184
  - b. Unpaid salary for November 2013-July 2015..... 710,682Total..... 1,282,866
35. This amount will attract interest at court rates from the date of judgment until payment in full.
36. The Claimant will have the costs of the case.



37. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY JULY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Langat h/b for Ms. Jeruto for the Claimant

Mr. Job Nyasimi for the Respondent

