



REPUBLIC OF KENYA



**Nyaberi & 5 others v Mediheal Hospital Nakuru (Cause 377 of 2017)
[2024] KEELRC 2860 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 377 OF 2017
DN NDERITU, J
NOVEMBER 14, 2024**

BETWEEN

**EDWIN NYABAYO NYABERI 1ST CLAIMANT
ROSE JEROGONY TUITOEK 2ND CLAIMANT
ROSELINE ADHIAMBO OMOLLO 3RD CLAIMANT
JOSEPHINE SYOMBUA KAVITA 4TH CLAIMANT
PERYN CHERUTO 5TH CLAIMANT
PAULINE AKINYI OWIDI 6TH CLAIMANT**

AND

MEDIHEAL HOSPITAL NAKURU RESPONDENT

JUDGMENT

I. Introduction

1. Through Kamoing' & Co. Advocates the claimants commenced this cause by way of a memorandum of claim dated 7th August, 2017 filed in court on 15th August, 2017 seeking the following reliefs –
 - a. A declaration that the conduct of the respondent amounts to constructive dismissal of the claimants.
 - b. A declaration that the verbal decision to terminate their services was unlawful.
 - c. Kshs. 4,000/- token for 1st, 2nd, 3rd, 4th, and 5th claimants.
 - d. March salaries and April salaries 1st, 2nd, 3rd, 4th and 5th claimants.
 - e. October and November salaries for the 6th claimant.



- f. 1 month's salary in lieu of notice.
- g. 12 months' salary in compensation for unfair termination.
- h. Service pay (for each claimant except Pauline Owidi)
- i. Certificate of service.
- j. Costs and interests of this suit at court rates.
- k. Any other relief that this Honourable court deems fit and just to grant.

BROKEN AS HEREUNDER

- a. Edwin Nyaberi (15/7/2015-05/05/2017)
 - Token.....Kshs4,000
 - March salary.....Kshs21,048
 - April.....Kshs21,048
 - One month's salary in lieu of notice.....Kshs21,048
 - Compensation for unfair termination.....Kshs21,048*12 months =Kshs252,576
 - Service pay.....Kshs21,048/26 days*15 days*1 year=Kshs12,143
 - Total =Kshs331,863
- b. Rose Tuitoek (17/05/2012-05/05/2017)
 - Token.....Kshs4,000
 - March salary.....Kshs25,079
 - April.....Kshs25,079
 - One month's salary in lieu of notice.....Kshs25,079
 - Compensation for unfair termination.....Kshs25,079*12 months =Kshs300,948
 - Service pay.....Kshs25,079/26 days*15 days*4 year=Kshs57,874.62
 - Total =Kshs438,059.62/=
- c. Roseline Amollo (25/08/2015-05/05/2017)
 - Token.....Kshs4,000
 - March salary.....Kshs18,850
 - April.....Kshs18,850
 - One month's salary in lieu of notice.....Kshs18,850
 - Compensation for unfair termination.....Kshs18,850*12 months =Kshs226,200
 - Service pay.....Kshs18,850/26 days*15 days*1 year=Kshs10,875
 - Total =Ksh.297,625
- d. Josephine Kavita (17/02/2015-05/05/2017)
 - Token.....Kshs4,000



March salary..... Kshs42,596
 April.....Kshs42,596
 One month's salary in lieu of notice.....Kshs42,596
 Compensation for unfair termination.....Kshs42,596*12 months =Kshs527,268
 Service pay.....Kshs42,596/26 days*15 days*2 year=Kshs49,149.23
 Total =Kshs692,089.23

e. Peryn Cheruto (13/01/2016-05/05/2017)

Token.....Kshs4,000
 March salary.....Kshs43,939
 April.....Kshs43,939
 One month's salary in lieu of notice.....Kshs43,939
 Compensation for unfair termination.....Kshs43,939*12 months =Kshs527,268
 Service pay.....Kshs43,939/26 days*15 days*1 year=Kshs25,349.42
 Total =Kshs688,434.42/=

f. Pauline Akinyi (03/12/2016-November 2017)

March salary.....Kshs17,200
 April..... Kshs17,200
 One month's salary in lieu of notice.....Kshs17,200
 Compensation for unfair termination.....Kshs17,200*12 months =Kshs206,400
 Total =Kshs258,000/=

2. Alongside the memorandum of claim was filed a verifying affidavit by the 3rd claimant, authority to plead given to the 3rd claimant, a list of witnesses, claimants' witness statements, a list of documents, and a bundle or copies of the listed documents.
3. On 30th August, 2017 the respondent entered appearance through Kipkorir Cheruiyot & Co. Advocates and filed a response to the claim dated 29th August, 2017. In the statement of response, the respondent prays that the claimants' cause be dismissed with costs for want of merits.
4. On 16th August, 2018 the respondent filed a list of witnesses, a statement by David Maina Mbae, a list of documents, and copies of documents in support of the response. Further, on 5th November, 2021 the respondent filed a supplemental list of witnesses and a statement by Violet Nyangasi Mwigai.
5. The claimants' case came up in court for virtual hearing on 2nd May, 2023 when the 3rd claimant (CW1), with the authority from the other claimants, testified and closed the claimants' case.
6. The defence did not call any witnesses and closed its case on 6th February, 2024.
7. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Miss Kamoing; filed her written submissions on 13th March, 2024 while the respondent's counsel, Miss Rono, filed on 1st March, 2024.



II. The Claimants' Case

8. The claimants' case is expressed through the memorandum of claim, oral and documentary evidence adduced through CW1, and the written submissions by their counsel.
9. In the memorandum of claim, the claimants pleaded that they were employees of the respondent based in Nakuru city, Nakuru County. It is pleaded that they all worked continuously in various departments either as nursing officers or nurse aids for different terms.
10. It is pleaded that on 5th March, 2017 a patient named Edwin Elitu escaped from the hospital's male ward, and on 10th March, 2017 another patient, Steve Macharia, escaped from the private wing. It is pleaded that the 1st to the 5th claimants were on duty on both occasions and only realized that the patients had escaped while conducting their ward rounds. It is pleaded that the two disappearances were reported to the matron who in turn reported to the general manager. A search by the respondent's ICT Department through CCTV showed that the patients had most likely escaped after visiting the toilet. The claimants were instructed to write their statements about the incidents upon which they resumed duty.
11. It is pleaded that on 15th March, 2017 all employees were paid a token of Kshs4,000 except them. They allege that they enquired from the general and the human resource managers about the said exclusion but no explanation was given. It is pleaded further that on 5th April, 2017 all employees were paid their monthly salaries for March, 2017 except the claimants.
12. It is pleaded that the respondent convened a committee and directed the claimants to appear in person for questioning. The five claimants declined and requested to be allowed to appear as a group. It is pleaded that the respondent declined the request and proceeded with the meeting in the claimants' absence. Thereafter a decision was communicated verbally by the human resources manager instantly terminating the claimants from employment.
13. It is pleaded that thereafter the claimants lodged a complaint with the labour office on 6th April, 2017 and the respondent in reply on 7th April, 2017 indicated that the claimants were only on suspension. The claimants aver that their indefinite suspension was unlawful and discriminatory for lack of written explanation and it amounted to dismissal. The claimants aver that the respondent did not pay the 1st to the 5th claimants' salaries for two months and the token of Kshs4,000/=.
14. It is pleaded that the 6th claimant's dismissal was ignited by an incident of on 1st November, 2016 when an unnamed 22-year-old patient escaped from the respondent's male ward. The patient had been placed in the ward after awaiting to clear his hospital bill. It is pleaded that the 6th claimant's shift on duty commenced from 6.30 pm to 8.00 am, and on the fateful night at about 4.00 am, she discovered that the said patient was not in his bed. She informed the head nurse, James, who in turn called the matron. A search was conducted but the patient could not be found.
15. She avers that all nurses on duty wrote their statements and at the end of her shift she went home. She pleaded that she was called by the matron the same day and informed to proceed to the Central Police Station, Nakuru. At the police station, the nurse-in-charge recorded a statement alongside the 6th claimant and other nurses who were on duty on 1st November. It is observed that she reported to duty that night as usual and at the end of the shift at 8.00 am the matron informed her that her services had been terminated until she found the escapee patient or his father to clear the bill. It is pleaded that the respondent paid the 6th claimant Kshs5,000 only instead of her full salary for two months.



16. In her testimony in court on her own behalf and on behalf of the other claimants, CW1 reiterated the contents of the foregoing pleadings and adopted her witness statement dated 7th May, 2017 as her evidence-in-chief. She produced copies of the listed documents as exhibits 1 to 5.
17. She testified that the escapee patient had been discharged by the respondent and he left without settling his hospital bill. She emphasized that the hospital blamed the claimants for the disappearance of the patients yet it was the duty of the security officers to keep guard. She testified that no suspension letters were issued to them and the show-cause letters dated 13th March, 2017 were not served upon them. She further testified that the responses to the show cause letters in the respondent's bundle were forgeries as the claimants could not respond to letters not delivered or served upon them. She testified that no efforts were made by the respondent to invite the claimants to the alleged disciplinary hearing conducted and hence the minutes of the said meeting are a forgery.
18. In cross-examination CW1 stated that her duty as a nurse assistant was to assist the nurse-in-charge in administering drugs, ensuring that the wards are cleaned, the patients are fed, among other functions. She indicated that she was aware of the patient attendance standard operating procedures (SOPs) by the respondent. She stated that she handed over after her shift to the concerned patient who was in the room before she left to inspect another room. She stated that once a patient is discharged they are issued with a discharge summary and the bill must be cleared. She stated that it was the duty of the security department to ensure that the patient did not leave without paying a bill.
19. She stated that the claimants were not issued with any show cause letters or invited for disciplinary hearing and the statements dated 15th March, 2017 allegedly recorded by the claimants were forgeries. She testified that the claimants reported the dispute to the labour office on 6th April, 2017 and by then they were still in employment of the respondent. She testified further that they were not served with the respondent's response to the labour office dated 7th April, 2017. She testified that there no disciplinary hearing was conducted and that the claimant's duties were of security or there was a department and officers in-charge of security of the facility and the patients.
20. It is on the basis of the foregoing that the claimants pray that the cause be allowed as prayed in the memorandum of claim.

III. The Respondent's Case

21. Apart from filing its response to the claim the respondent did not call any witnesses to adduce evidence rendering the response mere allegations. Likewise, the filed documents were not produced as exhibits.
22. Nevertheless, in the response to claim, the respondent pleaded that the 1st to 5th claimants were negligent in the performance of their duties and allowed patients to abscond. It is pleaded that the token of appreciation of Kshs4,000/= was in accordance with the hospital's policy.
23. It is pleaded that the respondent's disciplinary committee was formed in accordance with the law and that the claimants were allegedly accorded due representation and the committee's decision communicated to the claimants in accordance with the law. It is further pleaded that the respondent had the authority to suspend its employees pending investigations. Further, it is pleaded that the claimants were not discriminated as the suspension and the subsequent dismissal were based on gross misconduct on the part of the claimants. It is pleaded that the respondent followed due process and that the dismissal was fair, just and lawful.
24. It is further pleaded that the claimants' negligent conduct created reasonable and sufficient grounds for summary dismissal. It is pleaded that the claimants' conduct resulted in the loss of revenue. It is pleaded



that the claimants were not constructively or otherwise dismissed but rather willfully left employment of their own volition.

IV. Submissions By Counsel

24. On the one hand, the claimants' counsel submitted on four issues – Whether the claimants' termination by the respondent was unfair, unlawful and wrongful; Whether the respondent's actions amounted to unfair labour practices contrary to the Fair Administrative Actions Act, 2015 and *the Constitution* of Kenya, 2010; Whether the claimants should be paid their terminal dues and benefits; and, Who should bear the costs of this suit.
25. On the first issue, it is submitted that the respondent has not adduced any evidence to prove that the claimants aided the two patients in escaping without settling their bills. It is submitted that the respondent is a leading healthcare facility with the proper infrastructure to monitor the movement of patients. No evidence was adduced to prove the culpability of the claimants in that regard. Citing *Kipkebe limited v Peterson Ondieki Tai* (2016) eKLR, it is submitted that the burden of proof lies with the party that wants the court to rule in his favour. It is submitted that pursuant to the provisions of Sections 108 and 109 of the *Evidence Act* (Cap 80) the burden of proof placed on a person shall fail where no evidence is given unless the law shifts the burden onto the other party. It is submitted that the respondent bore the evidential burden in substantiating the allegations it made in the defence but failed as no oral or documentary evidence was adduced.
26. It is submitted that pursuant to Section 10 of the *Employment Act* (the Act) the claimants' job descriptions did not include providing security to patients which is ordinarily a reserve for security officers in a functional institution. It is submitted that in violation of the claimants' right to a fair hearing under Article 50 of *the Constitution* the respondent failed to apply due process and formed a disciplinary committee on 5th April, 2017 to decide on fit of the claimants. It is submitted that when the claimants requested to appear before the respondent in the company of an employee of their choice the respondent declined the request and proceeded to make a decision without hearing the claimants thereby violating their right to be heard. To buttress this assertion counsel cited *Ridge vs. Balwin* (1964) AC 40 and *Halsbury's Laws of England*, 5th Edition 2010 vol.61(para.639) and referred to Lord Loreburn's speech to the House of Lords, 1961. It is submitted that contrary to the right and known procedure, no investigations were conducted; no show-cause letters were served upon the claimants; no notice to attend a disciplinary hearing was issued; or proof that the respondent informed the claimants of their right to be accompanied by a representative or co-worker of their choice to the hearing. It is further submitted that the disciplinary meeting's minutes should have been recorded and signed by the parties present and that the claimants ought to have been informed of the outcome of the hearing and informed of their right of appeal.
27. It is submitted that the claimants were victimized, harassed, and frustrated without a valid reason in contravention of Article 4 of the International Labour Organisation -Termination of Employment Convention 1982(no.158) which forms part of the laws of Kenya by dint of Article 2(5) of *the Constitution*.
28. Citing *Munir Sheikh Ahmed V National Bank of Kenya* (2020) eKLR the court is urged to find that the claimants' termination was unprocedural, unfair, and unlawful. It is submitted that the respondent neither had no valid reason in terminating the claimants nor was lawful procedure followed before, during, and after the termination. The respondent thereby violated the provisions of Sections 41, 43, & 45 of the Act.



29. On the second issue, it is submitted that placing the claimants on an unpaid indefinite leave amounted to constructive dismissal which is an unfair labour practice under Sections 41, 43 & 45 of the Act and Article 41(1) of *the Constitution*. The court is urged to apply the reasoning in *Max Masoud Roshankar & Another v Sky Aero Limited* (2015) eKLR and *Humphrey Sitati v Board of Management Lenana school* (2020) eKLR in arriving at a finding that the claimants were constructively dismissed.
30. It is submitted that by the respondent failing to disclose the employment status of the claimants and its failure to pay the claimants' salaries as pleaded amounted constructive dismissal of the claimants. It is submitted that the claimants have been on alleged for over seven years and if indeed they were on suspension, which is not lawful anyway, then reasonable grounds should have been adduced by the respondent justifying or explaining the illegal prolonged suspension.
31. Citing *Walter Anuro vs Teachers Service Commission* (20130) eKLR and *Alphonse Machanga Mwachanya vs Operation 680 Limited* (2013) eKLR it is submitted that the respondent's failure to accord the claimants an opportunity to be heard and defend themselves fell short of the tenets of substantive and procedural fairness. It is submitted that contrary to the provisions of Sections 5 & 47 of the Act and Article 27 of *the Constitution* the respondent discriminated against the 1st to 5th respondent by excluding them in the payment of Kshs4,000/= as a token of appreciation
32. It is submitted that the Black's Law Dictionary 9th Edition defines discrimination as – 1. The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability. 2. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored. It is submitted that the claimants were evidently treated differently from the other employees and hence discriminated.
33. For all the foregoing reasons the court is urged to find in favour of the claimant, allow the claim, and award all the reliefs as prayed.
34. On the other hand, counsel for the respondent identified the following issues for determination – Whether the claimants were constructively dismissed/terminated from employment; Whether the claimants' termination/dismissal was wrongful and unlawful and whether they are entitled to compensation for unfair termination; Whether the claimants are entitled to the reliefs sought, and Who bears the costs of the suit.
35. On the first issue, citing *Netah Njoki Kamau & Another v Eliud Mburu Mwaniki* (202) eKLR where the court found that a plaintiff must prove their case on a balance of probabilities despite a defendant having failing to testify, it is submitted that the burden of proof was with the claimants to prove their case pursuant to Section 107(1) of the *Evidence Act* (Cap 80). Further, it is submitted that the filing of a suit is not proof that a party has established a prima facie case and the onus of proof does not shift but requires the claimant to prove liability. To buttress this assertion counsel cited *Eastern Produce (K) Limited v John Lumumba Mukosero* (2008) eKLR.
36. Further citing *Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited* (2015) eKLR, where the court found that the claimants therein had been constructively dismissed due to the respondent's fault of suspending its operations, it is submitted that the claimants herein were dismissed from employment after the disappearance of two patients without settling bills on 5th and 10th March, 2017 when the claimants were on duty.
37. On the second issue, it is submitted that in compliance with Sections 43 & 47(5) of the Act the claimants agreed that indeed two patients absconded during their shifts. It is submitted that the show-



cause letters dated 7th March, 2017 required the claimants to show-cause why action could not be taken against them for failing to maintain proper bedside handover. It is submitted that the disciplinary committee sat on 5th April, 2017 and decided to dismiss the claimants. That the claimants were invited by the committee to attend the hearing but alleged refused to attend.

38. Citing *George Okello Munyolo v Unilever Kenya Limited* (2019) eKLR the court is urged to find that the misconduct by the claimants was gross resulting in loss of revenue (property) to the respondent. It is submitted that the respondent hence had good reasons for terminating the claimants. It is submitted that the claimants' termination was fair, just, and right.
39. The court is urged to dismiss the cause with costs.

V. Issues For Determination

24. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered by the claimants, and the written submissions by counsel for both parties the following issues commend themselves to the court for determination –
 - a. Whether the claimants were unfairly and unlawfully terminated or constructively dismissed.
 - b. If (a) above is in the affirmative, are the claimants entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

VI. Termination

41. The facts on the circumstances leading to the termination are not in dispute. As noted elsewhere, other than filing its response to the claim, the respondent did not adduce any oral or documentary evidence in support of assertions made therein. However, the claimants were still nonetheless obligated to prove their case on a balance of probabilities. It is alleged that the claimants were on duty on diverse days when two patients disappeared and absconded settling their incurred hospital bills. The claimants assert that it was not their duty to guard patients who had been discharged as that was the duty of the respondent's security officers.
42. It is the claimants' case that the indefinite unpaid leave; the respondent's failure to give them a hearing; failure to issue them with termination letters; and the failure to pay their salaries amounted to constructive dismissal. The claimants were verbally informed that their employment had been terminated.
43. Constructive dismissal is deemed to have occurred whether, inter alia, an employer subjects employee(s) to such harsh and intolerable conditions forcing him/her to resign from employment. It is upon an employee(s) to demonstrate that such intolerable circumstances and conditions existed for the court to make a finding that indeed, placed under such conditions, the employee(s) was justified in tendering resignation. The claimants conceded that they were orally terminated arising from the two incidences whereby patients disappeared without settling their medical bills. The claimants did not resign from their positions but the reason for their disengagement with the respondent is that they were orally dismissed for allegedly failing to prevent the two patients from absconding. Therefore, there was no constructive dismissal arising from the respondent's actions rather what the court is asked to determine is whether the claimants' dismissal was unfair and unlawful – See *Coca Cola East Africa & Central Africa Ltd. V Maria Kagai Ligaga* (2015) eKLR.
44. The claimants' case is that they were not issued with show-cause letters before the respondent's committee convened a hearing on 5th April, 2017. The claimants allege that no justifiable reason was



given for the oral dismissal and due process was applied by the respondent. In not so few words the claimants are clearly and evidently saying that their dismissal was wrongful, unfair and unlawful.

45. The claimants are challenging the dismissal on two fronts. Firstly, that the reason for their dismissal was boundless and unfounded and, secondly, that the respondent did not follow the proper procedure before dismissing them. It is vehemently argued by the claimants that the dismissal was wrongful, unfair, and unlawful.
46. On the other hand, the respondent in their letter of 7th April, 2017 produced by the claimants took the view that the claimants colluded with patients to facilitate their unauthorised exit from the hospital and failed to ensure proper bedside handling. Further, the respondent alleged that the claimants refused to accept the show-cause letters or attend disciplinary hearings and are still on suspension pending conclusive investigations. However, as noted elsewhere in this judgment, the respondent did not avail oral or documentary evidence in support of those allegations.
47. The jurisprudence on what constitutes fair hearing, both in substance and procedure, in employment matters is now fairly settled – See *Mary Chemweno V Kenya Pipeline Company Limited* (2014) eKLR, *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, and *Janet Nyandiko V Kenya Commercial Bank Limited* (2017) eKLR.
48. There are a variety of reasons that could terminate a contract of employment and the Act provides for many such reasons. Sections 43, 44, 45, & 46 of the Act provide for some of the reasons and circumstances that may form good reasons or grounds for termination or dismissal. Similarly, Sections 35, 36, 40, & 41 of the Act provide for germane pointers towards what constitutes procedural fairness.
49. The claimants were medical officers and not security to providers to the respondent. They state that no evidence was adduced to demonstrate that they colluded with the escaping patients. Although no evidence was adduced by the respondent, in its letter of 7th April, 2017 addressed to the county Labour office (Nakuru), the respondent alleged that investigations indicated that there was collusion between the claimants and the patients. No evidence adduced that indeed the claimants failed to follow the laid-down patient attendance SOPs. No evidence was adduced to show that indeed the claimants aided patients in escaping. CW1 testified that the claimants conducted their ward rounds when needed and that patients had escaped when they were engaged in other activities.
50. It is the court's finding and holding that it was unreasonable for the respondent to expect that the respondent could not have expected the claimants to stand on guard on every patient who had been discharged whole at the same time they were required to undertake other duties. Although the claimants' contracts indicate that they could perform other functions as directed there was no proof that they had been directed to stand on guard patients who had been discharged. In fact, the respondent in the aforesaid letter alleged that the security firm entrusted with security of the hospital had been held responsible for the bills of the missing patients and the firm's payment had been withheld pending investigations. Clearly and evidently it is clear that the respondent was aware that the mandate of guarding patients was upon the security firm.
51. The court has carefully and thoughtfully considered the evidence adduced by the claimants and finds and holds that no evidence was available to prove that indeed the claimants were culpable to the disappearance as the two patients without them settling their medical bills. In fact, no evidence was adduced that such two patients escaped as alleged by the respondent.
52. Further, there is no evidence that to the effect that the discharged patients were under the care and custody of the claimants.



53. In terms of substance, therefore, the respondent did demonstrate good reason(s) upon which to found the summary dismissal.
54. In terms of the procedure adopted by the respondent, the evidence on record is that the claimants were not issued with show-cause letters and no invitation to the disciplinary hearing was issued to them. The disciplinary proceedings were conducted by the respondent in their absence. No evidence was adduced by the respondent to rebut the claimants' evidence.
55. In a letter dated 7th April, 2017 the respondent alleged that a disciplinary committee sat on 5th April 2017. However, there is no indication in the said letter of what decision the committee arrived at after sitting. Further in the same letter, the respondent indicated that investigations were ongoing and that the claimants were on suspension. The court poses the following motorial question – how could the claimants have been invited to a disciplinary hearing before the investigations were complete? Additionally, there is no mention that the claimants were informed of the right to attend the meeting in the company of a witness, a union representative, or a co-worker their choice. The claimants stated that they were invited to attend a meeting but declined citing failure by the respondent to allow them to be accompanied as above. The right is provided for under Section 41 of the Act. This evidence was not rebutted by the respondent.
56. A disciplinary hearing is not expected to meet the standards of a trial court as courts are subject to strict rules of evidence and procedure. However, rules of natural justice apply in disciplinary hearings in that no one may be condemned unheard, an employee has a right to all information and particulars of charges before the hearing, and (s)he has a right to test the evidence against him/her by way of cross-examination. An employer has to establish a prima facie case against an employee for the hearing to meet the minimum threshold of fair hearing as envisaged under Articles 47 & 50 of *the Constitution* and the various provisions of the *Fair Administrative Action Act*.
57. It is in the considered opinion of the court that while the respondent may have thought that it had grounds for taking disciplinary action against the claimants, there is no evidence that the claimants were issued with show-cause letters or a disciplinary hearing conducted. No evidence was adduced to indicate that the claimants were on suspension rather than that they had been dismissed. Even if one assumed that they were on suspension the same was then indefinite and up to date the respondent has never lifted the suspension, if at all. The evidence by the 6th claimant was not rebutted at all.
58. The court is of the view and holds that the claimants were not afforded and accorded a fair and reasonable opportunity to present their defence and were thus not heard within the meaning and context of the provisions of the law and more so Sections 41, 43, 44, & 45 of the Act.
59. In the circumstances, and in view of the foregoing the court finds and holds that the claimants were not afforded and accorded both substantive and procedural fairness before the dismissal.

VII. RELIEFS

55. Having held that the dismissal of the claimants by the respondent was wrongful, unfair, and unlawful, the court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
56. Prayer (a) is for a declaration that the conduct of the respondent amounted to constructive dismissal of the claimants. This has been decided in the foregoing paragraphs of this judgment that there was no constructive dismissal but an outright oral dismissal.



57. Prayer (b) is for a declaration that that the verbal decision to terminate the services of the claimants was unlawful. This has been decided in the foregoing paragraphs of this judgment and an order shall issue accordingly.
58. Prayer (c) is for Kshs4,000/- as a token for the 1st, 2nd, 3rd, 4th, and 5th claimants. While the respondent did not testify, the claimants did not adduce evidence that such token was indeed paid to any employee. The claimants did not call evidence from any employee who had received the money to corroborate this assertion. The token was not provided for in the claimants' respective contracts or employment and was thus not a contractual entitlement. This prayer is declined.
59. Prayer (d) is for salary for March and April, 2017 1st, 2nd, 3rd, 4th and 5th claimants. No evidence was adduced in form of records by the respondent to demonstrate that this was paid by the respondent to the claimants. The respondent is the custodian of the employment records ought to have availed records to disapprove the prayer. The prayer is allowed as prayed.
60. Prayer (e) is for October and November salary for the 6th claimant. No evidence was adduced to rebut this claim by the respondent and the same remains uncontroverted. However, the 6th claimant conceded that she was paid Kshs5,000/= only. The prayer is allowed less the Kshs5,000/= already paid.
61. Prayer (f) is for one month's salary in lieu of notice for the claimants. The court has already found that the dismissal was unfair, wrongful, and unlawful. In the circumstances, the claimants who were month-to-month contract were entitled to one month's gross salary in lieu thereof. The prayer is allowed as prayed.
62. Item (g) is for 12 months' salary in compensation for unfair termination. The 1st to 6th claimants have pleaded for the maximum compensation of 12 months' gross salary as follows –Kshs252,576/=, Kshs300,948/=, Kshs226,200/=, Kshs511,152/=, Kshs527,268/= and Kshs206,400/= respectively. Section 49(4) of the Act provides for some of the factors that the court ought to consider in determining the appropriate award in compensation for unfair and unlawful dismissal or termination. CW1 testified that the claimants were not responsible for securing patients and in no way contributed to their dismissal. CW1 testified that all the claimants secured alternative occupations after dismissal. Compensation is essentially not aimed at punishing an employer but intended to compensate an employee for the loss of salary or earnings bar the dismissal or termination. The court takes the view that this is not an appropriate case for the award of the maximum 12 months' gross salary in compensation. The court considers compensation equivalent to ten months' gross salary to be fair compensation considering the entire circumstances. The claimants are awarded as follows –
- a. 1st claimant –Kshs21,048*10 =Kshs210,048/=
 - b. 2nd claimant –Kshs25,079*10=Kshs250,790/=
 - c. 3rd claimant – Kshs18,850*10=Kshs188,500/=
 - d. 4th claimant – Kshs42,596*10=Kshs425,960/=
 - e. 5th claimant – Kshs43,939*10=Kshs439,390/=
 - f. 6th claimant –Kshs17,200*10= Kshs172,000/=
- These awards are subject to statutory deductions.
63. Item (h) is for service pay (for each claimant except the 6th). The 1st to 5th claimants produced their pay-slips evidence indicating that contributions to the National Social Security Fund (NSSF) were made and paid on their behalf. Therefore, service pay is not payable to them under Section 35 of the Act.



64. Item (i) is for certificates of service. In the submission the respondent indicates that it is ready to issue the same. The issuance of the same should be unconditional. The court orders that certificates of service be issued by the respondent to the claimants and that the same be delivered to their counsel on record within 30 days of this judgment.

VIII. Costs

63. The claimants are awarded costs of the cause.

IX. Disposal/orders

66. The court issues the following orders –

- a. A declaration be and is hereby issued that the dismissal of the claimants by the respondent was wrongful, unfair, and unlawful.
- b. The 1st to 5th claimants are awarded March & April, 2017 salaries as follows –
 - (i) 1st claimant – $\text{Kshs}21,048 \times 2 = \text{Kshs}42,096/=$
 - (ii) 2nd claimant – $\text{Kshs}25,079 \times 2 = \text{Kshs}50,158/=$
 - (iii) 3rd claimant – $\text{Kshs}18,850 \times 2 = \text{Kshs}37,700/=$
 - (iv) 4th claimant – $\text{Kshs}42,596 \times 2 = \text{Kshs}85,192/=$
 - (v) 5th claimant – $\text{Kshs}43,939 \times 2 = \text{Kshs}87,878/=$
- c. The 6th claimant is awarded October and November 2017 salary as follows –
 - (i) $\text{Kshs}17,200 \times 2 = \text{Kshs}34,400/=$ less $\text{Kshs}5,000$ paid = $\text{Kshs}29,400/=$
- d. The claimants are awarded one month's gross salary in lieu of notice as follows –
 - i. 1st claimant – $\text{Kshs}21,048/=$
 - ii. 2nd claimant – $\text{Kshs}25,079/=$
 - iii. 3rd claimant – $\text{Kshs}18,850/=$
 - iv. 4th claimant – $\text{Kshs}42,596/=$
 - v. 5th claimant – $\text{Kshs}43,939/=$
 - vi. 6th claimant – $\text{Kshs}17,200/=$
- e. The claimants are awarded compensation for wrongful dismissal together with interest thereon from the date of this judgment less statutory deductions as follows –
 - i. 1st claimant – $\text{Kshs}21,048 \times 10 = \text{Kshs}210,048/=$
 - ii. 2nd claimant – $\text{Kshs}25,079 \times 10 = \text{Kshs}250,790/=$
 - iii. 3rd claimant – $\text{Kshs}18,850 \times 10 = \text{Kshs}188,500/=$
 - iv. 4th claimant – $\text{Kshs}42,596 \times 10 = \text{Kshs}425,960/=$
 - v. 5th claimant – $\text{Kshs}43,939 \times 10 = \text{Kshs}439,390/=$
 - vi. 6th claimant – $\text{Kshs}17,200 \times 10 = \text{Kshs}172,000/=$



- f. Certificates of service shall be issued by the respondent to the claimants and the same be delivered to their counsel on record within 30 days of this judgment.
- g. Costs of the cause to the claimants.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 14TH DAY OF NOVEMBER, 2024

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DAVID NDERITU
JUDGE

