



**Oron v Mediheal Hospital Fertility Centre (Cause E024 of 2022)
[2024] KEELRC 13355 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13355 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E024 OF 2022
MA ONYANGO, J
DECEMBER 5, 2024**

BETWEEN

JOSEPH MBOYA ORON CLAIMANT

AND

MEDIHEAL HOSPITAL FERTILITY CENTRE RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 1st September, 2022 the Claimant avers that at all times material to this suit he was employed by the Respondent, a hospital registered under the Health Act, 2027, as the Chief Nurse of the Medical Facility. That he lawfully and faithfully executed his duties as an employee of the Respondent until 15th June 2022 when he was served with a letter of termination of his services.
2. Th Claimant avers that he was not given any reason for the termination of his employment. He further avers that before termination he was not issued with a show cause letter, a warning letter or subjected to a disciplinary hearing as dictated by the law.
3. The Claimant prays for the following reliefs:
 - a. A declaration that the termination of the claimant by the respondent was unfair and unlawful for failing to comply with the mandatory provisions of the Employment Act 2007 and the Constitution of Kenya 2010.
 - b. Judgment be entered for the claimant in terms of paragraph 11 of the memorandum of claim.
 - c. Costs of this suit.
 - d. Interest on (b) above until payment in full.
 - e. Any other relief that this Honourable court may deem fit.
4. At paragraph 11 the Claimant prays for:



- a. Twelve months salary for unfair dismissal (197,197-53,892) by 12 months =Kshs. 1,719,660
 - b. Salary in lieu of notice 3 months' notice Kshs. 591,591
 - c. Gratuity Kshs. 3,000,000
 - d. of Kshs. 2,301,768 to be paid to K.R.A.
Total payable to Claimant Kshs. 5,311,251
Total Payable to K.R.A. Kshs. 2,301,768
5. The Respondent filed its Memorandum of Response dated 3rd October, 2023 in which it denies the averments in the Memorandum of Claim and states that the Respondent summarily dismissed the Claimant after he was found guilty of gross misconduct.
 6. The Respondent avers that the Claimant had been talked to severally on underperformance and insubordination but the Claimant was not ready to change.
 7. The Respondent denies that it failed to pay taxes as alleged at paragraph 7 of the Memorandum of Claim.

Evidence

8. Both parties called witnesses at the hearing. The parties thereafter filed and exchanged written submissions.
9. At the hearing the Claimant testified as CW1 and adopted his witness statement in which he reiterated the averments in the Memorandum of Claim.
10. On cross examination the Claimant admitted that he was paid salary in lieu of notice and pay in lieu of outstanding leave days. He further admitted that he was issued with a certificate of service.
11. The Claimant further admitted that he signed a declaration of acceptance of terms and conditions of service attached to his letter of offer and agreed to work in accordance with the terms.
12. The Claimant stated that he did his work according to the declaration of acceptance and regulations of the Respondent.
13. The Claimant stated that around April, 2022 while on duty he went to the back office to do some printing. That he was called and told the CEO had called and had sent a lawyer. That the meeting was about redundancy of his office. That he was told there was over-employment of staff which the Respondent needed to reduce.
14. The Claimant testified that at the time of termination he was the group head of nursing and was working in all 4 branches of the Respondent. That he was in the 4 branches weekly. That he was in Nairobi for 2 weeks, in Nakuru for one week and in Eldoret for one week. He stated that it was not true that he was not going to the branches as alleged by the Respondent.
15. In re-examination the Claimant stated that he was not issued with a notice for the meeting and was walking in the corridor when he was called for the meeting. That he has never been shown minutes of the meeting. He further stated that he had never been served with any letter accusing him of not visiting branches. That the letter he was served with was titled "None Continuation of Service".



16. The Respondent called Hillary Biwott, the Hospital Administrator at its Eldoret Hospital who testified as RW1. He adopted his witness statement signed on 3rd October, 2023 and the documents filed with the Respondents List of Documents also dated 3rd October, 2023.
17. RW1 testified that the Claimant was employed by the Respondent as Group Head, Nurse Training. That the Claimant's role was to offer training, do training analysis and share with management. That the Respondent was not sure if the Claimant was doing his duties as he did not share anything with management. That the Claimant normally stayed in one unit and did not go to other units. That the Claimant continued doing duties of chief nurse and this caused a lot of insubordination with the unit chief nurse when doing ward rounds.
18. RW1 testified that this affected the hospital because it led to conflict of interest. That the Claimant would meet the ward in-charge without involving the chief nurse. That there was resistance when the chief nurse tried to give advice.
19. RW1 testified that the Claimant had several warnings because of not doing his duties and insubordination of the chief nurse. That after receiving several warnings the management told the Claimant that he was not doing his duties.
20. RW1 testified that according to the Respondent's policy any staff not on duty for 48 hours was liable for termination. That management realized that the Claimant was not on duty for 3 days.
21. RW1 testified that the Claimant was paid Kshs. 396,570 at the time of termination. That he was paid for annual leave for 2022 and one months' salary in lieu of notice. RW1 further testified that the Claimant was not entitled to gratuity as he was a member of NSSF. He further testified that the Respondent deducted and remitted PAYE.
22. RW1 denied that the Claimant was dismissed unfairly.
23. On cross-examination RW1 stated that he had testified that the Claimant was terminated but in the Memorandum of Defence the Respondent had pleaded that the Claimant was summarily dismissed. He stated that the letter issued to the Claimant is titled "Discontinuation of Service". He stated that the letter of discontinuation of service does not state any reason for the discontinuation.
24. RW1 stated that the Respondent did not have any letter inviting the Claimant for disciplinary hearing, or minutes or warning letters or notice to show cause or performance appraisal that refer to the Claimant's non-performance of his duties.
25. RW1 further stated that there was no letter from the chief nurse complaining about non-performance or insubordination. He stated there was no letter or internal memo to the Claimant about his failure to visit other facilities. He further testified that there was no letter to the Claimant about his absence.
26. RW1 stated that the Claimant was promoted in August, 2021. That the Respondent promotes employees based on performance.
27. RW1 further stated that the Claimant was issued with a Certificate of Service confirming that he worked well for over 8.5 years.
28. On the Claimant's claim on PAYE RW1 stated that the Claimant's payslips reflect that the same was deducted but he was not in a position to confirm that the Respondent remitted the same to KRA as only the accounts could confirm that.
29. RW1 stated that there was a cheque of Kshs. 396,570 but no evidence that to prove that the cheque was cleared.



30. In re-examination RW1 stated that the Claimant appended his signature as proof that he was issued with the cheque. He stated that the Claimant was paid his dues as a sign of good faith. That before his promotion the Claimant's performance was good and this informed his promotion. That what led to the Claimant's dismissal was the new assignment.

Analysis and Determination

31. I have considered the pleadings, the evidence adduced in court and the submissions of the parties including the cited authorities. The issues that fall for my determination are whether the Claimant's employment was terminated fairly and procedurally and if he is entitled to the remedies sought in his Memorandum of Claim.

32. The law relating to fair termination is contained in Section 41, 43 and 45(2) of the Employment Act.

33. Section 43 of Employment Act 2007 provides inter alia;

“ 43. Proof of reason for termination

(1) 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee

34. The import of the section 41 is that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure has been followed.

35. Further, Section 45(1) of the Employment Act provides:

“No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-

a) That the reason or reasons for the termination is valid.

b) That the reason for the termination is a fair reason.

(i) Related to the employee's conduct, capacity or compatibility or

(ii) Based on the operational requirements of the employer was that the Employment was terminated in accordance with fair procedures”.

36. In the instant case, the Claimant was issued with a letter as reproduced below:

Mediheal Hospital & Fertility Centre

MHFC/Perf/Disc/June-22

Joseph Oron



Group Head- Nursing Training and Development

Sub: Discontinuation from Service with Mediheal Group of Hospitals

The Management of Mediheal Hospital have reached a decision to discontinue your services with immediate effect following previous meetings with you.

The management has awarded you pay for annual leave of 2022 and also given you a 1 month Pay in lieu notice.

Kindly Collect your certificate of service from HR Office.

You are requested to clear the dues from all respective departments.

Thank You.

AGM HRsigned

Vice President Administration And Strategysigned

Vice President Operations ...signed

37. The letter does not state whether it is a termination, a redundancy or a dismissal. The letter further does not state the reasons for discontinuation of service.
38. RW1 testified that the Claimant was never taken through a disciplinary hearing. The Respondent did not adduce any evidence of misconduct or non-performance by the Claimant. The averments of misconduct by RW1 are not supported by the evidence on record.
39. The only conclusion from the totality of evidence before the court is that the termination of the Claimants employment through the letter of discontinuation from service was without reason and did not comply with fair procedure. The termination was therefore unfair in terms of sections 41, 43 and 45 of the Employment Act.

Remedies

40. The termination of the Claimant's employment having been unfair, he is entitled to notice which he has confirmed he was paid in lieu of. The prayer for 3 month's salary in lieu of notice as prayed for in the Memorandum of Claim is not supported by the Claimant's terms of service.
41. The Claimant is further entitled to compensation which I award him at 12 months' salary taking into account the length of service, the manner in which the termination of employment was conducted and all other relevant factors under section 49(4) of the Act.
42. The Claimant's prayer for gratuity is not payable as gratuity was not provided for in his terms and conditions of employment.
43. The Respondent is directed to regularize the position of the Claimant's PAYE with KRA and file the evidence of the same with the court within 60 days failing which the Claimant will be at liberty to move the court for further orders in respect thereto.
44. The Respondent will bear the Claimant's costs of the suit.
45. Interest shall accrue at court rates from date of judgment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 5TH DAY OF DECEMBER, 2024.

M. ONYANGO



JUDGE

