



**Nyoro v Ngara Comprehensive Health Services Limited (Employment and Labour Relations Appeal E077 of 2022) [2023] KEELRC 525 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 525 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E077 OF 2022**

**J RIKA, J**

**FEBRUARY 28, 2023**

**BETWEEN**

**PAULINE WAMBUI NYORO ..... APPELLANT**

**AND**

**NGARA COMPREHENSIVE HEALTH SERVICES LIMITED ..... RESPONDENT**

*(An Appeal from the Judgment of the Hon. Principal Magistrate A.N Makau delivered on 27th May 2022, in Milimani C.M.E.L Cause Number E1207 of 2021)*

**JUDGMENT**

1. The Appellant was employed by the Respondent Hospital as a Nurse, on a 3-year contract, beginning March 11, 2019, and ending March 10, 2022.
2. She was asked by the Respondent to take annual leave from January 8, 2021, until all her leave days had been exhausted. She was advised that this was necessary because the Respondent had already recalled 2 other Nurses, and did not wish to overstaff.
3. On January 19, 2021 while on leave, the Respondent wrote to her a letter advising her that her contract had been put on suspension effective from January 25, 2021, until further notice. It was explained by the Respondent that this was necessitated by the outbreak of Covid-19, which made it difficult for the Respondent to meet its financial obligations. It was explained further that more than half of the Respondent's Staff had been placed on unpaid leave.
4. By May 28, 2021, she had not been recalled, and filed the Claim before the Trial Court. She sought the following orders: -
  - a. Declaration that termination was unfair and unlawful.
  - b. 1-month salary in lieu of notice.



- c. Salary for the unexpired term of 13 months and 14 days at Kshs 808,000.
  - d. 12 months' salary in compensation for unfair termination at Kshs 720,000.
  - e. Costs and interest.
5. The Trial Court rejected the Claim, finding that the Appellant's contract was not terminated by the Respondent. It was the conclusion of the Trial Court that the Appellant was only suspended.
  6. She filed this Appeal, listing 8 Grounds of Appeal, mainly revolving around the finding by the Trial Court, that the Respondent did not terminate her contract, but only suspended her.
  7. It was agreed on November 10, 2022, that the Appeal is heard and considered on the strength of the Record of Appeal and Submissions.

**The Court Finds : -**

8. The letters of January 7, 2021 and January 19, 2021, from the Respondent to the Appellant, advised the Appellant to take indefinite and unpaid leave. The first, advised the Appellant to take annual leave, until all her leave entitlement was exhausted. She was not told how many days of annual leave she was to take.
9. The second letter was candid that the indefinite annual leave, had now been converted into suspension of the contract of employment, effective January 25, 2021, until further notice.
10. The Respondent took time in both letters to explain that it was facing financial constraints, occasioned by the outbreak of Covid-19. It was having problems meeting staff obligations.
11. A suspension of a contract for an indefinite period, without pay, is effectively a termination of the contract. It is a layoff. The Respondent explained to the Appellant why she could not continue working, and even thanked the Appellant for her service. It did not give an indication when the Appellant should report back. She was not working, and was not earning a salary. There was no longer any mutuality of obligations. The Appellant was free, and could as well have looked for another job. The Respondent was free, and could as well have recruited another Nurse. The Appellant would be justified in considering her contract to have been terminated.
12. In responding to her letter of demand before filing of the Claim, the Respondent's Advocates wrote on April 22, 2021, that the Respondent would easily establish it had lawfully terminated the Appellant's contract. Why then would the Trial Court reach a finding, that the Respondent did not terminate the Appellant's contract?
13. The Respondent simply laid off the Appellant on the ground of financial constraints occasioned by Covid-19, but did not wish to take responsibility for the decision.
14. The Court is satisfied that the Trial Court erred, in concluding that the Appellant was on suspension, and that the Respondent did not terminate her contract.
15. Based on the evidence before the Trial Court, it is the finding of this Court that Appellant established that her contract was unfairly terminated, as required under Section 47(5) of the *Employment Act*, and that the Respondent did not discharge its obligation under this provision of the law, by justifying the reason for termination.
16. Termination was unfair under Sections 41, 43, 45 and 47(5) of the *Employment Act*.



17. The Appellant was on a 3-year contract. 13 ½ months remained to the end of her contract. She earned a monthly salary of Kshs 60,000. The contract could be terminated by either party on notice, under clause 1.15. It was not guaranteed that the Appellant would serve for the remainder of the contract. She did not render service for the remainder of the contract, and her prayer for payment of anticipatory salary as well as compensation for unfair termination was an overkill. She had worked for about 2 years. Her performance and disciplinary record was not faulted. She did not create the circumstances leading to termination of her contract. Her contract was renewable.
18. It is ordered : -
- a. The Appeal is allowed.
  - b. It is declared that the Respondent unfairly terminated the Appellant's contract of employment.
  - c. The Respondent shall pay to the Appellant, equivalent of the Appellant's 6 months' salary in compensation for unfair termination at Kshs 360,000 and 1-month salary in lieu of notice at Kshs 60,000 – total Kshs 420,000.
  - d. Costs to the Appellant.
  - e. Interest granted at court rate, from the date of Judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,  
UNDER THE MINISTRY OF HEALTH AND THE JUDICIARY COVID-19 GUIDELINES, THIS  
28<sup>TH</sup> DAY OF FEBRUARY 2023.**

**JAMES RIKA**

**JUDGE**

