



REPUBLIC OF KENYA



KENYA LAW
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**St Josephs Nyabondo Hospital v Aloo (Appeal E020 of 2022)
[2023] KEELRC 774 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 774 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2022
CN BAARI, J
MARCH 28, 2023**

BETWEEN

ST JOSEPHS NYABONDO HOSPITAL APPELLANT

AND

FLORENCE AKINYI ALOO RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. K. Cheruiyot, Senior Principal Magistrate delivered on 8th June, 2022 in Kisumu CM Employment Cause No. 16 of 2020)

JUDGMENT

1. The appellant's memorandum of appeal is dated July 14, 2022, and filed in court on similar date. The appeal arises from a Judgment delivered on June 8, 2022, where the Respondent was awarded three months' salary *in lieu* of notice, 12 months' salary as damages for unlawful termination, payment for annual leave not taken, and an order for issuance of a certificate of service.
2. The appeal is premised on the following grounds: -
 - i. That the learned trial magistrate erred in law and fact in failing to analyse and evaluate the entire evidence presented before the court thus making a wrong decision.
 - ii. That the learned trial magistrate erred in law and fact in shifting the onus of proof to the appellant contrary to the rules of evidence.
 - iii. That the learned trial magistrate erred in law and fact in finding that there were no disciplinary proceedings when the evidence on record proves that the said proceedings were held, and the respondent equally admitted in her evidence that she went through disciplinary proceedings.
 - iv. That the learned trial magistrate erred in law and fact in failing to find that the respondent's admitted acts of insubordination amounted to gross misconduct which led to the dismissal and termination of the respondent's employment with the appellant.



- v. That the learned trial magistrate erred in law and fact in holding and finding that the respondent was entitled to payment of her dues despite the respondent failing to prove by way of evidence that the appellant had not paid her before terminating her contract of employment.
 - vi. That the learned trial magistrate erred in law and fact in finding that the respondent had proved her case on a balance of probabilities despite the fact that the respondent admitted to having committed acts of insubordination that may have compromised the services rendered by the appellant and exposed the appellant to disrepute among health care service providers.
 - vii. That the learned trial magistrate erred in law and fact in awarding the respondent payment of three months' salary in lieu of notice amounting to Kshs 75,000 when the respondent's contract of employment never provided for such payments thus making such payments *ultra-vires* the contract of employment and unjust enrichment of the part of the respondent herein.
3. Parties sought to canvass the appeal through written submissions, and submissions were filed for both parties.

The Appellant's Submissions

- 4. It is submitted for the appellant that the trial court merely restated the evidence and the testimonies of the witnesses, but failed to make independent evaluation and analysis of the evidence before it and arriving at a decision that is in complete variance with the evidence presented by the appellant.
- 5. It is the appellant's submission that the termination letter indicated that a disciplinary hearing was held on May 17, 2018, and for the learned trial magistrate to fail to mention the same, demonstrates that the trial court failed to evaluate and analyse the evidence before it. It is the appellant's further submission that the respondent admitted that a disciplinary hearing was held, and that she attended, and hence the learned trial magistrate erred in finding that the respondent was dismissed without being heard.
- 6. The appellant submits that had the learned trial magistrate evaluated and analyzed the evidence, he would have seen the charge against the respondent as per the termination letter was insubordination, amounting to gross misconduct for which charge the respondent duly admitted by stating that she declined to follow the instructions of her superior, the matron in charge of the hospital.
- 7. The appellant further submits that the respondent's contract of employment clearly provides that in cases of gross misconduct, the agreement is terminated instantly without notice or pay in lieu of notice.
- 8. The appellant submits that the respondent never proved her case on a balance of probabilities as required by law.
- 9. The appellant submits that the learned trial magistrate erred in awarding the respondent payment of three months' salary *in lieu* of notice amounting to Kshs 75,000.00, when the contract of employment provides that where employee's employment contract is terminated as a result of gross misconduct, the employee would not be paid even a penny and in any event the contract of employment provides for one month's salary in lieu of notice.
- 10. The appellant submits that the learned trial magistrate awarded the respondent amounts of money greatly exceeding what is captured in the contract of employment and fails to give reasons for such awards.
- 11. It is submitted that the respondent's contract of employment does not entitle her a certificate of service, and therefore for the learned trial magistrate to order the appellant to issue such a certificate, amounts to the learned trial magistrate rewriting the contract of employment for the parties.



The Respondent's Submissions

12. The respondent submits that her termination was unfair since the respondent did not have a clear policy on patient referral, and that she was not the one tasked with the duty of transferring patients.
13. The respondent submits that the appellant has not proven that her outstanding dues were paid when her employment were terminated.
14. It is the respondent's submission that she has suffered and continues to suffer considerable loss of income, and terminal benefits to which she is entitled to, and should therefore be adequately compensated.
15. The respondent submits that she is deserving of the damages for unfair termination as per section 49 of the *Employment Act*. The respondent had reliance in Nairobi ELRC Cause No 647 of 2019 *Dinah Jemelly Kirwa v National Hospital Insurance Fund & another* [2021] eKLR to support this position.

Analysis and Determination

16. I have considered the appellant's record of appeal together with the submissions by both parties. The grounds of appeal are summarized into the following three grounds:
 - i. The learned trial magistrate erred in law and fact in failing to analyse and evaluate the entire evidence presented before the court thus making a wrong decision.
 - ii. The learned trial magistrate erred in law and fact in awarding the respondent three months' salary in lieu of notice amounting to Kshs 75,000 when the respondent's contract of employment never provided for such payments, thus making such payments *ultra-vires* the contract of employment and an unjust enrichment on the part of the respondent herein.
 - iii. The learned trial magistrate erred in law and fact in finding that the respondent had proved her case on a balance of probabilities despite the fact that the respondent admitted to having committed acts of insubordination that may have compromised the services rendered by the appellant and exposed the appellant to disrepute among health care service providers.
17. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated: -

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
18. The respondent admitted being invited to a disciplinary hearing and her only issue in this respect, is that she was not allowed to be accompanied by a witness/representative of her choice. She also admitted responding to a 'verbal' show cause where she stated that she explained what transpired on the night of September 13, 2018.
19. The witness statement by the appellant's witness, indicated that the respondent was asked not to report to work after declining to accompany a referred patient, and further advised to appear for disciplinary hearing accompanied by a representative. The record does not show that the respondent was clearly informed of her right to be told what the charges against her were, and her right to have a representative present. Verbal instructions cannot hold.



20. The fact that the respondent was not disciplined in accordance with the requirement of section 41 of the *Employment Act*, renders the termination procedurally unfair. in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, the court observed as follows:

“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. 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.....”

21. I thus uphold the finding of the trial court in this respect.

22. The respondent confirmed receipt of a letter of termination which stated the reason for her termination as negligiting to attend to a critical patient and insubordination.

23. In my view, in a situation where a patient is fighting for dear life, such as the one the appellant faced, priority was doing what it takes to save the patient’s life, and not who knows the patient more than the other, or whose role it is to refer or accompany the patient. In my view, by putting procedures ahead of an important call of duty, the respondent’s action amounted to breach of her contract of service, which expressly required that she obeys instructions from those in authority. Further, the respondent’s contract was clear that she would work both at the appellant’s hospital premises and at any other place the employer may assign.

24. The respondent was assigned an urgent and delicate task by her superior, but which task, she declined despite the potential threat to a patient’s life. In my view, the appellant had valid, fair and justified reasons to terminate the respondent.

25. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the court stated: -

“It is now clear that the burden placed on an employer by section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment.” The Court of Appeal affirmed this position in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR.

26. This for me is confirmation that the trial court failed to analyze the evidence before it and therefore arriving at the wrong conclusion.

27. On the awards made by the trial court, it is clear that once it arrived at a finding of an unfair termination, the trial court did not consider each of the claims to determine whether or not each of the reliefs sought was proved and/or justified. The court proceeded to award as per claim.

28. For starters, the contract between the parties herein provides for a one month’s notice or one month’s salary in lieu of notice. The trial court in this matter proceeded to make an award of three months’ salary *in lieu* of notice. This award is unjustified, unsupported and devoid of merit.

29. I however agree with the trial court that the respondent was not issued with termination notice. Consequently, the trial court’s award of three months’ salary *in lieu* of notice, is set aside, and substituted therewith a one-month salary *in lieu* of notice.



30. On the award of damages for unfair termination, a finding of an unfair termination, entitles the respondent to an award of compensation per section 49 and 50 of the Employment Act, 2007.
31. It is now largely settled that such an award must be justified. In Ol Pejeta Ranching Limited v David Wanjau Muhoro civil appeal No 42 of 2015, the court expressed itself as follows:
- “Was the award of Kshs 3,489,084/- representing the respondent’s 12 months gross salary as compensation for unfair termination justifiable”
32. Again in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR , the court pointed out that an award of the maximum of 12 months pay, must be based on sound judicial principles, and the trial judge must justify or explain why a claimant is entitled to the maximum award.
33. The respondent herein, largely contributed to her own termination. She also was in the service of the appellant for less than a year. In my considered view, an award of one month’s salary is sufficient compensation for the unfair termination.
34. I thus set aside the award of 12 months’ salary, and substitute the award with an award of one-month salary in damages for the unfair termination.
35. The appellant did not show through production of leave forms that the respondent utilized her leave days. The award made however, is in respect of one year of leave, which the respondent did not earn, as she only served for about nine months. The award of Kshs 25,000 on account of leave is set aside, and substituted with Kshs 18,750 on account of leave.
36. Last but not least, issuance of a certificate of service is a requirement of statute and must not be a provision of a contract of service. The order for issuance of a certificate of service is upheld.
37. In the upshot, I make orders as follows: -
- i. The declaration that the respondent was unfairly terminated is upheld on account of procedure.
 - ii. The award of twelve (12) months’ salary as compensation for unfair termination is set aside, and substituted with one month salary as compensation for unfair termination at Kshs 25,000/-
 - iii. The award of three months’ salary in lieu of termination notice is set aside, and substituted with one-month salary *in lieu* of notice at Kshs 25,000/-
 - iv. The award of costs at the lower court is upheld.
 - v. The order for issuance of a certificate of service is upheld.
 - vi. Parties shall bear their own costs of the appeal.
38. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:



N/A for the Appellant

Mr. Lugano present for the Respondent

MS. Christine Omolo - Court Assistant.

