



**Simba v Karen Hospital Limited (Cause E239 of 2020)
[2023] KEELRC 929 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 929 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E239 OF 2020
BOM MANANI, J
APRIL 20, 2023**

BETWEEN

KEVIN ONCHIRI SIMBA CLAIMANT

AND

THE KAREN HOSPITAL LIMITED RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation for work related discrimination and unfair termination of a contract of service. The claimant served as an employee of the respondent until July 5, 2017 when his contract was terminated for reasons that are not explicit from the letter communicating the decision.
2. The claimant has challenged the decision. He has also pleaded discrimination against him during the currency of the contract and hence this suit.
3. The respondent does not admit liability for the alleged discrimination or wrongful termination. According to the respondent, the claimant was not subjected to differential treatment whilst in the respondent's employment as alleged or at all. Further, the respondent contends that the claimant's contract was lawfully terminated following infractions by him at the workplace.
4. According to the respondent, the claimant was granted a chance to respond to the accusations leveled against him at a disciplinary hearing but failed to do so. As a result, the decision to sever the employment relation was validly taken.

Claimant's Case

5. The claimant states that he was first employed by the respondent as an accounts assistant. Over time, he rose through the ranks to the position of accountant in charge. This is the position that he continued to hold until his contract of employment was terminated.



6. The claimant states that during the currency of the contract, he came to learn that his predecessor had been earning much higher salary than him. Further, the claimant contends that it came to his realization that the individual who stepped into his shoes after he was forced out was also earning much higher salary than him even when she was serving in a junior position. As a result, the claimant believes that he was subjected to discriminatory treatment.
7. The claimant also suggests that he suffered other forms of overt discrimination. In particular, he alleges that he was made to carry the cross of his colleague's infractions. In this respect, the claimant mentions an incident where the respondent lost cash through theft by one Peter Nduati. Following the incident, the claimant states that the respondent subjected him to unwarranted disciplinary action notwithstanding that it was known who had stolen the cash. In the claimant's view, this kind of conduct by the respondent constituted differential treatment against him.
8. The claimant states that his employment was eventually terminated on July 5, 2017. That the reason for the decision was not disclosed to him. The claimant therefore prays for an order declaring the decision unfair. In addition, he prays for compensation.

Defense Case

9. The respondent has denied the assertion by the claimant. It is the respondent's case that there has not been differential treatment of employees at its establishment. In particular, the respondent denies subjecting the claimant to differential treatment.
10. It is the respondent's case that the claimant failed to raise alarm about an irregular MRI scan within his docket. The respondent points out that employees working under the claimant performed the scan without first booking and billing for the procedure.
11. The respondent asserts that as the function of billing fell under the claimant's department, he ought to have flagged the anomaly immediately. It is the respondent's case that it took the claimant several days to raise alarm about the irregular scan.
12. Even then, the claimant appeared to downplay the malpractice by accommodating a suggestion by the offending employee to settle the account through deductions to his salary without the claimant reporting the matter to his superiors. In the respondent's view, this amounted to negligence of duty.
13. It was the respondent's case that following this incident, the claimant was issued with a notice to explain the anomaly. That although the claimant reacted to the respondent's letter, the response was unsatisfactory. Consequently, he was summoned for a disciplinary hearing on May 29, 2017 which he did not attend.
14. The respondent states that because the claimant failed to honour the summons, the disciplinary session of May 29, 2017 did not take off. Nevertheless, the disciplinary committee resolved to terminate his contract.

Issues of Determination

15. The parties did not file a joint set of issues. However, they framed individual issues in their final submissions.
16. After evaluating the pleadings, evidence and submissions on the record and having regard to the issues as individually framed by the parties, I consider the following to be the overall questions for determination:-



- a. Whether the claimant was subjected to discriminatory treatment at the workplace contrary to the law.
 - b. Whether the claimant's employment contract was unfairly terminated.
 - c. Whether the parties are entitled to the reliefs sought in their pleadings.
17. Regarding the claimant's alleged subjection to discriminatory treatment at the workplace the law that is applicable on the subject is article 27 of the Constitution of Kenya 2010 as read with section 5 of the Employment Act. As a general rule, the law forbids discrimination on proscribed grounds as set out in the above provisions of the Constitution and Employment Act.
 18. Under the Employment Act, when an employee alleges discriminatory treatment at the workplace, the burden lies with the employer to provide evidence to demonstrate that the acts that the employee complains about are not discriminatory. Specifically, section 5(7) of the Act provides as follows:-

“In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”
 19. However, before the employer is called upon to justify the impugned conduct as not constituting discriminatory practice against the employee, the employee must set out the basis for his assertion. Put differently, the employee must lay bare a prima facie basis for his assertion. The employee has a duty to set out the facts that suggest discrimination and for which, absent a reasonable explanation by the employer, a properly guided tribunal will be left with no other reasonable inference but that the employee has in circumstances suffered discrimination in the hands of the employer. Therefore, a mere assertion of discrimination by the employee is not a sufficient trigger for a shift in the burden of proof.
 20. As I understand the law on this matter, the employee that raises the complaint on discriminatory treatment is required to demonstrate that he falls in a protected class contemplated under section 5 of the Employment Act as read with article 27 of the Constitution. This may be a religious, political, racial, cultural, sexual or such other group that is mentioned in the said provisions of law. The employee must then demonstrate that the employer has committed some act or omission that targets the employee on account of the employee being in the protected class. The employee must also demonstrate that there exists no other reasonable explanation for the employer's conduct against him except that he belongs to the protected class. It is only after this factual basis is laid that the burden of proof will shift onto the employer to justify his conduct as not being discriminatory.
 21. Alluding to the above requirement in the context of pregnancy, Nderi J in G M V v Bank of Africa Kenya Limited [2013] eKLR expressed himself as follows:-

“All the ladies are required to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to:-Establish she belongs to a protected class.Demonstrate she qualified for the job she lost.Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide *prima facie* proof, that other explanations by the employer are pre-textual, and the real reason for termination was the pregnancy.Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy.”
 22. In the case before me in relation to the question of discrimination on account of differential pay, the claimant needed to establish the following:-



- a. That he was serving in the same position as the two other persons who were alleged to have been receiving higher salary.
 - b. That the individuals were as a matter of fact receiving a higher salary.
 - c. That there was no other reasonable explanation for the difference in salaries other than the employer targeting the claimant on account of some prohibited factor.
23. Besides alleging that there was differential treatment on account of salary between the claimant and the two other individuals that he mentioned, the claimant did not provide preliminary evidence in support of his assertion. He only made a bare assertion of alleged discrimination on account of salary variances.
 24. It was for the claimant to provide preliminary evidence of: the actual salaries of the two persons; their qualifications; and their positions in the respondent's organization. Only then would he have established a *prima facie* case that would require the respondent's response. As the record shows, the claimant did not provide this preliminary evidence.
 25. The claimant's failure to establish a *prima facie* case notwithstanding, the respondent provided evidence on the salary of one of the individuals that was allegedly receiving higher pay than the claimant despite occupying either a lesser or similar position. The evidence demonstrated that the individual was in fact within the same salary bracket as the claimant.
 26. The other allegation of discriminatory treatment was even more farfetched. The claimant asserted that because the respondent had subjected him to disciplinary action following loss of funds at the workplace, he had been treated in a discriminatory way.
 27. There is evidence that the loss happened in a department that was under the claimant's supervisory control. Although the money was stolen by another employee, the record shows that this employee was reporting to the claimant. In the circumstances, the respondent was entitled to require the claimant to explain the loss by virtue of the fact that the employee who stole the cash was working under his supervision. There was no discriminatory treatment as a result of this. The upshot is that the claim for discrimination has no basis and is rejected.
 28. The other claim relates to unfair termination of the claimant's contract of employment. The evidence on record shows that there was improper handling of an MRI procedure. Both parties agree that some employees processed an MRI scan without first booking and billing for it. Both parties concur that this was improper.
 29. The evidence shows that because of this development, the claimant was issued with a notice to explain the irregular activity. The letter is dated May 25, 2017. The record shows that the basis for issuing the claimant with the show cause was that the malpractice happened in the cash and billing department for outpatient services which fell under his supervisory mandate. The malpractice may have been by other employees but the respondent's concern was that these employees were working under the claimant and as the person in charge, the claimant was expected to have raised a red flag over the issue.
 30. The record shows that the claimant responded to the respondent's letter on May 26, 2017. In the response, the claimant distanced himself from the malpractice. He stated that the malpractice was committed by other employees and that he acted on the matter.
 31. Dissatisfied with the response, the respondent invited the claimant for a disciplinary session on May 29, 2017. Whilst the respondent denies that the claimant attended the disciplinary session, the claimant insists that he attended it.



32. On the respondent's part, it is asserted that after the claimant failed to show up for the session on May 29, 2017, the meeting did not take off. Nevertheless, the committee recommended that the claimant's services be terminated. That this was in line with the letter inviting the claimant for the disciplinary session which intimated that if he failed to show up for the session, the committee will render its decision in his absence.
33. As for the claimant, he asserts that he attended the session. However, he did not sign the minutes of the committee.
34. The court notes that apart from asserting that he was unfairly dismissed from employment, the claimant did not provide details of his complaint in the memorandum of claim. There is no indication of what exactly comprised the unfair termination that the claimant raised. Was it because the respondent proceeded to terminate the contract in the absence of valid grounds to support the decision or was it because the procedure for termination was flawed or was it because the two elements were both disregarded?
35. Faced with this inadequacy in the claimant's pleadings, the respondent simply denied the assertion of unfair termination against it. Importantly, the respondent's witness went ahead to explain in his written witness statement why the respondent believed that the process of terminating the claimant's contract was fair. The statement shows that the witness specifically alluded to the issue of the improper MRI as the reason why the claimant was dismissed. Further, the witness stated that the procedure followed in closing the contract was fair since the claimant was invited for a disciplinary session on May 29, 2017 but elected not to attend.
36. Notwithstanding this specific disclosure of the kind of evidence that the respondent was going to lead at the trial, the claimant did not bother to either amend his memorandum of claim or file a supplementary witness statement to counter the respondent's assertion that he did not attend the disciplinary session.
37. Before the trial, the claimant did not seek to have the respondent produce and show the court the minutes of May 29, 2017. No application was made by the claimant to compel the respondent to provide this evidence. No notice to produce was issued by the claimant as is required by law.
38. The only time the claimant sought to suggest that he attended the session of May 29, 2017 was during the trial. In my view, this was too late in the day.
39. I am therefore convinced and accept the respondent's position and which has been expressed from the very commencement of the dispute that the claimant was invited for the disciplinary session of May 29, 2017 but failed to show up. In the premises, I am satisfied the claimant was granted the chance to fight off the accusations against him but did not utilize it. Faced with this reality, the respondent was entitled to render its decision as it did without more.
40. It is true that the letter communicating the decision to terminate the claimant's contract does not set out the reasons for the decision. However, my view is that this letter must be construed in the context of the letter inviting the claimant for the disciplinary session. The invitation letter clearly states that if the claimant was not going to attend the session, the committee will render its decision. In this context, the letter of termination was intricately connected to the letter inviting the claimant for the disciplinary session and must be understood as communicating the committee's decision after the claimant failed to attend the disciplinary session.



Determination

41. On the basis of my observations in the earlier parts of this decision, I find that the respondent had valid reason to consider terminating the services of the claimant. The infraction relating to misuse of the MRI facility without billing for the service has been shown to have happened in a department over which the claimant had supervisory control with regard to billing and invoicing. The respondent was entitled to believe that the misconduct by the employees in the department in respect of the facility was on account of failure by those charged with supervision of the section including the claimant to exercise sufficient control over it. The respondent was therefore entitled to subject the claimant to disciplinary action to explain the lapses in the department.
42. The claimant may as well have had a valid defense to the accusations against him. However, the venue to raise this defense was the disciplinary committee which he failed to attend.
43. Following the claimant's failure to attend the disciplinary committee session, the respondent was entitled to terminate the claimant's contract. Consequently, I find that the respondent's decision to terminate the claimant's contract of service was in the circumstances, lawful. That being the case, the claimant's case is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ON THE 20TH DAY OF APRIL, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

