



**Opondo v Jocham Hospital Limited (Cause E002 of 2022)
[2023] KEELRC 1206 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1206 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E002 OF 2022**

**M MBARŪ, J
MAY 18, 2023**

BETWEEN

ERICK OMONDI OPONDO CLAIMANT

AND

JOCHAM HOSPITAL LIMITED RESPONDENT

JUDGMENT

- 1 The respondent employed the claimant on 7th January, 2019 as a Pharmacist earning Kshs. 135,000 per month. He was issued with a contract giving terms and conditions of service. The claimant worked until 24th April, 2020 when his employment was terminated on the grounds of non-satisfactory performance of his duties.
- 2 The claim is that as the pharmacist and in charge of the respondent's Pharmacy Department the claimant was placed under pressure to procure drugs from Chamianess Pharma Company which was controlled by one of the respondent's directors, Jacqueline Chamia and upon vetting the tender he noted that the company won 16 products but the director wanted him to purchase all the drugs at high prices against the best interests of the respondent. The claimant was a member of the Medicine and Therapeutics Committee which addressed procurement and tender documents and based on the committee recommendations, when he implemented the same but he was accused by Jacqueline Chamia of poor work performance.
- 3 The claim is also that for the period of the claimant's employment, the respondent made huge profits and therefore the alleged poor performance was only crafted to justify termination of his employment which is unfair and contrary to the law and he is seeking the following dues;
 1. 7 months' pay for breach of contract at Kshs. 945,000;
 2. Leave days earned for a year Kshs. 95,500; and



3. 12 months' compensation Kshs. 1,620,000.
- 4 The claimant testified that upon employment by the respondent, he diligently worked as the pharmacist but one director, Jacqueline Chamia wanted him to flout procurement procedures for a tender to purchase drugs at high prices and for products which were not required by the respondent hospital which prompted the claimant to write letter dated 7th October, 2019 to the administrator but there was no response. The Pharmacy Department purchased drugs as per the recommendations of the tender committee but the respondent accused him of poor work performance for declining to purchase the drugs from Chamianess Pharma Company. There was no poor performance because the respondent was making profits and when the claimant was called to discuss the issue of his performance, he wrote letter dated 20th June, 2019 to discuss the stock taking, the delay in supply of drugs by Chamianess Pharma Company and also his request for a review of his salary. The claimant had also noted that the respondent was rotating staff from his department to procurement duties in periods of 6 months which they did not like, forcing him to write letter dated 8th July, 2019 recommending that a procurement officer be employed to resolve the matter. On 28th February, 2020 the respondent directed that purchase of drugs should be done when patients were in the hospital which was contrary to the general policy that patients should find drugs in the hospital.
- 5 The claimant testified that because of applying the tender and procurement committee recommendations, Jacqueline Chamia unfairly accused him of poor performance on the grounds that the respondent had made financial losses and through letter dated 16th April, 2020 he was suspended from duty.
- 6 On 22nd April, 2020 the respondent held a disciplinary hearing but the claimant did not attend since he had not been invited and on 24th April, 2020 he was issued with letter terminating employment which was unfair, unlawful and the claims made should be awarded.
- 7 In response, the respondent's case was that the claimant had filed Mombasa suit ELRC No.42 of 2020 which he withdrew and hence facts forming part of his claim herein are false and the entire claim is fatally defective and should be dismissed.
- 8 The response is also that the claimant was employed and regulated under his employment contract and in charge of the pharmacy department to supervise dispensing of medicines, negotiating procurement of tender prices, inventory management, management of controlled drugs but after a performance appraisal and internal performance audits he was found to be poor. The claimant received verbal warnings on his poor performance due to failure to effect generic drug usage, controlled drugs were stolen, and there were losses in the pharmacy department to the detriment of the respondent.
- 9 The respondent extended the probation period to allow the claimant address his poor work performance.
- 10 On 8th April, 2020 the respondent issued the claimant with a notice to show cause why his employment should not be terminated but he gave unsatisfactory responses. On 24th September, 2021 the claimant was invited to a disciplinary hearing on 27th September, 2022 but he failed to give satisfactory responses leading to termination of employment. The claimant was paid his terminal dues and following improper performance of his duties, the respondent found justifiable grounds leading to termination of employment and the claims made should be dismissed.
- 11 The response was also that an employer is allowed to terminate employment where an employee improperly undertakes his duties contrary to Section 44(4) (c) of the *Employment Act*, 2007 (the Act).



Such is lawful and no notice pay or compensation is due. The claim for payment until age of retirement is not available since he has not worked for the respondent.

- 12 In evidence, the respondent called Jacqueline Chamia a director who testified that the claimant was found to be of poor work performance leading to huge losses to the hospital, he was issued with various verbal warnings about his conduct but failed to change and a show cause notice was issued requiring him to state why his employment should not be terminated but he failed to give satisfactory response. The respondent as a hospital had employed the claimant to take charge of the pharmacy but the claimant failed to supervise the dispensing of medicines, he failed to take an inventory, he failed to manage controlled drugs and upon an appraisal and performance audit, the respondent found his work poor.
- 13 Through notice dated 24th September, 2021 the respondent invited the claimant to a disciplinary hearing on 27th September, 2022 where he attended and was able to make his representations but the respondent took a decision to terminate his employment for good cause and within the law. The salary paid was all-inclusive and the claimant cannot claim for leave pay, notice pay or compensation.
- 14 Ms Chamia also testified that there were no work differences with the claimant with regard to where he was to purchase medicines and drugs as alleged. Rose Chamia is one of the directors of the respondent and who runs Chamianess Pharma Company and the allegations that she wanted the claimant to specifically buy from her is without evidence. Due to poor performance by the claimant, the respondent suffered huge financial losses and is yet to recover and the suit should be dismissed with costs.
- 15 At the close of the hearing, both parties agreed to file written submissions. Only the claimant complied.
- 16 The claimant submitted that under the provisions of Section 41, 43 and 45 of the *Employment Act, 2007* (the Act) an employer is required to adhere to the procedural requirements and prove that the reasons leading to termination of employment are fair and lawful as held in Civil Appeal No.118 of 2017 *National Bank of Kenya v Samuel Nguru Mutonya*. In this regard, the respondent did not file any report investigations of the various allegations made against him and leading to notice dated 8th April, 2020 directing the claimant to show cause why his employment should not be terminated due to poor work performance. This was not procedural as held in *Juma & others v Kenya Pipeline Company Limited (suits consolidated)* [2022] eKLR that the due process of the law required that a full investigation be conducted and the claimant allowed to see the witness statements before the disciplinary hearing.
- 17 The reasons given for termination of employment were that there was lack of improvement has resulted incurring huge losses running into millions were not justified having failed to conduct an investigation. The general statements made had no validity as held in *Richard Kimeu Muthama v Systeck Limited Kenya* [2020] eKLR. The respondent had no policy to measure performance as required under Section 5(8) of the *Act* and without setting any standards to measure his performance was unfair. the alleged huge losses in the millions were not proved since no audit reports were submitted and termination of employment was unfair and the awards sought should be issued with costs.
- 18 On 24th April, 2020 the respondent issued the claimant with notice terminating his employment on the grounds of being non satisfactory performance of your duties.
- 19 Further, the respondent stated that;

The above is evidenced by the appraisal done after your three months' probation that resulted in you being confirmed to the position. the reasons for extension of your probation were explained to you. ...



- 20 The respondent arrived at such decision after suspending the claimant on 8th April, 2020 and requiring him to show cause why his employment should not be terminated due to what was considered to be non-satisfactory performance of your duties.
- 21 Section 41(1) of the Act allow an employer to terminate employment following poor work performance. However, the employer must demonstrate how the poor work performance was addressed and the support given to the employee employed for good cause but suddenly deteriorates and is found to poorly undertake his duties.
- 22 The gist of Section 41(1) of the Act is to ensure the employee found to be of poor work performance is first given support to understand his duties within the standards of the employer and where the employee is unable to address, then there is good cause to apply and terminate employment.
- 23 In the case of George Okoth Okello v Africa Blooms Limited & another [2022] eKLR the court held that; ... the claimant was terminated on the basis of poor performance the employer was mandated under section 41 of the Employment Act to notify the employee of the poor performance and the intention to terminate employment. Ostensibly, for poor performance to qualify as a ground for terminating the services of the employee, it must be demonstrated that there are measures put in place to measure performance by the employer which measures were used to determine the performance of the employee thereof. In this they cited the case of Jane Samba Mukal V Ol Tukai Lodge Limited [2013] eKLR.
- 24 This is the basis of Section 41(1) of the Act;
41. Notification and hearing before termination on grounds of misconduct
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- 25 This is fortified by the Court of Appeal decision in National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR, that before an employee is dismissed for poor work performance, part of the fair procedure is to comply with the provisions of section 41 of the Act. On a claim that there is poor performance, the employer is placed at a high level of proof and must show that in arriving at the decision, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- 26 Without passing this stage, to proceed and invite the employee to show cause why his employment should not be terminated or to attend disciplinary hearing is all but a sham.
- 27 In this case, the court finds there were no justified grounds leading to notices to show cause or disciplinary hearing in the absence of the respondent addressing what comprised poor or good work performance. The claimant had been employed in his field of expertise, pharmacy on 7th January, 2019 and just within a year he was called to show cause why his employment should not be terminated without the respondent demonstrating what policy and practice measures were taken to adapt him to the business and where he was found wanting, there was training and directions by his supervisors on the best practices. To cite poor performance without giving the claimant any support resulted in unfair termination of his employment contrary to the mandatory provisions of Section 41 of the Act read together with Section 45 of the Act.



- 28 The claimant is seeking payment of 7 months for breach of his contract, leave pay for one year and compensation.
- 29 In the payment statement dated 8th May, 2020 after employment terminated, part of the dues paid to the claimant included Kshs. 120,000 for 22 days of annual leave not taken.
- 30 The respondent also paid Kshs. 120,000 in notice pay.
- 31 For breach of contract, the letter of employment dated 7th December, 2019 gave the claimant a two years' term contract with effect from 7th January, 2019. Due to unfair termination of employment, he was not able to serve under his term contract. However, the claimant as a pharmacist did not testify as to what he has done to mitigate his situation in securing new employment. He was paid in lieu of notice and freed to secure new employment and cannot claim that for the last 7 months of his term contract he stayed idle. The principles of anticipatory earnings into the future where the law allow for termination of employment were addressed in the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR and in the case of *African Highland Produce Limited v John Kisorio* [2001] eKLR, the Court of Appeal held that;
- 32 The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. ...
- Even in employment and labour relations, the same principles apply as held in the case of *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR
- 33 On this basis, upon the findings that there was unfair termination of employment, the respondent having paid the claimant terminal dues immediately employment terminated, compensation is hereby assessed at 3 months 120,000 x 3 total Kshs. 360,000.
- 34 Taking the paid dues into account, each party shall bear own costs.
- 35 Accordingly, judgment is hereby entered for the claimant against the respondent with an award of Kshs. 360,000 in compensation subject to the provisions of Section 49(2) of the *Employment Act*, 2007 and each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

.....and.....

