



**Mmeywa v Kenyatta National Hospital (Cause 23 of 2020)  
[2023] KEELRC 1148 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1148 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 23 OF 2020**

**B ONGAYA, J  
MAY 12, 2023**

**BETWEEN**

**FLORENCE MUTAMBI MMEYWA ..... CLAIMANT**

**AND**

**KENYATTA NATIONAL HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on 20.01.2020 through her trade union, the Kenya Union of Domestic, Hotels Educational Institutions, Hospitals and Allied Workers (KUDHEIHA). The claimant was employed by the respondent on 04.09.1996 as Enrolled Nurse III and successfully served the probation period of 9 months. In May 1998 she was confirmed in appointment on permanent and pensionable terms of service. She was promoted through the grades to a Senior Enrolled Nurse effective May 1, 2013 earning Kshs.1,725 outpatients medical allowance; Kshs.8,000.00 commuter allowance; Kshs.20,000.00 extraneous duty allowance; and Kshs.45,000.00 basic salary making a gross monthly salary of Kshs.74,725.00.
2. The claimant has pleaded that she was dismissed from employment on February 3, 2017 upon the allegation that on December 18, 2015 she took away a laptop, which was the property of Dr. Maswai, to her house without his consent and the fact that she was subsequently charged in Criminal Court with the offence of theft that was assumed to have rendered her untrustworthy as a public officer and that her conduct was in contravention of the *Public Officer Ethics Act, 2003*. The claimant further pleaded as follows. That it was not true that on December 18, 2015 she stole the laptop in issue. Further, the truth was that on December 24, 2015 she found the laptop in patients' files and medical cards while undertaking ward rounds as the only evening coverage nurse. The same evening, she enquired from a colleague and students about the owner of the laptop but who was not found. One Peter Maina Mwaniki a visitor and family friend advised her to take it to the Security Officers for safe custody. The said Mwaniki who is also a church member of the claimant's church accompanied her to the security desk but security officers declined to keep it because they deemed it insecure to do so and advised her



- to keep it at her hospital's provided residential house and, to bring it next Monday to trace the owner. That she complied with that advisory. The following day was Christmas Day December 25, 2015 followed with a weekend so she could bring the laptop back at work on Monday. On December 25, 2015 she was arrested from her house, the laptop taken, and released upon her husband's intervention for a police cash bail of Kshs. 10, 000.00. She was charged at Kibera Law Courts and subsequently acquitted on 15.03.2018 after the complainant, Dr. Maswai, withdrew the charges.
3. The claimant further pleads that she had been suspended from employment effective January 6, 2017 and appeared before the staff disciplinary and advisory committee on November 18, 2016. She was heard towards a self-exculpation and on February 15, 2017 she received a dismissal letter dated February 3, 2017 at a time the criminal proceedings at Kibera Law Courts had not been determined. The dismissal was effective February 3, 2017. On February 20, 2017, she appealed against the dismissal and received no response. After she was acquitted she again appealed by her letter dated June 29, 2018. The respondent then responded by the letter dated July 17, 2018 stating, "The Hospital Management has studied your appeal. However, it has been noted that although you were acquitted by the Court of law under section 204 of [CPC](#), you have not raised any other new grounds to warrant a review of your case. In the circumstances the contents of our letter Ref. No. KNH/531807/A/24 dated July 10, 2017 still stands and the case should now be put to rest."
  4. The claimant's further case is that on January 14, 2016 the complainant Dr. Charles Maswai had written to the respondent's CEO thus, "I Dr. Charles Maswai came to realize that Madam Florence Mutambi Mweywa, who is our Nurse had taken my laptop and gone with it in her house in good faith for safe keeping. I therefore kindly request the Management of Kenyatta National Hospital to reinstate her for she had not committed the offence of theft, for which she was wrongly accused of. Thanking you in advance, hoping that my kind and sincere request will be kindly considered." The complainant's letter is duly signed and exhibited as received for the respondent and union on February 1, 2019 – long after the letter of dismissal dated February 3, 2017 and decision letter on appeal dated July 17, 2018.
  5. The claimant's further case is as follows. The dismissal was contrary to clause 17(3) of the CBA because the case of theft was not proved and the claimant had not been convicted and punished as was charged. That the respondent breached clause 17(6)(b)(ii) of the CBA which states, "An employee shall be liable to summary dismissal where she/he is found in breach of discipline before expiry of 365 days from a final warning was served". It is urged that there had been no final warning. Further, the respondent ought to have retired the claimant in public interest and not dismissed her per clause 17 (7) of the CBA providing thus, "The Hospital Management will retire an employee in public interest when the offence committed is serious and would under normal circumstances warrant dismissal. In arriving at this decision, the employee's age and service are considered". The claimant was 48 years old and had served for 20 years.
  6. As at dismissal the claimant earned Kshs. 64,869.00 plus house allowance of Kshs. 25,830.00 per pay slip for January 2017 duly exhibited.
  7. The union reported a labour dispute to the Minister for Labour per section 62 of the [Labour Relations Act](#) and on October 1, 2019 the conciliator's report recommended that the claimant be reinstated without loss of benefits and the claimant to be compensated for unfair termination including payment of salary for the period the claimant was out of service, one month in lieu of notice, leave days not utilised, service gratuity for years served and a certificate of service. While the claimant accepted the recommendations, the respondent offered no response.
  8. The claimant prayed for judgment against the respondent for:



- a. Reinstatement with all benefits with effect from the date of suspension January 6, 2016. In alternative:
  - b. One-month salary in lieu of termination notice Kshs. 90,699.00.
  - c. Monthly salary from January 2016 to time of filing suit (4 years) Kshs.  $90,699 \times 12 \times 4 =$  Kshs. 4,353,552.00.
  - d. 12 months' compensation Kshs.  $90,699.00 \times 12 =$  Kshs. 1,088,388.00.
  - e. Be paid all money contributed to staff pension scheme from date of employment to February 3, 2017.
  - f. Costs of the suit.
  - g. Total claim (save for contributory staff superannuation pension scheme benefits) Kshs. 5,532,639.00.
9. The respondent filed the response dated February 25, 2020 and through Oregio & Odhiambo Advocates. The respondent pleaded as follows. It has recognised and entered a CBA with the claimant's trade union. The respondent admitted employing the claimant and at dismissal the claimant earned Kshs. 90,699.00 per month. The respondent admitted the claimant was suspended on January 6, 2016; per security daily incident report dated December 29, 2015 it was reported that on December 25, 2015 the security wardens and police officers had recovered the laptop (which had been reported on December 18, 2015 as missing) from the claimant's house. The laptop belonged to Dr. Charles Maswai of ophthalmology clinic which was later booked at KNH Police Post as OB No. 08/25/12/2015. The claimant confirmed to the security officers that she had found the laptop at the clinic and taken it to her house without permission. The respondent admitted the dismissal was on February 3, 2017 and was on account of lost trust as per the dismissal letter.
  10. The respondent further pleaded as follows. The claimant was on duty on December 18, 2015 up to including December 25, 2015 at the ophthalmology clinic. The laptop in issue was reported missing and later found at the claimant's house under the TV cabinet. The claimant was the only one present at the clinic on December 18, 2015 after 5.00pm and she admitted to knowing that the laptop belonged to Dr. Maswai. The respondent was not a party to the criminal case but was aware of its existence. The disciplinary hearing was on November 1, 2016 and the claimant's contract of service was subsequently terminated per the dismissal letter. The respondent denied breach of clauses of the CBA as alleged for the claimant and that clause 17 of the CBA envisaged dismissal on account of criminal misconduct. The respondent rejected the conciliator's recommendations. The respondent prayed that the suit be dismissed with costs.
  11. The Court has considered the material on record including the documents, oral testimonies, the pleadings and final submissions filed for the parties. The Court returns as follows.
  12. To answer the 1<sup>st</sup> issue, there is no dispute that the claimant and the respondent were in a contract of service. The claimant was dismissed from employment per the undisputed letter of dismissal.
  13. To answer the 2<sup>nd</sup> issue the Court returns that the respondent has established that the reason for termination was genuine and fair as envisaged in sections 43 and 45 of the *Employment Act, 2007*. In particular, the evidence was that the laptop in issue had been recovered from the claimant's house and the claimant admitted she had taken it to her house from the work place. Further, as at termination the claimant had been charged with the alleged offence of theft of the laptop. At the disciplinary hearing the claimant stated that she knew the procedure of handling lost items in the ward and it was that such



lost items should be handed over to the matron in charge of the ward. The Court finds that in view of the claimant's conduct and the ensuing criminal charge as at the time of dismissal, the disciplinary committee cannot be faulted for recommending that the claimant be dismissed from the service on account of gross misconduct and loss of trust. While making that finding, the Court has considered the claimant's statement of December 29, 2015 given to security officers. She stated that it was on December 23, 2015 when she came across the laptop and she carried it to her house because she did not know the owner and she did not inform anyone since all her colleagues had left. In the same statement she stated that on December 22, 2015 her colleague nurse one Anne Mutuku had informed her that a 1<sup>st</sup> year student-doctor had reported about a missing laptop. The Court finds contradictory account on the part of the claimant that on December 23, 2015 when she found the laptop she did not have knowledge of the owner. More important, the Court finds that account not to mention the claimant's witness No. 2 (CW2) Peter Maina Mwaniki who in the testimony before Court alleged he was the claimant's Christian friend who had carried the laptop to the claimant's house on December 24, 2015. Such contradictory testimonies cannot be trusted. The Evidence is that as at termination date the claimant had irregularly or suspiciously taken the laptop to her house and she had been charged with a criminal offence in that regard and per the letter of dismissal.

14. To answer the 2<sup>nd</sup> issue for determination the Court returns that the claimant was accorded due process including the right of administrative appeal. She was informed the case that confronted her, she responded, she attended disciplinary hearing and she was eventually dismissed. She states that she deserved a final warning per clause 17(6b) (ii) of the CBA. However, as submitted for the respondent, a warning would issue by a supervisor to an employee only in minor offences per clause 17.3(1) of the CBA, while, clause 17 (3) (i) and (vi) of the CBA permitted summary dismissal on account of gross misconduct as was alleged against the claimant in the instant case. Further, the Court has observed that the letter by Dr. Maswai appears to have been received by the respondent and the union long after the summary dismissal and the decision on the administrative appeal so that in the Court's view it did not serve to exculpate the claimant as it purported to do – it was belated as to vindicate the claimant in the circumstances of the flow of events. However, in consideration of that belated and purportedly exculpating letter, each party will bear own costs as it appears one way or the other, it may have encouraged the claimant to file suit.
15. It was urged for the claimant that retirement in public interest rather than summary dismissal should have been imposed. Essentially it appears to be urged that the claimant ought to have enjoyed a softer landing than dismissal. However, that appears to have been a discretionary power of the employer, it was not urged at the disciplinary hearing or at appeal stage, and, the Court will not interfere in the circumstances of the case.
16. The remedies as prayed for and per submissions were predicated on a finding of unlawful and unfair termination. Accordingly, they will fail as there is no finding of unfair or unlawful termination. As already observed earlier in this judgment, each party will bear own costs of the suit.

In conclusion the memorandum of claim is hereby dismissed with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 12TH MAY, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

