



**Kamau v Coptic Hospital (Employment and Labour Relations Cause
384 of 2017) [2023] KEELRC 1575 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1575 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 384 OF 2017**

BOM MANANI, J

JUNE 22, 2023

BETWEEN

GEORGE MWANGI KAMAU CLAIMANT

AND

COPTIC HOSPITAL RESPONDENT

JUDGMENT

1. This is a claim for compensation for alleged unfair termination from employment. Through it, the Claimant seeks various reliefs against the Respondent following his termination from employment on October 18, 2016.
2. The Respondent does not admit the claim. It is the Respondent's position that the Claimant's contract of service was lawfully terminated after the latter got involved in unethical conduct whilst on duty.

Claimant's Case

3. The Claimant asserts that he was hired by the Respondent in October 2012 to serve in the position of a nurse. On January 1, 2016, his contract was renewed for a period of twelve (12) months at a gross monthly salary of Kshs 60,000.00.
4. It is the Claimant's case that he served uneventfully but diligently until October 4, 2016 when the Respondent served him with a notice to show cause why his services should not be terminated for allegedly posting patient information on his face book page without the Respondent's and or the patient's consent.
5. The Claimant states that he did not publish information about any particular patient as alleged by the Respondent. Whilst not denying posting data on his social media platform on the material date, the Claimant denies that the data he posted was about a particular patient. He states that the post did not have a patient's name. Neither did it contain the Respondent institution's name.



6. It is the Claimant's case that the decision to terminate his contract was without valid basis. Further, the Claimant states that he was not accorded a fair hearing before his contract was terminated. The Claimant points out that he was not given the specific patient data that he is alleged to have posted. Besides, he alleges that he was denied the right to call his witness before the disciplinary panel.

Respondent's Case

7. On its part, the Respondent maintains that the Claimant posted data regarding one of its patients on his social media platform without the Respondent's or the patient's permission. In the Respondent's view, the Claimant's action constituted unethical conduct which attracts disciplinary action.
8. The Respondent contends that upon learning of the post, it summoned the Claimant for interrogation on October 4, 2016. The Respondent's witness states that although he attended the session, the Claimant became uncooperative. As a result, no meaningful deliberations took place on that date.
9. The Respondent states that the Claimant was issued with a notice to show cause later that day requiring him to explain the post. The Claimant did a response to the notice dated the same day (October 4, 2016).
10. It is the Respondent's case that it later invited the Claimant for a disciplinary session which was held on October 13, 2016. It is only after this session that a decision was taken to summarily terminate the Claimant's contract of service.

Issues for determination

11. From the record, there is no indication that the parties filed a joint statement of issues for determination at the pretrial stage. However, both of them formulated their separate issues at the stage of tendering the final submissions in the cause.
12. The pleadings and evidence demonstrate that the parties do not dispute that they had an employment relation at the material time to this action. The contest appears to centre on whether the relation was lawfully terminated. Springing from this is the corollary issue whether the parties are entitled to the remedies that they seek through their respective pleadings.

Analysis

13. There is no controversy about the fact that the Claimant posted some information on his social media platform on October 2, 2016. What is disputed is: the content of the post; whether the post related to private patient information on a patient under the Respondent's care; and whether the post is what the Respondent produced in evidence before me.
14. According to the letter of show cause dated October 4, 2016, the Respondent asserted that the post related to a patient called Benard Ambaka. On his part, the Claimant denied that he posted any data on the patient. The Claimant denied that he was on duty on October 2, 2016, the day he allegedly posted the information. It was his case that an analysis of the Respondent's CCTV would have demonstrated that he was not at the hospital on October 2, 2016 to retrieve and post the impugned data.
15. In a bid to confirm its assertions that the Claimant posted data on the patient, the Respondent filed in evidence an image of the alleged post. The Claimant denied that what the Respondent produced in evidence is what he posted on his social media page. He further denied that the document emanated from his face book account as the account displayed on the document relates to 'Gibson Kim Mwangi' and not 'George Kamau Mwangi.'



16. I have looked at the post presented in evidence purporting to be the post made by the Claimant on the aforementioned patient. Clearly, the document does not bear the said patient's name or indeed anybody else's name. Neither does it bear the Respondent's name. Further, the document does not contain the hospital patient number that was quoted in the Respondent's notice to show cause dated October 4, 2016. It is also clear that the Claimant's name is not indicated as the username for the account from which the post was retrieved.
17. There is no record to demonstrate how the Respondent linked the Claimant to the post it produced in evidence. There is no indication how the Respondent linked the information in the post to the patient in question.
18. The document produced by the Respondent bears October 2, 2016 as the date the notes were prepared. That means that the record, having been prepared on October 2, 2016 could only have been retrieved on October 2, 2016, the date it was also uploaded online.
19. The Claimant states that he was not on duty on October 2, 2016 when the patient data was generated and harvested for uploading online. It was up to the Respondent to demonstrate that the Claimant retrieved the information and posted it on October 2, 2016 as alleged notwithstanding that he was off duty that day. It was not sufficient for the Respondent to make mere allegations on the issue. It is for this reason that I think that the Claimant's insistence that the Respondent ought to have reviewed its CCTV footage for the day makes sense.
20. Sections 41, 43 and 45 of the *Employment Act* place the obligation to establish the validity of the reason for terminating an employee's contract of service on the employer. In respect of the case before me, the Respondent could only have discharged this obligation by: linking the impugned data to the Claimant; demonstrating that the data related to one of its patients; and demonstrating that the Claimant accessed the hospital's records office on October 2, 2016 to retrieve the data notwithstanding his assertion that he was off duty that day. From the evidence on record, the Respondent did not discharge this obligation.
21. It is also apparent that despite the Claimant vehemently contesting posting the impugned data, the Respondent did not produce minutes of its disciplinary session to demonstrate that the Claimant's contestations were considered and found to be without basis on plausible grounds. Without the minutes, it is impossible to determine how the Respondent arrived at the conclusion that: the impugned data related to one of its patients; the data was unlawfully retrieved by the Claimant on a day that he was said to have been off duty; and the data was uploaded onto the virtual platform by the Claimant.
22. In view of the foregoing, I am unable to arrive at the conclusion that the Respondent had a valid reason to terminate the Claimant's contract of service. In the premises, I find that the Respondent did not establish existence of a substantive ground to terminate the Claimant's contract of service.
23. Regarding procedural fairness, the Claimant's case is that despite being accused of circulating information on patient data, he was not shown the actual post he was accused of circulating. Although he admitted making some posting on October 2, 2016, the Claimant denied that it related to the Respondent's patient as alleged.
24. In court, the Respondent produced a document that the Claimant denied was retrieved from his social media platform. As a matter of fact, there was no certificate of electronic evidence accompanying the document to confirm its authenticity.



25. There is no record to demonstrate that before or during the disciplinary session, the Respondent shared with the Claimant the extract that the Respondent produced in evidence before me as proof of the post allegedly made by the Claimant. Proof of release of this information to the Claimant can only be established through evaluation of the minutes of the disciplinary session. For some reason, although the Respondent's witness confirmed the availability of the minutes, these were not produced as exhibits in court.
26. Article 47 of the Constitution which the Claimant relies on and which is actualized through the Fair Administrative Action Act entitles him to administrative action that is procedurally fair. Section 4 of the Fair Administrative Action Act in part provides as follows:-

‘Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision information, materials and evidence to be relied upon in making the decision or taking the administrative action.’
27. The Respondent shouldered the obligation to share the impugned data with the Claimant beforehand. There is no evidence that this was done. Although the Respondent argues that the Claimant conceded to uploading the post, I understand the Claimant's response to the notice to show cause as admitting making a post on October 2, 2016 but which did not refer to a patient of the Respondent. This is not the same thing as admitting posting the image that the Respondent produced in evidence before me as the Respondent suggests.
28. Under sections 41, 43 and 45 of the Employment Act, the obligation lies with the Respondent as the Claimant's employer to demonstrate that it conducted the disciplinary case against the Claimant in a manner that was procedurally fair by for instance supplying him with an extract of the post that constituted the foundation of its case. Absent evidence that the extract of the impugned post was shared with the Claimant, I find that the disciplinary case against the Claimant was not conducted in a manner that was procedurally fair.
29. The next issue for determination relates to whether the parties are entitled to the reliefs that they seek through their respective pleadings. Having arrived at the conclusion that the decision by the Respondent to terminate the Claimant's contract was unfair, it follows that the prayer by the Respondent to dismiss the Claimant's case cannot issue.
30. I have noted from the record that the contract of service between the parties was for a fixed term. According to the contract produced in evidence dated January 1, 2016, the parties renewed their employment relation for a period of one (1) year to run from January 1, 2016 up to December 31, 2016.
31. Although the contract has a renewal clause, there is no indication that this was to be automatic. On the contrary, the clause specifically stipulates that any renewal of the contract had to be in writing.
32. The Claimant's contract ran into headwinds in early October 2016, about three months before it was to come to a close through lapse of time. If any compensation is to issue to the Claimant, this reality must be taken into account.
33. Clause 16 of the contract provides for the duration of the notice that ought to issue before terminating the contract. All factors remaining constant, the notice should be for a period of one (1) month. Absent notice to terminate, the party terminating the contract must pay the other compensation equivalent to salary for one (1) month.
34. Since the decision to summarily terminate the Claimant's contract has been found to have been unfair, he is entitled to pay in lieu of the notice to terminate his contract. The Claimant indicates that his exit salary was Kshs 60,000.00. This is confirmed by the pay slip that he produced in evidence. In the



premises, I award the Claimant Kshs 60,000.00 being pay in lieu of notice to terminate his employment contract.

35. Since the Claimant's contract was drawing to a close and there is no evidence that it was going to be automatically renewed, I decline the prayer for compensation for unfair termination that is equivalent to the Claimant's gross salary for twelve (12) months. Instead, I enter judgment for the Claimant for a sum equivalent to his salary for three (3) months to cover the period between October 1, 2016 and December 31, 2016. The amount so awarded is Ksh. 180,000.00.
36. In making the above award, I have considered the guiding principles in this respect under section 49 of the Employment Act. In particular, I have taken into account the period of service by the Claimant to the Respondent.
37. The Claimant has also sought payment for accrued leave days on pro-rata basis at Kshs 12,305.00. There was no evidence that the Claimant had taken his earned leave days for the year 2016. To the contrary, the Respondent appeared to acknowledge the leave claim through its letter of summary dismissal issued to the Claimant when it undertook to pay him earned leave days. Accordingly, I enter judgment for him for leave pay amounting to Kshs 12,305.00.
38. The Respondent is ordered to issue the Claimant with a Certificate of Service.
39. I award the Claimant interest on the sum awarded at court rates from the date of this judgment.
40. I award the Claimant costs of the case.
41. The award is subject to the applicable statutory deductions.

Summary of the Award

- a. The Respondent's decision to terminate the Claimant's contract is declared unfair.
- b. The Claimant is awarded compensation for unfair termination equivalent to his gross salary for three months, that is to say, Kshs 180,000.00.
- c. The Claimant is awarded salary in lieu of notice to terminate his contract of service, that is to say, Kshs 60,000.00.
- d. The Claimant is awarded pay in lieu of accrued leave days, that is to say, Ksh 12,305.00.
- e. The Claimant is awarded interest on the awarded sum at court rates from the date of judgment.
- f. The Claimant is awarded costs of the case.
- g. The Respondent to issue the Claimant with a Certificate of Service.
- h. The award is subject to the applicable statutory deductions.

DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF JUNE, 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

