



**Twahir v AAR Hospital Ltd (Cause E682 of 2021)
[2023] KEELRC 1965 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1965 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E682 OF 2021
AN MWAURE, J
JULY 31, 2023**

BETWEEN

DR MAJID S TWAHIR CLAIMANT

AND

AAR HOSPITAL LTD RESPONDENT

JUDGMENT

1. The claimant filed a claim dated August 16, 2021 and prays for judgment against the respondent as per the prayers in his claim

Claimant's case

2. He says he is a medical director and a health care manager and administrator with over twenty years' experience. He has served as a medical director in diverse hospitals including Aga Khan Hospital and Nairobi Women's Hospital inter alia.
3. He says on February 9, 2021 he was employed as Chief Executive Officer of the respondent's hospital that was still undergoing construction. He was entitled to a month salary of kshs 1,700,000 and Kshs 10,000 telephone allowances as well as medical insurance for him and his immediate dependants.
4. He was to serve a probationary period of six months. He says the hospital commenced its operations on July 19, 2021 and opened doors to its patients then.
5. He says on August 13, 2021 while still serving his probation he was unlawfully and unfairly terminated and his termination letter was signed by the chairman of the board purportedly.
6. The claimant says he was not given the reason for his termination and he was not invited for a disciplinary hearing. Furthermore he avers he was not informed during the period of his employment that he had underperformed.



7. He seeks for several remedies including reinstatement and compensation equivalent to 12 months' salary

Respondent's case

8. The response dated November 16, 2021 seeks that the court to dismiss the claimant's suit with costs.
9. Respondent says he employed the respondent vide an employment contract dated February 9, 2021. He was employed as a healthcare management professional and bore the title of Chief Executive Officer.
10. He was to report both to the Chairman of the board and the Group Chief Executive Officer. He was to start employment on March 15, 2021. The first 6 months were to be served on probation. Each party could terminate the contract by giving one month notice during the probationary period.
11. The respondent avers that serious issues arose during the claimant's probationary employment which raised serious doubts about his suitability to hold that position. Some of the issues are about setting key performance indicators and performance concerning senior Management and as from March to July 2021 there were no set performance indicators of the said senior management.
12. Again the strategic plan raised by the claimant had not been shared to the senior management team. The witness says it was only after the meeting of 27th July 2021 that claimant extended senior management team's probationary period.
13. The witness says that the claimant failed or refused to comply with repeated instructions to propose a recovery plan for the hospital. He is accused of handling performance of the hospital casually. On July 27, 2021 and July 28, 2021 the claimant was informed of the need to improve the hospital's performance by the Group CEO (GCEO).
14. Among other accusations claimant was accused of hiring the staff for roles of salaries that was higher than what was budgeted by the respondent.
15. On July 27, 2021 the GCEO informed the claimant and the senior management team of the poor performance of the hospital and explained to them that the issues raised could be basis for termination of their employment.
16. After considering all these issues the respondent terminated the claimant on August 13, 2021. The claimant appealed the decision on August 14, 2021 but respondent did not reverse their decision. The respondent says they have since discovered some of their assets were stored in unclear circumstances leading to their loss. He avers that the claimant was not unlawfully terminated and further that they paid all his dues.
17. He claims that claimant has no cause of action and so his claim should be dismissed with costs.

Claimant's evidence in court

18. The claimant testified in court on October 31, 2022 and on February 9, 2023. He basically retaliated the evidence in his detailed claim and confirmed he was not served with a notice before termination nor was he invited for a disciplinary meeting. He however says some of the accusations were communicated to him after he was dismissed. He also admits he was paid one month salary in lieu of notice, accrued leave and the days worked in August 2021.



Respondent's evidence in court

19. The respondent testified in his viva voce evidence on February 9, 2023. The witness is Steve Okero the group CEO of the hospital. He says that claimant was terminated as he had poor leadership skills. He did not set performance indicators and he employed staff un procedurally.
20. He further says appraisals happened daily for the people on probation but Dr Frank Njenga the board chair did not appraise the claimant. He says he was not aware appraisal was necessary before termination. He also says there were no letters raising complaints of poor performance but there were emails urging him to work towards the hospital's recovery plan.
21. He also says the list of assets were compiled in October 2021 after the claimant had been terminated. He further says there was no team work and the claimant did not sign the contract of the staff members.
22. The court considered the claimant's submissions dated February 24, 2023. And the respondent's submissions as well dated March 16, 2023.

Determination

23. The court is minded to consider the issue for determination is to whether the claimant was unlawfully terminated or his termination was in accordance to the law and to his contract of employment.
24. The letter of termination of employment by the respondent simply states that his suitability and performance role were assessed and obviously were not suitable and hence the termination.
25. The employment contract dated February 9, 2021 (commencement of employment was to be March 15, 2021) provided that the probationary period was terminable by giving one month salary or payment in lieu of notice.
26. The claimant's case is that he was not given any notice of poor performance and was not called for disciplinary hearing. He says he was surprised to receive the termination letter. The court noted the termination letter did not specify the grounds for the claimant's termination. There was only reference to the employment contract (clause 5) in the termination letter.
27. There were emails correspondence between the claimant and one Andrew Rowell and also Steve Okeyo but these are raising issues of budget and employment of staff above their budget. They have not necessarily raised issues of performance and the respondent did not produce performance indicator of the target the claimant was expected to meet from time to time. Without performance targets it becomes difficult to prove whether claimant's performance was poor or not and whether he met his targets or not.
28. Section 41(1) of the *employment act* provided as follows

“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.
29. Section 45(1) of the same *Employment Act* provides:

No employer shall terminate the employment of an employee unfairly.



30. The respondent is mandated by law to give a valid reason for terminating the employment of the claimant as provided in the law. The various emails between staff of the respondent cannot be interpreted to be reasons given to the claimant to prove his poor performance.
31. The claimant was still on his probation. Section 42(4) of *employment act* provide that a party to a contract can terminate the employee by giving seven (7) days' notice or 7 days' pay in lieu of notice during probation. But it is in the public domain that section 42(1) as far as it excludes employees holding probationary contracts from the provisions of section 41 it is inconsistent with articles 24, 41 and 47 of *the Constitution*. This was the ruling in the case of *Monica Munira Kibuchi & Others vs mount Kenya University and Interested Party* Petition No. 94 of 2016. The same was delivered and dated 30th July 2021. The claimant was terminated on 13th August 2021 when the above had already been delivered by the three men bench of the court.
32. The court is therefore obliged to find the claimant was entitled to be given a valid reason for his termination and to be taken through the mandatory provision of sections 41(1) of the *employment act*.
33. In cases pertaining to poor performance as is alluded herein courts have and to quote only one authority *Maina Mwangi vs Thika Coffee Mills Limited* (2012) eKLR held severally as follows:-

“Where the Employee fails to meet the standards, the first duty of the Employer is to let the Employee know that his performance has fallen below the set standards. The Employer should then propose training, guidance and fresh instructions to the Employee. The Employer is required to allow the Employee time to improve. If no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee, and advise the Employee he may be separated from the Employer on account of poor performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the organization. At investigation, the Employer should engage the Employee, and if at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then Section 41 of the *Employment Act* 2007, must come into play.”
34. The respondent has not demonstrated he gave the claimant an opportunity to defend himself on allegations of poor performance.
35. Flowing from the pleadings the evidence and the submissions the court is satisfied the claimant was even though at the tail end of his probationary period unfairly and unlawfully terminated from his employment. He seems to have left a lucrative job and barely five months he was terminated without a valid reason and it is clear the hospital was being set up. There were clearly teething problems as is expected in a new establishment and so claimant should have been given latitude and a bit more time to prove himself. The court is satisfied claimant has proved a case of unfair and unlawful termination.

Remedies

1. This being one private hospital even if an order of reinstatement is given the practicability of implementing the order may not be plausible and so reinstatement is declined.
2. That therefore also applies to prayer 2 and the court would find no reason to give an injunction against the respondent from recruiting any other persons to the position of the CEO.



3. The claimant only worked for a few Months. One month salary is awarded being kshs 1,700,000/- as compensation for unlawful termination.
4. The prayer for violation of his rights under labour law is well covered with the award above.
5. Claimant admitted he was paid one month salary in lieu of notice (he is entitled to one month salary not 3 months and was paid for days worked in August 2021 and leave days accrued).
6. Costs follow the event and so he is awarded and also interest at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF JULY, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

