



**Kasura v Kenyatta National Hospital (Cause 817 of 2018)
[2023] KEELRC 2159 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2159 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 817 OF 2018
J RIKA, J
SEPTEMBER 22, 2023**

BETWEEN

RACHAEL RENIK KASURA CLAIMANT

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 29th May 2018.
2. She states, she was employed by the Respondent on 3rd January 2013, as a Nursing Officer.
3. She was alleged to have beaten a patient, while the patient was giving birth, on 14th July 2015.
4. She was invited before the Departmental Disciplinary Committee on 28th July 2015. There was no formal complaint made against her at the time of her appearance. The meeting was adjourned, pending filing of a formal complaint.
5. She was summarily dismissed on 13th August 2015. She states, the grounds for dismissal were completely different from the allegations contained in the letter that invited her for hearing.
6. She was said to have beaten a patient, SN, IP [In Patient] No. xxxx. It was alleged that this patient gave evidence on 16th July 2015. The patient subject matter of the disciplinary proceedings was SN, IP No. xxxx.
7. The Claimant was said to have intimidated and harassed a student, MW, on 15th May 2015. No such complaint was brought to the attention of the Claimant, prior to the disciplinary hearing.
8. It was alleged further that the Claimant was involved in other serious offences. No details were communicated. Lastly the letter of summary dismissal alleged that the Claimant had poor public



- relations skills and was rude to members of the public and her colleagues. Again details of the accusation were not supplied.
9. The Claimant states that she was ambushed with fresh accusations in the letter of summary dismissal, which were not discussed at the meeting she attended on 28th July 2015. Witnesses against the Claimant were not availed. The whole process was a witch-hunt. The National Nursing Association of Kenya, wrote a letter to Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [KUDHEIHA], with a copy to the Respondent, complaining about the disciplinary process. The Respondent did not respond to the said letter.
 10. The Claimant states that at the time of dismissal, she earned a monthly salary of Kshs. 96,266. She prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair.
 - b. 12 months' salary in compensation for unfair termination at Kshs. 1,155,182.
 - c. 1- month salary in lieu of notice at Kshs. 96,266.
 - d. Certificate of Service.
 - e. Costs.
 - f. Interest.
 11. The Respondent filed its Statement of Response on 12th March 2019. It is conceded that the Claimant was employed by the Respondent as a Nurse.
 12. It is not correct that there was no formal complaint made against the Claimant by the patient, at the time that the Claimant was invited for disciplinary hearing. The patient made her complaint orally to Mrs. Wanga, who escalated the complaint to Mrs. Wang'ombe, head of labour ward.
 13. Mrs. Wang'ombe convened a meeting on 22nd July 2015. The allegations were communicated to the Claimant. The Claimant was afterwards called for disciplinary hearing on 28th July 2015. She was fully aware of the allegations against her at the hearing.
 14. She was heard and dismissed for beating up a patient SN, IP No. xxxx. There were no two different patients. The other IP No. indicated in communication with the Claimant, was a typographical error. The error was corrected in the letter of summary dismissal, and did not in any way prejudice the Claimant. Other instances of indiscipline were not the main reasons for summary dismissal. They were only considered, in sentencing of the Claimant. She had been found guilty in the past for various infractions and warned. There was no change in her conduct.
 15. The patient was interviewed before the hearing. There was no requirement that she makes a written complaint. It was not necessary to call the patient as a witness, since she was still unwell. The Respondent did not receive a copy of the letter from the Nursing Association to KUDHEIHA. The Respondent states that the Claim has no merit. It is proposed by the Respondent to have the Claim dismissed with costs.
 16. The Claimant gave evidence and rested her case, on 1st November 2022. Respondent's Human Resource Officer, Peris Nyawira, gave evidence on 15th March 2023, when the hearing closed. The Claim was last mentioned on 27th July 2023 when Parties confirmed filing and exchange of their Submissions.



17. The Claimant adopted as her evidence-in-chief, her witness statement dated 25th February 2018, and 6 documents, contained in a list dated 25th February 2018. She testified that she was accused of negligence. She was alleged to have neglected a patient, SN, while she was due for delivery.
18. The Claimant explained that she was on night duty. She found the patient already in labour. The patient was accompanied by her husband/partner. She was admitted under the Claimant's care. The Claimant was serving as a Nurse / Midwife. She opened the patient's file. The baby was big, and the birth a difficult one. The Claimant monitored labour. She called the in-charge, madam Kiura. The two Nurses attended to the patient and she delivered.
19. The patient then started bleeding profusely. She was attended to, and monitored. She continued to bleed and was taken from delivery room, to theatre. The Claimant handed the patient over to theatre. She thereafter went looking for blood for the patient, who was in need of 4 pints of blood. In the morning, the Claimant handed over to the day duty Nurse. She did not interact with the patient after this.
20. She next heard about the patient through her supervisor Mrs. Wang'ombe. It was alleged that the Claimant beat up the patient. A week later, she was issued a letter inviting her to appear before the Disciplinary Committee.
21. She attended the meeting. It was alleged that the patient's husband had complained. There was no written complaint and the Claimant was advised that she would be called, when there was one. None was availed. The Claimant was not called. On 17th August 2015, she was issued a letter of summary dismissal.
22. The Claimant did not know a Ms. Peris Ndung'u, who was shown as the Respondent's witness in the minutes of the meeting. The Claimant was not shown as a participant in the meeting. The complainant was alleged to have stated that the Nurse who assaulted her had red hair. The description did not fit the Claimant. It was alleged that the Claimant refused a student, M, to handle a delivery. This was a separate incident. The Claimant was not allowed the company of a colleague or trade union representative at the hearing. Persons mentioned at the hearing were not called as witnesses. The Claimant did not sign the minutes of the meeting.
23. On cross-examination, the Claimant confirmed that she worked for 2 years. The reasons for termination were communicated. She was alleged to have beaten up a patient. She was invited for hearing on 27th July 2015, and heard on 28th July 2015. She was present throughout the hearing. Only the incident concerning beating up of a patient, featured. The Claimant did not concede that the allegation was true, and undertake to reform. She did not apologize as alleged.
24. The patient was allegedly slapped by the Claimant, on 18th June 2014. The Claimant denied the allegation. There was a meeting attended by Mrs. Wang'ombe and Mrs. Mukhwana, concerning the incident, on 22nd July 2015. Mrs. Wang'ombe told the Claimant that the complaint was made orally by the Claimant's husband. Mrs. Mukhwana did not attend the hearing on 28th July 2015.
25. Dismissal was based on one ground- beating of the patient. The Claimant appealed against the decision to dismiss her, to the Respondent's Board. She did not know if appeal was received. Her monthly gross salary was Kshs. 96,000.
26. Redirected, the Claimant told the Court that the letter inviting her to hearing issued on 27th July 2015. Hearing was on 28th July 2015. She did not attend the preparatory meeting of 22nd July 2015. She did not apologize at any time.



27. Human Resource Officer Peris Nyawira Ndung'u, adopted her witness statement, in her evidence-in-chief. The Claimant beat up a patient. She was invited to a disciplinary hearing. The minutes of the hearing are on record. The Disciplinary Committee made recommendations. It was established that she beat up a patient and left her in labour, unassisted. She was dismissed. She appealed unsuccessfully.
28. Cross-examined, Peris told the Court that she was employed by the Respondent in 1995. She was not involved in the process of the Claimant's summary dismissal. The Claimant was aware of the accusations. She was invited for disciplinary hearing on 28th July 2015. The minutes of the meeting do not show that the Claimant attended. It is indicated that the chairperson of the Committee asked the complainant to make a written complaint. Peris was not aware if a written complaint was made. There as a security officer at every ward. There was no incident report from the security office. Beating a patient is criminal. There is a police station at the Respondent. No report was made there. The Claimant and the Union representative did not sign the minutes. Mrs. Mukhwana was the Head of Nursing. The Claimant appealed. There is no response to her appeal on record. Redirected, the witness confirmed that the Claimant was informed that she beat up a patient, and invited for hearing. Not every issue is reported by the Respondent to the Police.
29. The issues are whether termination of the Claimant's contract was procedurally fair; whether it was substantively fair; and whether she merits the prayers sought.

The Court Finds: -

30. Rachael Renik Kasura, the Claimant herein, was employed by the Respondent Hospital as a Nursing Officer 3, on 30th January 2013. She was stationed at the Department of Reproductive Health, where she performed midwifery. She was summarily dismissed on 13th August 2015, on the principal accusation of assaulting a patient SN, in the course of assisting the patient in labour. Her date of employment and termination are not disputed, and are documented in the letter of appointment and the certificate of service on record.
31. Procedural fairness. A report was made that the Claimant beat up a patient, SN on 14th July 2015. The Claimant acknowledged that the patient was admitted at the Hospital, and placed under her care on 13th July 2015. She states that the patient arrived in the company of her spouse / partner. According to the Claimant the patient went into labour, progressing well until at some point when the Claimant realized that the patient " had poor maternal powers." The Claimant called a colleague, and they assisted the patient deliver a big baby. The patient developed postpartum haemorrhage, and was taken to theatre. The Claimant's contact with the patient ended there. She handed over her nursing duties in the morning, to the day Nurse.
32. The Respondent received reports that in discharging her role, the Claimant has accosted the patient. Investigations were carried out led by Mrs. Wang'ombe Assistant Chief Nurse, labour ward. This included a face to face interview with the patient, on 16th July 2015, who confirmed that she was accosted by the Claimant.
33. The Court does not think that it was mandatory for the Respondent to only act, after a written complaint had been submitted by the patient. The Claimant did not exhibit the terms and conditions of her service, compelling the Respondent to only act, upon receipt of a written complaint. It is immaterial whether the complaint was written, oral, from the patient or the patient's spouse/partner. It is sufficient that the Respondent received an oral complaint, and interviewed the complainant.
34. The Claimant was invited to appear before the Departmental Disciplinary Committee for hearing, through a letter dated 27th July 2015. Hearing was scheduled for 28th July 2015. The Claimant attended



- hearing, accompanied by KUDHEIHA representative, Mrs. Irene Moke. She was given an opportunity to defend herself.
35. It was established that she accosted the patient. The assertion by the Claimant that there were 2 patients, who made complaints against her, is diversionary and not assistive of her cause. The different In-Patient [IP] numbers assigned to SN, was explained by the Respondent, and the Court accepts the explanation, to have been a typographical error. There was only one SN, who was a patient received by the Claimant, attended to by the Claimant, and physically accosted by the Claimant in the process of being assisted to give birth. There were no two N.
 36. Similarly unhelpful, is the position taken by the Claimant, that the patient's description of the Nurse who attended to her and presumably accosted her, as having red hair, did not fit the Claimant's description. At issue was not an identification of a criminal suspect, at a criminal identification parade, but the identification of an Employee, who was alleged by the Employer's client to have accosted the client. There was no evidential requirement to have the patient identify the Claimant in detail, beyond reasonable doubt, as the Nurse who accosted her. It was sufficient that the Claimant was the Nurse on night shift duty, who received the patient and who by her own evidence, took the patient through the birthing process. The patient was familiar with the Claimant from the time of her admission. Whether the Claimant had red hair or not, is not a significant fact.
 37. The Respondent had the discretion, whether to escalate the assault to police authorities. The patient too could have reported assault to the police. The assault could have been reported to the Respondent's own internal security. Failure to report in any instance, did not absolve the Claimant of her responsibility for the employment offence.
 38. The decision to summarily dismiss her was communicated to her. The letter of summary dismissal was copied to KUDHEIHA. The trade union was involved throughout, and there is no objection seen by the Court at any turn of the disciplinary process, lodged by the trade union on any aspect of the process.
 39. The Claimant lodged an appeal against her dismissal to the Respondent's Board. She did not explain to the Court in clear detail what became of her appeal, but the Human Resource Officer, Peris Nyawira Ndung'u, told the Court that the appeal was placed before the Appeals Board, and there was no record of its outcome exhibited in Court. Parties did not canvass this procedural issue well, and did not avail to the Court the terms and conditions of service, or the disciplinary code applicable to the dispute. It is therefore not possible for the Court to make a finding on the fate of the appeal, and whether procedure on appeal was fair.
 40. The letter from the National Nursing Association of Kenya dated 21st August 2015, complaining about the disciplinary process the Claimant was taken through, is addressed to the Claimant's Union KUDHEIHA. It was a general complaint, made by the Claimant's professional body to her trade union, after the fact. It does not require any finding from the Court, having issued after the fact, and from a party who was not involved in the disciplinary process. It is only KUDHEIHA who perhaps could respond to the letter, having been the addressee.
 41. Procedure on the disciplinary hearing was fair, under section 41 of the *Employment Act*.
 42. Substantive fairness. There is no doubt in the mind of the Court that the Claimant was involved in an act of gross misconduct. She beat up a patient, in the course of assisting the patient to give birth. The patient herself, was interviewed by the Assistant Chief Nurse at the labour wards, and tearfully confirmed assault. The Claimant appears to have discharged her midwifery role, in a manner characteristic of a good student and adherent of obstetric violence, where midwives believe in beating mothers in troubled labour, "to help them push," [see Yalley A.A. in *Exploring Midwives' Perspectives*



on Obstetric Violence in Ghana” Preprints Org 2022]. Yalley reveals that in Ghana, studies on women’s birth experiences show enormous and brutal acts of violence during delivery. The study, carried out among Ashante women in Ghana, concluded that there was widespread normalization of violence in delivery rooms.

43. Obstetric violence [OV] is described by World Health Organization as, “outright physical abuse, profound humiliation and verbal abuse, coercive or unconsented medical procedure [including sterilization], lack of confidentiality, failure to get full informed consent, refusal to give pain medication, gross violation of privacy, refusal of admission to health facilities, neglecting women during childbirth to suffer life-threatening complications and detention of women and their newborns in childbirth facilities due to an inability to pay,” [see WHO statement ‘The Prevention and elimination of disrespect and abuse during facility-based childbirth’ @ WHO 2015].
44. In a case at the Inter American Court of Human Rights, *Britez Arce v. Argentina* [16th November 2022], the Court held that obstetric violence is a form of gender-based violence, exercised by those in charge of health care for pregnant women accessing services during pregnancy, child-birth and postpartum, and is prohibited by various forms of international human rights instruments.
45. The Universal Declaration of Human Rights [UDHR] [Article 3] guarantees every person the right to life, liberty and security of the person. The right is restated in the International Covenant on Civil and Political Rights [ICCPR] [Article 9], the International Covenant on Social, Economic and Cultural Rights [ICESCR], and Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW].
46. Article 29 of *the Constitution* guarantees every person freedom and security of the person, which includes the right not to be subjected to any form of violence, from either private or public sources. Article 28 of *the Constitution* protects to right of all persons to inherent dignity, which includes the right to be treated ethically. Our Penal Code criminalizes assault and battery. There is no place for assaulting women in childbirth, in the name of correcting their poor maternal powers, to borrow the expression used by the Claimant.
47. Nurse Rachael Renik Kasura, the Claimant herein, seems to have embraced this retrogressive midwifing practice, assaulting SN to assist her bring forth her big baby. She in her mind, may have assisted the patient to give birth, but the method applied by her in doing so, was not in consonance with basic tenets of human dignity, the instructions, policy and practice of her Employer. The Court does not think that even the National Nursing Association of Kenya, would approve such forms of assistance to women in troubled labour. The patient did not accede to this form of assistance, and even after discharge, had difficulty narrating the painful experience she was taken through by the Claimant, to the investigators.
48. There was valid reason, to justify dismissal of the Claimant, under Section 43 of the *Employment Act*. She was engaged in obstetric violence. The Respondent took the right measure, to prevent normalization of the vice at its labour wards.
49. Certificate of service dated 15th August 2015, is exhibited on the record, and presumably is available to the Claimant.

It is ordered:-

- a. The Claim is declined.
- b. No order on the costs.



DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 22ND DAY OF SEPTEMBER 2023.

JAMES RIKA

JUDGE

