



**Nyaga v Moi Teaching and Referral Hospital (Cause 157 of 2017)
[2023] KEELRC 2605 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2605 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 157 OF 2017
MA ONYANGO, J
OCTOBER 26, 2023**

BETWEEN

LEONARD NYAGA CLAIMANT

AND

THE MOI TEACHING AND REFERRAL HOSPITAL RESPONDENT

JUDGMENT

1. The Claimant herein filed his Statement of Claim on 21st December 2016 seeking for the following reliefs;
 - a. A declaration that his interdiction was unlawful and unfair and thus claims for salary @ Kshs 19,455.50 per month during the period of suspension from 20th April, 2016 until 9th August 2016 when he received termination letter
 - b. A declaration that the termination of his employment by the Respondent was unlawful, spurious and unfair
 - c. Reinstatement to employment in the same capacity as his fellow employees working in his department at the time of termination i.e permanent and pensionable basis
 - d. Payment of;
 - i. 3 months' salary in lieu of notice @ Kshs 38,911 per month
 - ii. 12 months' salary as compensation for unfair and unlawful termination of employment at @ Kshs 38,911 per month
 - iii. Service pay for 2 years completed service @Kshs 38,911 per month
 - iv. Damages for breach of right to fair labour practices and discrimination under Articles 27 and 41 of the Constitution of Kenya,2010



v. Certificate of costs

2. The Claimant avers in his Statement of Claim that he was employed by the Respondent as a nursing officer vide a letter of appointment dated 13th January 2014 at a salary of Kshs 38,911.
3. He states that he worked dutifully and diligently until 20th April 2016 when he was interdicted by the Respondent from employment. According to the Claimant, the said interdiction was irregular, unfair and improper as it did not accord with the requirements of due process under the Employment Act; it did not accord with the terms of service and the contract of employment; it amounted to unfair labor practices as it was unfair and that no opportunity to be heard prior to the interdiction was accorded.
4. It is the Claimant's case that the Respondent on 9th August 2016 proceeded to summarily terminate his employment unlawfully and unfairly.
5. The Respondent filed its Response on 12th June 2017 denying the averments in the claim and contended that it was entitled to proceed with its internal disciplinary procedures with regards to the Claimant so as to protect its reputation, legitimate business interests and to prevent further injury due to the Claimant's fraudulent activities.
6. The Respondent avers that its terms and conditions of service provides for internal disciplinary procedures and punishments that can be administered including appeals and summary dismissals which were adhered to while handling the Claimant's case.
7. It was the Respondent's position that the termination of the Claimant's contract was subjected to the due process of the law including the right to fair administrative action that is expeditious under Article 47 of the constitution.
8. At the hearing on 13th June 2023, the Claimant testified as CW1. CW1 and basically reiterated the contents of his Statement of claim and witness statement. He stated that he was not given a fair hearing before his employment was terminated.
9. On cross examination, CW1 averred that he was employed as a nurse on contract in 2014. He further stated that he earned a salary of Kshs 38,911 and that there was deduction of NSSF. CW1 admitted that he was issued with a letter of interdiction which contained 3 charges.
The first charge was:-
 - i. Failure to perform properly ad carefully work assigned to you.The second charge was
 - ii. Being involved in corrupt practicesThe third charge was
 - iii. Committing or on reasonable grounds being suspected to having committed criminal offence against or to the substantial detriment of your employer's property
10. CW1 admitted that he returned the money that he had taken from the guardian of a patient. However, he maintained that his intention was to take the money to the cash office. He stated that he was invited to a disciplinary hearing vide a letter dated 13th July 2016, which hearing he attended on 19th July 2016 without a representative. The claimant further stated that he appealed but the appeal was dismissed.
11. The Respondent called Felix Kosgei its Human Resource Officer who testified as RW1. RW1 in his testimony stated that the Claimant's employment was terminated on grounds of gross misconduct. He testified that the Claimant had extorted Ksh 2,500 from a patient taking advantage of the waiver



- process. That it was after the patient was asked to produce a receipt before being attended on that she spilled the about the money she had been asked to pay by the Claimant. RW1 stated that investigations were carried out and the Claimant admitted that he had taken the money against the hospital's policy.
12. On being cross examined by counsel Kittony, RW1 maintained that the Claimant was taken through a disciplinary hearing before his employment was terminated and that the termination was to take effect from the date of the disciplinary hearing.
 13. The Claimant's written submission were filed on 4th July 2023 while the Respondent filed its submissions on 27th July 2023.

Determination

14. I have considered the pleadings and the submissions of the parties including the authorities cited. I find that the issue that falls for determination is whether the Claimant's employment was terminated fairly and procedurally
15. The law relating to fair termination is contained in Section 41, 43 and 45(2) of the [Employment Act](#)
16. Section 43 of [Employment Act](#) 2007 provides inter alia;
 - “ 43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee
17. The import of the above provisions is that before an employer terminates an employee's employment, the employer must not only prove that it had valid reason for the said termination but must also ensure that the laid down procedure has been followed.
18. Further, Section 45(1) of the [Employment Act](#) provides;
 - “No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-
 - a) That the reason or reasons for the termination is valid.
 - b) That the reason for the termination is a fair reason.
 - (i) Related to the employee's conduct, capacity or compatibility or
 - (ii) Based on the operational requirements of the employer was that the Employment was terminated in accordance with fair procedures”.
19. In the instant case, the Claimant is said to have been dismissed from employment by the Respondent on grounds of gross misconduct. RW1 testified that the Claimant was interdicted after the guardian



- to a patient complained that the patient was not attended to as she did not have a receipt. That it is then that the issue of the alleged extortion was discovered and the Claimant was found guilty of the misconduct.
20. The Claimant in his testimony admitted to have taken the money on 15th April 2016 when the patient was to be attended to. He stated that he returned the money on 18th April 2016, that is three days later.
 21. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee.
 22. In the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91 Lord Denning described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
 23. The victim of the alleged extortion, Judith Naliaka Kimongoi is said to have reported to the Respondent’s nurse covering the Accident and Emergency Area that the Claimant had solicited for Kshs 2,500 from her. The Claimant admitted to having taken the money and refunding the same. I therefore find that the Respondent has discharged the burden of proving that it dismissed the Claimant for a valid and fair reason.
 24. On the question of the procedure, the Claimant has maintained that he was not given a fair hearing. He stated that although he was invited to a disciplinary hearing, he attended the said hearing without a representative or colleague. He further stated that even after he appealed against the decision of the disciplinary committee, he was not heard but was given a response that his appeal was dismissed and that the said decision was final.
 25. It is not contested that the Claimant was invited to a disciplinary hearing. This is confirmed by the letter dated 13th July 2016 inviting the Claimant to appear before the Hospital Staff Disciplinary Advisory Committee meeting. The Claimant’s bone of contention is that he did not attend the said meeting with a representative or a colleague. The Claimant in his testimony admitted the Kenya National Union of nurses, union Branch Secretary was present at the disciplinary hearing. The allegation that he was not given a fair hearing because he did not attend the hearing with a representative does not therefore unfounded. There is also evidence that the Claimant fully participated in the hearing and even preferred an appeal against the decision of the Hospital Staff Disciplinary Committee.
 26. From the foregoing, the Court is satisfied that the Respondent followed due and fair process in the termination of the Claimant’s employment.
 27. In the end, the claim is found to be without merit and is accordingly dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF OCTOBER 2023

M. ONYANGO



JUDGE

