



**Amuguni v Registered Trustees of the Sisters of Mercy t/a Mater Misericordiae Hospital  
(Petition E054 of 2022) [2023] KEELRC 2384 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2384 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E054 OF 2022  
L NDOLO, J  
OCTOBER 5, 2023  
IN THE MATTER OF ARTICLES 22 OF THE CONSTITUTION OF KENYA, 2010  
AND  
IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 29, 39(2), 41(1), 43(1) AND 47 OF  
THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**NAOMI KEMUNTO AMUGUNI ..... PETITIONER**

**AND**

**REGISTERED TRUSTEES OF THE SISTERS OF MERCY T/A MATER  
MISERICORDIAE HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. By her Petition as amended on 21<sup>st</sup> February 2023, the Petitioner pursues the following remedies:
  - a. A declaration that the Respondent has violated the Petitioner’s right to freedom and security of the person, right to leave Kenya, right to fair labour practices, economic and social rights and right to fair administrative action;
  - b. An order of compensation for violation of the Petitioner’s rights assessed at Kshs. 20,000,000;
  - c. An order of compensation for unfair termination;
  - d. An order of damages arising from unfair termination;
  - e. An order directing the Respondent to pay for the entire legal costs of the Petitioner’s appeal against her visa revocation;



- f. Costs and interest.
2. The events leading to this dispute, as narrated by the Petitioner are as follows:
- a. The Petitioner, who was an employee of the Respondent, sought and was granted 6 months' unpaid sabbatical leave, to enable her travel to the United States of America (US). The Petitioner was scheduled to travel on 2<sup>nd</sup> December 2021;
  - b. In order to comply with the US travel requirements of negative PCR-based COVID-19 test conducted within 72 hours prior to departure, the Petitioner attended the Respondent facility In the afternoon of 1<sup>st</sup> December 2021 where she took a COVID-19 test. The Respondent, through its employees and/or servants supplied the Petitioner with a COVID-19 certificate showing that she had tested negative for COVID-19. The Petitioner uploaded the certificate on the travellers' portal;
  - c. On 2<sup>nd</sup> December 2021, while at the check-in counter at the Jomo Kenyatta International Airport (JKIA) ready to travel to the US, the Petitioner was notified by travel officials that she could not travel as her COVID-19 certificate had errors. While still at JKIA, the Petitioner contacted the relevant officers at the Respondent Hospital, who acknowledged that the COVID-19 certificate they had supplied to the Petitioner had an error and proceeded to send her another one on email, which they said was rectified. It is only then that the travel officials allowed the Petitioner to board her flight to the US. However, since the Petitioner had already uploaded the erroneous certificate on the travellers' portal, she was unable to upload the corrected one.
  - d. Upon arrival at Los Angeles Airport in the US, the travel officials at the Airport pointed out to the Petitioner that the certificate she had uploaded on the travellers' portal had errors. The Petitioner offered an explanation as to what had transpired at JKIA, but the travel officials at Los Angeles Airport detained her and began investigating her for making and presenting a forged COVID-19 certificate to border officials, attempting to enter the US with missing COVID-19 test results and lying to border officials. The Petitioner was detained at the Airport cells for 3 days and thereafter, her 5-year US visa was cancelled and she was deported back to Kenya, after being forced to undergo another COVID-19 test at a cost of \$125, which test turned out negative;
  - e. After her deportation back to Kenya, the Petitioner notified the Respondent through email, what had transpired and requested them to assist her to hire an Attorney in the US for purposes of appealing the revocation of her US visa but the Respondent ignored her, prompting the Petitioner to hire an Advocate to engage with the Respondent on her behalf. On 13<sup>th</sup> January 2022, the Petitioner's Advocate wrote to the Respondent asking that the Respondent commits to foot the entire legal costs of the appeal against the cancellation of the Petitioner's US visa but the Respondent responded by demanding that the Petitioner 'express her concerns with the hospital directly', 'present documentary evidence of her accusations against the hospital' and 'utilize internal mechanisms available to her to address the matter'. The Respondent further warned the Petitioner that any action she took against the Hospital would be defended at her own cost and detriment;
  - f. The Petitioner subsequently attempted, on several occasions, to access her work email and was shocked to realise that she no longer had access to the email. The Petitioner opines that the email may have been disabled by the Respondent and her credentials blocked. She states



that the Respondent's actions amount to constructive termination of employment and are calculated at further violating her rights.

3. The Petitioner accuses the Respondent of bad faith and attempting to exercise its dominant position as an employer to arm-twist the Petitioner to drop her claim regarding the erroneous COVID-19 certificate.
4. After institution of the suit and during its pendency, the Petitioner's sabbatical leave lapsed and she reported back to work. The Petitioner claims to have been received with hostility by her superiors.
5. In the month of December 2022, the Petitioner, who is a member of the National Kenya Women 7 aside team (Kenya Lioness), was named in the final squad to represent Kenya in an international rugby tournament in Dubai. The Petitioner applied for leave but she did not get a response from the Respondent. She claims to have sought the intervention of the Cabinet Secretary for Sports who is said to have informed her that he had spoken with the Respondent's Chief Executive Officer over the issue and the Petitioner could therefore travel with the team.
6. After the tournament in Dubai, the Petitioner returned to the country and reported back to work. She was served with a notice to show cause why she should not be dismissed for absenteeism from work.
7. The Petitioner responded by presenting her communication with the Cabinet Secretary for Sports. This notwithstanding, the Respondent informed the Petitioner that her explanation was unsatisfactory and summarily dismissed her with effect from 28<sup>th</sup> December 2022.
8. The Petitioner avers that her dismissal was unfair because the Respondent's Chief Executive Officer did not deny speaking with the Cabinet Secretary for Sports over the Petitioner's travel.
9. The Respondent's response is by way of a replying affidavit sworn by Evelyn N. Maina on 21<sup>st</sup> March 2023.
10. Evelyn N. Maina, who describes herself as in-house Counsel for the Respondent, admits that the COVID-19 certificate initially issued to the Petitioner had errors but adds that the Petitioner did not exercise due diligence by scrutinising the certificate.
11. Maina further admits that the Respondent's officers were contacted to rectify the noted errors, which was done promptly.
12. Maina denies the Petitioner's allegations that the Respondent attempted to arm-twist her and states that the Petitioner was asked to reach out as an employee but she declined.
13. Regarding the Petitioner's work email, Maina states that the email address was a working tool and the property of the employer who had discretion over it. She adds that passwords are bound to expire as a standard safety measure and renewal cannot be done remotely outside of the work environment.
14. With respect to the Petitioner's claim of violation of her rights, Maina states that the rights under Article 29 of *the Constitution* were not breached. According to Maina, these rights are territorial and the detention complained of was in exercise of US laws and not at the behest of the Respondent.
15. With regard to the right guaranteed by Article 39(2), the Respondent denies curtailing the Petitioner's right to leave Kenya. According to the Respondent, the action taken by the US immigration office was in exercise of its sovereign laws.
16. The Respondent further denies breaching the right to fair labour practices under Article 41(1). It is deponed that from her approach, the Petitioner decided to have the issue at hand addressed from a patient-hospital relationship and not from an employer-employee perspective.



17. Regarding the claim relating to breach of socio-economic rights under Article 43(1)(a), the Respondent maintains that the Petitioner being on unpaid leave, was not entitled to salary and there is no claim for substandard healthcare services to sustain such a claim.
18. In response to the claim for unfair termination of employment, the Respondent states that:
- a. The Respondent is not privy to any hostility meted on the Petitioner by her colleagues;
  - b. The Petitioner previously utilised her leave days for events relating to her participation in the Kenya Lioness team. She had no pending leave days in the instant case. She never applied for leave nor procured permission to be away from work but left, nevertheless;
  - c. Having absconded duty without permission, the Respondent was justified to issue a show cause letter;
  - d. The termination was based on absenteeism and had no relationship with the COVID-19 certificate nor the claim arising from the erroneous certificate issued over one year before;
  - e. The Petitioner's salary for the month of December 2022 was delayed as she had not cleared with the employer as is the practice;
  - f. The termination was fair as due process was undertaken culminating with the termination.
19. The Respondent faults the Petitioner for negligence in failing to scrutinise the COVID-19 certificate issued to her and failing to ameliorate her damages by opting to board her flight being aware that the COVID-19 certificate she had conflicted with the initial one.
20. The Petitioner's employment was terminated by letter dated 28<sup>th</sup> December 2022 stating as follows:

“Dear Ms. Naomi,

RE: Summary Dismissal

Reference is made to the disciplinary hearing held on 13<sup>th</sup> December 2022 regarding your absenteeism from work.

Following the disciplinary hearing held on 13<sup>th</sup> December 2022, we write to inform you that your explanation on your actions were found unsatisfactory. You are hereby summarily dismissed in accordance with the Employment Act, section 44 (a) and section 44 (e) subsequently effective 28<sup>th</sup> December 2022.

You shall be paid outstanding money as below:

Pay

Pay salary up to and including 28<sup>th</sup> December 2022  
Pay any outstanding leave days owed  
Pay any public holidays earned but not taken  
Any off days earned and not yet taken

Less

Any leave days taken but not earned  
Any other Hospital outstanding bill

A clearance form will be available to you immediately after your last date on duty to enable you clear with the Hospital. To enable us process your dues, kindly return the attached clearance checklist duly completed.

The Retirement Benefits Act allows you to access fifty percent your own contribution and fifty percent of the employer's contribution if you have been in scheme but not reached the age of retirement. You may also transfer the employer's portion to a new employer's



retirement scheme or an individual retirement scheme. Please advise us in writing how you would like your contribution and the Hospital's contributions handled.

Please note that should you wish to appeal you can do so within 14 days from the date of this letter to the Chief Executive Officer.

Yours Faithfully

Mater Misericordiae Hospital

(signed)

Magdalene Mutua

Head, Human Resource ”

21. The reason given for the Petitioner's dismissal is unauthorised absenteeism from work. It is not in dispute that the Petitioner was away from work during the period in question.
22. The Petitioner states that there was communication between the Respondent's Chief Executive Officer and the Cabinet Secretary for Sports by which she was authorised to travel to Dubai. In support of this assertion, the Petitioner filed a screenshot of WhatsApp messages, which according to her, constituted communication of approval for her travel.
23. This document falls within the category of electronic evidence as defined in the [Evidence Act](#), which at Section 106B(4) requires as follows:
  4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
    - a. identifying the electronic record containing the statement and describing the manner in which it was produced;
    - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
    - c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
    - d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be to the best of the knowledge of the person stating it.
24. Courts have consistently held that electronic evidence that is not supported by a certificate under the foregoing provision is not admissible (see *Samwel Kazungu Kambi v Nelly Ilongo & 2 others* [2017] eKLR and *Peter Ngethe Ngari t/a PNN Funeral Services v Standard Group Limited PLC & another* [2020] eKLR).
25. The Petitioner did not produce a certificate in the fashion contemplated under Section 106B of the [Evidence Act](#) and the WhatsApp messages contained in the screenshot filed by her are inadmissible in evidence.
26. That settled, it follows that the Petitioner did not adduce any evidence to demonstrate that she was authorised to be absent from work. Her absence therefore constituted a valid reason for termination of her employment as set out in Section 43 of the [Employment Act](#).



27. Regarding the procedure adopted in executing the termination, there is evidence that the Petitioner was issued with a show cause letter dated 2<sup>nd</sup> December 2022, to which she duly responded on 7<sup>th</sup> December 2022. She was subsequently invited to a disciplinary hearing which took place on 13<sup>th</sup> December 2022.
28. Based on the foregoing, I am satisfied that in effecting the termination of the Petitioner's employment, the Respondent complied with the procedural fairness requirements set by Section 41 of the [Employment Act](#).
29. Throughout her pleadings, the Petitioner sought to create a nexus between the termination of her employment and the COVID-19 certificate issued to her by the Respondent. According to the Petitioner, the certificate carried an error that caused her much prejudice, culminating with the cancellation of her US visa and her deportation back to Kenya.
30. The Employment and Labour Relations Court is established as a specialised Court under Article 162(2)(a) of [the Constitution](#) which provides that:

SUBPARA (2)

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

SUBPARA a.

employment and labour relations; and

SUBPARA b.

...

31. Pursuant to this constitutional edict, Parliament enacted the [Employment and Labour Relations Court Act](#), which at Section 12(1) sets out the jurisdiction of the Court as follows:

12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of [the Constitution](#) and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-
  - a. disputes relating to or arising out of employment between an employer and an employee;
  - b. disputes between an employer and a trade union;
  - c. disputes between an employer's organisation and a trade union's organisation;
  - d. disputes between trade unions;
  - e. disputes between employer organisations;
  - f. disputes between an employers' organisation and a trade union;
  - g. disputes between a trade union and a member thereof;
  - h. disputes between an employer's organisation or a federation and a member thereof;
  - i. disputes concerning the registration and election of trade union officials; and



j. disputes relating to the registration and enforcement of collective agreements.

32. In adjudicating claims before it, the Court must at the first instance, satisfy itself that it is clothed with the jurisdiction to hear and determine the matter.
33. Gleaning from the pleadings filed in court, there is nothing to suggest that the Petitioner presented herself at the Respondent Hospital for a COVID-19 test in her capacity as an employee of the Hospital. It would follow therefore that any issues arising from the COVID-19 certificate had nothing to do with the employment relationship between the parties. In fact, in her claim the Petitioner faults the Respondent in its capacity as a healthcare provider and not as an employer. The fact that the Petitioner was also an employee of the Respondent Hospital is a mere coincidence which cannot confer jurisdiction on the Court to delve into matters that are clearly outside its specialised mandate.
34. In the result, the only conclusion to make is that the Petitioner's claim, in as far as it relates to the COVID-19 certificate issued to her by the Respondent is incompetent and is struck out.
35. As the claim for unlawful and unfair termination of employment has also been disallowed, the net effect is that the entire claim as contained in the Petition is dismissed.
36. Each party will bear their own costs.
37. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otieno for the Petitioner

Mr. Mbugua for the Respondent

