



**Mutua v St. Mary’s Mission Hospital (Cause E340 of 2022)
[2023] KEELRC 3089 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3089 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E340 OF 2022
NZIOKI WA MAKAU, J
NOVEMBER 29, 2023**

BETWEEN

FAITH MBULA MUTUA CLAIMANT

AND

ST. MARY’S MISSION HOSPITAL RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking compensation for her wrongful and unlawful termination. The Claimant averred that she was employed on 1st January 2018 as a quality assurance manager of the Respondent and was entitled to a gross monthly salary of Kshs. 120,000/-. She averred that she worked diligently and with total dedication until 13th June 2019 when the Respondent terminated her contract on grounds that she had made a presentation on best practices and exposed the Respondent to negative publicity and scrutiny and that she had failed to report that the facility’s instruments in theatre were rusted. She averred that the presentation was not made with an intention to expose the hospital to any negative publicity or bringing any form of disrepute to the facility. The Claimant averred that in her report to the forum she had indicated that she had a desire to see the Respondent achieve its mission and vision. The Claimant averred that the issue of rusted instruments had never been mentioned or discussed by the theatre in charge who had been attending meetings. Further, she averred, it was the heads of departments who were tasked with the audits of their respective departments and were supposed to file reports of the same with her department who then would coordinate the formulation of improvement plans and schedules. She averred that she was invited to a disciplinary hearing on 12th June 2019 at 3.00pm and was shocked to be issued a termination on 13th June 2019 as she had explained the issues and apologized for any misgivings that may have arisen. She averred the termination was unlawful since the reasons for the summary dismissal of her services did not form the grounds for dismissal as outlined in the *Employment Act*. The Claimant submitted that the Respondent refused to pay her one month salary in lieu of notice and thus claimed twelve months salary as compensation.



2. The Respondent averred that the Claimant attended the best practices forum without the authority or instructions of her supervisor. The Respondent averred that the Claimant ignorantly failed to inform her supervisor of the presentation she was to make to the different stakeholders in the health sector thus leading to the Respondent receiving negative publicity. The Respondent averred that the presentation was an embarrassment to the institution as it did not present the true picture of the facility. She was alleged to have knowingly and willingly made negative remarks about the Hospital causing the Respondent to be under scrutiny. The Respondent averred that due to the Claimant's failure to report to the Respondent about the rusted instruments the Infection Prevention & Control Coordinators of the County and Sub-County conducted an audit of the Hospital on 21st May 2019 revealing the rusted instruments in the theatre. The Respondent averred that the Claimant was validly issued with a dismissal letter dated 13th June 2019 after careful consideration and after being accorded a hearing. The Respondent denied that the Claimant's dismissal was unlawful and averred that it was lawful and due procedure was followed in accordance with the *Employment Act*. The Respondent averred that the Claimant had been issued with a warning notice indicating the Claimant's performance was unsatisfactory in the areas of quality of nursing care, ward rounds, clinical audits, customer feedback collection, analysis and resolution of emerging issues, development of standard operating procedures and reporting time. The Respondent thus urged the dismissal of the suit.
3. The Claimant and the Respondent's HR Manager testified. The Claimant testified that her dismissal was unlawful and without foundation. The Respondent's witness testified that the Claimant was dismissed for cause and that due process was followed. She admitted in examination-in-chief that there was no record of the presentation made by the Claimant. The parties thereafter made submissions.

Claimant's Submissions

4. The Claimant submitted that under section 45 of the *Employment Act*, 2007, an employer should not terminate a contract of employment except for valid and fair reasons. Further, section 43 of *the Act* provides that an employer is required to prove the reason or reasons for the termination and where they fail to do so, the termination is deemed to have been unfair within the meaning of section 45. It was the Claimant's submission that she was unfairly dismissed as no fair or valid reason was given for her dismissal. In addition, she clearly gave an explanation to the allegations raised in the Show Cause Letter. According to the Claimant, an analysis of the Respondent's evidence clearly depicts certain gaps that cast a doubt on the veracity of the reasons advanced for her dismissal. That the Respondent further failed to accord her an opportunity to defend herself prior to issuing her the dismissal letter as required under section 41 of the *Employment Act*, which further requires an employer to explain to the employee the reason for which they are considering termination. She further submitted that since the Respondent did not produce any evidence to show that she had a negative attitude towards management or how her work led to low productivity in the hospital, she was entitled to full compensation for the unfair and wrongful termination of her employment. The Claimant relied on the case of *Kenya Plantation & Agricultural Workers Union (KPAWU) v Finlays Tea (K) Limited [2022]* eKLR (Cause No. 21 of 2019) wherein the Court found that the respondent had failed to discharge its burden of proving that there was a valid and fair reason(s) to justify the summary dismissal of the grievant as required by sections 43, 45 and 47(5) of the *Employment Act*. The Claimant further submitted that hearing of an employee in an employment disciplinary process takes precedence and has an effect on the validity and fairness of the substantive reasons advanced for termination. That an employer cannot avoid compliance with the requirements of section 41 on fair hearing with the hope that they will have a chance to prove the reasons in Court. She cited the case of *John Otieno Mukabi v Kenya Builders & Concrete Company Ltd [2014]* eKLR (Cause No. 2417 of 2012) in which the Court observed that the employer is required to provide the reasons for termination of an employee



in the course of the internal disciplinary process which is triggered by a Notice to Show Cause. That similarly in the case of *Enos Olungo Mang'ong'o v Kenya Commercial Bank [2015]* eKLR (Cause No. 1994 of 2012) the Court affirmed that once the internal process is marred at the workplace, it cannot be salvaged in court and that the role of the court is to review the internal disciplinary proceedings to determine whether the employer acted reasonably and within the law in all respects. The Claimant further relied on the decision of the Court of Appeal in *Kenfreight (E.A.) Limited v Benson K. Nguti [2016]* eKLR in which the court agreed with the trial Court that an employee is entitled to be heard and his representations considered by an employer before the decision to terminate his contract of service is taken.

5. It was the Claimant's submission that she had demonstrated on a balance of probabilities that her dismissal was unfair and unlawful as required under section 47(5) of the *Employment Act*. That she had proved that the termination was a redundancy that was not carried out in compliance with the provisions of section 40 of the Act. That on the other hand, the Respondent had failed to discharge its burden of proof by showing that the reasons leading to the termination of her service was valid or that it accorded her a fair hearing. On this submission, she relied on the decision of the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited [2017]* eKLR. On the remedies sought, the Claimant submitted that having established that her dismissal was unlawful hence unfair, she was entitled to compensation equivalent of 12 months' salary in line with section 49(1)(c) of the *Employment Act* and as asserted in *Ahmed Salim Bahannan v Foton East Africa – (ELRC Cause No. 2434 of 2012)*. It was the Claimant's submission that she was entitled to the remedies as prayed seeing that she had suffered great emotional trauma and distress as a result of her dismissal. That the Respondent should also pay the Claimant's costs of the suit and that judgment be as prayed in the Statement of Claim.

Respondent's Submissions

6. The Respondent submitted that the provisions of sections 41(1), 43, 45 and 47(5) of the *Employment Act* provide the applicable law for termination of employment. It cited the case of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021]* eKLR in which the Court stated that:

“It binds the claimants at the onset bring out the case of unlawful termination for employment to which the respondent shall adduce evidence in justification failure of which a claim is lost.

The respondent's case overwhelms that of the claimant. This is because the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under section 47(5) of the *Employment Act*, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the reliefs sought.”

7. The Respondent further relied on the cases of *Nancy Njeri Muturi v Kabansora Millers Limited [2019]* eKLR and *Mesback Auta Ongeru v Nyamache Tea Factory Company Limited [2019]* eKLR in



support of its case. It cited the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR – Industrial Court Case No. 66 of 2012 wherein the Court observed as follows:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

The Respondent thus urged the dismissal of the Claimant’s case with costs.

8. The Court has considered the pleadings of parties, evidence tendered, the cases cited and the submissions made in coming to the decision. The Claimant was apparently dismissed on allegations of painting the hospital in poor light. She was the quality assurance manager and in the Respondent’s view, she was required to ensure the following:-
 - a. quality of nursing care,
 - b. ward rounds,
 - c. clinical audits,
 - d. customer feedback collection,
 - e. analysis and resolution of emerging issues,
 - f. development of standard operating procedures and;
 - g. reporting time.
9. The Court wonders what the work of the CEO, doctors, nurses, auditors, planning department and the rest of the staff is. The CEO is the one in charge of the overall operations of the Hospital, the doctors are the ones who undertake ward rounds, the nurses are the ones in charge of quality of nursing care while the staff are responsible for reporting on time to work. Standard operating procedures are not the work of the quality assurance department alone but are a collective effort with input from all stakeholders. Nevertheless, the Claimant was accused of painting this Hospital in a bad light, was asked to show cause on 11th June, was heard on 12th June 2019 at 3.00pm and then dismissed on 13th June 2019. The Respondent asserts the Claimant was given a fair hearing, there was due consideration of the matter before the decision to send her home was reached. The chronology alone shows this was a roughshod hearing with only one goal in mind – the dismissal of the Claimant from her employment. That does not accord with the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd (supra) cited by the Respondent. How could there have been consideration of the matter if a decision was made the very next day granted that no one has had sight of the impugned presentation she made? If she painted the hospital in such bad light, wouldn’t there be a record of the same? If indeed the Hospital was under scrutiny by the County why would the Respondent place blame on the Claimant for the Respondent’s failure to ensure equipment in the operating room is not rusted? Would that not



be the responsibility of procurement and the user departments? The Claimant was clearly punished for unlawful reasons and the Court returns that she is entitled to remedies for the unfair and unlawful dismissal. She claims 12 months but given she had only worked for the Respondent for a period slightly over 1 year, a compensation of about 6 or so months would suffice and as such I will grant her 5 month's salary as compensation as well as one month's salary in lieu of notice as her termination is reduced from summary dismissal to normal termination with notice. She will also have the costs of the suit.

10. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice – Kshs. 120,000/-
- b. 5 month's salary as compensation – Kshs. 600,000/-
- c. Costs of the suit.
- d. Certificate of service in terms of section 51 of the *Employment Act*.
- e. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

