



**Patel v Max Cure Hospitals Limited (Cause E047 of 2022)
[2023] KEELRC 3002 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3002 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E047 OF 2022
CN BAARI, J
NOVEMBER 23, 2023**

BETWEEN

DR JIGAR PATEL CLAIMANT

AND

MAX CURE HOSPITALS LIMITED RESPONDENT

JUDGMENT

1. The Claimant in his Memorandum of claim dated 11th November, 2022, prays for the following reliefs as against the Respondent;
 - a. A declaration that the termination of the Claimant by the Respondent was unfair for failing to comply with the rules of natural justice and the mandatory provisions of the Employment Act 2007 and the Constitution of Kenya 2010.
 - b. Judgment be entered for the Claimant and against the Respondent for:
 - i. Salaries owed.
 - ii. Return air ticket to India.
 - iii. Three months' pay in lieu of notice.
 - iv. Damages for wrongful termination.
 - v. A no objection letter.
 - vi. Certificate of service.
 - vii. Alternative residence.
 - viii. Transport costs.



- ix. Aggravated damages.
 - x. Damages for breach of constitutional rights.
 - xi. Costs and interest.
1. The Respondent filed a Memorandum of Response dated 5th December, 2022, and filed on 8th December, 2022.
 2. The suit was first heard on 3rd July, 2023. The Claimant testified in support of his case, adopted his witness statement and produced documents filed as exhibits in the matter. The Respondent's case was heard on 11th July, 2023. The Respondent presented one Jonah Kimeli to testify in support of his case.
 3. Both parties filed submissions in the matter.

The Claimant's Case

5. The Claimant's case is that he was employed by the Respondent as a Consultant Physician for a two-year fixed-term contract, via an appointment letter dated 13th September, 2021.
6. It is his case that between 30th August, 2022 and 15th September, 2022, the management of the Respondent began summoning him to multiple meetings, where he was requested to take a pay cut on the basis that the hospital was not doing well financially, but which proposal he declined.
7. It is his case that when he declined the pay cut, he was issued with a notice to show cause why disciplinary action should not be taken against him, dated 15th September, 2022. He states that he responded to the notice to show cause, and that on 16th September, 2022, he was issued with an invitation to a disciplinary hearing scheduled for 19th September, 2022.
8. The Claimant also states that he requested for particulars of the allegations against him to enable him to prepare for the hearing, which request the Respondent ignored.
9. The Claimant states that he was not informed that he had a right of representation during the hearing which proceeded on 19th September, 2022, after which, he was issued with a dismissal letter.
10. The Claimant states that he was dismissed without full compensation of his dues.
11. In his oral testimony, the Claimant told the Court that he was asked to do unnecessary tests, hospitalization, and CT-scan tests on patients to generate revenue for the Respondent Hospital, but he declined because it is against the Hippocratic oath.
12. The Claimant further testified that his role was that of treating patients who came to the hospital, and had no targets for tests or admissions for money generation nor was his duty to go out and get patients for the hospital.
13. The Claimant told the Court that he was not told who will be present at the disciplinary hearing, and that a lawyer attended the hearing on behalf of the hospital.
14. It is his case that he was not at any time put on a performance improvement plan (PIP), and that his performance was the best in the Respondent's hospital.
15. It is the Claimant's case that he asked for minutes of the disciplinary hearing, but was instead dismissed and asked to empty and get out of a company house that he occupied with his wife and 3-year-old baby,



- and hand over car keys of the company car immediately. He states that he requested for a few days to pack and leave, but his request was declined.
16. It is the Claimant's testimony that the day after his termination, he got a call from immigration officials telling him that he was an illegal immigrant, and who demanded that he fulfils the demands of the Respondent or risk deportation. The Claimant states further, that his passport was withheld by the Respondent
 17. The Claimant states that the agreement with the Respondent was that he would be given a ticket back to India, but that he was not given any and no money was paid to him after the termination.
 18. The Claimant prays that the Court awards him the reliefs in his statement of claim.

The Respondent's Case

19. The Respondent's case is that it employed Claimant. It is its further case that it paid the Claimant all his salaries for the months of October, November, December, 2021 and January and February, 2022.
20. The Respondent states that during the disciplinary hearing on 19th September, 2022, the Claimant was represented by his lawyer, and the allegations against him was in respect of his performance which was not satisfactory.
21. The particulars of the underperformance, the Respondent states were that the Claimant was not assisting the Respondent in business development thereby causing the hospital losses, failure to take advice, consult and/or directions from anyone, failure to adhere to reporting times and being a habitual latecomer, and failure to cooperate with other departments and would get upset if anyone suggested any procedure.
22. The Respondent further states that the Claimant was seeing clients privately hence he was summarily dismissed.
23. The Respondent states that the notice to show cause was as a result of underperformance by the Claimant and that he was represented by an advocate during the disciplinary hearing.
24. The Respondent states that the Claimant's prayers should not be granted because the termination was in accordance with the law, hence compensation for unfair termination is not factual and/ or actionable.
25. It is the Respondent's further case that no notice was required since dismissal was summary in nature, hence a notice is not envisaged in Law. It further states that the claim for a return air ticket to India is not factual since the association was terminated vide summary dismissal, hence the right does not accrue.
26. It is the Respondent's further case that damages for wrongful termination are not actionable since the termination was fair and in accordance with the Law. It states further that the Claimant's certificate of service is ready but the Claimant is yet to collect the same.
27. The Respondent states that the claim for aggravated damages does not apply in this instance, and that there is no breach of Constitutional rights.
28. On cross-examination, the Respondent's witness (RW1) told the Court that he was not present when the Claimant was dismissed and he only relied on the records available. He further testified that the Respondent did not provide a certificate of translation for the cheques provided.
29. RW1 further stated that it was not the Claimant's work to improve clients to the Respondent's hospital, marketing or collection of revenue.



30. RW1 further confirmed that the Claimant's net monthly salary was Kshs. 975,000/- he further confirmed that payment vouchers said to amount to Kshs. 975,000, actually amount to Kshs. 420,000/-
31. It is his further testimony that the Claimant was paid both by voucher, cheques and through direct credits to both his Indian and Kenyan accounts. RW1 told Court that the salary for November and December, 2021, was paid via cheque dated 2/6/2022 to Indian Bank, but also stated that the drawer of the cheque is not the Respondent.
32. It is RW1's testimony that the cheques are drawn in a language other than English and Swahili, and which he also does not understand and has not produced a certificate of translation.
33. RW1 further told Court that he does not know whether the Claimant was put on a performance improvement plan. He further stated that termination notice dated 19th September, 2022, took effect immediately. He again confirmed that the contract between the Respondent and the Claimant provided for a 3 months' notice period, for any party intending on tending the contract.
34. It is the Respondent's testimony that the Claimant was never asked to accept a pay cut and that the discussion on the issue never arose.
35. RW1 denied that the Respondent wrote to Immigration department to deport the Claimant. He confirmed that a letter was issued demanding that he vacates the company house the day following his termination.
36. RW1 told the Court that the Claimant's dues were never computed at termination, and have to date not been computed. He further confirmed that the certificate of service has not been send to him even though they have his working email address.

The Claimant's Submissions

37. It is submitted for the Claimant that the phrase, 'loss of confidence' can be interpreted in any way, and that in this situation, "loss of confidence" arose from the Claimant's refusal to comply with the Respondent's demands for a pay cut.
38. The Claimant's further submission is that administering unnecessary treatments or subjecting patients to unnecessary tests to make more money for the hospital, would have amounted to a breach of duty as a health care provider and goes against the Hippocratic oath and a breach of Section 12(2) of the [*Health Act*](#)
39. It is submitted for the Claimant that the meetings held were to have him accept a salary deduction. He further submits that he was not given sufficient time to respond to the show cause. He had reliance in the case of *Omenda v Gurudumu Sacco Society Limited (Cause 2588 of 2016) [2023]* to buttress this position.
40. It is submitted that the Claimant was employed as a consultant physician and at no point was he required to lobby for clients to visit the hospital for treatment, and hence the allegation that he failed to grow his practice therefore failing to generate revenue for the Respondent is outside the scope of his duties.
41. The Claimant further submits that the Respondent failed to offer evidence to support its allegations that he mistreated patients or that he provided them with private treatments at their homes, diverting the Respondent's income. It is his submission that no patient was called as a witness, and the Respondent did not offer any such report or feedback.



42. It is the Claimant's submission that were the Respondent dissatisfied with his performance, it would have put him on a performance improvement plan (PIP) which it did not. The Claimant sought to rely in the case of *National Bank of Kenya Limited v Samuel Nguru Mutonyi* [2019] eKLR to support this position.
43. It is the Claimant's further submission that the whole process of terminating his employment and his removal from the hospital and the country, was vindictive and malicious owing to the fact that the Claimant refused to bend to the whims of the Respondent.
44. The Claimant submits that the Respondent failed to inform him of his right to be accompanied by a representative contrary to Section 41(1) of the *Employment Act*. It is his further submission that he attended the disciplinary hearing only to be surprised by the presence of the Respondent's advocate, Mr. Nixon Abira, after which he was forced to contact his friend, a Ms. Nishi Pandit to offer advice on how to deal with the matter.
45. The Claimant submits that he is entitled to the damages sought and relies on the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR to support this position.

The Respondent's Submissions.

46. The Respondent submits that the Claimant was informed of the charges against him and that he failed to respond conclusively to the allegations against him. Reliance was had to the holding in *Douglas Katana Randu v Judicial Service Commission & another* [2021] eKLR to buttress this position.
47. It is submitted for the Respondent that the Claimant was fully paid his salaries despite him claiming for the same from the Respondent. The Respondent further submits that the Claimant is dishonest and the probative value of the evidence he has given should diminish automatically.
48. It is the Respondent's submission that from the minutes presented and the evidence from the Claimant, it is evident that the Claimant was present in the meeting, had an advocate to represent him, he presented his defense and the hospital made a recommendation that he be terminated from employment, and as a result, he was issued with a termination notice as per clause 13 of the employment contract between the Claimant and the Respondent. The Respondent further submits that it complied with the termination procedure under Section 41 of the *Employment Act*, 2007.
49. The Respondent submits that the employment contract between the parties provided for summary dismissal on loss of confidence, hence the Claimant cannot allege that the provisions of the employment contract are inapplicable.
50. The Respondent submits that the Claimant is not entitled to the reliefs sought, and pray that this suit be dismissed with costs to the Respondent.

Analysis and Determination

51. I have considered the pleadings, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
 - i. Whether the Claimant was unfairly terminated.
 - ii. Whether the Claimant is entitled to the remedies sought.



Whether The Claimant Was Unfairly Terminated.

52. The question of fair termination has largely been settled to depend on the employer's adherence or lack thereof to the tenets of fair procedure and the substantive justification for the termination enshrined in Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007.
53. The Claimant's assertion is that he was summoned severally by the Respondent's Directors to meetings where he was asked to agree to a salary cut, owing to low business, and that on declining the reduction of salary, he was issued a show cause letter and a day later, summoned to a disciplinary hearing.
54. The Respondent on their part contend that the Claimant's summary dismissal was on the basis of loss of confidence, whose particulars include failure to grow his practice, few in-patient admissions, attitude and behavior towards management, amongst others.
55. To start with, the Claimant admitted receipt of a show cause letter dated 15th September, 2022 and a second letter dated 16th September, 2022 inviting him to a disciplinary hearing that was scheduled to take place on 19th September, 2022. The Claimant further admitted having responded to the show cause letter and appearing before the disciplinary committee for the disciplinary hearing.
56. Section 41 of the *Employment Act*, states thus on procedural fairness: -

“41(1). 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.”
57. The question that begs answer is whether the Claimant was explained for the reasons the Respondent was considering his termination, informed of his right to representation and given adequate time to prepare his defence.
58. The Claimant's evidence is that upon receipt of the show cause letter and the invitation for the disciplinary hearing, he contacted a friend who appeared to represent him at the hearing. The show cause letter and the invitation to the hearing, confirm that he was not informed of this right to be represented as no mention of such right was made in the two letters. The Claimant got to know about representation on consulting a friend on the issue.
59. Further, the period between receipt of the show cause letter, his response, the invitation for the hearing and the actual hearing, was a mere five days. In *Angela Wokabi Muoki v. Tribe Hotel Ltd* (2016) eKLR, it was held that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him, is a mandatory requirement of the law.
60. Further, the Court in *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR) held that the *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated.
61. Again, in the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the Court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
62. It is therefore my considered opinion, that the Respondent failed to meet the irreducible statutory minimums principles of a fair hearing, and which renders the Claimant's dismissal unfair, and I so hold.



63. The second limb in determining whether a termination/dismissal is unfair, concerns the reasons for the termination/dismissal. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified.
64. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee. Courts have held that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. (See *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91.)
65. The show cause letter carried the following as the grounds upon which the Respondent was considering the termination of the Claimant: -
- ‘a. For the last 1 year, there has been hardly any growth in your practice in terms of number of patients in your clinic.
 - b. Patients diagnosed with regards to evidence-based care have been lacking and it was notified a couple of times during multiple business review meetings.
 - c. There are very few patient admissions reported from your end with respect to any international hospital standards.
 - d. As a hospital Resident Internal Medicine Physician you have only done one TMT practice and not acceptable.
 - e. Your attitude and behavior towards management has been poor, non-conductive, non-flexible and non-receptive.
 - f. You have also behaved rudely with your peers and colleagues.’
66. These grounds were summarized in the show cause to mean loss of confidence and during the hearing, the same grounds were translated to amount to poor performance.
67. The main issue by the Respondent from the evidence placed before Court, is that the Claimant was paid a higher salary than he brought in terms of revenue.
68. RW1, who is the Respondent’s Human Resource Officer, told Court that it was not the Claimant’s work to improve patient flows to the Respondent’s hospital, do marketing or collection of revenue. Further, nothing linked the Claimant to low patient levels or low business sales for that matter, and the Claimant’s testimony that the Respondent required him to send patients for unnecessary tests for purposes of raising revenue for the Respondent’s hospital was not rebutted.
69. In *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR the Court of Appeal relying on the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) had this to say on termination for poor performance: -
- “
- “a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place



an employment policy or practice on how to measure good performance as against poor performance.(Emphasis own)

It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

- c. Beyond having such an evaluation measure, and before termination on the grounds of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, and the reasons for termination shared with the employee.”

- 70. The Respondent did not lead any evidence to show that it noted poor performance by the Claimant, and the effort made to address the issue before resorting to dismissal like it did. RW1 told the Court that he did not know whether the Claimant was put on a performance improvement plan, and the Claimant denied that this ever happened.
- 71. Although the Respondent denied that the Claimant was terminated for declining a salary cut, the payment of salary in bits, is in itself indication that the Respondent’s business was not doing well, and hence, the possibility that the Claimant was requested to accept a salary cut is realistic.
- 72. The allegations by the Respondent that the Claimant saw patients privately, hence diminishing its revenues was not proved, not to mention that this did not form part of the reasons it dismissed the Claimant.
- 73. The foregoing leads me to the conclusion that the Claimant’s termination did not meet the substantive fairness test.
- 74. I find and hold that the termination fell short of the requirements of Sections 41, 43, 45 and 47 of the [Employment Act, 2007](#).
- 75. I find and hold that the Claimant’s termination is both procedurally and substantively unfair.

Whether The Claimant Is Entitled To The Reliefs Sought

- 76. The Claimant sought a declaration that his termination by the Respondent was unfair for failing to comply with the rules of natural justice and the mandatory provisions of the [Employment Act 2007](#) and [the Constitution](#) of Kenya 2010. He prays that judgment be entered in his favour for payment of Salaries owed, Return air ticket to India, Three months’ pay in lieu of notice, damages for wrongful termination, a no objection letter, a certificate of service, cost of alternative residence, transport costs, aggravated damages, damages for breach of constitutional rights, Costs of the suit and interest thereon.

Salaries Owed

- 77. The Claimant admitted receipt of his full salary for the month of October, 2021. His claim herein, relates to salaries for the months of November and December, 2021 and January to April, 2022.



78. The Respondent's position is that it paid the salaries in issue vide a cheque from the Bank of Baroda which was written in Gujarati. RW1 told the Court that he did not know the language of the cheques since he was only proficient in English, Swahili and Kalenjin languages, but that he understood the figures on the cheque.
79. It is also true that a certificate of translation was not produced to enable the Court understand how much the money subject of the cheque was, who the drawer of the cheque was and who the beneficiary was.
80. RW1 further confirmed that the cheque in issue was not drawn by the Respondent and nothing indicates that the money was remitted to the Claimant.
81. Further, a bank statement of 3rd June, 2022, does not show that the money was paid to the Claimant as his name does not appear on the statement.
82. The Claimant further told Court that upon termination, his dues were not paid and RW1 confirmed that the Claimant's dues have to date not been computed.
83. I thus return that the Claimant's claim for unpaid salaries for the months of November and December, 2021 and those for January to April, 2022, is credible and is allowed as prayed.

Return Air Ticket To India

84. The employment contract between the parties herein, provided that the Claimant would be provided an air ticket back home, except if dismissed for an act of misconduct. The Claimant's termination has been found to be unfair and, hence the Respondent's assertion that the Claimant is not entitled to the ticket back home on account of the dismissal does not hold.
85. The claim for air ticket is valid, and is awarded as prayed.

Three Months' Pay In Lieu Of Notice

86. The employment contract between the parties provided a three months' notice period. The Claimant appeared before the disciplinary panel on 19th September, 2022 and a dismissal letter issued the same day indicated that the termination was to take effect immediately.
87. The Claimant was therefore evidently not given notice of the dismissal, and nothing shows that he was paid in lieu of the notice as envisaged in the contract of service.
88. The Claimant is awarded three months' salary in lieu of termination notice.

Damages For Unfair Termination

89. The Claimant's termination has been declared unfair. This holding entitles him to compensation in accordance with Sections 49 and 50 of the *Employment Act*, 2007. (See Benjamin Langwen v National Environment Management Authority (2016) eKLR.)
90. The Claimant told the Court that he was aware that the Respondent's business was struggling, but still declined a salary cut. He further told the Court that he has since returned to his country and has been able to secure alternative employment. Further, the Claimant having been in the service of the Respondent for less than a year, leads me to the conclusion that he has not proved a case for maximum compensation.



91. In the circumstances, I deem an award of five (5) months' salary sufficient compensation for the unfair termination, and which is hereby awarded.

Aggravated Damages

92. The general rule is that aggravated damages are not payable in cases of breach of employment contract (See Margaret Omondi v Kenya Revenue Authority).

93. There are however instances that have been held to warrant the award of aggravated damages in addition to compensation for unfair termination. Lord Devlin in *Rookes v Benard* (1964) AC 1129, summarized the three instances as follows:

- “i. i.;
- ii.;
- iii. Where acts of the defendant have caused distress and intolerable anxiety.”

94. The Respondent terminated the Claimant on 19th September, 2022. Upon issuance of the dismissal letter which was to take effect immediately, the Respondent demanded that the Claimant and his young family vacate the company house they occupied immediately, and further surrender a company car he utilized on the same day. As if that was not enough, the Respondent reported the Claimant at the immigration department as being in the country illegally and sought that he be deported.

95. This turn of events, no doubt caused the Claimant distress and a hell of anxiety. The shortage of doctors in this country is not so dire, and to have resolved to hire an expatriate, the Respondent should have been ready to live by the terms of their contract.

96. In the premise, the Claimant is hereby awarded Kshs.2,500,000/- in aggravated damages.

97. Consequently, Judgment is entered for the Claimant as against the Respondent as follows:

- i. A declaration that the Claimant's termination is unfair.
- ii. Salaries owed for November and December, 2021 and January to April, 2022 at Kshs. 5,850,000/-
- iii. Three-months' salary in lieu of notice at Ksh. 2,925,000/-
- iv. Costs of return air ticket at Kshs. 141,922/-
- v. 5 months' salary as compensation for unfair termination at Kshs. 4,875,000/-
- vi. Kshs. 2,500,000/- in aggravated damages
- vii. The Respondent to issue the Claimant with a certificate of service and a letter of no objection.
- viii. The Respondent shall bear the costs of the suit.

98. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE



Appearance:

Ms. Raburu b/b for Mr. M. M. Omondi for the Claimant

Mr. Aloo present for the Respondent

ERWIN ONGOR- C/A

