



Ochieng v M.P Shah Hospital (Employment and Labour Relations Cause E1073 of 2021) [2023] KEELRC 2838 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2838 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1073 OF 2021
BOM MANANI, J
NOVEMBER 9, 2023**

**BETWEEN
EDWARD CLAIRE ODHIAMBO OCHIENG CLAIMANT
AND
M.P SHAH HOSPITAL RESPONDENT**

JUDGMENT

Background

1. This is a suit for compensation for unlawful termination of a contract of employment. The claimant avers that he was employed by the respondent in December 2012. He avers that on January 25, 2021, he was charged with the offense of issuing a false Covid 19 Certificate. As a result, he was allegedly suspended from work on January 28, 2021 with immediate effect.
2. The claimant avers that he was subjected to trial for the aforesaid offense where the respondent's officers actively participated as State witnesses. However, the trial court found that he (the claimant) had no case to answer. As a result, he was cleared of the charges.
3. It is the claimant's case that when the respondent suspended him from duty, it did not pay him a fraction of his salary. Further, the claimant contends that the decision to suspend him from work was not preceded with any form of hearing.
4. The claimant contends that the respondent eventually terminated his contract of service during the currency of the criminal case. This, the claimant contends was without following due process as envisaged in law.
5. The claimant contends that after his acquittal, the respondent did not reinstate him to his position. Further, the respondent did not pay him his terminal dues.



6. It is the claimant's case that the manner in which the respondent handled his release from employment was irregular and unlawful. In the claimant's view, the whole process violated his constitutional rights to fair labour practice and fair administrative action as protected under articles 41 and 47 of *the Constitution* of Kenya respectively.
7. The claimant prays for compensation for unfair termination. In addition, he prays for pay in lieu of his accrued leave as he was allegedly not permitted to utilize his leave days during the currency of his employment.
8. The respondent neither entered appearance nor filed a defense to the cause. This is notwithstanding evidence of service of summons to enter appearance on it (the respondent) as evidenced by the affidavit of service dated 25th July 2022 which was placed on the court file on 6th July 2023. Attached to the affidavit of service is a copy of the served summons to enter appearance which bears the respondent's stamp showing that it (the respondent) received the pleadings on 10th March 2022.
9. Having regard to the foregoing, I am satisfied that the respondent was served with the summons to enter appearance but has failed to participate in the trial. Thus, the case legitimately proceeded to trial as an undefended claim.

Analysis

10. Having regard to the pleadings and evidence on record, the following are the issues that present for determination: -
 - a. Whether the claimant was an employee of the respondent.
 - b. Whether the claimant's employment contract with the respondent was unlawfully terminated.
 - c. Whether the claimant is entitled to the reliefs that he seeks through this claim.
11. On the first issue, it was the claimant's evidence that he was employed by the respondent. There was no testimony from the respondent to controvert this assertion.
12. The claimant produced a letter of appointment that was issue to him by the respondent dated 1st December 2012. The letter shows that the respondent engaged the claimant's services as a Laboratory Technician.
13. The claimant also produced a pay slip for December 2020 that was issued to him by the respondent. The pay slip confirms that the claimant was on the respondent's payroll.
14. All this evidence verifies the fact of existence of an employment relationship between the claimant and the respondent. Having regard to this evidence, I am satisfied that the claimant was an employee of the respondent as a Laboratory Technician.
15. On the second issue, it is the claimant's case that after he was charged with the offense of issuing a false Covid Certificate, the respondent terminated his contract of service. The claimant contends that the said termination of contract was without due process. The claimant further contends that even after he was cleared of the charge against him, the respondent did not reverse the decision to terminate his contract of service.
16. I have looked at the evidence that has been presented against the law on termination of a contract of service. Sections 41, 43 and 45 of the *Employment Act* require that a contract of service be terminated only for lawfully cause. Further, it is a requirement of these provisions of law that before the employer terminates an employee's contract of service, he must follow due process by: informing the employee



of the charge against him; allowing the employee an opportunity to respond to the said charge; and hearing the employee's witnesses on the matter.

17. There is no evidence that the respondent followed this procedure before it terminated the claimant's services. The respondent may have had legitimate grounds to consider terminating the claimant's contract. However, before taking the decision, the respondent was under duty to ensure due process.
18. In the absence of evidence of the respondent having followed due process in processing the claimant's release from employment, the decision to terminate the claimant's employment becomes inevitably vitiated. It is so declared.

Determination

19. The decision to terminate the claimant's employment is declared unlawful for want of due process.
20. The claimant has claimed for payment of accrued annual leave dues for nine (9) years. Leave is a statutory entitlement for every employee who has been in continuous service of an employer for a year and above. Under section 28 of the *Employment Act*, an employee is entitled to annual leave of not less than twenty-one (21) working days for every year worked.
21. The respondent did not challenge the claimant's evidence that he was not permitted to enjoy this statutory right. As a result, I enter judgment for the claimant for accrued annual leave dues for eight (8) years running from December 2012 when he was employed to January 2021 when he was relieved of his employment.
22. According to the pay slip that was produced in evidence, the claimant's salary was Ksh. 108,770.00 per month. Thus, I award him Ksh. $108,770.00 \times 8 =$ Ksh. 870,160.00 being accrued annual leave dues for eight (8) years.
23. I also award the claimant compensation for unfair termination of his contract of service that is equivalent to his monthly salary for six (6) months that is to say, Ksh. 625,620.00. In making this award, I have considered the length of service by the claimant to the respondent as is required under section 49 of the *Employment Act*.
24. The aforesaid awards are subject to the applicable statutory deductions.
25. I award the claimant interest on the aforesaid awards at court rates from the date of this decision.
26. I award the claimant costs of the case.
27. Any other reliefs that were prayed for but which have not been expressly awarded under this section are deemed as having been declined.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the claimant

.....for the respondent

ORDER



In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

