



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 832 OF 2017

HILDA GACHERI RURIA.....CLAIMANT

VERSUS

TEXAS CANCER CENTRE.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant states her case against the Respondent in a Statement of Claim dated and filed in court on 5th May 2017. The Respondent's response is by way of a Statement of Defence dated 22nd June 2017 and filed in court on 29th June 2017.
2. At the trial, the Claimant testified on her own behalf but the Respondent did not call any witness.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent as a Nurse from 5th September 2014 until 13th March 2017, when her employment was terminated.
4. The Claimant claims that she was not assigned any duties for the week commencing from 23rd January 2017 as was the norm. After numerous enquiries, the Respondent informed the Claimant that it had been decided that she and her colleague be suspended without pay from 24th January 2017, pending investigations into allegations of running chemotherapy treatment on a patient beyond time.
5. The Claimant avers that she was not called back to work but her colleague was called back and allowed to resume her duties.
6. Thereafter, the Claimant made numerous enquiries on the status of the investigations and her employment. On 13th March 2017, she was notified that a decision to terminate her employment had been made. The Claimant was consequently issued with a termination letter.
7. The Claimant states that she was not given notice of the termination and was not allowed an opportunity to respond to the allegations levelled against her.
8. The Claimant's case is that the termination of her employment was without justifiable cause and was in violation of due procedure. She therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 72,500
- b) 12 months' salary in compensation.....870,000
- c) Unpaid salary for 50 days.....120,833
- d) Service pay for 2 years & 5 months.....87,604
- e) Certificate of Service
- f) Costs plus interest

The Respondent's Case

9. In its Statement of Defence dated 22nd June 2017 and filed in court on 29th June 2017, the Respondent denies having employed the Claimant as alleged and further states that there was no contract of service between the parties.

10. The Respondent further states that the Claimant was a freelance Nurse on casual terms only employed on demand when work was available. The Respondent adds that the Claimant was on intermittent employment and did not work for more than three (3) months. Further, she was paid at the end of each day worked.

11. The Respondent denies ever paying the Claimant a monthly salary of Kshs. 72,500.

12. The Respondent states that the Claimant, who was assigned a cancer patient to administer chemotherapy, failed to document how far the chemotherapy treatment had run and the time it was to end. The Respondent terms this as a serious medical negligence, as a result of which the patient died.

13. The Respondent further states that the Claimant was summarily dismissed for breach of the terms of engagement and violation of the law. The Respondent accuses the Claimant of habitual neglect of assigned duties, engaging in numerous malpractices and misconduct, failure to obey lawful orders, dishonesty and insolence.

Findings and Determination

14. There are three (3) issues for determination in this case:

- a) The nature and status of the Claimant's employment;
- b) Whether the Claimant has made out a case of unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of the Claimant's Employment

15. In its Statement of Defence, the Respondent claims that the Claimant was a casual employee, engaged on need basis and paid at the end of each day.

16. Section 2 of the Employment Act defines a casual employee as:

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”

17. The Respondent did not produce any document to back its assertion that the Claimant was a casual employee. What is more, neither the suspension letter dated 24th January 2017 nor the dismissal letter dated 13th March 2017 made any reference to the Claimant being a casual employee. Significantly, the dismissal letter refers to termination of the Claimant's contract.

18. Additionally, the Claimant produced a confirmation letter dated 27th October 2015 as well as bank statements showing that she received regular monthly salary from the Respondent.

19. Overall, the Respondent's claim that the Claimant was a casual employee is not supported by the evidence on record and is therefore rejected.

Unlawful Termination?

20. The dismissal letter issued to the Claimant on 13th March 2017, states as follows:

“RE: DISMISSAL LETTER

Reference is made to the above.

This official letter of dismissal has been issued due to your negligence and breach of duty of care that you owed to one of the hospital patients. The decision has been reached after carefully reviewing the details as spelt out on (sic) our letter addressed to you dated January 24, 2017.

It is for this reason that your contract with Texas Cancer Centre has been terminated on grounds of gross negligence with effect from March 13, 2017. You are hereby dismissed.

Yours sincerely,

DATE:

SIGNATURE:

Chief Executive Officer 13/3/2017

(signed)

Human Resource 13/3/2017

(signed)

21. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee. And the employer can only discharge this burden by allowing the employee an opportunity to defend themselves at the shop floor, prior to the termination. This is the essence of the procedural fairness requirements of Section 41 of the Act.

22. The dismissal letter accuses the Claimant of gross misconduct. There was however no evidence of the said charge having been placed before the Claimant for her response at the shop floor. The said charge was therefore unverified and unproved.

23. The Claimant's dismissal was consequently substantively and procedurally unfair. This is accentuated by the Respondent's decision to send the Claimant on suspension without pay, an action which was not supported by any law or internal regulation.

Remedies

24. In the result, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service alongside the Respondent's unlawful conduct in the dismissal transaction.

25. I further award the Claimant one (1) month's salary in lieu of notice.

26. By its own admission, the Respondent withheld the Claimant's salary during the suspension period. This action was without any legal basis and the withheld salary is therefore payable.

27. Regarding the monthly salary payable to the Claimant, the Respondent made a general denial on the figure of Kshs. 72,500 pleaded by the Claimant but did not provide evidence of the correct salary. I therefore invoke Section 10(7) of the Employment Act and adopt the figure pleaded by the Claimant as the applicable monthly salary for purposes of tabulating this claim.

28. The Claimant told the Court that she was a contributing member of the National Social Security Fund (NSSF) and that the Respondent remitted her dues to the statutory body. She is therefore not entitled to service pay.

29. In the end, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....Kshs. 435,000

b) 1 month's salary in lieu of notice.....72,500

c) Withheld salary for 50 days (72,500/30*50).....120,833

Total.....628,333

30. This amount will attract interest at court rates from the date of judgment until payment in full.

31. The Claimant is also entitled to a Certificate of Service plus costs of the case.

32. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022

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JUDGE

Appearance:

Mr. Kirimi for the Claimant

No appearance for the Respondent