



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 656 OF 2016**

**BETWEEN**

**SIMON MULO ODIPO.....CLAIMANT**

**VERSUS**

**NAIROBI WOMEN'S HOSPITAL....RESPONDENT**

Rika J

Court Assistant: Emmanuel Kiprono

Nyabena Nyakundi & Company Advocates for the Claimant

Musa Juma & Company Advocates for the Respondent

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 21<sup>st</sup> April 2016.
2. He avers, he was employed by the Respondent on or before 25<sup>th</sup> August 2011, as a Stores-In-Charge, on a monthly salary of Kshs. 24,000.
3. On 21<sup>st</sup> March 2016, he received a letter from the Respondent, asking him to show cause why he should not face disciplinary action.
4. It was alleged that the Claimant had failed in ensuring optimum stock levels, timely generation of GRNs and in minimization of losses due to damages and expiries. It was said that in the morning of 21<sup>st</sup> March 2016, 100 pieces of chicken were found to be stale by the Head Chef. There had been a similar incident in the past 4 days. The Claimant was given guidance by the Procurement Manager after the first incident, which he did not follow. There was delay in payment to suppliers. It was also alleged that the Store was untidy, with a foul smell emanating from there, to the discomfort of Respondent's customers.
5. The Claimant replied on 21<sup>st</sup> March 2016. He apologized for the stale chickens. He suggested that there was fault in the freezers, which required to be redressed. He was experienced enough, and had been receiving chickens from the same supplier without complaint. Chickens should have been delivered frozen or semi-frozen. When delivered with excessive water, the water mixed and collected with some blood settling on the floor, and emitting the foul smell. Maintenance team should have checked on the gas levels. The Claimant suggested also, that the chickens could have been mishandled at source by the suppliers.
6. The Respondent was not satisfied with this explanation. The Claimant was invited to attend disciplinary hearing on 23<sup>rd</sup> March 2016.
7. He was heard on 23<sup>rd</sup> March 2016. He was advised to stay at home to pave way for further investigations.
8. On 12<sup>th</sup> April 2016, he was asked to report to Human Resource Office the following day, 13<sup>th</sup> April 2016. He did so and was issued a letter of termination of even date. He was advised he could appeal within 7 days.
9. His last salary was Kshs. 40,950 monthly.

10. The Claimant urges the Court to find termination was unfair and unlawful, and grant him Judgment against the Respondent for: -

- a. Declaration that termination was unfair and unlawful.
- b. A month's salary in lieu of notices at Kshs. 40,950.
- c. Salary for 13 days worked in April 2016 at Kshs. 19,110.
- d. 4 annual leave days at Kshs. 6,300.
- e. Unremitted N.S.S.F contributions at Kshs. 4,000.
- f. 12 months' salary in compensation for unfair termination at Kshs. 491,400.
- g. Luggage and baggage allowance at Kshs. 45,000.
- h. Special damages and general damages at Kshs. 100,000.
- i. Costs.
- j. Interest.
- k. Certificate of Service.
- l. Permanent injunction restraining the Respondent from terminating the Claimant's contract.
- m. Unconditional reinstatement.

11. The Respondent filed an Amended Statement of Response, on 17<sup>th</sup> January 2017. It is agreed that the Claimant was employed by the Respondent as pleaded, and dismissed on the date pleaded. He failed to explain delay in generating GRNs, which occasioned delay in payment to suppliers. He kept the store untidy, with a foul smell emitting from the premises, leading to customer complaints. He came up with suggestions on how to redress the stale chickens, but said nothing about delay in generation of GRNs. He was heard on 23<sup>rd</sup> March 2016. The Committee deliberated and reached the conclusion that the Claimant's contract be terminated. Due process was followed. There was valid reason justifying termination. Termination was fair and lawful. The Respondent prays the Court to dismiss the Claim with costs.

12. The Claimant gave evidence, and rested his case, on 22<sup>nd</sup> January 2021. Respondent's Chief Human Resource Officer Nancy Mwabili, gave evidence for the Respondent on 16<sup>th</sup> September 2021, closing the hearing. The Claim was last mentioned in Court on 22<sup>nd</sup> October 2021, when Parties confirmed filing of their Closing Submissions.

13. The Claimant withdrew the prayers for reinstatement and permanent injunction, in his evidence.

14. He restated his employment history, and the terms and conditions of employment, as pleaded. He adopted his Witness Statement and Documents.

15. He explained that he received chickens from a supplier on a Friday. By Monday the chickens had become stale. He advised the Respondent to investigate the cause, because only the particular product went stale. He was required to respond to the letter to show cause, within 30 minutes. It was an ambush. He was not availed any investigation report. He was invited to attend disciplinary hearing the same date the notice issued- 23<sup>rd</sup> March 2016. He managed to attend and was heard. He was then asked to go home for 2 weeks. He was recalled after 2 weeks and issued letter of termination. He was not given details of mishandling of stocks. He appealed against the decision the same date. There was no response to his appeal. He received his Certificate of Service. He prays the Court to uphold the rest of the Claim.

16. Cross-examined, he told the Court that he had full access to the store. The Procurement Manager was his Supervisor. The Claimant could raise any problem concerning the store, with the Procurement Manager. GRNs stands for 'Goods Received Notes.' The Procurement Manager had questioned why the Claimant did not generate GRNs within 24 hours. The Claimant's performance was not questionable. He agreed chickens went stale. The Respondent offers essential services. The chicken was for patients and staff. It was the Claimant's responsibility to advise on equipment. There was no problem with the equipment. He did not agree that he received stale chickens. He was not negligent. He did not offer apologies for stale chickens. He was accompanied by a colleague to the disciplinary hearing. Termination letter was not related to stale chickens, but to foul smell and GRNs. The letter was not detailed.

17. Nancy Mwabili adopted her Witness Statement in her evidence. The Respondent is a hospital. The Claimant worked as its Stores-in-Charge. Several issues of recurrent nature were raised against the Claimant. 100 pieces of chickens were found to be stale. There was delay in generating GRNs, which delayed payments to suppliers. The store was not hygienic. Patients wondered if the Respondent kept dead bodies at the store. Spoiled food was a threat to already sick patients. A clean environment is a hallmark of any hospital.

18. The Claimant was issued letter to show cause. He conceded there were stale chickens. He suggested that chickens should be delivered frozen, and the fridge serviced. It was his duty to liaise with Maintenance Department, to redress such issues.

19. Considering repeated poor performance, the Respondent decided to take disciplinary action against the Claimant. He was heard and found guilty. He was suspended for 2 weeks. He was advised that determination would be made by Management. He was advised that his contract had been terminated and informed of his right of appeal. He lodged an appeal. The Respondent received the Summons from the Court, before it could sit on appeal. The Claimant was accommodated by the Respondent for continuous breach. He was taken through Performance Improvement Plan, counselling, transfers- and nothing worked. Termination was fair.

20. Cross-examined, Mwabili told the Court that she joined the Respondent in June 2013. The Claimant was employed in 2011. He had received bonuses for good performance. The letter on bonuses was a standard letter issued to recipients of bonuses. Letter to show cause issued on 21<sup>st</sup> March 2016. He was required to respond the same day. He responded. He was notified of disciplinary hearing, and required to attend on the 23<sup>rd</sup> March 2016. Notice issued in the morning. There were hours to prepare. Notice was short because the matter was urgent. The Respondent did not specifically look at the fridge. Notice was adequate, because the issues were recurrent.

21. The Respondent offered to pay Claimant's terminal benefits. Salary for days on suspension would be deducted. It was in accordance with Respondent's policy. The Respondent had valid reason to warrant dismissal of the Claimant. He would have been paid salary for 13 days, leave and notice – total Kshs. 33,200.

22. Redirected, Mwabili told the Court that the Claimant attended disciplinary hearing accompanied by a representative of his choice. He did not complain of short notice. Reasons for termination went beyond the stale chickens. It was the Chief Chef who found out that the chickens were stale, not the Claimant.

23. The issues in dispute are whether termination was fair under Sections 41, 43 and 45 of the Employment Act; and whether the Claimant merits the prayers sought.

**The Court Finds: -**

24. The facts surrounding the employment of the Claimant by the Respondent, the terms and conditions of employment, and the sequencing of the disciplinary procedure, are not disputed.

25. The letter to show cause dated 21<sup>st</sup> March 2016, required the Claimant to respond by 5.00 p.m. on the same date. It was not a reasonable period for the Claimant to study the accusations, look at his own records, and compile a detailed response. There was more than 1 accusation, some referring to documents such as GRNs. When was the Claimant to look at his documents, and respond within the period given? A reasonable man would not agree with the Respondent that the time given was sufficient, owing to the urgency of the matter.

26. 2 days later, on 23<sup>rd</sup> March 2016, the Claimant was invited to a disciplinary hearing. Hearing was scheduled for the same date, at 4.00 p.m. It is not indicated at what time the notice issued, but again, how was the Claimant to prepare for the hearing within the short period?

27. The Court does not think that the fact that the Claimant did not complain at the hearing, that notice issued was short, or that he was able to attend accompanied by a representative of his choice, obviated the need for the Respondent to avail the Claimant a reasonable facility to conduct his defence.

28. A rushed hearing cannot amount to a fair hearing. There is no urgency in a matter, that permits an Employer to sidestep the demands of industrial justice. There must reasonable time given to an Employee to respond to letter to show cause and to defend himself at the disciplinary hearing.

29. The Respondent, having heard the Claimant, suspended the Claimant for 2 weeks. It is not clear why the suspension came after the hearing, rather than before the hearing. The letter of termination indicates that the Claimant's salary for the 2 weeks on suspension, would not be paid, yet he was still under contract for the 2 weeks.

30. The Claimant lodged an Appeal, which was not dealt with by the Respondent. The Respondent explains that it was not able to deal with the Appeal, because the Claimant instigated the Claim, before the Appeal could be heard.

31. It was the responsibility of the Respondent to hear and determine the Appeal before it, and leave the Court to deal with the Claim before it. If necessary, the Respondent should have asked the Court to stay its proceedings, pending hearing and determination of the Appeal. It is not acceptable that the Appeal is deemed to have dissipated, owing to the filing of the Claim in Court. It was the duty of the Respondent, to deal with the Appeal before it.

32. For these reasons, the Court would conclude that procedure was flawed, and did not meet the standards of fairness, under Sections 41 and 45 of the Employment Act.

33. On validity of reason, the Claimant was the Stores-in-Charge. His responsibility included receiving of stocks from suppliers, and overseeing proper storage of supplies. He did not give a proper explanation surrounding the 100 stale chickens. He failed to diagnose the fault. It was the Chief Chef who raised the alarm about the stale chickens. The alarm should have originated from the store, not the kitchen.

34. The Court has taken into account that the Respondent is a hospital. Standards of health are expected to be high at all times. There was a palpable risk, that patients and staff would have been fed on contaminated chickens, if the Chief Chef had not raised the issue.

35. The Claimant only came up with suggestions on rectification of a problem he had failed to take note of, when he was required to show cause, after someone else realized there was a problem with 100 pieces of chickens.

36. The suggestions he made were within his job description to implement, without waiting to be told to do so, by his Supervisor. He could have liaised with the maintenance team to rectify any problems with the freezers. He did not take the initiative, yet he was the overall –in-charge of the store. He was negligent.

37. He proffered no explanation for delay in generation of GRNs. Delay occasioned gaps in the supply chain. The Claimant concentrated on explaining stale chickens, while not answering the equally grave accusation on GRNs.

38. He had been issued a warning letter in August 2015 for repeated poor performance. The Respondent states it had placed the Claimant on PIP. It had transferred him. It had counselled him. There was nothing left for the Respondent to do, to assist the Claimant.

39. The Court agrees that the Respondent established valid reason or reasons, to justify termination, under Section 43 and 45 of the Employment Act.

40. The Claimant does not plead his date of employment lucidly. He states that he was employed on or before 25<sup>th</sup> August 2011. How far back before 25<sup>th</sup> August 2011? It is however pleaded by the Respondent that the Claimant was employed on 28<sup>th</sup> August 2011. He left employment on 13<sup>th</sup> April 2016. He worked for approximately 5 years. He had received warning letters. He had been accommodated in multi-ways by the Respondent. He was not amenable to change for the better, but continued to perform poorly, placing the Respondent's staff and patients at risk. Patients wondered if the food store was preserving dead bodies. The Claimant played a significant role, in circumstances leading to termination of his contract.

41. He is granted the prayer for compensation for unfair termination, equivalent of 4 months' salary at Kshs. 163,800.

42. He is granted a month's salary in lieu of notice at Kshs. 40,950.

43. He was in employment until 13<sup>th</sup> April 2016, when he received the letter of termination. He merits salary for 13 days worked, at Kshs. 20,475.

44. The Respondent conceded the prayer for 4 days of annual leave, in the letter of termination. The prayer is granted at Kshs. 6,300.

45. There is no evidence to support the prayers for refund of statutory deductions, luggage and baggage allowance and special and general damages. These prayers are declined.

46. No order on the costs.

47. Interest allowed at court rates, from the date of Judgment until payment is made in full.

**IN SUM, IT IS ORDERED: -**

**a. Termination was flawed on procedure, but well-founded on justification.**

**b. The Respondent shall pay to the Claimant: equivalent of 4 months' salary in compensation for unfair termination at Kshs. 163,000; notice at Kshs. 40,950; 13 days' salary at Kshs. 20,475; and 4 days of annual leave at Kshs. 6,300 – total Kshs. 230,725.**

**c. No order on the costs.**

**d. Interest allowed at court rates, from the date of Judgment till payment is made in full.**

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2022**

**JAMES RIKA**

**JUDGE**