



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 41 OF 2020

WILSON ODUOR OCHIENG.....CLAIMANT

-VERSUS-

KENYATTA NATIONAL

HOSPITAL BOARD..... RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant by the amended statement of claim dated 15th day of June 2020 and filed on the 19th June 2020, seeks the following prayers from the Respondent;-

- a. Reinstatement of the Claimant to his previous job position with the Respondent without any loss of benefits, due promotions and or awards including scholarships for the Masters of Science- Nursing Course at the University of Nairobi.
- b. Payment of due salary arrears (inclusive of any increments, if any) including the withheld salary during the interdiction from 29/09/2016 to 6th September 2016, from the date of interdiction 29/09/2016 upto the date of reinstatement.
- c. General Damages in compensation for infringement/violation of the claimant's fundamental rights.
- d. Costs of the claim
- e. Interests at the foregoing court rates
- f. Any other remedy the Court may deem expedient and just to grant.

In the alternative,

- g. Payment of one month salary in lieu of notice
- h. Payment of withheld salaries during the period of interdiction from 29/09/2016 to 6/02/2016
- i. Salary for the remainder of the years of service from the date of termination of employment of 6/02/2017 to 16/04/2033, the claimant's retirement age.
- j. Compensation for wrongful and or unfair termination of employment
- k. Costs of the claim.
- l. Interests on the above at court rates.
- m. Any other remedy the Court may deem just to grant.

THE CLAIMANT'S CLAIM

2. The Claimant is a registered nurse who was an employee of the Respondent from 31st July 2006 as a Nursing Officer II. He was the Chairperson of National Nurses Association of Kenya (NNAK) KNH branch. In pursuit of the objectives of the NNAK of, inter alia, promoting quality health care, the Claimant issued a circular to all the staff of the Respondent dated 22/09/2016 with the intention of clarification of some misunderstanding and misconception arising from payment of extraneous allowance to staff of the Respondent including nurses, which misunderstanding and animosity were already bringing animosity between nurses and other cadres of employees.

3. By a letter dated the 29th September 2016, the Respondent interdicted the claimant from duty with immediate effect for the reason he had issued the circular dated the 22/09/2016 to staff of the Respondent without authority from the Chief Executive Officer of the Respondent. He was to lose half of his basic salary for the duration of the interdiction. He was earning a gross salary of ksh 138,966. He was dismissed from employment with immediate effect by a letter dated the 6th February 2017 which termination was wrongful and unfair.

4. The claimant says that he has suffered loss and damage by losing his only source of livelihood and support and has thereby been without employment and that his constitutional rights have been infringed and or violated. He holds the Respondent responsible

DEFENCE

5. The Respondent on its part whilst agreeing that the claimant was its employee avers that the Claimant issued the circular dated the 22nd September 2016 in total disregard and contravention of the protocol on staff grievance handling procedure and the section XIV, Part 1 clause 13; Section XV, Part 1 Clause 4 (iv) of KNH Terms and conditions of service which the claimant is well aware of.

6. The Claimant in total disregard and contravention of the staff grievance handling procedure, Communication and Terms and Conditions of Service of KNH of which the claimant is well aware of issued the circular dated the 22nd September 2016 to employees of the Respondent notwithstanding that the association which the claimant purports to lead is only an association of nurses and is not a trade union nor a representative of the employees of the Respondent.

7. The Respondent further says the claimant had engaged in other previous act of insubordination, disobedience and disregard of the Respondent's terms and conditions. The Respondent denies infringing the rights and fundamental freedoms of the Claimant and urges that the claim by the Claimant be rejected.

CLAIMANT'S CASE

8. The Claimant, Wilson Owuor Ochieng gave sworn testimony and testified that he is claiming compensation for unfair termination. The witness adopted the filled witness statement dated 27/1/2020 and the list of documents dated the January 2020 and the supplementary list of documents dated the 16th July 2020 (1-42 and 1-9) respectively marked as exhibits.

9. The claimant testified that he was employed as a nurse and rose to the position of a senior nurse. He was a member of Nurses Association of Kenya which is registered and recognized by the Respondent. He was interdicted as a result of the letter dated 21st September 2016 which they had issued to their members. The said letter was calling for peaceful co-existence and was from the association and not himself. The said interdiction did not comply with the HR policy. He was invited to the disciplinary hearing by one Mr Mbui who had signed the interdiction letter. The said Mr Mbui was not a board member as required by the HR policy.

10. He said that his disciplinary meeting was meant to be a board committee but it was his colleagues that were in the disciplinary meeting. There were previous disciplinary warnings like in the year 2012 December. There were three disciplinary warning letters accusing him of inciting the nurses to go on strike. There was a strike called by nurses' union which was a national strike. The letter was from a national union. The management after discovering he was not a national official reinstated the claimant but the letters remained in the file. The claimant did a letter discouraging the strike but was still given a warning letter.

11. The letter leading to termination was done by a Committee of National Association of Nurses but he was the only one who was dismissed. He says his dismissal was unlawful as he was to appear before the board as per the terms and conditions of service but was never given that opportunity. The charges levelled against him were different from those at the disciplinary hearing. He was not accompanied by a member of National Nurses Association of Kenya. Instead, two union officers were brought by the Respondent from Kudheihha who were not of his choice. The committee was also not representative of the board. He asked the court to give an award as prayed in the claim.

12. Upon cross-examination, he said that the Nursing Association of Kenya was recognized by the Respondent and was representing the nurses. The circular sent in 2016 was meant for nurses and had nursing association letter head. The circular prompted the disciplinary process. The said circular was addressed to staff who subscribed to the association. There is a protocol to communicate with all staff of KNH. Circulars were only to be issued by CEOs. All communications touching matters of hospital were to be done through the CEO. The claimant said that there was evidence to show that Nurses Association was a recognised outfit which is filed in court.

13. The witness said he was a member of KUDHEIHA but that it never represent his interest. He said he appeared before union Committee when he should have appeared before the board. He said that he was in Job Group K7 and Management was K7. His letter of interdiction contained reasons for the interdiction. Upon re-examination he said that his role in the Association was to hold meetings and social purposes and to promote quality nursing. At the NNAK he wrote circulars to members and communicating with the Respondent. They were targeting all staff who subscribed to the Association as per the Gala Night invitation. He said the association was recognized and that he did not call the strike but persuaded members not join the strike. The hearing was before his colleagues and was not represented by the rightful representatives.

RESPONDENT'S CASE

14. RW1 Duncan. M. Safiri testified that he is a senior HR officer at KNH. He adopted the witness statement dated the 24th February 2021 as his evidence in chief and the list of documents as well as the supplementary list of documents dated 5th October 2020, 24th February 2021 and 9th May 2020 as part of the evidence. He said he had worked for about 27 years for the Respondent. The claimant was dismissed after he failed to follow procedures and instructions of the Respondent in communicating with the staff.

15. The nursing association is a professional body and not union with CBA with the Respondent. The claimant was represented by a union official and the disciplinary meeting was well conducted. The claimant did not need to appear before the Board which deals with the discipline of directors and deputy directors and heads of departments. The management starts with job Group K5 whilst the claimant was in K7. The Claimant's discipline is handled by Management Staff Advisory Committee. The Committee deals with cases of gross misconduct of professionals and general staff.

16. The witness further said that Mr Mbui was acting Deputy Director Human Resource and he attended the Committee of Staff as a member and secretary. The items in the show cause were the same as those at the hearing. One of the claimant's previous letters were show cause and caution. The claimant continued with defiance. The Respondent followed all the procedures in terminating the Claimant and he was informed of a right of appeal. The Claimant appealed and was heard but the appeal was unsuccessful.

17. Upon-cross examination he said that processes were followed but section 2 alone can also include section 1&4 on misconduct. Upon being referred to page 7 & 15 on the staff discipline he said that the members as constituted were the correct members. The process was fair and the Claimant was heard and had the opportunity to make representations.

18. He said the letters leading to the termination were authored by the Claimant and Gerald Njaye but did not know whether the said person was also dismissed. Later, the witness said that the said person was not dismissed. There were also others who co- signed the letter. He couldn't say why the others were not terminated whilst the claimant was dismissed. The strike occurred nationally but did not take place at the Kenyatta National Hospital.

19. The dismissal was not about the strike but on the continued defiance of the Claimant. The claimant defied warnings and issued the letter without authority. He said that he did not know if the claimant collected his dues and if he collected his terminal dues and cleared with the hospital and there was no evidence of payment of his withheld salary. It was not part of the claimant's duties to write the letter and he was not advancing the interests of the nurses by so doing.

20. In re-exam he said that the process of dismissal was fair and the Claimant was given the opportunity to defend himself and was represented by the union. He was not aware if the Claimant cleared with the hospital or collected his final dues.

CLAIMANT'S SUBMISSIONS

21. The claimant submitted that the termination of the Claimant was unfair as the Claimant testified that he received no warnings and or the reasons for the impending interdiction and dismissal from employment and the Respondent failed to follow the procedures as required by section 41 of the Employment Act 2007. The Claimant relied on the case of **MARY CHEMWENO KIPTUI VERSUS KENYA PIPELINE COMPANY LIMITED 2014 E KLR** for the proposition that *the employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets*

22. The Claimant submitted further that at the hearing new and extraneous issues were discussed which had bearing on the outcome of the case as the letter of interdiction only mentioned the issue of circular whilst the minutes produced by the claimant shows that he was confronted on issues such as the letter on the Deloitte Report on the incitement through the social media and allegations of incitement to strike as alleged in the letters from the Respondent to the Claimant dated the 18th December, 2012 and letter dated the 20th December, 2012

23. The Claimant further submitted that the previous letters ought not have had any effect on the claimant's disciplinary hearing on the strengths of the provisions of Clause 11.9.3 and 11.9.8 which provides that a warning letter shall be in place for six months and the said warning would be invalid after a period of six months. The Claimant said that the issues covered in the said earlier warnings were investigated and that he was exonerated.

24. The Claimant contended that loss of trust does not establish gross misconduct and relied on the case of **SAEED HUSSEIN SAID VERSUS BANODA OIL LTD (2017) EKLR**, where the Court found that the Respondent had not demonstrated the alleged loss of trust and confidence because the same allegation was founded upon allegations which the court had found not to establish genuine or valid reasons at the time of termination and for want of disciplinary hearing in that regard.

25. The Claimant also relied on the case of **STEPHEN KABURIA RUTERE VERSUS KENYATTA NATIONAL HOSPITAL BOARD 2020 EKLR** where it is said the Court in affirming the fact that the Board of the Respondent was the only board mandated and authorised to interdict and terminate employment stated that *the letter by the Principal Secretary Health dated the 26/11/2014 addressed to the 1st Respondent's Chief Executive Officer in the said disciplinary case of Douglas Munyala Malombe stated that the 1st Respondent's Chief Executive Officer in the disciplinary case of Douglas Munyala Malombe stated that the 1st Respondent's Board must be involved in the disciplinary cases of the 1st Respondent's employees because the Board is the one which is mandated and accountable for Human Resources in terms of employment and discipline of the employees. The evidence is that the 1st Respondent's Board had the power to employ and exercise the disciplinary powers over the claimant and the Boards mandate in that regard had not been delegated to the SDAC or the 2nd Respondent or the person the 2nd Respondent signed letter for.*

26. The Claimant also submitted that his constitutional rights were violated and that his rights as enshrined in Article 47 and section 4 (3) of the Fair Administration Act were violated by failing to accord the Claimant the right to fair hearing before taking any adverse action against

him and his right to equal treatment was not followed. The Claimant submitted that the employer bears the burden of proving that the discrimination did not take place as alleged and that the discriminatory acts or omissions is not based on any of the grounds specified in this section. The claimant also submitted on the remedies that should be awarded in case the court upholds the claim.

RESPONDENT'S SUBMISSIONS

27. The Respondent submitted that the Claimant's termination was justified as he failed to obey lawful commands and continued in defiance of the terms and conditions of service as provided by the employer in spite of having express knowledge of the Respondent's communication protocol and grievance handling mechanisms,

28. The Respondent contended that the disciplinary hearing was properly convened and the due process was followed as the Claimant attended the said meeting and was accompanied by Mr Pius Cheboi as representative of KUDHEIHA and while making the statement was represented by Ms Irene Moke. The Respondent relied on the authority of **JUDICIAL SERVICES COMMISSION VERSUS GLADYS BOSS SHOLLEI AND ANOTHER 2014 EKL**R for the proposition that where an employer accuses the employee of misconduct by way of a query and allows them to respond to the same (before a decision is taken) satisfies the requirement of fair hearing or natural justice. The Respondent has also submitted on the remedies which I have heard the opportunity of going through. The Respondent urges the Court to dismiss the instant claim.

ISSUES FOR DETERMINATION

a. Whether the claimant was lawfully terminated

b. The remedies, if any, the claimant is entitled to.

29. Section 45(1) of the *Employment Act 2007* provides that '*No employer shall terminate the employment of an employee unfairly.*

(2) A termination of employment by an employer is unfair if the employer fails to prove?

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason?

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure'.

30. In **Swaleh David versus Premier Cookies Limited (2021) eKLR**, the Court stated that '*Under Section 45 of the Employment Act, termination of an employee's contract of service is unfair and therefore unlawful if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operation requirements. On the other hand, procedure is fair if the employer accords the employee a fair hearing in the presence of another employee of his choice and the representation made by the employee and his companion are considered before making the decision to terminate the contract.*'

31. Flowing from the above mandatory provision of the law, termination of an employee's contract of service does not pass the test of fairness unless the employer demonstrates that it was done on the basis of valid and fair reasons and upon following fair procedure.

32. In my view, the issues raised in the statement of claim adequately falls within the purview of the Employment Act 2007 and do not really call for the invocation of the constitutional provisions/principles.

33. The key reason cited by the Respondent for the termination of the claimant is the circular dated the 22nd /09/2016 which it is said was issued by the Claimant in disregard of the Respondent's procedures and mode of conveying information to employees, the Delloite Reports dated the 9th August 2016 and the Delloite Job evaluation Report dated the 16th August 2016. Attendant to the said circular and reports is also what the Respondent considered previous acts of defiance, insubordination, disobedience and violation of the Respondent's terms and conditions.

34. Irrespective of whether the said Nursing Association had CBA with the Respondent, the Respondent at least was aware that it was a professional association of the nurses within the hospital and this much was confirmed by RW1 who said that it was a professional association of the nurses which did not play similar role as the Union. The Respondent contention is that the Claimant presented himself as one dealing with a union but the NNAK was a professional association.

35. The key question then is whether communications emanating from the said Association and signed off by the claimant could be equated to personal acts of the claimant rather than those of the Association, granted the circular indicates it emanated from the secretariat of the Association and the Delloite Reports at the very least were co-signed by other members of the association.

36. The said circular and Reports cannot be said to emanate from the claimant personally but the Association he was representing. And the

fact that the Respondent elected not to proceed with the disciplinary action against the other employee who together with the Claimant can be said to have authored the circular and the reports not only evinces discrimination but crucially demonstrates that the Respondent did not consider the circular and the reports alone to be enough to warrant termination as alleged.

37. The Respondent most evidently relied on the circular and other past conduct of the claimant as the basis for termination. The claimant explained that he was exonerated in respect of the previous warnings and complaints which testimony was not dislodged by the Respondent who has custody of the records relating to such previous exoneration. There was accordingly no basis, as per the evidence brought to court, that demonstrated gross misconduct or at the best wrong doing on the part of the Claimant to deserve dismissal.

38. Also, the interdiction letter dated the 29/09/2016 which called upon the claimant to show cause why disciplinary action should not be taken against him there was no mention of the Delloite Reports nor the previous allegations of misconduct that the Respondent considered whilst making the decision to terminate.

39. The Claimant was a Chair of a Professional Nurses Association and he asserts he wrote a circular to try to calm relationship between the nurses and other employees. The said circular is the one that the Respondent cited as having been sent without consent and so amounted to insubordination and gross misconduct.

The law relating to the employees provides in mandatory terms that the employer must give a reason or reasons that are valid to justify termination of an employee.

The reason given in this case are not really valid and the Respondent established no perimeters to show what the Claimant's role was as the Chair of the **NATIONAL NURSES ASSOCIATION OF KENYA (NNAK)**.

40. Section 45 of the Employment Act 2007 provide that no employer will terminate the employment of an employee unfairly.

Section 45 (2) (a) provides that termination of an employee is unfair if the employee fails to prove that the reason for termination is valid.

The Claimant was dismissed on grounds of gross misconduct which are defined as acts or omissions on the part of the employees which are regarded as intolerable behaviour.

From the foregoing, I find the Respondent did not prove a case of gross misconduct by the Claimant and so ends up with a conclusion that the Claimant was unfairly terminated.

The Respondent did not pass the fairness test envisaged in the case of **WALTER ONURO VS TEACHERS SERVICE COMMISSION NO.955 OF 2011** where it was held by the court that in order for termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness.

41. Having failed to give a credible reason or reasons for terminating the Claimant's employment the procedure followed cannot be found fair because the Claimant must be very clear what he is defending himself against as provided in Section 41 of the Employment Act and Section 45 of the Employment Act.

42. In view of the foregoing the court finds the Claimant's employment was unfairly and wrongfully terminated and therefore enters judgement in the Claimant's favour.

REMEDIES

43. (i) The payment of one month salary in lieu of notice, court is not informed of the salary of the Claimant at separation. The Claimant to provide his payslip.

(ii) Payment of salary between 29th September, 2016 to 6th February, 2017 is awarded upon production of the payslip.

(iii) 3 months equivalent to his last salary entitlement upon production of the payslip.

(iv) Costs of the suit.

(v) Interest at court rates from date of award until full payment.

(vi) Reinstatement is declined due to passage of time from 2017 to date.

(vii) Claimant to work out the dues and as per his salary and present it to court on 4th May, 2022 for verification.

(viii) Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 31ST DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE