



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 316 OF 2016**

**PATRICK ABWAMBA OTUNDO**

**CLAIMANT**

**v**

**ACK MASENO MISSION HOSPITAL (PORT FLORENCE HOSPITAL)**

**RESPONDENT**

**JUDGMENT**

1. For determination are the questions:

(i) Whether the summary dismissal of Patrick Abwamba Otundo (the Claimant) was unfair?

(ii) Whether ACK Maseno Mission Hospital (the Respondent) was in breach of contract?

2. The Cause was heard on 3 December 2019, when the Claimant testified, and on 2 December 2021, the Respondent's two witnesses testified.

3. The Claimant filed his submissions on 31 December 2021, while the Respondent filed its submissions on 4 February 2022.

**Unfair termination of employment**

**Procedural fairness**

4. The Respondent suspended the Claimant through a letter dated 18 August 2016. On 29 August 2016, he was invited to appear before the Disciplinary Committee for a hearing on 2 September 2016 (the allegation was the theft of bricks).

5. Despite the invitation, the Claimant did not attend the hearing, and on 6 September 2016, he was notified of summary dismissal.

6. The Claimant admitted in his witness statement, which he adopted as part of his evidence, that he was called and informed of the suspension and reasons for the suspension on 18 August 2016.

7. On whether he was invited to attend the disciplinary hearing, the Claimant only stated that he was called by the Respondent's Secretary on 6 September 2016. Upon going to the hospital, the Human Resources Manager handed him the dismissal letter.

8. The Respondent's second witness testified that the Claimant was served with the letter inviting him to the hearing on 29 August 2016 at his home and that despite the invitation, he did not appear for the hearing.

9. Minutes of the hearing were produced in Court.

10. The Claimant admitted that on 18 August 2016, he met with the Security Manager, Human Resource Manager, among others, where the theft of bricks was discussed.

11. The Court finds that the Claimant was made aware of the allegations against him.

12. However, the Court has inconsistent narrations about whether the Claimant was invited to attend the disciplinary hearing.

13. It is more probable that the Claimant was invited to attend the hearing. Otherwise, the Disciplinary Committee would not have met and kept minutes.

14. The Court, therefore, concludes that the Claimant's right to procedural fairness was not violated.

#### **Substantive fairness**

15. The Respondent's witnesses stated that the Claimant was observed by a security guard moving bricks towards the fence with a view to removing them from the hospital premises and that he was confronted with the allegation.

16. The Court was informed that the Managers who confronted the Claimant with the allegations had left employment and therefore, they could not be called as witnesses.

17. Despite the failure to call the witnesses, the contemporary records kept and produced by the Respondent corroborate the version of events as stated by the Respondent's witness.

18. The Court is satisfied that the Respondent had valid and fair reasons to dismiss the Claimant.

19. Pay in lieu of notice and compensation do not, therefore, avail the Claimant.

#### **Breach of contract**

##### **Shares**

20. The Claimant did not lead any evidence as to the juristic personality of the Sacco and its relationship with the Respondent regarding the shares, and the Court finds this head of the claim was not proved.

##### **Contributions to Welfare Association**

21. The Claimant did not include the officials of the Welfare Association or disclose its nexus with the Respondent to enable the Court to determine the Respondent's liabilities in respect of the contributions.

##### **Overtime**

22. The Claimant did not place before the Court any evidential, contractual, or legal foundation to this head of the claim and relief is declined.

##### **Leave**

23. The Claimant sought Kshs 195,700/- on account of leave for 19 years of service.

24. The Respondent produced the Claimant's leave records for 2006, 2007, 2011, 2012, 2013, 2014 and 2015. The 2015 leave records show that the Claimant did not carry forward any leave days.

25. The Court finds no breach in respect to leave.

##### **Loss of income**

26. The Claimant did not lay a contractual, evidential, or legal basis for this head of the claim and relief is declined.

##### **Certificate of service**

27. A Certificate of Service is a statutory right, and the Respondent should issue one to the Claimant within 21-days if one was not issued.

##### **Conclusion and Orders**

28. From the foregoing, save for a Certificate of Service, which the Respondent should issue within 21-days, the Court finds no merit in the Cause.

29. It is dismissed with no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF MARCH 2022.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

**Appearances**

For Claimant M.I. Wafula & Co. Advocates

For Respondent Onsongo & Co. Advocates

Court Assistant Chrispo Aura