



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1681 OF 2016

GODFREY ALLAN TOLLO.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES GERTRUDE CHILDREN'S HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Godfrey Allan Tollo against, the Registered Trustees, Gertrude Children's Hospital. The claim is condensed in a Memorandum of Claim dated 22nd August 2016 and filed in court on 23rd August 2016.
2. The Respondent's response is by way of a Memorandum of Defence dated 16th February 2017 and filed in court on 20th February 2017.
3. The matter opened for trial on 10th May 2021 when **O.N Makau J** took the Claimant's testimony. On 29th September 2021, the parties appeared before me and it was agreed that the Respondent's case would be heard on 2nd November 2011.
4. On the scheduled date however, neither the Respondent nor its Counsel attended court. The Respondent's case was therefore deemed closed and the parties were directed to file final submissions.

The Claimant's Case

5. The Claimant states that he was employed by the Respondent sometime in July 2009, in the position of Information Communication and Technology Manager, with an entry salary of Kshs. 330,000 which was later increased to Kshs. 550,000.
6. The Claimant avers that he worked for the Respondent until 7th June 2014, when he tendered his resignation notice, to take up employment with Smart Applications International Limited.
7. On 8th June 2014, the Claimant was invited by the Respondent's Chief Executive Officer, to discuss his resignation. During the meeting, the Claimant was made aware that the Respondent had been carrying out investigations.
8. The Claimant was therefore informed that his resignation would not be accepted and that he must face charges, pursuant to the investigations.
9. The Respondent subsequently wrote to the Claimant acknowledging the resignation letter, but at the same time proceeded to issue a notice to show cause and a suspension letter dated 10th June 2014.
10. The Claimant states that he was not aware of any investigations being undertaken by the Respondent, concerning his conduct and terms the suspension letter as a witch hunt.
11. The Claimant responded to the show cause and suspension letter vide his letter dated 12th June 2014. He also raised concern about materials that he needed from the author of the investigation report, one Alice Njoroge and from the Chief Executive Officer. The Claimant states that the said materials were never availed to him.
12. The Claimant further states that on 18th June 2014, the Respondent wrote to him, levelling new accusations against him, being:

- a) During the period 2013/2014, the bulk of the goods purchased by the Claimant were not secured through proper tendering process as required by the Hospital's policies;
- b) Over the same period, the Hospital lost Kshs. 3,139,253 through purchase of goods at inflated prices;
- c) The Picture Archive System was purchased at a much higher cost than the prevailing prices as the Claimant deliberately did not disclose critical information to the Hospital management, thereby exposing the Hospital to the potential loss of USD 22,600.

13. According to the Claimant, he was given 24 hours to respond to the new accusations levelled against him, without being given an opportunity to prepare his defence. The Claimant wrote to the Respondent stating that he would respond not later than 24th June 2014.

14. The Claimant adds that on 28th June 2014, he attempted to access his former office and sought audience with the Chief Executive Officer to enable him access documents relevant for his defence. He was however denied entry into the compound, with express instructions from the office of the Chief Executive Officer, addressed to all security personnel.

15. On 30th June 2014, the Claimant was issued with a letter of summary dismissal and on 5th July 2014, he discussed with his new employer, Smart Applications International Limited on the need to finalise the issue with the Respondent, before taking up his new position.

16. The Claimant claims that he was advised by the Respondent's Human Resource Manager to meet with the Chief Executive Officer of the Respondent. The Claimant states that he met with the Chief Executive Officer, who threatened him with police action and publication of his picture in the newspapers, which would lead to destruction of his career. The Claimant further claims to have been coerced into writing an apology letter, in addition to making a commitment to pay Kshs. 1,000,000 to the Respondent.

17. The Claimant took up his appointment as Technology Director with Smart Applications International Limited on 1st August 2014 and sometime in October 2014, he processed his clearance with the Respondent, through a Mr. Kevin Ondiko.

18. The Claimant goes on to state that he requested for his clearance certificate in March 2015 but it was denied. He was informed that he had to clear again with the Respondent and a new clearance form was sent to him.

19. In November 2015, the Claimant applied for his pension and submitted a duly completed form. Upon enquiry, after the statutory 40-day period, the Claimant was informed that he was required to complete another clearance form, as there was no evidence of clearance from his personal file.

20. The Claimant states that the Respondent, through its Chief Executive Officer, wrote to the Pension Administrators, Alexander Forbes asking them not to release the Claimant's pension.

21. The Claimant avers that a meeting between Alexander Forbes and the Respondent, concerning the Claimant's clearance and his pension did not bear fruit as the pension form still remained unsigned. According to the

Claimant, it took the intervention of the Retirement Benefits Authority, for the form to be signed. The Claimant states that the Respondent gave its approval on 3rd March 2016 and he was finally paid.

22. The Claimant now claims the following against the Respondent:

- a) A declaration that the termination was unlawful and illegal;
- b) 12 months' salary for wrongful dismissal;
- c) Bonus equivalent to monthly salary;
- d) 3 months' salary on lieu of notice;
- e) 60 pending leave days;
- f) Certificate of service
- g) Costs of the claim.

The Respondent's Case

23. In its Memorandum of Defence dated 16th February 2017 and filed in court on 20th February 2017, the Respondent admits having employed the Claimant as Information Communication and Technology Manager at a consolidated monthly salary of Kshs. 300,000, effective 6th July 2009.

24. The Respondent adds that on 14th January 2011, the Claimant was appointed to the position of Head of Information Services, at a

monthly salary of Kshs. 550,000. The Claimant worked as such until his summary dismissal on 30th June 2014.

25. The Respondent states that upon clearance, the Claimant was paid all his terminal dues, inclusive of 51 days' leave pay.

26. The Respondent avers that sometime in 2013, it began to notice some serious discrepancies regarding the tendering process of ICT equipment for the Hospital and immediately commenced investigations into the matter.

27. The Respondent claims that the Claimant, as the Head of the ICT Department, was not only the custodian but also an executor of many of the documents that were relevant in the investigations, and was therefore aware of the ongoing investigations, as the primary point of reference for any information required.

28. The Respondent further claims that as the investigations escalated, the Claimant tendered his resignation on 7th June 2014, in an outright attempt to scuttle and sabotage the investigations, in which he featured in a varied series of fraudulent activities that had fleeced the Respondent of huge amounts of money, that could not be accounted for.

29. The Respondent avers that it had reasonable ground to suspect the Claimant's involvement in the fraudulent activities and therefore declined to accept his resignation, pending conclusion of the investigations, to allow accountability by all those involved.

30. The Respondent therefore proceeded to suspend the Claimant in order to pave way for conclusion of the investigations and to deter destruction or concealment of crucial evidence, necessary to facilitate the investigations.

31. The Claimant was further issued with a show cause letter dated 10th June 2014, requiring him to adduce a written explanation of the issues raised against him in the internal audit report.

32. The Claimant responded vide his Advocates' letter dated 12th June 2014, acknowledging the investigation report but denying any knowledge of the investigations or the allegations and charges levelled against him.

33. On 18th June 2014, the Respondent reverted to the Claimant, providing a subsequent report, containing further details regarding the allegations and charges facing the Claimant. The Claimant was given 5 days within which to furnish a response during which period, specifically on 20th June 2014 at 10 am, the Claimant would have access to any documents he needed for preparation of his defence.

34. The Respondent summarises the allegations in the subsequent investigation report as that:

- a) During the period 2013/2014, the bulk of the goods purchased by the Claimant were not secured through proper tendering process as required by the Hospital's policies;
- b) Over the same period, the Hospital lost Kshs. 3,139,253 through purchase of goods at inflated prices;
- c) The Picture Archive System was purchased at a much higher cost than the prevailing prices as the Claimant deliberately did not disclose critical information to the Hospital management, thereby exposing the Hospital to the potential loss of USD 22,600.

35. The Respondent states that the Claimant merely communicated that he would respond before 27th June 2014 and did not avail himself to peruse the documents on 20th June 2014.

36. The Respondent further states that the Claimant was invited to discuss his lack of response regarding the issues raised in the auditor's investigation reports and the allegations specifically made against him and any defence he may have but the Claimant failed to avail himself, alleging restriction of his entry to the Respondent's premises.

37. The Respondent goes on to state that the Claimant did not furnish his written response nor did he attend to seek audience with the Chief Executive Officer as requested, and the Respondent had no choice but to summarily dismiss him.

38. The Respondent avers that, the Claimant having failed to avail a substantive defence, the Respondent had reasonable belief that:

- a) The Claimant had altered the tender quote presented by Massatech to read Kshs. 55,000 as opposed to the original quote of Kshs. 50,000 thereby increasing the liability of the Hospital to a supplier;
- b) The Claimant had awarded the tender for the supply of Dell Desktop to Massatech despite the fact that there were two bids from Computerways Limited and Kirvan International Limited, which were lower;
- c) The Claimant had alleged to have returned two laptops to Massatech Limited because of copyright issues but had in fact requested them to resupply the same after it came to light that no issues of copyright were actually involved;
- d) The Claimant awarded San Micro Technologies Limited orders for ICT supplies prior to their registration, which was against the Hospital's procurement policy;
- e) The Claimant withheld critical information from the Hospital, while procuring the Picture Archive System thereby exposing the

Hospital to a loss of Kshs. 690,860.

39. The Respondent further avers that the Claimant gave an undertaking to make a payment of Kshs. 1,000,000 and also issued the Respondent with an apology letter, in return for the Respondent withholding pressing of criminal charges against the Claimant.

40. The Respondent alleges that the Claimant failed to formally clear until 3rd August 2015, when he made an enquiry via email and was issued with the relevant clearance form, which he finally submitted on 1st October 2015.

41. The Respondent submits that the Claimant's dismissal was lawful and fair and that the Claimant was given ample opportunity to defend himself, which opportunity he squandered in his haste to flee the scene and seek employment elsewhere.

Findings and Determination

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

- a) The impact of the Claimant's resignation notice on disciplinary proceedings against him;
- b) Whether the Claimant's dismissal was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

Disciplinary Proceedings vis a vis Resignation Notice

43. The Claimant states that the disciplinary proceedings initiated against him by the Respondent were of no consequence because he had given a resignation notice.

44. In pursuing this argument, the Claimant relied on the decision in *Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR* where it was held:

“The Employment Act does not bar, or in any way limit an Employee, from terminating his/her contract of employment before, during or after, a disciplinary hearing....The Respondent ceased to have the jurisdiction to discipline the Claimant on 27th November 2015. Although the disciplinary hearing had concluded, there was no verdict at the point the employment contract was terminated. The Respondent could not deliver a lawful verdict arising out of the disciplinary process, after termination of employment. The Claimant was no longer an Employee of the Respondent, after 27th November 2015. The Court is fortified in this finding, by the decision of the Labour Court of South Africa, in Mtati v KPMG (Pty) Ltd (2017) BLL 315 (LC).....The court held that where an Employee tenders resignation immediately, the Employer is immediately deprived of jurisdiction to continue with the disciplinary process....Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority. The court went on to distinguish the consequence of immediate resignation, and resignation by notice, on pending disciplinary process. If the Employee has given notice, and is serving notice period, the Employer retains jurisdiction to discipline the Employee until the notice takes effect.”

45. In the present case, the Claimant give a 90-day resignation notice by his letter dated 9th June 2014. The letter states in part:

“I would like to inform you that I am resigning from my position as Head of Information Services effective 8th September 2014. I am offering a 90-day notice as stipulated in my letter of employment.”

46. It is evident therefore that by the time the Claimant was issued with a summary dismissal letter on 30th June 2014, he was serving his notice period and was therefore still an employee of the Respondent and therefore subject to the Respondent's disciplinary control. That settles the question whether the Respondent had the capacity to discipline the Claimant.

The Dismissal

47. The dismissal letter issued to the Claimant on 30th June 2014 reads as follows:

“Dear Mr. Tollo

RE: SUMMARY DISMISSAL

Reference is made to the show cause letter dated 10th June 2014 and the subsequent one dated 18th June 2014 and your email and letter responses dated 10th, 12th, 19th and 26th June 2014.

The Hospital has considered your responses vis a vis the investigation reports availed to you and have made the following findings:

1. To suggest that you were not aware of the investigations in progress is being insincere because as pointed out in my letter dated June 18th, 2014 you did confess to me that the main reason behind your resignation was because you felt that the outcome of those

investigations could discredit you in the eyes of the Management and hence you might not be able to perform your duties as expected.

Moreover in your letter dated 12th June 2014 at paragraph 3 thereof you have alleged that you only became aware of the ongoing investigation on 10th June 2014 then in the succeeding paragraph you concede that in our discussions on 9th June 2014, the day you handed your resignation I suggested to you that you should not have given the notice of resignation and that I would not accept your resignation because of the ongoing investigation. The observations made by me were obviously as a result of you having given the reasons for your resignation.

2. In the Hospital letter dated June 18, 2014 you were advised that you could report to the offices on Friday 20th June 2014 at 10am when you were to be provided with a sitting space and documents you might need to help you compile your defence. Notwithstanding the seriousness of the issue at hand you simply wrote back stating that you were not available until 24th June 2014 and that your response would be received not later than 27th June 2014. In the same letter of response you did not indicate your willingness to come over to the office between 24th and 27th June 2014 to peruse any materials which could be relevant in compiling your defence. Subsequently on 26th June 2014 at 5.07pm you sent an email requesting to be provided [with] certain documents which had all along been available for inspection at the Hospital's offices as from 20th June 2014.

3. Arising from the foregoing the Hospital has come to the conclusion that you have given the issue of your defence a cursory approach because you either have no defence to the allegations made against you in the audit reports or because you have already issued a notice of intention to resign and therefore have least interest in the matter. On its part the Hospital is satisfied that sufficient opportunity has been afforded to you to provide a defence to allegations against you but you have failed to do so. The Hospital therefore makes the following conclusions;

(a) For some reasons best known to yourself you altered the tender quote presented by Massatech to read Kshs. 55,000/= as opposed to original quote of Kshs. 50,000/= thereby increasing the liability of the Hospital to a supplier.

(b) You awarded the tender for the supply of Dell desktop to Massatech despite the fact that there were two bids from Computerways Limited and Kirvan International Limited which were lower than theirs.

(c) Whereas you allege that you returned two laptops to Massatech Limited because of copyright issues you in fact requested them to resupply the same laptops after it came to light that no issues of copyright were actually involved. Indeed your disagreement stemmed out of a dispute which had the hallmark of a fraudulent intention.

(d) You awarded San Micro Technologies Limited orders for ICT supplies prior to their registration which is against the Hospital's procurement policy. The Hospital also incurred losses as a result of buying goods from the company at prices far above market prices.

(e) You withheld critical information from the Hospital while procuring Picture Archive System (PAC) thereby exposing the Hospital [to] a loss of Ksh. 690,860/=.

Because of your acts and omission enumerated above, the Hospital stands to lose Kshs. 3,830,113/= for which you are held liable.

Despite the fact that you gave three months notice of your intention to resign, the fact remains that you are still an employee of the Hospital until the last day of your notice. The above omissions and commissions having come to the attention of the Hospital during the tenure of your employment and given the magnitude of the offences they amount to, the Hospital has no alternative but to summarily dismiss you from service. You will be paid your terminal benefits upon calculation less any amount of money you could be owing the Hospital which includes loss established through audit, advances or any other liabilities you may hold with the Hospital after ensuring that you have cleared with and handed over all hospital property and equipment to the Chief Executive Officer.

Yours sincerely

(signed)

Gordon O Odundo

Chief Executive Officer."

48. Prior to the dismissal letter, the Claimant was issued with a show cause and suspension letter dated 10th June 2014. By this letter, the Respondent forwarded an investigation report dated 9th June 2014, to the Claimant. The Claimant responded on 12th June 2014 and in his response, he referred to an earlier email dated 10th June 2014, by which he had requested for certain material to enable him respond to the allegations levelled against him.

49. Subsequently, the Respondent wrote to the Claimant on 18th June 2014 forwarding three additional investigation reports dated 12th, 17th and 18th June 2014. The Claimant was asked to comment on the three reports alongside the earlier report and show cause why disciplinary action should not be taken against him. He was required to respond by 23rd June 2014. By this letter, the Claimant was informed that he could access any official documents needed for preparation of his response on 20th June 2014 at 10am.

50. According to the evidence on record, the Claimant sent an email to the Respondent's Chief Executive Officer on 19th June 2014 indicating that he was out of town until 24th June 2014 and would therefore send his response by 27th June 2014. At this stage, the Claimant made no comment on the Respondent's offer to allow him access to documents he may require to prepare his defence. Instead, the Claimant sent a subsequent email on 26th June 2014 asking for documents, which the Respondent states, had all along been available for inspection as from 20th June 2014.

51. I have examined the Claimant's conduct regarding the disciplinary process initiated by the Respondent and find that he was an unwilling participant. He failed to keep the timelines given by the Respondent, without proper explanation, and cannot now turn around and say he was not heard.

52. In its decision in *Jackson Butiya v Eastern Produce Limited (Cause No 335 of 2011)* this Court stated the following:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to court and say, ‘I refused to talk to those people and therefore I was not heard, order them to pay me.’ It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

53. In this case, the Claimant squandered the opportunity to exonerate himself from the serious allegations made against him by the Respondent. This, coupled with his willingness to forfeit part of his benefits, in favour of the Respondent, as some form of restitution casts doubt as to his innocence.

54. On the whole, I find and hold that the Claimant has failed to establish a case of wrongful dismissal. The claims for compensation and notice pay are therefore rejected.

Other Claims

55. No basis was established for the claim for bonus and no particulars were provided for the claim for leave pay. These claims therefore also fail and are disallowed.

56. In the end, apart from an order that the Claimant be issued with a Certificate of Service, his claim fails and is dismissed.

57. Each party will bear their own costs.

58. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MARCH 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Olewe for the Claimant

Mr. Ouma for the Respondent