



**REPUBLIC OF KENYA**

**RELATIONS COURT AT NAIROBI**

**PETITION NUMBER E047 OF 2020**

**IN THE MATTER OF: ARTICLES 41 AND 232 OF THE CONSTITUTION OF KENYA;**

**AND,**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015;**

**AND,**

**IN THE MATTER OF: THE EMPLOYMENT ACT 2007 AND THE LABOUR RELATIONS**

**COURT ACT.**

**BETWEEN**

**ALICE NJERI MUTURA.....PETITIONER**

**VERSUS**

**1. PRINCIPAL SECRETARY MINISTRY OF HEALTH**

**2. THE HONOURABLE THE ATTORNEY- GENERAL.....RESPONDENTS**

*Rika J*

*Court Assistant: Emmanuel Kiprono*

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*Petitioner appearing in person.*

*State Counsel Mr. Mulili for the Respondents*

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**JUDGMENT**

1. In her Amended Petition dated 17<sup>th</sup> November 2021, the Petitioner states, she was employed by the 1<sup>st</sup> Respondent as a Nurse, on 10<sup>th</sup> January 1989.
2. She was posted to various stations over time. While serving at Mathari National Teaching and Referral Hospital, she fell sick and asked for sick leave. Leave was granted by her Supervisors.
3. She states that she was subjected to night shifts. The 1<sup>st</sup> Respondent declined her request for transfer from night duties, which the Petitioner had performed continuously for 5 years. She could not spend time at night with her family. She was compelled to spend daytime alone in her house sleeping. This night separation from her family led to collapse of her marriage of over 20 years.
4. Her illness was induced by the cold she endured during her night shifts. She had cold-related illness and psychological trauma.

5. When she returned from sick leave on 3<sup>rd</sup> January 2017, she found out she had not been assigned any duty. She enquired about this omission from the Nursing Services Manager. She was referred to the Medical Superintendent, who advised the Petitioner that there were no duties assigned to her, for the particular day.
6. The Superintendent also declined to extend the Petitioner's sick leave. She continued reporting for work, but was assigned none. She wrote to the Superintendent on 18<sup>th</sup> May 2017 and 25<sup>th</sup> May 2017, enquiring why no work was assigned to her.
7. In April 2017, her salary was stopped without reason.
8. On 30<sup>th</sup> May 2017, she received a letter dated 6<sup>th</sup> May 2017 from the 1<sup>st</sup> Respondent alleging that she had not reported for work, since 3<sup>rd</sup> January 2017. She was asked to show cause why she should not be dismissed. She was given 21 days only, to do this. Delay in delivering the letter to show cause, was aimed at depriving the Petitioner of administrative justice.
9. She responded on 6<sup>th</sup> June 2017, informing the 1<sup>st</sup> Respondent that the letter to show cause was received by her, on 25<sup>th</sup> May 2017, when the 21 days given for her to respond, had already expired. She explained that she did not desert, but was removed from the register.
10. On 5<sup>th</sup> December 2017, she received a letter from the 1<sup>st</sup> Respondent, conveying the decision to dismiss her, on account of desertion. On 15<sup>th</sup> March 2018, she wrote asking for review of the decision, but received no response from the 1<sup>st</sup> Respondent.
11. She prays for Judgment against the Respondents, as follows: -
  - a. Declaration that refusal by the 1<sup>st</sup> Respondent to transfer the Petitioner from night duties violated her right to fair labour practices, freedom from discrimination and violated her rights as a Public Servant, under Articles 27, 41 and 232 of the Constitution.
  - b. Declaration that refusal by the 1<sup>st</sup> Respondent to allow the Petitioner sick leave, similarly violated her constitutional rights above.
  - c. Declaration that dismissal of the Petitioner without according her a hearing, and delayed response to her appeal, violated her rights under Article 47 of the Constitution.
  - d. Declaration that the letter of dismissal was unconstitutional.
  - e. Dismissal be reduced to normal retirement.
  - f. The 1<sup>st</sup> Respondent to pay the Petitioner back salaries from the date of termination to the date of retirement [30<sup>th</sup> June 2021 when the Petitioner attained the mandatory age of retirement at 60 years].
  - g. The 1<sup>st</sup> Respondent to pay the Petitioner her pension.
  - h. Compensation for violation of constitutional rights.
  - i. Costs.
  - j. Interest.
  - k. Any other suitable relief.
12. Stephene Khaemba, Deputy Director, Human Resource Management and Development, Ministry of Health, responded to the Petition through his Affidavit, sworn on 13<sup>th</sup> December 2021.
13. It is not disputed that the Petitioner was employed by the 1<sup>st</sup> Respondent, as pleaded in her Petition.
14. Sometime in 2017, the Medical Superintendent Mathari National Teaching and Referral Hospital reported that the Petitioner deserted duty, with effect from 3<sup>rd</sup> January 2017.
15. The 1<sup>st</sup> Respondent issued the Petitioner a letter dated 5<sup>th</sup> May 2017, to show cause why she should not be disciplined, for habitual absenteeism. She was required to respond within 21 days. She declined to respond. She did not serve the 1<sup>st</sup> Respondent with a response at all.
16. The Ministerial Human Resource Management Advisory Committee held a meeting on 23<sup>rd</sup> August 2017. It was observed that the Petitioner had not responded to the letter to show cause. She had prior charge of desertion. It was recommended that the Petitioner is dismissed for habitual absenteeism.
17. She was issued a letter of dismissal dated 5<sup>th</sup> December 2017. She was advised of her right of appeal. She was to appeal within 6 weeks from the date of dismissal. She did not do so. She was advised to refund salaries paid during her period of desertion, amounting to Kshs.

290,322. She has not refunded the amount to-date.

18. Her contract was fairly and lawfully terminated. She is not entitled to the remedies claimed.

19. It was agreed that the Petition is determined on the strength of the Parties' Affidavits and Submissions. The Parties confirmed filing and exchange of Submissions at the last mention on 1<sup>st</sup> February 2022. Judgment was reserved for delivery 10<sup>th</sup> June 2022, but is ready on the date indicated below.

20. The Submissions filed by the Parties replicated what is deponed in their respective Affidavits.

21. The issues are whether the Petitioner's statutory and constitutional rights were violated by the 1<sup>st</sup> Respondent as pleaded; whether termination of her contract was fairly done; and whether she merits the remedies claimed.

**The Court Finds: -**

22. The Petitioner filed additional documents on 13<sup>th</sup> January 2022. These documents were irregularly filed, the Court having given directions on the filing of Submissions, on 9<sup>th</sup> December 2021. The documents filed by the Petitioner on 13<sup>th</sup> January 2022 are expunged from the record.

23. It is not contested that she was employed as a Nurse by the Ministry of Health, on 10<sup>th</sup> January 1989.

24. She was posted to various hospitals in the country. She lastly was stationed at Mathari National Teaching and Referral Hospital.

25. She states that she worked on night shift continuously, which resulted in her suffering from cold-related illnesses. Her family life was disrupted. She was denied the right to spend quality time with her family. She was in the house sleeping alone during the day. She states that this state of affairs led to the collapse of her marriage of over 20 years.

26. She has exhibited various sick sheets, covering the years 2016 and 2017.

27. The Petitioner states that she asked to be changed from night duties on account of her failing health, a request that was declined by the 1<sup>st</sup> Respondent.

28. On 5<sup>th</sup> May 2017, the 1<sup>st</sup> Respondent wrote to the Petitioner, alleging that she had not reported for duty since 3<sup>rd</sup> January 2017. She was required to show cause why she should not be dismissed on account of desertion. She was to respond within 21 days.

29. She complains that the letter was received by her, on 25<sup>th</sup> May 2017, while the 21 days given to her to respond, had already lapsed. The letter was sent to her through registered mail, on the same date it was received, 25<sup>th</sup> May 2017.

30. She responded on 6<sup>th</sup> June 2017, explaining that she had not deserted. She had reported for work, but was not assigned any. She was advised that she had to be cleared by Human Resource Office, before she could be assigned work.

31. The 1<sup>st</sup> Respondent did not respond to her explanation. On 5<sup>th</sup> December 2017, the 1<sup>st</sup> Respondent issued the Petitioner a letter of dismissal. She was advised that the Ministerial Human Resource Management Advisory Committee, had held a meeting on 23<sup>rd</sup> August 2017 and determined that the Petitioner is dismissed from service on account of desertion.

32. She was further advised that she had lost all terminal benefits she may have been entitled to, had she left employment regularly. The 1<sup>st</sup> Respondent also demanded a sum of Kshs. 290,322 being salary and other allowances the Petitioner continued to receive, during the period she was said to have deserted.

33. The procedure does not appear to the Court, to have conformed to the minimum statutory standards of fairness, under the Employment Act and the Fair Administrative Action Act.

34. The letter to show cause issued on the same date the 21 day-deadline calling for a response from the Petitioner, expired. There was no adequate time given to the Petitioner for a response.

35. Even after she responded, there was no response from the 1<sup>st</sup> Respondent, advising her that her response was unsatisfactory. She was not told if her position had been investigated, and found wanting. The 1<sup>st</sup> Respondent does not seem to have been interested in her sick sheets, which have been exhibited in the Petition.

36. There is no evidence that the Petitioner was called to the Ministerial Human Resource Management Advisory Committee meeting, which sealed her fate. She was not heard by this Committee. There are no minutes availed to the Court, showing deliberations of this Committee. The 1<sup>st</sup> Respondent simply relied on the advice of the Committee, without enquiring how this advice was arrived at.

37. The Affidavit sworn by the Ministry's Human Resource Director, Stephen Khaemba, in response to the Petition, does allude to any hearing granted to the Petitioner. It is also alleged in the Affidavit that the Committee observed that the Petitioner did not respond to the

letter to show cause. The record indicates that she responded on 6<sup>th</sup> June 2017. The letter has the stamp of the hospital, indicating received and forwarded.

38. After dismissal, the Petitioner was advised of her right of appeal. She exercised this right through her letter dated 15<sup>th</sup> March 2018. The 1<sup>st</sup> Respondent again states that the Petitioner did not appeal, but there is a letter of appeal on record, dated 15<sup>th</sup> March 2018, which the 1<sup>st</sup> Respondent did not reply to.

39. In all the Court is satisfied that the 1<sup>st</sup> Respondent did not accord the Petitioner a fair procedure, in accordance with Section 41 and 45 of the Employment Act; in accordance with the Fair Administrative Action Act; and in accordance with the demands of Articles 41, 47 and 232 of the Constitution of Kenya.

40. Valid reason justifying termination was not shown. It was alleged that the Petitioner deserted. She was ailing and availed sick sheets for specific dates. She explained that she reported for duty, but was assigned none. The 1<sup>st</sup> Respondent continued to pay her salary until April 2017. It is not likely that the Government of Kenya would continue to pay salary to a deserter.

41. The Court finds the position of the Petitioner more persuasive. She was ailing and given to sick leave. She at the same time had been agitating for change in shift. The 1<sup>st</sup> Respondent probably became exasperated and felt that the Petitioner was a problematic nurse, a burden to the Ministry. She was not given a proper hearing, and was prejudged.

42. Termination was not fair, both on procedure and substance.

43. The Respondents do not counterclaim the sum of Kshs. 290,322 from the Petitioner. The Court has in any event found that the charge of desertion was not established, and there is no foundation to seek this refund.

44. The Petitioner was to retire on 30<sup>th</sup> June 2021. She states that she ought to be paid anticipatory salaries for the period between termination and the expected date of retirement [ 2017 -2021].

45. She did not work for the public during this period. She complains about her conditions of service, but these are not matters which are directly in dispute. As a Nurse she knew the conditions of service, and was paid health risk, extraneous and nursing service allowances, which in the view of the Court compensated the matters which she complained incessantly about. She received salary for the period she was not assigned any duty. The Court has taken into account that she left employment 3 years before her mandatory date of retirement, in assessing compensation due to her. She had worked for a considerable number of years – 28. She was alleged, but not shown, to have a poor disciplinary record. Her last gross monthly salary, captured in the pay slip of February 2017, was Kshs. 96,774.

**46. She is granted compensation for unfair termination, violation of her rights under Articles 41, 47 and 232 of the Constitution, equivalent of her 12 months' gross salary at Kshs. 1,161,288.**

**47. It is declared that termination of her contract violated Sections 41, 43, 45 of the Employment Act; the Fair Administrative Action Act; and Article 41, 47 and 232 of the Constitution of Kenya.**

48. The Employment Act, 2007 provides the minimum standards to all contracts of employment. Section 18 [4] states that, “ **where an Employee is summarily dismissed for lawful cause, the Employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of dismissal.**”

49. The advice to the Petitioner by the 1<sup>st</sup> Respondent, contained in the letter of dismissal, to the effect that the Petitioner had lost all rights to terminal benefits that would have been due to her on regular termination, was the wrong advice. It is not supported by the law. An Employee who had worked for 28 years could not leave employment empty handed, whatever her transgression. The law does not allow her to leave empty-handed.

**50. The Respondents shall pay / facilitate payment to the Petitioner her pension and any other benefits she would have been entitled to, upon mandatory retirement.**

51. **No order on the costs.**

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

**a. It is declared that termination of the Petitioner's contract by the 1<sup>st</sup> Respondent, was in violation of her rights under Sections 41, 43 and 45 of the Employment Act; the Fair Administrative Action Act; and Articles 41, 47 and 232 of the Constitution of Kenya.**

**b. The Respondents shall pay to the Petitioner equivalent of 12 months' gross salary for these violations, at Kshs. 1,161,288.**

**c. The Respondents shall pay / facilitate payment to the Claimant her pension and any other benefits she would have been entitled to, upon mandatory retirement.**

**d. No order of the costs.**

Dated, signed and released to the Parties electronically, at Chaka, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 28<sup>th</sup> day of April 2022.

**JAMES RIKA**

**JUDGE**