



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. E001 OF 2020

DR. BENJAMIN CHARLES AKENGA.....CLAIMANT

VERSUS

HEMA HOSPITAL LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant is a medical doctor. From August 2016, he was employed by the respondent as a doctor for a monthly salary of Kshs 250,000 which was paid through his bank account. However, the employment contract was never reduced into writing. He had his practicing certificates from 2016 to 2020 but from November 2019 to July 2020 his salary was not paid. During the said period, he was recovering from an ailment and in his view, the respondent's failure to pay him salary was discriminatory and unlawful.

2. On 20th April, 2020, he reported a dispute to the Labour Officer Kisii County and a meeting was held on 11th June, 2020 for conciliation. However, on 19th July, 2020, the respondent terminated his services. He avers that, the termination was unfair and unlawful because there was no valid reasons to justify the same. Further he was not accorded a fair hearing as required under **Section 41 of the employment Act**.

3. As a result of the foregoing matters, the claimant brought this suit on 27th October, 2020 seeking the following reliefs: -

- a) A Declaration that the respondent's dismissal of the claimant from employment was illegal, unlawful, irregular, wrongful and unfair.***
- b) An order directing the respondent to pay the claimant his terminal dues and benefits of Kshs 5,635,000/-.***
- c) General damages.***
- d) Punitive damages.***
- e) An order directing the Respondent to issue the claimant with a certificate of service.***
- f) Costs of and incidental to this suit.***
- g) Interest at court rates.***
- h) Any other relief as the court may deem just and fit.***

4. The respondent filed defence on 9th October, 2020 denying all the averments set out by the claimants including the alleged termination. However, on a without prejudice, the respondent avers that the claimant absconded from duty for 9 months and failed to make any official communications about his alleged illness. Therefore, it prayed for the suit to be dismissed with costs.

5. The suit went to full hearing where both parties tendered evidence and thereafter filed written submissions

EVIDENCE

6. The claimant testified as CW1, and basically adopted his written statement dated 14th October, 2020 as his evidence in chief and supported it with 11 documents as exhibit.

7. In brief, the claimant case is that he was employed by the respondent as a Medical doctor for a monthly salary of Kshs 250,000 but the same was abruptly stopped from November 2019. Therefore, he prayed for the reliefs sought because he considers the termination of his employment to be unfair and unlawful.

8. On cross-examination, he stated that he fell sick on 1st September, 2019 and he was discharged on 4th September, 2019 when he sought permission from the respondent's directors for one month. The Directors examined him from the boardroom and they approved the leave verbally.

9. He contended that the leave lapsed on 4th October, 2019 and he reported back to work on 5th October, 2019 but the Directors refused to let him resume his duties that day and told him to wait until he was called back. He did not register biometrically because the owner of the hospital had excused him from doing so since 1992 when he was a director in the hospital. Therefore, he admitted that he had no documentary evidence to prove that he reported to work on 5th October, 2019.

10. He further testified that on 7th November, 2019 he went back to the office but again he was not received back. He went back again on 2nd December, 2017, 3rd October, 2020, 3rd February, 2020 and 4th March, 2020 and also made many calls to the Director **Dr. Manduku** and his mother **Mrs Manduku** but they persistently kept him from work.

11. He contended that his employment was on permanent basis and he was attending to work daily. He confirmed that after termination in July 2020 he was paid service pay for 2017, 2018, and 2019 totalling to Kshs 365,000 but however he was not given a certificate of service to enable him look for another job.

12. On re-examination he reiterated that when he reported to work on 5th October, 2019 he was told to go away until further notice. Thereafter he reported to work once every month for six months but he was not assigned any work. He stated that he dealt with the directors verbally except when he wrote SMS. He gave the print out of the correspondences to the labour officer during the conciliation.

13. He confirmed that apart from the Kshs 365,000 indicated the letter dated 19th July, 2020 nothing else was paid to him by the respondent.

14. **Dr. Robert Nyakenyanya Maduku**, respondents Managing Director testified as RW1. He confirmed that the claimant was employed by the respondent as, Lead Surgeon in the Surgery Department workers for 3 years from 2016 to mid 2019. and worked for 3 years from 2016 to mid, 2019.

15. He contended that in May 2019, the claimant began to fall sick frequently after he was hit by a cow while at home and suffered injury. He was also kept away from work by a personal court case which he had. The injury was also affecting his work which required a lot of standing and at one time, he sought for unpaid leave.

16. RW1 further stated that the application for leave was made informally after he was asked to apply for the same in September 2019. The claimant never resumed work thereafter and as such the claimant's last day at work was in August 2019. He contended that due to claimant's ailment, they employed another surgeon.

17. RW1 confirmed that the claimant was paid his service pay totalling to Kshs 365,000.

18. On cross-examination, RW1 contended that the claimant left employment voluntarily. He further stated that they called him repeatedly to formalize his leave. He admitted that when the claimant was being treated at the hospital he was still an employee there. RW1 denied being aware of the proceedings initiated by the claimant at the labour office.

SUBMISSIONS

19. The claimant submitted that he was unlawfully and wrongfully dismissed from employment by the respondents. He reiterated that after recovery from an ailment, he reported back to work but the employer refused to let him in and declined to pay him salary forcing him to report a dispute at the labour office.

20. On 19th July, 2020, he was surprised when the employer wrote to the labour office stating that his service had been terminated. The letter also set out the service pay due to him. He further submitted that the termination was without valid reason and procedurally unfair because it was not done in accordance with justice and equity as required by section 41 and 45 of the employment Act. For emphasis he relied on **Ken freight E.A Limited v Benson K Nguti [2016] eKLR**.

21. As a result he submitted that he is entitled to the reliefs sought in the suit including salary in lieu of notice compensation and salary for November 2019 to July 2020.

22. On the other hand, the respondent submitted that the claimant misconducted himself grossly by absenting himself from work for 9 months without leave, which justified summary dismissal under **Section 44 (3) and (4) (a) of the Employment Act**. For emphasis it relied on **Banking, Insurance and finance Union Kenya v Barclays bank of Kenya Ltd Cause 1660 of 2013** and **Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd [2020] eKLR** to urge that the claimant had deserted his employment.

23. The respondent further submitted that the claimant absconded work for 9 months without leave and carried all his belongings. He also failed to communicate to the employer even after the stoppage of salary but reappeared after he was served with a termination letter. Therefore, the respondent blamed the claimant for the separation and prayed for the suit to be dismissed with costs.

ISSUES FOR DETERMINATION

24. Having considered the evidence and the submissions by the parties, it is clear that the claimant only reappeared after he was served with a termination letter. He was employed by the respondent as a doctor from 2016 earning a monthly salary of Kshs.250,000. There is also no dispute that he worked up to September 2019 when he was given one month's unpaid leave due to ill health. Thereafter he never resumed his duties in the hospital. The issues for determination are: -

a) **Whether the claimant deserted his employment or he was unfairly dismissed by respondent**

b) **Whether the reliefs sought are merited.**

DESERTION OF UNFAIR TERMINATION

25. The claimant testified that after the lapse of his unpaid leave, he reported back to work but the employer told him to wait until he was called back. He maintains that he kept calling and reporting to the office once every month and making telephone calls but he was not allowed back to work. When he could not wait any longer, he reported the matter to the labour office Kisii for conciliation.

26. The respondent denies every averment by the claimant in its defence. Further RWI maintained that the claimant deserted employment after proceeding to his unpaid leave. He denied knowledge of any proceedings lodged by the claimant at the labour office.

27. Having carefully considered the evidence on record, I am persuaded that the claimant has proved on a balance of probability that he did not voluntarily desert his employment. I do not doubt his explanation that he reported back to work after the lapse of his unpaid leave but the respondent barred him from resuming duty. He was not also paid and after holding peace for 6 months, he reported a dispute to the labour office for conciliation but it was not resolved.

28. On the other hand, I find RW1 to be untruthful and dishonest in his evidence because he denies the obvious. He does not come out clear whether or not he gave the claimant one month unpaid leave. At one point he alleges that the claimant absconded work and remained mute but changes to say that he sought leave informally. He also denies knowledge of the conciliation proceedings at the labour office, yet there is a letter dated 3rd August, 2020 on record by the labour officer in which he mentions that the respondent made submissions in the said proceedings.

29. Consequently, I find and hold that the claimant has proved on a balance of probability that he was constructively dismissed from employment by the respondent. The said dismissal was for no valid reason and without following a fair procedure. Even if the claimant absconded duty, the court is of the view that the respondent did not reach out to the claimant before dismissing him.

30. It is now trite law that before terminating the employment contract of an employee the employer must have a valid and fair reason and must follow a fair procedure. I gather support from the case of **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, the Court of Appeal held that:-

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

RELIEFS

31. In view of the findings above, I make declaration that the dismissal of the claimant from employment was unlawful and unfair within the meaning of **Section 45 of the employment Act**.

32. Flowing from the above declaration the claimant is entitled to one month salary in lieu of notice plus 2 compensation for unfair termination considering that he served for only 3 years and that he did not cause his dismissal through misconduct.

33. I further award him salary for November and December 2019 only. It is generally common sense that an employee is obliged to mitigate loss by seeking for alternative employment when the employer acts in breach like in this case. In this case, the claimant should have also resigned and sued for constructive dismissal after the employer stopped his salary and prevented him from resuming duty.

34. The claimant is also entitled to certificate of service of service under **Section 51 of the employment Act**.

35. In conclusion, I enter judgment for the claimant in the following terms: -

a) Notice Kshs. 250,000

b) Compensation Kshs. 500,000

c) Salary Arrears Kshs. 500,000

Total **Kshs. 1,250,000**

36. The claimant will also have certificate of service, costs and interest at court rate from the date hereof. The award of damages is however subject to statutory declarations.

Dated, signed and delivered at Nakuru this 28th day of April, 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE