



**KJDL v Daystar University (Cause 1850 of 2017)  
[2022] KEELRC 4123 (KLR) (25 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4123 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1850 OF 2017**

**M MBARŪ, J  
APRIL 25, 2022**

**BETWEEN**

**KJDL ..... CLAIMANT**

**AND**

**DAYSTAR UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a male adult and the respondent is a chartered institution offering tertiary education within the country.
2. On 1<sup>st</sup> October, 2012 the respondent employed the claimant as a senior accountant on a salary of Kh.141,130 per month and which was increased lastly earning Ksh.193,186.
3. The claimant worked for the respondent until 24<sup>th</sup> May, 2017 when he was issued with letter tormenting his employment and backdated to March, 2017 at his level of employment, he was entitled to notice pay of 3 months which was not the case.
4. In the month of April, 2017 the respondent demoted the claimant but purported to terminate employment in March, 2017.
5. The respondent failed to pay the due salary until May, 2017 when employment terminated over alleged misconduct which commenced by way of a suspension on 18<sup>th</sup> January, 2017 and without good cause, the respondent accused the claimant of illegally inserting a dependent in the medical cover which allegation is not true. During the suspension, the claimant was on half pay for 5 months contrary to the rules of natural justice. He was not allowed a hearing, he was unfairly demoted and eventually employment was terminated without justification which was unfair and contrary to fair labour practices.



6. The respondent orchestrated the entire matter to paint the claimant in bad light and then inserted his estranged wife on the list of beneficiaries in the medical cover despite the claimant omitting her name from the list of beneficiaries.
7. The respondent withdrew the claimant's sponsorship for the Staff Training and Development Training which he was undertaking on the respondent's undertaking that it would offer him full sponsorship until completion of his studies. The withdrawal of sponsorship was effected before the disciplinary letter was served upon the claimant a manifestation of malice. The respondent promised to pay to the claimant his severance benefits but then refused leading to this suit.
8. The claimant is claiming the following dues;
  - a) 3 months' notice pay Ksh.579,5558;
  - b) 15 days outstanding leave Ksh.93,477;
  - c) Unpaid half salary for 5 months January to May, 2017 Kh.315,140;
  - d) Compensation for los of earning Ksh2,354,232;
  - e) A certificate of service; and
  - f) Costs.
9. The claimant testified that upon employment by the respondent he worked diligently as a senior accountant but on 9<sup>th</sup> November, 2016 he received a letter from the respondent over alleged illegal insertion of a dependant in the university medical cover. This was after he had written a letter dated 2<sup>nd</sup> October, 2016 informing the respondent on the changes to the beneficiaries on his medical cover due to the fact that he had separated with his wife. He inserted Ms MM who is his sister to the medical cover.
10. This was followed by a series of investigations with the respondent intent to discredit Ms MM as his sister. The respondent wrote to the Director of Civil Registration on the issue. The claimant submitted the Birth Certificate of the person in issue but the respondent ignored the evidence. This was contrary to the respondent's human resource policy which allows for medical cover for staff together with their nuclear family members. The respondent had no justification to deny he claimant's sister right to be enjoined in the medical cover after he had submitted the necessary Birth Certificate.
11. The claimant also testified that he was subjected to a disciplinary process unfairly leading to a demotion and eventually his employment was terminated wrongfully without due process or payment of his terminal dues.
12. The claimant also testified that while in the employment of the respondent he was given a full scholarship for study within the University and was in his final year but this was discontinued even before the disciplinary process started. This was unfair and without justification. The respondent had given the sponsorship with an undertaking which was binding and should not have changed without giving the claimant a hearing. Such was unfair.
13. The claimant also testified that he explained the circumstances leading to his need to add his sister to medical cover but the respondent insisted that she did not qualify. He had separated with his wife and only his son qualified. MM is his sister and did not make a false declaration when adding her to the medical cover and submitted to the respondent. Such action is not forbidden under the human resource policy because he had separated with his wife and his sister became his dependant. In the medical cover from, there was only space for a spouse and he indicated to be MM. This was not correct but it was a replacement of his wife with who they were going through a divorce and he wrote seeking



to remove his wife from the medical cover. He did a letter with an explanation and the respondent had no justification to use the issue to terminate his employment.

14. The claimant also testified that at the end of his employment he did not owe the respondent any money save he had a loan with the Sacco which was not part of his employment. He had a loan balance of ksh.843,000. He could not repay due to termination of employment.

### **Response**

15. In response the respondent has denied all the allegations made by the claimant and that the claimant did not undertake his duties with diligence or loyalty as alleged and the decision to terminate his employment was lawful and based on good cause. He was taken through the due process.
16. The response is also that the claimant wilfully inserted his estranged wife to the list of beneficiaries in the medical cover which was contrary to the human resource policy and the claims made should be dismissed with costs.
17. The respondent filed a detailed list of work records.
18. Pius Muia the chief human resource manager testified in support of the response that the claimant was employed as the senior accountant. In July, 2016 the respondent changed medical insurance service provider from First Insurance to Saham Assurance and the change required all employees to complete new medical declaration forms and indicate their legal dependants. All forms were received by the human resource department and submitted to the insurance company
19. During the reconciliation process of the medical data it was discovered that the claimant had indicated his spouse to be MM while the records held by the respondent his wife was IM. When the claimant was asked to address the issue, he agreed that he had personally completed the form and inserted the name of MM to replace his wife from whom he had separated.
20. On 2<sup>nd</sup> March, 2017 the respondent convened a disciplinary committee to listen to the claimant and made a finding that the accusations against the claimant were proved when he illegally inserted a dependent on the medical application form, signed and submitted to the respondent for processing. The change of a dependant in the medical cover was without disclosure of the particular dependant and he was informed this was not possible and he had breached the policy and this was a major offence.
21. The respondent disciplinary committee recommended to management that the claimant be demoted from 19<sup>th</sup> January, 2017 and that he be served with a final warning. The claimant was to remain under watch for a year and mentorship. The respondent also recommended further investigation with regard to the added person in the medical cover and whether she was indeed the claimant's sister as alleged. The claimant failed to submit any identification documents and this led to termination of employment and the claims made should be dismissed with costs.
22. At the close of the hearing both parties filed their written submissions which have been put into account and the issues which emerge for determination can be summarised as follows;

Whether there was unfair termination of employment;

Whether the reliefs sought should issue; and

Who should pay costs.



23. In a letter dated 24<sup>th</sup> May, 2017 the respondent terminated the claimant's employment on the grounds that;

... please refer to this office letters dated 18<sup>th</sup> January 2017 and 14<sup>th</sup> April 2017 as well as your letter dated 2<sup>nd</sup> May 2017 on your disciplinary case. The University considered all the aspects of the disciplinary case and gave you an offer which you have subsequently declined..

24. In light of the above development and considering the outcome of the disciplinary proceedings and subsequent decision of the University Management Board be informed that your services are hereby terminated with effect from 29<sup>th</sup> March, 2017. ...

25. In the letter dated 18<sup>th</sup> January, 2017 the respondent suspended the claimant from duty for illegal insertion of dependant in the university medical cover. The respondent noted that the claimant had responded to the matter but failed to exonerate himself from misconduct since the

... lady by the name MM is not your legal spouse as you indicated in the medical form for personal information not your biological child. At the same time, the language you used in the response mail was exhibited some level of rudeness and this is not acceptable from an officer of your level or even the work environment.

26. The above omission was aimed at defrauding the University of money of unknown value, since by that act of inserting her name in the University medical cover, she was to access medical services from any of the authorised medical providers in the approved medical facilities. ...

27. In the letter of 14<sup>th</sup> April, 2017 [19<sup>th</sup> april,2017] the respondent shared with the claimant the outcome of the disciplinary decision following his invitation to attend and defend himself following allegations of illegal insertion of a dependant in the university medical cover. The respondent noted that, the claimant in mitigation over his cod cut he indicated that MM was his sister and hence concluded as follows;

- i. That you be demoted from senior Accountant, job grade 4A to accountant job grade 4B with effect from 19<sup>th</sup> January 2017.
- ii. That you be served with a final warning.
- iii. The above decision is subject to a proviso that you provide proof that Ms. MM is indeed your sister. If it turns out that you were not truthful to the Disciplinary Committee, it will confirm your lack of truthfulness and integrity which is a central principle in the current position you hold.

To this end, kindly provide the University with an official identification report obtained from National Registration Bureau within fourteen days from the date of this notification. ...

28. In response to this letter, the claimant on 2<sup>nd</sup> May, 2017 wrote and contested the decision by the respondent to demote him on the reasons that he had submitted details of his dependants in accordance with the human resource manual and according to him a dependant was any member of his family who was dependent on him and his sister Maureen Mugeni was one such person and qualified to be under the medical cover and from the documents submitted it was the duty of the respondent to prove otherwise, he had followed all procedures required for dependants and from the statement of account, Maureen Mugeni had never been included in the medical cover while his estranged wife was deleted from the same as per his request. That it was unfair to be given a final warning whereas he had no other warnings before.



29. The claimant does not contest that he was suspended and then called for a disciplinary hearing. He was issued with the decision therefrom and various sanction issued. One was a demotion, another was a warning and the other was for him to supply an official identification for his sister. He declined and contested these directions.
30. These were reasonable terms and conditions issued by the respondent as the employer to the claimant, employee. Had he accepted the same, the matter would have rested at this stage. He contested.
32. The due process of the law is outlined under Section 41 of the *Employment Act, 2007*. An employee must be allowed to attend at the shop floor and defend himself, which was done to the claimant. He had both written and oral representations. A sanction(s) issued. He contested and declined the sanctions issued.
33. The claimant does not contest that in the medical cover; he indicated MM was his spouse whereas this was his sister. According to the claimant, his sister was his dependant and under the policy, such dependant was eligible to be listed under the medical cover.
34. However, the claimant filled the medical cover form dated 24<sup>th</sup> August, 2016 and made a declaration that the contents therein were true and that he understood that the information he had given to be truthful.
35. In the medical form, the claimant indicated his dependants to be ;
1. MM born on 28<sup>th</sup> May, 1987 and relationship was Spouse and living with him;
  2. BL born on 15<sup>th</sup> July, 2007 a son living with him
  3. JL both on 28<sup>th</sup> December, 2010 a son living with him; and
  4. GLborn on 25<sup>th</sup> November, 2015 and living with him.
- Previously, the claimant had given his list of dependants in the following order;
- BL, son born on 15<sup>th</sup> July, 2007;
- JL, son born on 28<sup>th</sup> December, 2010; and
- IM, wife born on 28<sup>th</sup> January, 1981.
36. On the confirmation by the claimant in his evidence that his wife IMM was estranged and they were going through a divorce and that MM was his sister and not his spouse, under the subject medical cover, where his sister was indeed his dependant, she was not a spouse as listed. It was not truthful and honest to indicate that MM was a spouse while he knew and made a declaration that such person was indeed a Sister.
37. Where eligibility to be under the respondent's medical cover was for dependants in the nature of spouse and children, before the claimant could list and enjoin his sister as a spouse under the medical cover, such matter he knew and was aware at all material times was not true.
38. The claimant was taken through the disciplinary process and a decision taken. A sanction issued for him to be demoted for failing to be truthful and honest to his employer. He was also issued with a warning and directed to submit identification for his sister. He declined. He contested the outcome.
39. Having been found to have failed to be honest in a matter that the claimant had been called to make a declaration of his dependants under a medical cover so as to enjoy an employment benefit of being covered under the same, a sanction was legitimately due pursuant to the provisions of Section 43 of the



Employment Act, 2007 that where an employer genuinely finds existing matters to justify termination of employment, such is proper and lawful. Section 43(2) of the Act requires that;

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

40. The court finds the respondent had valid and justifiable reasons to terminate employment. the claimant was taken through the due process and his decision to decline the sanction issued of a demotion and a warning led to frustration of his own employment.
41. The claimant cannot justify his conduct at the workplace in any lawful manner. The claim for damages and compensation is not justified.
42. In the letter terminating employment, the respondent offered the claimant notice pay of 3 months which is generous. Such is due based on the claimant's last salary of ksh.196,186 x 3 all Ksh.588,558.
43. For the 15 days of untaken leave, the tabulation of such dues is based on the basic salary of ksh.126,056 all being Ksh.63,028.
44. Employment terminated on 24<sup>th</sup> May, 2017 and not 29<sup>th</sup> March, 2017. The sanction to backdate the termination date is an unfair labour practice.
45. The claimant had remained on half salary during the suspension period until employment terminated on 24<sup>th</sup> May, 2017. The total salary due up and until such date, 24<sup>th</sup> May, 2017 is due.
46. On the payment statement for May, 2017 the wage paid to the claimant is ksh.130,158 being half basic pay and full allowances. The total balance of Ksh.66,028 each month is due. such pay shall be put into account in the tabulation of final dues.
47. The claimant testified that in the payment of his dues, the respondent put into account his loan facility with the Sacco whereas such matter was not part of his employment relationship. However, under the payment statement, the loan with Biblia Sacco was being off-set from the salary paid. pursuant to Section 17 and 19 of the Employment Act, 2007 the employer is authorised to make a deduction and remit to a third party any amount that the employee owes at the end of employment pursuant to an agreement during the pendency of such employment. such loan due to a Sacco by virtue of employment and secured through a salary is a lawful deduction at source by the employer. See Mitawa Samora Okeke & 25 others v Wycliffe Sava Mundu & 3 others [2021] eKLR; and Joshua Toroni Ntabo v Hipora Business Solutions (E.A) Limited [2020] eKLR where the court held that;

... For membership, the claimant has to give his application and consent outside of the respondent. even where the respondent was making wage deductions from the claimant to the Sacco, the foundation is the membership of the employee. Within such membership, each Sacco regulated under the Societies Act, the claimant ought to address his claims therefrom under the rules and regulation governing Saccos and not claim for his unpaid dues from the respondent.

48. In the case of Javan Were Mbango v H. Young & Co. (E.A) [2012] eKLR the court held that;

Employees who out of their own free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, there are owed all their savings without taking into consideration the collective agreement under their Sacco and or



cooperative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.

49. Accordingly, the tabulation of terminal dues for the claimant shall be paid less what he owes to the Sacco.

Judgement is hereby entered for the claimant for payment of the following dues;

- a. Notice pay Ksh.588,558;
- b. Leave pay Ksh.63,028;
- c. Unpaid half salaries from 29<sup>th</sup> March to 24<sup>th</sup> May, 2017;
- d. Dues (a), (b) and (c ) shall be paid if not already paid and subject to the provisions of Section 49(2) of the *Employment Act*, 2007;
- e. Dues owing (a), (b) and (c ) above shall be paid less what the claimant owes to Biblia Sacco;
- f. Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2022.**

**M. MBARU JUDGE**

In the presence of.....

