



Mokeyra v Adnan Zavery t/a The Regency Dental Practice & another (Cause 1608 of 2015) [2022] KEELRC 12693 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12693 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1608 OF 2015
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

ELIDAH BOSIBORI MOKEIRA CLAIMANT

AND

**ADNAN ZAVERY T/A THE REGENCY DENTAL PRACTICE 1ST
RESPONDENT**

MITUL VASANI T/A THE REGENCY DENTAL PRACTICE 2ND RESPONDENT

JUDGMENT

1. The claimant filed her statement of claim on September 11, 2015.
2. She states that she was employed by the respondents dentists as a dental nurse, on or about the year 2011. She worked on renewable contracts.
3. She was summarily dismissed on July 4, 2015 for no apparent reason [paragraph 7 of the statement of claim]. The date given at paragraph 8, is July 6, 2015].
4. She states that she was denied terminal dues. She was diligent and did not have warnings.
5. She had informed the respondents that she was expectant, and would be proceeding on maternity leave. Termination of her contract was done to pre-empt her going on maternity leave. She states that this was discriminatory and in violation of her constitutional rights.
6. Termination was not based on valid reason. It was not related to her conduct, capacity or compatibility. It was not based on operational requirements. Disciplinary procedure was disregarded. She was not given a hearing.



7. She pleads that she was entitled to leave allowance, 3 months in lieu [?], 1-month salary in lieu of notice, and gratuity. She is yet to receive her certificate of service. She states that owing to the actions of the respondents, she has failed to secure alternative employment.
8. Her last salary was Kshs. 26,028 monthly.
9. She prays for judgment against the respondents for: - [26,028 x 8] = Kshs 182,196. [It is not explained what this represents]
 - a. Compensation for wrongful termination, in the sum of Kshs 78,084. [It is not explained again, how the figure has been arrived at]
 - b. Salary in lieu of notice at Kshs 26,028.
 - c. Unpaid severance for each year worked for [?].
 - d. Unpaid gratuity of 1-month current basic salary for each year worked, for 4 years x 26,028 = Kshs 104,112.
 - e. Compensation for days worked for and not paid in the sum of Kshs 6,000.
Total pleaded at Kshs 668,922.
10. Other prayers separately pleaded by the claimant include: -Compensation for loss of employment.Premature termination of the contract of employment by the respondents amounted to unfair termination.General damages.Certificate of service.Costs.Damages and the footing of aggravated or exemplary damages.Any other relief.
11. Quite clearly, the claimant's prayers are poorly pleaded and considerably inelegant. What is meant by 'damages and the footing of aggravated or exemplary damages'? Is the claimant going to be compensated for unfair termination, and separately for loss of employment, and damages for unspecified violations said to be contained in paragraph 13 of the statement of claim? The claimant obscures her claim, through muddling of the prayers.
12. The respondents filed their statement of response and counterclaim, on October 9, 2015. Their position is that they employed the claimant as a receptionist, from February 2011, to mid-2013. Thereafter, they part-sponsored the claimant for training as a dental nurse.
13. She was guilty of gross misconduct, and on being warned about it, displayed utter arrogance and absconded. Her attitude to the respondents was wanting. So was her performance from 2013. Her performance as discussed severally with the respondents was unsatisfactory. She was issued a letter of warning, dated February 27, 2015. The respondents asked for an explanation from the claimant, why she failed to complete work assigned to her on July 2, 2015. She did not respond. She became uncooperative and walked out. She was not dismissed by the respondent. She absconded.
14. The respondents deny that they violated any of the claimant's rights as pleaded. They do not owe the claimant the sums claimed. They counterclaim notice of 30 days from the claimant at Kshs 23,000; outstanding loan of Kshs 4,609; NSSF payment of Kshs 10,600 advanced to the claimant upon her request; and nurse training fees at Kshs 22,500 – total Kshs 60,709.
15. The respondents pray that: -
 - a. The claim is declined.
 - b. The counterclaim for the sum of Kshs 60,709 is allowed.



- c. Costs to the respondents.
 - d. Interest granted on the counterclaim.
16. The claimant filed a statement of reply to the response and counterclaim, on November 17, 2015. She denies the acts of gross misconduct attributed to her by the respondents, and in particular, denies that she absconded. She was dismissed, and does not owe the respondent any notice. Kshs 4,609 could only have been salary advance, to be recovered from the claimant, but the respondents proceeded to unlawfully terminate her contract. She denies that the respondents paid for her training. NSSF remittances were paid as a statutory responsibility of the respondents. The claimant prays the court to dismiss the counterclaim.
 17. The respondents filed a reply to the claimant's response, which is the view of the court is unnecessary. It does not raise any issues that have a bearing on the pleadings. Parties should avoid excessive pleadings, which add no value to the claim before the court.
 18. The claimant gave evidence on October 29, 2021, and on February 10, 2022 when she closed her case. Dr Mitul Vasani gave evidence for the respondents on February 10, 2022 when hearing closed. The claim was last mentioned before the court on July 7, 2022, when parties confirmed filing and exchange of submissions.
 19. The claimant adopted her pleadings and witness statement on record. She adopted her 6 documents on record, as her exhibits. She stated that she was 3 months' pregnant and informed the respondents about it. Their attitude to her became negative, on receiving the information. She was advised by the respondent to go home until they recalled her. She was then issued a letter of termination. She did not accept the letter of termination, because the respondents refused to allow her lawyer to participate in the process. She had only one warning letter issued in February 2015, which was unrelated to termination. She was financed in half for the nursing training by the respondents. She financed herself for the other half. The respondent retained the receipts for the fees paid. She owed the respondents about Kshs 4,600 on termination. She had a loan of Kshs 35,000 which was being redressed through monthly instalments.
 20. Cross-examined, the claimant told the court that she was trained as a dental assistant at Hurlingham, Nairobi. She was a nurse at the time of termination. Training was financed 50:50 by the parties. Her duties included assisting the respondents on the side chair, suctioning, and providing dental tools. She became pregnant in February 2015. She left in July 2015. She informed the respondents verbally. It was not an issue to them, when she informed them about her pregnancy. It was later, that their attitude changed. She received a warning letter dated February 27, 2017. It alleged that she was rude to the respondents. When the doctor came to work in a bad mood, the claimant could not discharge her duties smoothly. She did not have a verbal warning. The warning letter had no relation to the letter of termination.
 21. Upon recall to give further evidence, the claimant told the court that she did not have a wrong attitude to work. She did not have marital problems which affected her work. Her husband was supportive. She did not sleep at work. She was hosted by her sister-in-law, because her place was near the claimant's workplace. She was told to go away by the respondents until recalled. She was not recalled. She did not sign termination letter.
 22. Dr Vasani confirmed that the claimant was employed by the respondents as a receptionist, before being trained as a dental nurse, and serving in the latter role. The practice opened in 2011. She was good at her work, but temperamental.



23. On July 4, 2015, Vasani was attending to a minor patient. The claimant was at his side suctioning. She went too deep. Vasani cautioned the claimant. He stopped the procedure and asked the claimant to follow him outside theatre. He told her that they could not treat a minor like that. She went, changed her work attire and walked out. Vasani had to call another Nurse from sterilization department to hold forte. In 17 years of his practice, he had not encountered such conduct. Vasani later called her on phone. She did not answer. She engaged in misconduct, and absconded. After some time, the respondents received a demand letter from her lawyers. Her attitude was below par. The respondents thought that the claimant would change. She did not. She was not approachable, even to other clinical staff. She spoke to the directors rudely, even in front of patients. Vasani confirmed that the claimant owed the respondents the sums counterclaimed.
24. Cross-examined, Vasani told the court that the claimant worked for 4 years, 2011- 2015. She became a dental nurse in 2013. There was 2 dentists, 3 nurses and a receptionist. Each dentist had 1 nurse. The other nurse, Lilian worked at sterilization department. Lilian was on duty on the material day. The claimant confided in the respondents about her family issues. Vasani recommended counselling. On the material day, she assisted Vasani perform a procedure on a minor. The minor was accompanied by the parent. Vasani was concerned about the minor. Lilian replaced the claimant. If needed, Lilian could be availed as a Witness. The practice did not retain a staff attendance register. The claimant did not report on Monday after the event. Vasani called her in vain. The respondents then received demand letter from her lawyers. The respondents did not issue termination letter. The claimant could not be taken through a disciplinary hearing because she disappeared. She had a loan which she had not completed paying on termination. She did not give notice of termination to the respondents. The respondents have not claimed refund from the NSSF She was advanced training fees. She owed a balance of Kshs 4,609. Redirected, Vasani told the court that the claimant was treated fairly by the respondents, she was given support, but simply walked out on them.
25. The issues are whether the claimant's contract of employment was terminated by the respondents, fairly, lawfully or at all; whether she is owed the remedies sought; and whether she owes the respondents the remedies sought in the counterclaim.

The Court Finds: -

26. The claimant was employed by the respondents' dental practice in the year 2011, as a receptionist. The practice opened in 2011. In 2013 she became a dental nurse, having been trained as such, with the respondents financing half her cost of training, while she met the other half.
27. She pleads that the respondents unlawfully dismissed her on or about July 4, 2015, and on/or about July 6, 2015 [her statement of claim paragraph 7 and 8]. She pleads that no reason for the decision was communicated. She was told to go home and stay there until she was recalled by the respondents. They did not recall her.
28. The respondents deny that they terminated the claimant's contract. Vasani explained that the claimant was involved in an act of gross misconduct. She suctioned a minor patient too deep, while assisting Vasani in the dental procedure. He paused the procedure, took the claimant aside and cautioned her. She became agitated, changed her work attire, and walked out. Vasani was compelled to seek the assistance of Lilian who was a nurse in the sterilization department. Once she walked away, she did not return the following Monday. Vasani placed calls to her, which went unanswered. The respondents then received demand letter issued by the claimant's lawyers.



29. Section 47 [5] of the *Employment Act* requires the employee to discharge the burden of proof, in establishing that unfair termination of employment or wrongful dismissal has occurred. The burden of justifying the grounds for termination, rests on the Employer.
30. The claimant as pleaded, does not have a clear date, when she alleges her contract was terminated. It cannot have been on 2 alternative dates. She did not have a letter of termination issued by the respondents. She states that she was offered a letter of termination which she declined, because her lawyers were not involved in the process of termination. She concedes receiving a letter of warning in February 2015, which she states, had no relation to termination. The court does not believe her, because she did not receive the letter of termination, if any issued; she would not know what reasons were contained in the letter of termination; and she would not know if those reasons were related to the letter of warning. Without evidence of a letter of termination, and with her contradiction on the date of termination, the claimant has not discharged her burden of proof under section 47[5] of the *Employment Act, 2007*.
31. She offered no other evidence to corroborate her assertion that it was the respondents who initiated termination. She did not call any Witness to establish that she was told to go home by the respondents and would be recalled later. She alleges that she was offered evidence of termination, in form of a letter of termination, which she refused to take, thereby leaving herself with a herculean task, in establishing termination at the instance of the respondents.
32. Her position that, the respondents victimized her because she was pregnant has no foundation and was probably floated, to incite the mind of the court under the banner of pregnancy discrimination.
33. Section 47 [5] of the *Employment Act* would not require the respondents to justify the ground for termination, because the claimant did not establish that they terminated her contract.
34. There is however persuasion in the explanation given by Dr Vasani that the claimant was negligent in assisting him, with the procedure that was conducted on a minor. She suctioned the minor too deeply, necessitating the halting of the procedure, and resort to another nurse for assistance. When confronted by Vasani, the claimant walked away. She did not return to work. She issued demand letter and filed this claim shortly after she walked away. She had been warned on February 27, 2015 about being disrespectful to the directors, and about subjecting patients to substandard treatment. The background to her abandonment of duty was substandard treatment of a minor patient. Ultimately, there would have been justifiable reasons in terminating the claimant's contract, had the respondents been required to provide justification. The court however is satisfied that the claimant has not shown that her contract was unfairly terminated, or at all terminated by the respondents, and it is not necessary to place a burden on the respondents, to justify termination.
35. The respondents have not established that they are owed NSSF refunds by the claimant. What is the context of this prayer? Is it not the legal obligation of an employer to deduct and remit statutory contributions to the NSSF? The court is not convinced that the respondents are owed Kshs 22,500 in refund of training costs. There is no agreement exhibited by the respondents, showing the terms of their financing of the claimant's training. They were catering for her training so that she could discharge the nursing role, which she did for 2 years.
36. The counterclaim prayers for notice, and for Kshs 4,609 are merited. The claimant walked out of the employment relationship without notice to the respondents, after she was confronted by Vasani for her dental negligence. She conceded that she owed the respondents a sum of Kshs 4,600 when she left employment.
37. Certificate of service to issue.



38. Parties shall meet their own costs.

39. No order on interest.

It is ordered: -

- a. The claim is declined, save for the prayer on certificate of service.
- b. The counterclaim for notice at Kshs 23,000 and loan amount at Kshs 4,609 – total Kshs 27,609, is allowed.
- c. No order on the costs and interest.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER, 2022.

JAMES RIKA

JUDGE

