



**Omwamba v Marie Stopes Kenya (Cause 120 of 2016)
[2022] KEELRC 13216 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13216 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 120 OF 2016
CN BAARI, J
NOVEMBER 17, 2022**

BETWEEN

EZEKIEL OMWAMBA CLAIMANT

AND

MARIE STOPES KENYA RESPONDENT

JUDGMENT

1. The Claimant lodged a claim against the Respondent by way of a Memorandum of Claim dated May 9, 2016 and filed on May 18, 2016. He seeks general damages for mental torture and anguish, termination benefits, salary in lieu of notice, leave allowance, special damages and costs of the suit and interest.
2. The Respondent entered appearance on June 2, 2018, and filed a Memorandum of Response to the Claimant's claim on February 27, 2019.
3. Parties did not set the matter down for hearing until the court issued notice to show cause why it should not be dismissed for want of prosecution on March 16, 2022, when the Claimant expressed interest to prosecute their case, and which was then fixed for hearing on June 8, 2022.
4. The matter was heard on June 8, 2022 as scheduled. The Claimant testified in support of his case. He adopted his witness statement and produced the bundle of documents filed in the matter in support of his case.
5. The Respondent's case was heard on July 4, 2022. The Respondent presented a Ms Elizabeth Munyefu, their Director of People and Development to testify on her behalf. Ms Munyefu adopted her witness statement and produced the list of documents filed in the matter in support of the Respondent's case.
6. Submissions were filed for both parties.



The Claimant's Case

7. The Claimant's case is that he was employed around the year 2000 by the Respondent in the position of Registered Nurse at their Kisumu Nursing home.
8. The Claimant states that in the time he was in the service of the Respondent he rendered sterling services which saw him raise in rank. It is his further case that on November 27, 2015, the Respondent arbitrarily and without any legal justification summarily terminated his services, and the benefits he enjoyed under his contract of employment.
9. It is the Claimant's case that the Respondent terminated his services without according him a chance to explain the circumstances under which the allegations against him arose. It is his case that the dismissal letter issued to him was vague.
10. The Claimant states that the Respondent failed to present his accuser for cross-examination during the disciplinary hearings, to clarify the circumstances under which money was allegedly given to him. It is the Claimant's case that he was dismissed without being told the nature of the offence against him, contrary to the rules of natural justice.
11. The Claimant states that pursuant to the Respondent's illegal actions, he was sent home without his terminal benefits, salary in lieu of notice, severance benefits and leave allowance.
12. The Claimant prays that the court awards him the reliefs listed in his statement of claim.

The Respondent's Case

13. The Respondent's case is that she employed the Claimant as a Nurse, initially at its Kisumu Nursing Home Branch, and later transferred him to their Kisii branch Clinic.
14. The Respondent further states that in or around November, 2015, it was reported that a client called the Respondent's Call Centre, and later on their County Director, with a complaint that she had paid money to the Claimant in respect of a service which would have normally been offered, and administered by the Respondent but which service was not offered and/or was improperly administered.
15. The Respondent states that she established that the Claimant took money from her client to independently procure a reproductive health service when he knew that the same was being done by the Respondent, and that as an employee of the Respondent, he was supposed to both receive the money and render service on behalf of the Respondent.
16. It is the Respondent's case that with prior notice, the Claimant was invited for a disciplinary hearing that was slated for November 20, 2015, where the Claimant appeared and made his representation.
17. The Respondent states that after the hearing, the Claimant was suspended from duty and a further audit ordered to establish the extent of financial misconduct and the performance of the Kisii Clinic, where the Claimant was working on the realization that the misconduct involved other staff members of the Respondent.
18. The Respondent further states that she considered the representations made by the Claimant and the evidence available, and made the decision to summarily dismiss him from service. The Respondent states that the decision was duly communicated to the Claimant through a letter dated the November 27, 2015.



19. It is the Respondent's case that the Claimant's conduct aforesaid, constituted gross misconduct and loss of trust, and which warranted action against him for compromising and/or threatening to compromise the standards of the Respondent which may have fatal consequences to the clients.
20. The Respondent states that the Claimant engaged in what was basically a fraudulent activity, to wit, accepting money from a client for his personal use, and failing to provide the service according to the set procedure and for the benefit of the Respondent.

The Claimant's Submissions

21. It is submitted for the Claimant that the statement by the Respondent's client who complained against the Claimant was not disclosed to him and so was the money alleged to have been paid.
22. The Claimant states that no audit report was presented to court on the alleged financial impropriety nor were the allegations of fraud specifically pleaded or proved.
23. The Claimant submits that the disciplinary hearing conducted by the Respondent against him contravened his constitutional rights on fair hearing. It is the Claimant's further submission that failure by his accused to appear at the hearing or at the very least file her statement denied him an opportunity to challenge the evidence against him.
24. The Claimant finally submit that he was unfairly terminated and that he is entitled to the remedies sought.

The Respondent's Submissions

25. The Respondent submits that the Claimant contravened the very basic attribute that the Respondent assigned him, which was trust, rendering the relationship between them incompatible.
26. The Respondent submits that her disciplinary committee was not convinced by the Claimant's side of the story and noted glaring inconsistencies and inability to provide answers to certain crucial and sensitive issues during the hearing.
27. The Respondent submits that it afforded the Claimant an opportunity to extricate himself and followed the provisions of the *Employment Act, 2007*, and the Respondent's internal disciplinary procedure in reaching the decision to summarily dismiss the Claimant from employment.
28. The Respondent submits that the Claimant was summarily dismissed for lawful cause. It is further submitted that the Claimant suffered no wrongful termination of employment as to warrant any award of damages.
29. The Respondent submits that the Claimant was dismissed for acting in a manner that substantially eroded the trust and fidelity that the Respondent had bestowed upon him by virtue of his office.
30. The Respondent submits that the Claimant was paid his pension which was being administered by an independent entity.
31. The Respondent submits that she has demonstrated that the reason informing the disciplinary action against the Claimant, was a matter that involved the health of a client, confidentially of the client and an element of honesty on the part of the Claimant in the discharge of his duties, and hence valid reasons.



Analysis and Determination

32. Upon careful considered of the pleadings herein, the witnesses' oral testimonies and the submissions filled in the matter, the issues for determination are:
- i. Whether the Claimant was unfairly and unlawfully dismissed
 - ii. Whether the Claimant is entitled to the reliefs sought

Whether the claimant was unfairly and unlawfully dismissed

33. To arrive at a determination of a fair termination/dismissal, the court has to consider the twin issues of procedural and substantive justification. Procedural and substantive justification are determinable by examining the employer's adherence or lack thereof to Sections 41, 43, 45 and 47 of the [Employment Act, 2007](#).
34. The Claimant's case is that he was dismissed from service for receiving money from a client of the Respondent under pretext that he was in a position to provide a service as an employee of the Respondent, but which service he did not provide. His contention is that his accuser's statement and/or appearance before the disciplinary committee was crucial to enable him interrogate her on her allegations. It is on this basis that he contends that his dismissal was unfair.
35. The Claimant confirmed to court during cross-examination that the nature of the treatment that his accuser needed is confidential, hence the Respondent's refusal to present her or her statement for interrogation. He further told the court that the client sought a sexual reproductive health service, and is the reason her identify needed to be protected.
36. The Respondent told the court that the client whose incident was the subject of the Claimant's dismissal, declined to appear for the disciplinary hearing but that they were able to establish facts from her letter to the Respondent and a call to the Respondent's Director and their call center.
37. The Respondent further stated that she was the complainant at the point where the Claimant was facing disciplinary action as the complaint was in regard to monies paid for services not rendered.
38. It is not disputed that the Claimant was taken through a disciplinary process which culminated in his summary dismissal. The Claimant admitted that he appeared before a committee of the Respondent and made representation at the hearing before the decision to terminate his services was arrived at.
39. Section 41 of the [Employment Act](#) provides as follows:
- “41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
40. In [Mary Mutanu Mwendwa v Ayuda](#) [2013] eKLR the Court held that the [Employment Act](#) has made it mandatory by virtue of section 41 for an employer to notify, and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present.



41. Further in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
42. In my view, the Claimant having been accorded an opportunity to make representation and to appear before a disciplinary panel to defend himself against the charges leveled against him, satisfies the requirements of procedural fairness enshrined in Section 41 of the *Employment Act, 2007*. The dismissal was procedural fair and I so hold.
43. The second limb concerns the reasons for dismissal. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the court opined thus:
- “..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”
44. The provisions of Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer establishes the validity or correctness of the reasons for termination, and this is a requirement that never shifts to an employee.
45. The reason for the Claimant’s dismissal is for receiving money for a service he was not in a position to provide. The Respondent told the court that the person/client who gave the Claimant money called to complain to both the Respondent’s Country Director and their call center.
46. The Court of Appeal in *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR cited with approval the following excerpt from the *Halsbury’s Laws of England*, 4th Edition, Vol 16(1B) para 642:
- “In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.
- In assessing an employer’s action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer’s decision.”
47. The client could not in my view, have gone out of her way to make calls to the Respondent if she had not paid for the service she sought, and which she did not receive. It could only be due to the fact that she paid and did not receive the service that she registered her complaint with the Respondent.



48. The charge against the Claimant was a matter of conflict of interest as the Claimant used the Respondent's premises to do that which he was employed to do for his own benefit, and not that of the employer and contrary to the employer's policy.
49. This in my view, is a fair, valid and justified reason to dismiss an employee. The Respondent in my opinion, acted reasonably and responsibly in the circumstances of the case.
50. I find and hold that the Claimant's summary dismissal met both the procedural and the substantive justification test. The dismissal is not unfair.

Whether the claimant is entitled to the reliefs sought

51. The Claimant sought payment of general damages for mental torture and anguish, termination benefits, salary in lieu of notice, leave allowance, special damages and costs of the suit and interest.
52. The claim for general damages for mental torture and anguish, fails on account of the finding of a fair dismissal.
53. The claim for special damages was not proved. It is not clear on what account the Claimant claims special damages. He did not incur costs in respect of the disciplinary process or anything else that entitles him to reimbursement in form of special damages. The claim likewise fails and is dismissed.
54. On the claim of termination benefits, the Claimant was a member of the Respondent's pension scheme and he admitted receipt of his retirement benefits, except the portion that is not payable until he attains retirement age. This claim is thus not merited and is dismissed.
55. The claim for payment of salary in lieu of notice is merited as the Claimant was not given notice or payment in lieu thereof. The Claimant is awarded one month's salary in lieu of dismissal notice.
56. Leave allowance was also not proved. Nothing shows that the Claimant either did not utilize his leave, or that he was not paid for the leave not taken.
57. In sum, the claim succeeds only with respect to payment of one month's salary in lieu of notice. The rest of the claims fails.
58. The Respondent will pay the Claimant one month's salary at Kshs 91,604/-
59. Parties shall bear their own costs of the suit.
60. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Kerubo h/b for Mr. Mose for the Claimant

Mr. Ouma present for the Respondent

Christine Omollo- C/A

