



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 19 OF 2015

BARTHOLOMEW MUTUA KIMANZICLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 11.9.1987 as a General Worker Grade II and among other benefits, he was entitled to medical cover with his dependants. On 1.12.2012 his daughter was allegedly admitted at Mwingi Baraka Nursing Home until 13.12.2012 when she was discharged. Due to logistical challenges, she was not able to swipe her Smart Card until a later date.

2. In July 2013, the Claimant was called from his field duties to Mwingi Office where he found the company nurse Ms. Mercy Kibara, Internal Auditor Mr. Kodek and Ms. Grace Njuguna his immediate boss. The reason for the meeting was to discuss his daughters admission at the said medical facility but he declined to comment on the matter because he was a stranger to it. Thereafter he visited the hospital to enquire about his daughter's admission and to get a copy of the discharge summary.

3. In September, 2013 he was summoned to record a statement at the Respondent's Headquarters and he did so on 18.9.2013. Subsequently, he was served with a show cause letter dated 26.11.2013 and he responded. On 13.12.2013 he was invited to a disciplinary hearing by the Senior HR Manager at Thika Office and he attended with his Union's branch Chairman. Thereafter he received a dismissal letter dated 3.1.2014.

4. In his view the dismissal was irregular, unlawful and unjustified and therefore, he brought this suit seeking the following reliefs:

- (a) A declaration that the claimant's termination was wrongful.
- (b) Maximum compensation for unfair termination at Kshs. 91,084/- p.m. Kshs. 1,093,008/-
- (c) Costs of this suit and interest.
- (d) Interest on (b) and (c) above at court rates
- (e) Any further relief deemed fit by the court.

5. The Respondent filed defence on 5.3.2015 denying the alleged unlawful termination and averred that the termination was lawful since it was grounded on a valid reason of gross misconduct and the Claimant was accorded a fair hearing. It therefore, prayed for the suit to be dismissed with costs.

SUMMARY OF EVIDENCE

6. The Claimant testified as CW1. He stated that on 1.12.2012, his daughter Esther Kalekye, fell sick and she was rushed to Mwingi Baraka Nursing Home where she was admitted. He learned of the said matter from his wife via phone call because he was on duty at Usueni 400 Kms away where he was from 29.11.2012 to 17.12.2012. According to the information received, the doctor did a minor operation on the daughter to remove a growth on her private area and also did a blood transfusion using blood from Mwingi District Hospital blood bank, 600 meters from the Nursing Home. Finally, the daughter was discharged on 13.12.2012 but she did not swipe her smart card because the system was down. She did so in March 2013 during her mid term break from school. The Claimant further testified how he was summoned for interrogation then issued with a show cause letter and finally summoned to a disciplinary hearing on 13.12.2013 before being served with the dismissal letter dated 3.1.2014. He maintained that the termination of his employment was irregular, unlawful and without justification. He therefore prayed for compensatory damages.

7. On cross-examination he contended that he worked for over 26 years without any disciplinary case except the subject of this case. He admitted that he was served with a show cause letter after his daughter was hospitalized at the nursing home with a boil in her private parts. He explained that the daughter was 15 years and she was in Form 3 at Kimangau Girls in Mwingi. He further stated that she ought to have swiped her smart card upon discharge from the hospital but it was not swiped until 24.12.2012 by the daughter who went to the hospital alone. He maintained that he never accompanied the daughter to the hospital since he was away on duty.
8. He contended that the girl had fever and excess bleeding and she was treated and given blood transfusion. He admitted that a bill of Kshs. 237,411 was raised by the doctor but contended that it is only the doctor who can tell how he came up with that bill. He also stated that the doctor never recommended for any review of the daughter after the treatment. He denied that he conspired with the doctor to defraud the company. He contended that he learned the amount of the bill after the start of the investigations. He maintained that the daughter was taken to hospital by his wife.
9. He contended that he was not given a fair hearing but he admitted that he was accorded a hearing in the presence of his union branch chairman. He further admitted that his union official was given a chance to present his case. He also admitted that he was given a termination letter stating the reason for the termination. Finally he admitted that he was paid terminal dues but contended that the salary used was wrong and the leave days paid were only 8 instead of the 37 outstanding days.
10. **Mr. Argwings Kodhek Ocheing**, Respondent's Senior Internal Auditor testified as RW1. He was in the team that investigated the alleged fraud and prepared the Investigations Report. He contended that he went to the Hospital and found that it was only an outpatient facility managed by a nurse aid. That the nurse confirmed that the Claimant's daughter was never admitted there and the hospital does not admit patients.
11. He further stated that the proprietor of the hospital told him that he left the hospital earlier to open a diagnostic clinic in Thika. The doctor further confirmed that the hospital had no capacity for blood transfusion but he had an agreement with the public hospital to do blood transfusion. However, the public hospital denied any existence of such agreement.
12. RW1 further stated that there was no record of any out patient treatment for the Claimant's daughter before and after the admission. He contended that the discharge summary referred to a diagnosis of left scrotal hernia which cannot be of a female patient and it was signed by a clerk as opposed to a doctor. RW1 further stated that there were six other fraudulent cases like that of the Claimant involving dependants of Respondent's employees and one of the patients, a wife of an employee confessed that she was given 55000 to allow the hospital to raise a higher bill. That the employee was not dismissed because he brought his wife to confess the fraud but the Claimant failed to avail his wife and daughter and he was dismissed.
13. On cross-examination RW1 contended that he holds a B.A. Business Administration degree and is trained in Fraud Detection and Prevention from ESAMI. He has worked for the Respondent for 27 years. He admitted that the Claimant and his dependants had a medical cover and that the subject invoice was delivered by the hospital to the Respondent. He contended that the subject bill was suspiciously too high while the hospital was too small and as such they recommended for the hospital to be black listed.
14. He admitted that the hospital and not the company is responsible for record keeping He further admitted that the hospital proprietor said the Claimant's daughter was treated by locum doctors. He further admitted that he never interviewed the Claimant's wife and the daughter because the Claimant refused to avail them.
15. **Ms. Joyce Koskei, Respondent's Senior HR Officer testified as RW2.** She stated that a report was received from internal auditors indicating that the Claimant had colluded with a Mwingi Hospital to defraud the Respondent. Thereafter she served the Claimant with show cause letter and he responded. However, the response was unsatisfactory and she invited him to a disciplinary hearing on 11.12.2012 which he attended with his union officials. That the Claimant was informed of the charges and he defended himself.
16. She testified that the allegations that the Claimant's daughter was admitted and operated at Mwingi Baraka Nursing home was fraud because there were no admission sheets and treatment records for her. That the hospital had no capacity to do the operation and blood transfusion stated in the discharge summary. Against the document was signed by a Clerk as opposed to a doctor and there was no review after the surgery. Finally the Claimant was asked to avail the daughter for examination to confirm the alleged surgery but he declined. He also failed to avail her and his wife to give evidence in his favour during the disciplinary hearing.
17. RW2 further testified that after the hearing the management decided to terminate the Claimant's services by the letter dated 3.1.20-14 and thereafter paid him terminal dues including salary in lieu of notice, salary earned plus accrued leave. She contended that the termination was lawful and fair because it complied with the procedure set out in the CBA and the company disciplinary procedure.
18. On cross-examination, RW2 contended that she has been Respondent's Senior Human Resource Officer since 1998 and admitted that the Claimant was Respondent's employee for 26 years. She further admitted that the Respondent had contracted Mwingi Baraka Nursing Hospital and contended that the fraud herein involved both the hospital and the employee or representative of the Claimant's daughter. She contended that if there was no collusion, the hospital could have reported the fraud to the Respondent.
19. She further testified that the Claimant had been served with previous warnings but she did not produce any documentary proof of the same. She admitted that the hospital was not invited to attend the disciplinary meeting but the investigation report was relied upon. She contended that the Claimant who failed to call the hospital to confirm that his daughter was indeed treated at the said hospital.
20. **Ms. Grace Njeri Njuguna Respondent's officer, Marketing Investor Relations testified as RW3.** She confirmed that she was working in Mwingi Branch with the Claimant and she attended his disciplinary hearing at Thika Office. She stated that the case involved an attempt to defraud he Respondent Kshs. 237,411 through a collusion between he Claimant and Mwingi Baraka Nursing Home. She further contended that the Claimant attended the hearing in the company of his union branch chairman and defended himself but he was dismissed.

21. She contended that the termination was fair because the reason was valid and he was accorded a fair hearing before the dismissal in accordance with the CBA. Therefore, she prayed for the suit to be dismissed because the Claimant is not entitled to the reliefs sought.

SUBMISSIONS

22. The Claimant submitted that he and his dependants were entitled to medical scheme which had been introduced by the Respondent. He further contended that due to systems failure, his daughter delayed to swipe her smart card. He maintained that he and his family had control over the record keeping by the hospital after they received treatment nor did they discuss the cost of the treatment.

23. He further submitted that the termination was unfair because the reason was not valid and the employer did not consider that he had worked for 26 years without any disciplinary cases. He maintained that the employer should have called the doctor/nurse of the hospital to the disciplinary meeting so that he could cross-examine them on the alleged fraud.

24. He relied on **Fredrick Kariuki Kaniaru v. Bank of India[2015]eKLR** where the Claimant was dismissed for alleged fraud and the court held that the reason for termination ought to be valid as required under section 45 of the Employment Act.

25. He further relied on **ELRC 1817 of 2011 Pithon Mwangi Njoroge v. Cooperative Bank of Kenya** where the court found dismissal on ground of fraud unfair because the Claimant was not taken through a fair process. He, therefore prayed for the reliefs set out in the suit.

26. The Respondent submitted that the burden of proving unfair termination lies with the employed under section 47 (5) of the Act. It relied on **Kennedy Maina Mirera v. Barclays Bank of Kenya Limited[2018]eKLR** where the court held that the plaintiff must adduce prima facie evidence to show that the reason for the termination of employment was not valid and the employer did not follow a fair procedure.

27. In the instant suit, the Respondent submitted that the evidence on record shows that the reason for the termination was valid and that a fair procedure was followed before terminating the Claimant's employment. It contended that the investigations report revealed that the Claimant's medical card was used in an attempted fraud where his daughter was allegedly admitted at Baraka Nursing Home and underwent an operation and blood transfusion at a cost of Kshs. 237,000.

28. The Respondent further submitted that the bill for the said treatment was presented for payment but it was declined and investigations carried out and several irregularities revealed. These included the fact that the hospital had no capacity to carry out the alleged operation or do a blood transfusion, there was no record to the effect that the Claimant's daughter was treated in the hospital and the discharge summary was not signed by the doctor who did the operations, but a clerk. It therefore urged for a finding that the Claimant's misconduct was a valid reason warranting summary dismissal under section 44(4) of the Act.

29. In addition, the Respondent submitted that the procedure followed before the termination was fair because the Claimant was accorded a hearing where he was accompanied by his union official. That before the oral hearing had been served with a show cause letter and he responded to in writing.

30. The Respondent relied on **Stephen Okumu Ongaro v. Casurina Nomad Limited[2019]eKLR** where the court held that the court should not substitute the employer's decision with its own and that once the circumstances show that the employer acted reasonably the court should not interfere. It further relied on **Kenya Plantation and Agricultural workers Union v. Del Monte (k) Limited [2018]eKLR** to support its case that the reason for the termination was valid.

31. As regards the procedure followed it relied on **Antony Mkala Chivati v. Malindi Water & Sewerage Co. Limited [2013]eKLR** where the court held that the employer should inform the employee about the charges for which dismissal is contemplated, hear the employee's defence, and finally consider the defence raised before making the decision to dismiss the employee.

32. Finally it relied on **Justus Mukulu Muasya v. Wells Fargo Ltd.[2018]eKLR** where the court found that the dismissal of the claimant was fair because he had been served with a show cause letter and thereafter accorded an oral hearing before dismissal.

33. As regards the reliefs sought, the Respondent stated that the Claimant is not entitled because the termination was fair and justified. It relied on the aforesaid precedents to urge that under section 49 of the Employment Act, the Claimant is not entitled to compensatory damages.

ISSUES FOR DETERMINATION

34. There is no dispute that the Claimant was employed by the Respondent from 1987 to 3.1.2014 when he was dismissed for gross misconduct. The issues for determination are:

- (a) Whether the reasons for the determination was valid and fair.
- (b) Whether the procedure followed was fair.
- (c) Whether the reliefs sought should be granted.

REASONS FOR TERMINATION

35. The reasons for the termination according to the termination letter was that the Claimant colluded with Mwingi Baraka Nursing Home to

defraud the company Kshs. 237,411. Under section 43 and 45 of the Employment Act, the employer must prove that the said reason was valid and fair for the termination to pass the test of substantive fairness. In default, the termination becomes unfair within the meaning of section 45 of the Act.

36. In this case, the Respondent contends that the reasons were valid because the investigations done by its team of investigators at the said hospital revealed that there were no records to prove that the Claimant's daughter was treated at the facility and that indeed the hospital did not have the capacity to cry out the procedure indicate in the subject discharge summary.

37. In addition, the Respondent contends that the said document was signed by a Clerk as opposed to the doctor who did the alleged procedures. Finally, the Respondent contends that the Claimant has totally failed to avail his daughter and wife and call the hospital staff to exonerate him from the said gross misconduct.

38. The only defence by the Claimant is that he was 400 kms away on duty for three weeks and only learned of the daughter's sickness from his wife. He further says the daughter was discharged on 13.12.2012 while he was still away and when he returned he did not know the amount of the bill incurred at the hospital until investigations commenced. He, however saw his daughter go alone to hospital on 24.12.2012 to swipe her Smart Card.

39. Having considered the evidence and submissions by the two parties, I find that the Respondent has proved on balance of probability that the Claimant was involved in a conspiracy to defraud his employer of Kshs. 237,411. The main reason for the foregoing opinion is that in addition to lack of treatment and hospital records to support the alleged treatment and the incapacity to perform the alleged operation and blood transfusion, the Claimant has failed to call his wife, daughter and the hospital staff to confirm that indeed the daughter was admitted in the hospital as alleged in the Discharge Summary.

40. Under section 44(4) (g) of the Act, it is enough if the employer has reasonable and sufficient grounds to suspect that his employee has committed a criminal offence against him or to his substantial detriment. The grounds cited by the employer herein upon which it suspected the Claimant for colluding with the hospital to defraud it of Kshs. 237,411 are in my view reasonable and sufficient since the Claimant has failed to present evidence from the hospital, his wife and daughter to exonerate himself. Consequently, I hold that the Respondent has discharged the burden of proving that the reason for dismissing the Claimant was valid and fair as required by section 43(1) and 45(2) of the Act.

PROCEDURE FOLLOWED

41. Under Section 45(2) (c) of the Act termination of employees contract of service is unfair if the employer fails to prove that it was done in accordance with fair procedure. A fair procedure includes but is not limited to according the employee a fair hearing as contemplated under section 41 of the Act which 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 shop floor union representative of his choice present during this explanation.

Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

42. In this case, the Claimant was served with a show cause letter and he responded to it in writing. Thereafter he was accorded an oral hearing in the presence of his union official and he defended himself. Finally, he was served with a termination letter citing the reason for the separation and he was also paid his terminal dues. In the circumstances, I find and hold that the Respondent has proved that the termination herein was done in accordance with a fair procedure.

RELIEFS

43. In view of the finding that the reason for the dismissal was valid and that the dismissal was done in accordance with a fair procedure, I decline to declare dismissal to be wrongful. For the same reason I find that the Claimant is not entitled to compensation for unfair termination. In the end I dismiss the suit in its entirety and each party to bear its own costs.

Dated, signed and delivered in Nairobi this 22nd day of January, 2021.

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