

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1485 OF 2015

CHARLES KIPKEMOI CHEBII.....CLAIMANT

VERSUS

NATIONAL HOSPITAL INSURANCE

FUND MANAGEMENT BOARD.....RESPONDENT

JUDGMENT

1. The Claimant herein Mr. Charles Kipkemoi Chebii sued the Respondent the National Hospital Insurance Fund Management Board vide a Memorandum of Claim dated 17th August 2015 seeking redress for wrongful, unlawful and unfair termination. He averred that he worked for the Respondent as a Clerical Officer from 1991 and diligently and skillfully discharged his duties and obligations to the satisfaction of the Respondent. It was averred that the Respondent without any lawful or justified reason terminated his services on or about 12th September 2012 on the allegation of desertion of duty and despite there being sufficient medical evidence of him being absent due to depression. The Claimant averred that the Respondent was aware he was suffering from depression and further completely refused to consider the recommendation by the doctor that he had fully recovered to resume duty. The Claimant further avers that he was earning a monthly gross salary of about Kshs. 58,000/- at the time of termination of service and that he claims his salary withheld by the Respondent as from January 2011 to September 2012. He also claims salary in lieu of notice as the Respondent did not give him due notice on termination of service and further claims 12 months' salary as damages for the inhuman manner in which he was dismissed. He avers that the Respondent did not pay him service pay as well as his statutory/terminal benefits and neither did it issue him with a Certificate of Service as required by law, and which he hereby claims. The Claimant thus prayed for judgment to be entered against the Respondent for the abovementioned claims and further, for salary in lieu of any leave earned but not taken; all other benefits whether statutory or otherwise; costs of the suit and any other relief this Court may deem just and expedient to grant. He later filed a Witness Statement dated 27th June 2018 in which he stated that when his very close colleague at work died in 2010, it took a toll on him and he sought for leave after he started experiencing constant feelings of fear, but which leave was declined by his superior. That him being alone in the office at Mathari Mental Hospital further led to him having hallucinations and stress to a point of depression which was thereafter treated by one Dr. Omar Aly after his own family intervened. He stated that he gave reasons for his absence from duty both in his response to the notice to show cause and thereafter in his appeal against termination of his services. He further stated that he was never involved in any issue of misconduct and neither was he issued with any warning letter in the course of his employment.

2. The Respondent filed its Memorandum of Defence dated 26th October 2015 averring that the Claimant, without notification to it, absconded duty on or about 1st December 2010 thus breaching the terms and conditions of his employment contract, the CBA and the Employment Act. The Respondent averred that it wrote to the Claimant on 20th January 2011 requiring him to defend himself and further notified him that his salary had been stopped with effect from 1st January 2011 and after the Claimant failed to respond, it summarily dismissed him on 31st March 2011. The Respondent averred that the Claimant later explained his absence in a letter dated 13th May 2011 after it invited him to make a representation before the Staff Advisory Committee on 2nd November 2011. The Respondent averred that the Staff Advisory Committee deliberated the matter and recommended that the Claimant's services be terminated and he be paid terminal dues and pension benefits. It averred that after the Claimant appealed against the termination, he made representations to the Management Executive Committee which deliberated on the case and upheld his termination as he had not offered any new evidence. The Respondent averred that the Claimant was lawfully terminated after absconding duty for 133 days and that he only communicated with it upon receiving his termination letter. It denied that the Claimant is entitled to the compensation he seeks and states that an award in favour of the Claimant will encourage truancy. It prayed that the Claimant's suit is dismissed with costs to the Respondent. The Respondent also filed a Witness Statement by Lucy Kande dated 21st December 2018 who stated that neither did the Claimant or his family or friends advised or updated the Respondent of his alleged ailment prior to his services being terminated. She further stated that the Claimant has never cleared with the Respondent's HR so as to enable the Fund pay his dues as per its regulations.

3. The Claimant testified at the hearing of the case and he adopted his statement and relied on the attached documents in support of his case. The Respondent did not present any witnesses in support of its case and parties were to file submissions. The Claimant submitted that termination of his employment was contrary to the Employment Act, the Constitution of Kenya and the International Labour Standards. The Claimant submitted that Article 41 of the Constitution of Kenya behooves every employer to offer fair labour practices to its employees but which was not realized in his case and that even though he was a Union member of KUCFAW, he was never accompanied by a shop steward or a colleague to his disciplinary hearing as envisaged under Section 41 of the Employment Act. He submitted that the Respondent further failed to adhere to the disciplinary procedure set out in Clause 16(b) of the CBA as it did not issue him with warning letters before summarily dismissing him and that he also ought to have been receiving half the salary during the hearing processes as per Clause 19 (iv) of the CBA. He submitted that Section 45(4) of the Employment Act provides that a termination of employment shall be unfair if in all the circumstances the employer did not act in accordance with justice and equity as enumerated under sub-section (5). The Claimant submitted that Clause 17 of the CBA stipulates that the employer shall give the employee an opportunity to be heard before terminating the employment on grounds of misconduct. In support on the argument of unfair summary dismissal, he cited the case of **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** which enumerated the aspect of procedural fairness. The Claimant submitted that the Respondent's Committees

wrongly ruled that the medical report he provided was inadmissible as it had been prepared by one doctor and not two and that Dr. Omar Aly is a qualified psychiatrist and which qualification was not challenged by both disciplinary committees. He further submitted that by virtue of the termination letter being issued in September, he is entitled to all withheld pay from December 2011 to the date of termination as he was still an employee of the Respondent and that further, the Respondent took long to determine his case failing to do so within the stipulated period of three months per Clause 18 of the CBA. On his claim for unpaid salary, he relied on the case of **Christian Samba Obath v Fossil Fuels Limited [2016] eKLR** and submitted that he is also entitled to payment in lieu of notice under Section 35 of the Employment Act and that since Clause 3(b)(iv) of the CBA further provides for 2 months' notice or 2 months' pay in lieu of notice, he is entitled to 2 months' pay in lieu of notice. The Claimant submitted that since was denied leave on account of being the only person manning the station, he should be paid in lieu of leave earned but not taken for the year 2010. The Claimant submitted that he should be compensated in terms of Section 49(1) of the Employment Act for the unfair termination and thus prayed for 12 months' salary compensation. He cited the case of **Lydia Kaguru Makathimo v Consolidated Bank of Kenya Limited [2019] eKLR**. The Claimant submitted that he is entitled to service pay under Section 35(5) of the Employment Act at the rate of 15 days for every year worked as he was not a member of the NSSF. He cited the case of **Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR** and argued he was entitled to service pay for the 21 years he served the Respondent. The Claimant submitted that the Respondent disregarded the provisions of Section 51 of the Employment Act by failing to issue him with a Certificate of Service upon his dismissal and sought in addition for costs of the suit. The Respondent did not file any submissions.

4. The Claimant was dismissed after absconding from work for a lengthy period. This was in order as he was not able to effectively explain away his absence to the satisfaction of the Staff Advisory Committee or the Management Committee on appeal. He most surely suffered depression as recorded by Dr. Omar J. Aly but this did not excuse the requirement that a proper explanation be given by his presenting a report of at least two doctors. It is not in doubt that Dr. Aly is a suitably qualified psychiatrist and he is competent to diagnose the condition the Claimant suffered from. The report that is required for purposes of excusing the absence on account of mental illness is required to be under the hand of two doctors as medical board assessments require the concurrence of 2 or more doctors. This is to try to take away the bias one individual doctor may have, especially so with mental illness, most of which may be subject to varied interpretation by different doctors. Other than this, the Claimant was not dismissed fairly as he was entitled to the safeguard of having a shop steward or colleague of his choice attend as per Section 41 of the Employment Act. The letter of 27th October 2011 by L. Kande Assistant Manager Human Resource & Development did not bear the critical words of Section 41 – no indication was made he was entitled to be accompanied by the witness as contemplated in law. He was thus dismissed after a flawed process despite there being basis for the dismissal. He was entitled to receive half salary for the period he was under the cloud of suspicion and for this he would be entitled to recover half salary from December 2010 to 12th September 2012 when his appeal was dismissed. He did not prove that the Respondent never remitted his NSSF dues as no statements were provided nor was any evidence adduced at the hearing in this regard. The Claimant is required to discharge his duty to clear with the Respondent which he must do within 14 days of the Judgment herein being rendered. Failure to do so will disentitle him to interest on the sums due. The default must only be that default that can be attributed solely to the Claimant.

5. In the final analysis I enter judgment for the Claimant against the Respondent for –

- i. Half salary from December 2010 to 12th September 2012;
- ii. 3 month's salary as compensation for unlawful termination;
- iii. Costs of the suit;
- iv. Certificate of Service
- v. Interest at court rates on i) and ii) above from date of judgment till payment in full provided the Claimant clears with the Respondent within 14 days as held above in Paragraph 4.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2021

Nzioki wa Makau

JUDGE