



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.16 OF 2020

(Before D.K.N.Marete)

ENOCK OTIENO ONDU.....CLAIMANT

VERSUS

THE BOARD OF TRUSTEES OF

NANYUKI COTTAGE HOSPITAL.....RESPONDENT

JUDGMENT

This matter was originated by way of a Statement of Claim dated 5th August, 2020 it does not disclose an issue of dispute on its face.

The Respondent in a Respondent's Response to the Claim dated 11th September, 2020 denies the claim and prays that this be dismissed with costs to herself.

The Claimant's case is that by a contract of service duly executed on 7th July 2007, he was employed by the Respondent to work as a Clinical Officer and Anaesthetist at a consolidated salary of Kshs.141,772.00, full particulars of which are in the respondents knowledge.

His further case is that on 4th May, 2017, the Respondent transferred its services from Nanyuki Cottage Hospital Society to Nanyuki Cottage Hospital Registered Trustee (NCH Registered Trustees) effective 1st January, 2015 but recognised his employment as set out with all deserved entitlements and benefits.

He further avers thus;

“The Claimant avers further that the Respondent assigned him various duties and responsibilities which included but not limited to the following:-

- a. Medical and Clinical duties*
- b. Surgical and anaesthesiology*
- c. General and outreach services*

“The claimant continued working for the Respondent and provided exemplary services and because of this his salary was increased to Kshs.247,840/- per month and then to Kshs.313,929/- as per the pay slip for the month of September, 2019.

The Claimants other aversion is that he continued working and rendered exemplary services and his salary was increased to Kshs.247,840.00 together with an agreement for overtime but on 25th June, 2020, he was unlawfully, wrongfully and unfairly terminated from employment in total disregard of the Employment Act and the constitution for no apparent or justifiable reason.

The Claimant's further case is that by another contract of service executed *inter partes* on 20th May, 2011, his contract was renewed for a period of twenty four (24) months at a consolidated salary of Kshs.181,845.00 with arrangement for catering for overtime by way of time off in lieu of such overtime.

Overall, the claimant put in thirteen (13) years as the only Anaesthetist in the medical and clinical Departments and faithfully and devotedly executed his duties prior under difficult circumstances and all with no complaint. He cites a breach of contract in the following terms;

Particulars of Breach of Contract by the Respondent.

- a. Failure and/or willful refusal to serve the claimant with any termination notice.
- b. Failure and/or willful refusal to give the claimant a fair hearing.
- c. Failure and/or willful refusal to constitute a relevant and competent panel to hear the disputed allegations.
- d. Failure and/or willful refusal to supply the claimant with all the requested documents to enable him answer the Respondent's frivolous allegations.
- e. Harassing and intimidating the claimant.
- f. Failure and/or willful neglect and refusal to pay the claimant his accrued overtime.
- g. Failure and/or willful refusal to pay the claimant his rightful dues in lieu of notice.
- h. Failure and/or willful refusal to do everything within its abilities and powers to adhere to the claimant's contract of service.
- i. Terminating the claimant without any valid and justifiable cause.
- j. Terminating the claimant during the Global COVI-19 pandemic.
- k. Purporting to terminate the claimant even when his appeal was pending.
- l. Conducting flawed disciplinary hearings comprising of unqualified and incompetent people.
- m. Hearing the claimant's appeal by the same people who had heard the first hearing.
- n. Failure to avail the complainant during the hearing and supply the claimant with all the requested documents.

Other developments relating to the Claimant's employment forming his case are as follows;

- That the renewed contract provided for two (2) months notice by either party in the event of termination of contract.
- That by a further contract executed *interpartes* on 9th October, 2014, a further renew for three years 1st July 2014 – 30th June, 2017, was effected.
- That by a letter dated 28th September, 2015 the Respondent asked the Claimant to make a choice between contract or permanent employment.
- He worked as a sole anaesthetist for twenty four (24) hours each day and had raised the issue of overtime which was acknowledged by the Respondents memo dated 3rd May, 2016.
- By a memo dated 16th November, 2016 and a letter of 30th November instant, the Respondent promised to look into the Claimant's work schedule and settle the issue of overtime and this did not happen.
- That in total he put in overtime for 63399 hours amounting to Kshs.98,760,824.55.
- That he also worked for 7 days of public holiday amounting to Kshs.142,273.6.
- His leave days unpaid salaries for the months of May, 2020 plus 2 months pay in lieu of notice which amounts to 1,823,202.00

“Leave Arrears and off days- 61 days

Amount payable Kshs.607,734/-

Unpaid Salaries for May and June 2020

Amount payable Kshs.607,734/-

Two months pay in lieu of notice

Amount payable Kshs.607,734/-“

- On 8th February, 2017 he was issued with the Personal Employment Number 02707.

The Claimants further case is that on 16th January, 2020 he was asked to show cause as to why disciplinary action should not be taken against him in a case relating to a patient, Lian Mugendi Kimathi, to which he responded. This was followed by the Respondents warning letter dated 30th January, 2020 in which the Claimant was admonished and disallowed to perform any major clinical theatre except minor cases in consultation with the Head of Critical Care and subject to approval among other recommendations. To this, he responded positively.

The Claimant was later and by a letter dated 11th March, 2020 accused of refusing to obey lawful order issued by the head of Department critical care or theatre Dr.Kariuki when he was on leave and having in mind the letter of admonishment against major theatre cases. This he denied and thoroughly explained.

The Claimant's other case is that as a consequence of this response and by a letter dated 18th March, 2020 he was invited to a disciplinary committee on 26th March, 2020 to answer charges of refusal to obey lawful orders and instructions and insubordination. This was heard and resulted in his termination from employment vide a letter dated 18th May, 2020.

He appealed against termination by letter dated 25th May, 2020 on grounds that Dr.Kariuki had not been called to substantiate the allegations against him. He later got a letter of acknowledgment of appeal and advising him that the termination was effective and should clear with the hospital. He was however invited to appear before the Board of Management on 16th June, 2020. This was also accompanied by a demand letter from the County Labour Officer.

On 24th June, 2020, the Respondent communicated a dismissal of the appeal and the upholding of the letter of termination.

It is his further case that even before the appeal was heard and determined, the Respondent had barred him from accessing the hospital to see his personal doctors for routine check-up.

He prays thus;

- a. A declaration that the Claimant's employment with the Respondent was terminated arbitrarily, unfairly, unlawfully, wrongfully and contrary to the provisions of the Employment Act and the Kenyan Constitution.
- b. Kenya shillings Three Million six hundred and forty six thousand four hundred and four only calculated at Kshs.303,867/= per month on account of Twelve months (12) compensation for wrongful termination of employment and Two (2) Months salary in lieu of the notice.
- c. Kenya shillings six hundred and seven thousand seven hundred and thirty four (Kshs. 607,734/= on account of unpaid salaries for the months of May and June 2020.
- d. Kenya shillings one hundred and forty two thousand two hundred and seventy three (Kshs. 142,273/=) on account of unpaid public holidays worked.
- e. Kenya shillings six hundred and seven thousand seven hundred and thirty four (Kshs 607,734/=) on account of unpaid leave arrears for the period of 2018-2019 and 2019-2020.
- f. Kshs.98,760,824.55/= on account of overtime worked.
- g. General damages for wrongful termination of employment.
- h. Any other or alternative relief that this court may deem fit and just to grant in the circumstances.

The Respondent's case is a denial of the claim. This comes out as follows;

- The Claimant was issued with a first warning letter dated 30th January, 2020 after being issued with a show cause letter of 30th instant.
- The warning letter clearly demonstrated that the Claimant was subject to both the Head of Critical Care Unit, Dr.Kariuki in the case of minor theatre assignments and also Dr.Butt in regard to Outpatient Department and Clinical duties.
- On 10th March, 2020 he deliberately failed and refused to obey Dr.Kariuki's lawful instructions and retorted thus in an SMS

“Doc, I am afraid that I will not be legally tenable to avail myself to offer anaesthesia service at cottage hospital” part 1 of the board's recommendations expresses itself clearly. I have authoritatively been advised against making local arrangements in contravention of the said recommendations. I have not equally gotten any communication from the management regarding my appeal and the need to have the issue revisited by the MAC. Regards Enock”.

The Respondent narrates and reiterates the Claimant's position and evidence on disciplinary procedure all the way upto the appeal against termination of employment by the Claimant. It is her submission that the disciplinary panel and appeal were chaired by different people and the two participants who appeared in both declared this on 16th June, 2020 with no objection to their attendance by the Claimant. A complaint arising on this can only be construed as an afterthought.

The Respondent *in toto* denies any liability on overtime and dismisses the allegation of being at work for 24 hours every day. She only admits the amount of Ksh.711,390.15 being final dues to the Claimant which he has so far refused to receive.

She in the penultimate prays as follows;

a. A declaration that the termination of the Claimant's Employment was lawful, fair and procedural and the Claimant is only entitled to the items listed on paragraph 23 of the Response herein.

b. The claimant be condemned to pay costs to be deducted from his final dues referred to in (a) above.

The matter came to court variously until the 26th November, 2020 when the parties agreed on a *determination* by way of written submissions.

The issues for determination in the circumstances therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the Claimant entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The Claimant in her written submission dated 8th January, 2021 enters a case of unfair and unlawful termination of employment. In this he reiterates his case as presented and faults the disciplinary process leading to his termination of his employment on grounds of its composition. It is his submission that this was illegal all the way.

The Claimant further submits as follows;

- He had not had reprieve from the letter of 30th January, 2020 allowing him to resume major clinical theatre duties.
- He was on leave on 10th March, 2020 when he received instructions from Dr.Kariuki.
- Dr.Kariuki was never called to testify on his complaint letter.
- He had not been furnished with Dr.Kariuki's complaint letter for answer.
- Dr.Anup, the respondent's Executive officer was also never invited to testify as a witness.
- The Respondent's counter claim comprises of non-issues only intended to crowd the courts mind.

The Respondent in her written submissions dated 4th February, 2021 reiterates her case and submits that the termination of the employment was lawful in that the Claimant was accorded due disciplinary process in which he fully participated.

Overall, the Respondents case overwhelms that of the Claimant. She well illustrates and demonstrates a case of termination of employment which pursued all disciplinary process. The Claimant was taken through the legal modules of discipline culminating in an appeal against termination of his employment. He participated in all this. This complies with the provisions of Section 41 and 43 of the Employment Act, 2007 which provide for substantive and procedural fairness in cases of termination of employment. The reasons for termination of employment were always clear to him. The Claimant cannot be heard to complain. I therefore find a case of lawful termination of employment in this cause. This answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, the Claimant becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same. And this answers the last issue for determination.

Dated and delivered at Nyeri this 16th day of June, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Bwononga instructed by Bwononga & Company Advocates for the Claimant
2. Mr. Abwour instructed by Abwour & Company Advocates for the Respondents