



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**CAUSE NO. 59 OF 2018**

**DR OLIVER SHADRACK MAMATI.....CLAIMANT**

**v**

**BOARD OF GOVERNORS, FRIENDS LUGULU MISSION HOSPITAL.....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 24 July 2019, when Dr Oliver Shadrack Mamati (the Claimant) and his witness testified and 8 June 2021, when the Head of Human Resources with the Board of Governors, Lugulu Mission Hospital (the Respondent) testified.

2. The Claimant filed his submissions on 9 July 2021 while the Respondent filed its submissions on 9 August 2021.

3. The Court has considered the pleadings, evidence and submissions.

**Breach of contract**

**Unpaid professional fees for surgeries**

4. The Claimant sought Kshs 150,000/- which he said was unpaid professional fees for surgeries performed.

5. The Claimant did set out the averments in respect of this head of the claim in the Amended Statement of Claim. It was only outlined as one of the remedies pleaded.

6. The Claimant did not also lay any evidential foundation for this head of the claim either in the initial witness statement, the further witness statement or during oral testimony.

7. The Court finds that the Claimant did not prove that the Respondent was in breach of contract in respect to the payment of professional fees.

**Gratuity**

8. The Claimant did not have a formal contract providing for payment of gratuity at time of termination on 30 August 2018.

9. By that time, the Claimant had served for 8 months.

10. The Court therefore declines to allow the head of claim for gratuity.

**Certificate of Service**

11. The Respondent produced a copy of the Claimant's Certificate of Service in Court. If the Claimant did not collect the original, he should collect the same.

**Unfair termination of employment**

**Procedural fairness**

12. Section 35(1) of the Employment Act, 2007 requires an employer to issue a written notice of termination of employment while section 41 of the Act contemplates the employer affording the employee an opportunity to make representations before the decision to terminate is made.

13. The Claimant was first offered employment by the Respondent on a 3-year renewable contract effective 3 December 2012 (first contract).

14. The contract lapsed and through a letter dated 23 December 2014, the Respondent informed the Claimant that the contract would be renewed for 3-years starting 1 January 2015 (second contract).

15. On or around 19 March 2017, the Respondent offered the Claimant a third contract.

16. However, the Claimant through a letter dated 10 July 2017, indicated that he would not sign the contract because of questions surrounding the effective date, working hours, annual leave, overtime, gratuity and applicable human resources policies.

17. Nevertheless, when the second contract lapsed in December 2017, the Claimant continued offering services until he received a letter dated 31 August 2018, informing him of the termination of his contract.

18. The reasons given for the termination of contract were that the Claimant had failed to comply with invitations to appear before the Board to discuss medical and clinical services on 25 June 2018, 23 August 2018 and 30 August 2018.

19. Another reason given was that the Claimant had declined to sign a new contract.

20. The Court has looked at the invitation letters dated 19 June 2018, 15 August 2018 and 28 August 2018, sent to the Claimant to appear before the Board.

21. Apart from the last two invitations which indicated that the subject of the meetings were *employment contract issues*, none of the letters put the Claimant on notice that the termination of his contract was on the cards.

22. The Court finds that the Respondent did not comply with the procedural fairness requirements as envisaged by sections 35(1) and 41 of the Employment Act, 2007.

### **Substantive fairness**

23. The Respondent gave two reasons for terminating the Claimant's employment (declining to sign a contract and failing to appear before the Board).

24. The Claimant admitted that he declined to sign the third contract because some of the terms were not acceptable to him.

25. In the Court's view, the failure of the Claimant to accept the terms of the contract was a frustrating event, and thus not a consideration of unfair termination of employment.

26. The second reason given by the Respondent was that the Claimant failed to appear before the Board.

27. The Claimant admitted that he received the invitations to appear before the Board and that he went to the chapel boardroom but was never called to the meetings.

28. The Claimant called a colleague who testified that the Board adjourned on 30 August 2018, immediately after she had appeared before it.

29. The Court has looked at the minutes of the Board meetings held on 23 August 2018 and 30 August 2018.

30. The witness presented by the Respondent is not captured as having been present or in attendance and weighing the evidence advanced on behalf of the Claimant against her evidence, the Court finds that it is more probable that the Claimant presented himself before the Board but was not called into the meeting.

31. Further, in the Court's view, if the real reason for terminating the Claimant's contract was failure to appear before the Board on the 3 occasions, the Respondent should have issued a show-cause notice to the Claimant informing him that it intended to terminate the contract on account of failure to appear before the Board.

32. The Court finds that the reasons for the termination of the Claimant's employment were not valid or fair.

### **Salary in lieu of notice**

33. The Claimant was paid 1-month salary in lieu of notice and nothing turns on this head of the claim.

### **Compensation**

34. The Claimant served the Respondent on distinct contracts but at the time of separation, there was no formal contract as he had not agreed to the terms of the new contract offered by the Respondent.

35. In the circumstances, the Court is of the view that the equivalent of 1-month salary as compensation would be appropriate (gross salary in June 2018 was Kshs 262,750/-).

**Conclusion and Orders**

36. The Court finds and declares that the termination of the Claimant's employment was unfair.

37. The Claimant is awarded:

(i) Compensation **Kshs 262,750/-**

38. Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8<sup>TH</sup> DAY OF OCTOBER 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Hammerton Maloba & Co. Advocates

For Respondent Abok Odhiambo & Co. Advocates

Court Assistant Mr Musanga