



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.61 OF 2018

RHODA FAITH ANGWENYI.....CLAIMANT

VERSUS

NAROK COUNTY REPUBLIC SERVICE BOARD.....1ST RESPONDENT

NAROK COUNTY GOVERNMENT.....2ND RESPONDENT

TRANSMARA WEST SUB-COUNTY MEDICAL OFFICER OF HEALTH.....3RD RESPONDENT

JUDGEMENT

The claimant is a female adult. The 1st respondent is a body established under the County Government Act. the 2nd respondent is a county government under the provisions of Article 176 of the constitution. the 3rd respondent is an officer serving under the 2nd respondent.

The claimant was employed by the 1st respondent as a nurse under a yearly fixed term contract from 1st October, 2010 and stationed at Trans Mara West Sub-county Hospital. The contract of service would run from 1st October to 30th September of each succeeding year.

The contracts of service were renewed from the year 2011 to 2017.

The claim is that On 22nd January, 2018 the respondent terminated the claimant in her employment without due process as there was no notice or justifiable cause.

Before employment terminated, the respondent had failed to pay the due wage of ksh.46,888.27 for October to December, 2017 and January, 2018.

The claims made for;

- a. payment of compensation for unfair termination of employment;
- b. Notice pay;
- c. Unpaid leave from the years 2010 to January, 2018;
- d. Certificate of service; and
- e. Costs of the suit.

The claimant also testified that she was employed on fixed term contracts since the year 2010 with the last contract ending 30th September, 2017. After the lapse of the contract it was not renewed.

On 22nd December, 2017 the claimant was issued with letter to show cause cause. There was a period she was to report to work but got sick and remained absent for 2 weeks and upon return the head nurse issued the notice. she presented several letters to confirm that she had been sick.

The claimant also testified that she would only be absent from work when sick or attending school and in such cases would inform the respondent. she did show cause why she was absent from work and that her employment should not be terminated.

By letter dated 8th December, 2017 the claimant was given a hearing. She was sent to a female doctor to examine her and to file a report to which the claimant complied with but there was no response from the respondent. this was followed by summary dismissal from employment.

The claimant also testified that she was part of the team taken to West Africa for 6 months to address the *ebola* outbreak. She was away from her duty on secondment following a communication done through the government departments to the Council of governors and the respondent.

The defence that the claimant shared confidential information of the respondent is not correct as the claimant is not aware of such information. There was no notice to show cause on such matter.

From the year 2010 the claimant did not take annual leave save to attend classes but no annual leave was allocated.

Termination of employment was on the grounds that her contract of service would not be renewed and that she had been absent from duty and she posted it on social media and that she had been rude to her supervisors which was not true and was not given a chance to give her defences.

On 22nd January, 2018 the claimant was on night duty when she was called and issued with letter terminating her employment. From October, 2017 to January, 2018 she had not been paid her due salaries.

Upon cross-examination the claimant testified that she was employed a programme and placed with the respondents, the Walter Reed and who paid the due salaries and issued annual contracts. The contracts would be renewed based on good work performance. Under the contract there was no benefit save for a salary. She was entitled to leave and pension and gratuity was paid annually.

Every October, the claimant would receive a double payment of salary.

The last contract ended on 30th September, 2017.

The claimant also testified that in the year 2016 she went on mission to West Africa for 6 months it followed a communication from the government. The respondent did not know her whereabouts. She received full salary for the period. The ministry was aware of the deployment but the respondent was not aware. A circular had been sent to the respondent and the Ministry said she had to travel and could not be able to communicate. Upon return she was quarantined for two weeks and then report back to work.

The claimant also testified that she got a work benefit of school with sponsorship from the respondent and remained in school from the year 2013 to 2017. The respondent allowed the claimant to attend school and further studies on condition that she would take examination during her leave days. She was never denied the chance to attend school upon request.

In the year 2017 there was a strike by nurses running from June to November, 2017.

She was at work. She however did not register for work attendance.

In January, 2015 the claimant travelled until June, 2015 and was not allocated duty.

The work register indicates she was attending school but she was in Sierra Leone.

The respondent thought she was attending school.

The claimant also testified that she was issued with a notice to show cause on 29th November, 2017 for absenteeism and replied thereto. There is evidence of being away sick and treatment. There was however no sick off note issued.

Defence

The defence is that on 25th August, 2005 a Memorandum of Understanding (MOU) was entered between the United States Army Medical Research Unit – Kenya, the Walter Reed Project, the Kenya Medical Research Institute (KEMRI) and Kilgoris Trans Mara District Hospital, renamed Trans Mara West Sub-County Hospital. The project provided for funds to support the prevention and control of HIV/AIDS.

Under the project it was agreed that certain personnel would be contracted and seconded for execution of the work and activities. Employment contracts would run from 1st October, to 30th September of each year and renewed annually based on work performance and recommendation of the head of department.

The claimant was engaged on a one-year renewable contract as a nurse starting from 1st February, 2010 to 30th September, 2017.

The claimant was initially posted to Langata Health Centre until February, 2013 when she was transferred to the Trans Mara hospital under

the 2nd respondent ad became subject to the human resource manual as policy procure dues for public service applicable thereof.

The claimant's work and duty attendance was erratic from the year 2015 to 2017.

At the time the claimant claimed she was attending classes at Kenya Methodist University for in-service Bachelor of Science Degree but unlike other nurses of the respondent she declined to share the schedule of her training with the head of department of the medical superintendent and the programme coordinator. The nursing officer found it difficult to maintain the claimant on the duty rota.

In January, 2015 the claimant accompanied the medical delegation from Kenya to Liberia and Sierra Leone to fight *ebola* without permission and or leave from the respondent. she did not inform anyone about her departure. The nursing officer discovered the claimant had departed for West Africa upon failing to trace her and after failing to attend duty for over a month.

For this period the claimant was maintained on the payroll and upon return she could not give reasonable justification for her actions. She explained that her travel was an emergency and had no chance to call anyone.

Following discussions, the claimant was asked to apologise for her conduct but to date she has refused to do so.

The defence is also that in the year 2015 and 2016 the claimant's work attendance continued to be erratic.

On 26th April, 2016 the claimant submitted a request for leave to attend a clinical placement from 9th May to 29th August, 2016 but the official University clinical placement schedule letter dated 13th April, 2016 indicated the claimant as to be in rotation from 6th June to 12th August, 2016. The claimant was hence informed that she was expected to be on duty following the contradictory information on clinical placement. The claimant proceeded to absent herself from duty from May to August, 2016.

In October, 2016 when the claimant's contract was up for renewal the nursing officer was hesitant to recommend but the claimant pleaded for leniency and there was renewal of contract for a year.

Between June and November, 2017 during the national strike for nurses the 4 nurses contracted under the project were expected to be on duty and of the 4 the claimant declined to attend duty claiming to be a member of the union. When the nurses resumed duty on 3rd November, 2017 the claimant did not report back and only reported 3 weeks later and purported to submit a discharge summary from hospital alleging she had been admitted in hospital. Such was without leave.

The nursing officer refused to recommend the claimant for her contract renewal given her history of erratic work attendance.

By notice dated 27th November, 2017 the claimant was given reasons why disciplinary proceedings would be commenced against her and was directed to attend on 30th November, 2017. She refused to endorse the notice in acceptance. A show cause notice was issue don 29th November, 2017 to which she responded on equal date and on 30th November, 2017 attended hearing and gave her defence but the committee found them unsatisfactory as there was no evidence of a school schedule or admission in hospital.

By letter dated 8th December, 2017 the claimant was required to supply supporting documents but she failed to comply. The claimant remained away from duty until 23rd December, 2017 when she sneaked back to the ward and duty rota without informing the nursing officer and without confirming whether her contract had been renewed. The documents submitted by the claimant related to various visits to hospital but none related to the dates she alleged to have been admitted in hospital.

The defence is also that the disciplinary committee met on 18th January,, 2018 and reviewed the responses by the claimant and the supporting documents and upon careful consideration resolved not to renew her contract of service for the period starting 1st October, 2017. The decision was communicated vide letter dated 22nd January, 2018.

The claims made are without merit, there is no evidence that the claimant applied for leave and this was declined and the contract of service having lapsed the respondent was justified not to renew it. The claims made should be dismissed with costs.

Timothy Kabula the Medical officer at Trans Mara Hospital and the medical officer testified in support of the defence. Under the Walter Reed programme, the claimant was employed as a nurse on annual fixed term contract and for renewal a recommendation would be based on work performance. the last contract ended on 30th September, 2017 and was not renewed. It came to the attention of the project team and the respondent that the claimant had been erratic in duty attendance, she had been away for 6 months in the year 2015 without permission or the knowledge of the respondents and the most notable incident was the claimant's absence doting the nurse's strike in June to November, 2016. Despite being on contract under the project, she remained absent from duty without good cause.

Mr Kabula also testified that even when he nurses' strike was called off on 3rd November, 2016 the claimant remained absent. She was not a member of the union that had called for a national wide strike. the respondent did not know her whereabouts.

Despite the claimant having no contract of service she was issued with a notice to show cause dated 29th October, 2017 and she responded. The respondent needed to know why the claimant had failed to attend duty.

On 30th November, 2017 the claimant was invited to attend a disciplinary hearing and she gave her defence that she had been in school and sick. She had medical documents but no evidence of an admission making it impossible for her to attend work.

Mr Kabula also testified that looking at the claimant's work records, a decision was taken not to renew her contract. This was communicated vide letter dated 22nd January, 2018. There was good a justified grounds not to renew her contract.

Everline Siparo the nursing officer at Trans Mara West Sub-County Hospital also testified that she worked closely with the claimant under the Walter Reed project and under her contract she would be allowed to attend school or be at work but on several occasions the claimant would not be at work or at school and she was issued with verbal warnings and promised to change but this was constantly repeated.

The claimant was however away for 6 months in the year 2015 without the knowledge of the respondent and without any communication from her. upon return she said she had been appointed by government to go to West Africa but there was no permission given by the respondents or under the project.

Ms Siparo also testified that the claimant continued to be a difficult employee and failed to attend work without notice or permission. In June to November, 2016 she was not at work when the nurse went on strike yet she was not unionised.

In the year 2017 the claimant remained absent from May stating she was in school but produced conflicting documents. She then stated she had been admitted in hospital but upon interrogation of the submitted documents, there was no admissions.

Ms Siparo also testified that as the Nursing officer she would plan nurses duty per month including the claimant who would fail to attend. In January, 2017 the claimant was supposed to be on duty but was noted as absent and attending school and only at work for 7 days only;

March, 2017 the claimant is noted as attending school;

April, 2017 the claimant is noted as attending school;

In May, 2017 the claimant was assigned duty but there was no attendance; and

The period of June to October, 2017 was during the strike and the claimant was not at work.

In November, 2017 the claimant as not allocated duty. Other nurses had resumed duty but she was absent.

The Walter Reed project had been allocated 4 nurses on contract and all attended duty save for the claimant. When her contract ended in September, 2017 it was not renewed.

At the close of the hearing both parties filed written submissions.

The court has analysed the pleadings, the evidence and the filed written submissions and the issues which emerge for determination can be summarised as follows;

Whether there is a case of unfair termination of employment;

Whether the remedy of compensation is due;

Whether the claimant should be paid for annual leave for the period of February, 2010 to January, 2018;

Whether the salary claim for October, 2017 to January, 2018 should be paid;

Issuance of certificate of service and Who should pay costs.

It is common cause that both parties regulated the employment relationship through written and fixed term contracts. Save for the initial contract running from February to September, 2010, all other contract had a fixed period of one year and each running from 1st October to 30th September, each year the last written contract ending 30th September, 2017. There was no renewal of the contract after such period.

A fixed term contract end on its own terms as held in the case of **Bernard Makokha & others versus Centre Star Company Limited Cause No.2177 of 2016 (Nairobi)**.

Fixed term contract in employment and labour relations is recognised as a lawful and legitimate mode of employment and in accordance with section 10(3)(c) of the Employment Act, 2007 (the Act);

c. where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

Also a written contract of service defining terms and conditions of employment is regulated under the provisions of section 10 of the Act and an employer is required to issue such written contract to employees. Where there is a dispute, the court is bound by the agreed terms and conditions unless there is evidence to the contrary in defining the set out terms and conditions. See **Fatuma Abdi versus Kenya School of Monetary Studies [2017] eKLR** and **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR**.

In this case the parties agreed to be bound by an annual contract of service in regulating the employment relations. The last such contract of service ended on 30th September, 2017 and was not renewed. The claimant was no longer bound to attend work without a contract of service and the respondent was not bound to allocate and or direct the claimant to attend duty in the absence of a written contract as this is what regulated the work relations.

However, pending the end of the last contract on 30th September, 2017 the claimant had work issues unresolved and which related to her being absent from work on various days and which the respondent required her to address.

By a show cause notice dated 29th November, 2017 the respondent required the claimant to respond to matters that;

You have been absconding duty on several occasions without proper communication to your ward in charge or the hospital Nursing Officer in charge, despite several verbal warnings by the Nursing Officer in charge you have not reformed.

On two occasions you have refused to a bend [append?] your signature on the misconduct claims. ...

On equal date the claimant responded thus ;

Communication during my absence

...

On the date 11th January 2015 I was privileged to be one of the Kenya Ebola volunteers team to assist in control of Ebola outbreak in West Africa specifically Liberia. During this period an official communication was made through the ministry of health to the county government with an assurance that full communication was made to all relevant protocols and assured out job security too. Since I left Kenya having lost all my contacts and my cell phone it was deemed that an official communication was made and I proceeded with my duties as normal, little did I know it would raise issues with my immediate supervisors.

.....in October, I fell sick, the illness persisted and was later admitted to Mediheal Hospital to undergo a procedure on 10th November, 2017 and given 14 days bed rest. During that period I was so confused and was not in my full senses the family was traumatised over my rapid health deterioration. I couldn't [could not] make it to the job nor communicate, attached herewith find the sick sheet attached. ...

Hence the claimant admitted to being absent from duty on several occasions without having the chance to inform or communicate with the respondents. On the one had her reasons are that she travelled as a volunteer team to Liberia and on the other case that she fell sick and got admitted in hospital and had no chance to communicate to the respondent in both instances.

Section 44(4) (a) of the Employment Act, 2007 allow an employer to issue summary dismissal notice to an employee absent from work for no good cause. Where the claimant remained absent from duty for a good cause, it was her duty to inform the employer and or seek permission to be absent and await approval as absence from duty without the employer's permission attract the sanction of summary dismissal.

Even in a case where the claimant was sick and or ill and was admitted in hospital, section 30 and 34 of the Employment Act, 2007 requires that the employee who is sick should inform the employer within a reasonable time and even where the employee is not able to communicate, a third party is allowed to undertaken such role.

In the case of **Dorothy Ndungu versus Machakos University [2016] eKLR** and in **Ronaldo Hamisi versus Orascom Construction Company Cause No.1477 of 2015** the court held that;

In employment and labour relations, an employee who is sick and absent from work due to illness is required under section 30 and 34 to take medical leave and seek medical attention. Where the employee is sick or ill, the employer must be notified of the same and upon return, the employee is legally bound to produce a medical certificate from a medical practitioner from a recognised medical facility. The facility the claimant attended after issuance of the P3 form is not one such recognised medical facility in terms of section 34 of the Act.

And in **Anne Wairimu Kimani versus Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR** the court held that;

Further to the above, section 34 of the Employment Act, 2007 requires that where an employee is unable to attend work due to illness, sickness or any medical condition, such should be brought to the attention of the employer within a reasonable time. The law gives the condition that the employee should also submit a medical certificate from a medical practitioner. See **Dorothy Ndungu versus Machakos University & others [2016] eKLR**.

Therefore Where the claimant was ailing and attended hospital, the law required her to address and cause the employer to be informed and upon return to produce the requisite certificate. This is not addressed.

Even where the claimant was under a contract of service fixed in time, upon discharge from hospital she made effort to return to work but failed to address the mandatory provisions of section 34 of the Employment Act, 2007. In the reply dated 29th November, 2017 the claimant

has made effort to file some of the medical documents with regard to attending hospital on various date, however the legal requirement to produce a Medical Certificate and prove the need to be absent from work due to sickness or illness is not addressed.

The respondent did not act on the continued absence of the claimant instantly. She was left at large and until her fixed term contract lapsed and was not renewed.

This being the prerogative of the respondent to renew or not renew the contract ending 30th September, 2017, the claimant was not bound to attend work. The claim that there was unfair termination of employment on the face of the ended contract of service is without foundation. The claimant was aware at all times that all her employment period with the respondent was regulated under written terms and after the 30th September, 2017 she had no written contract requiring her to attend duty.

Having been absent without due cause and as analysed above, there being no bidding terms and condition required work attendance after the 30th September, 2017 termination of employment ended as agreed upon. No notice or compensation is due.

With regard to the claim for payment of salaries due from October, 2017 to January, 2018 as set out above, employment ending as of 30th September, 2017 there was nothing bidding the respondent to allocate work or pay a salary to the claimant. Even where the claimant would have been entitled to a pay for work done, in her evidence she was not at work from October, 2017 on the alleged sickness which is found to comprise a period of absence from duty without good cause and hence the respondent is not bound to pay for such time in accordance with section 19 of the Employment Act, 2007.

The claims for salary payments for the periods the claimant did not attend work for no good cause are without merit. To claim payment of salaries from October, 2017 to January, 2018 while aware there was no work attendance is without a good foundation. Section 19 (1) (c) of the Employment Act, 2007 allow an employer to deduct from the wages/salary paid to an employee for every day the employee is absent from work. This is stated in the following terms;

c. an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

The claimant having been absent from work for a period of 6 months in the year 2015 and was paid for such time, such payment is not justified and should be repaid back. There was no work attendance to justify the payment.

With regard to the claims for annual leave pay from February 2010 to January, 2018 the claimant was under fixed term contract each running under its own terms and conditions. Section 90 of the Employment Act, 2007 only allow claim arising within a period of 3 years. all other claims outside such period are time barred.

The Memorandum of Claim was filed on 22nd February, 2018 and claims for leave pay due can only be assessed as of 21st February, 2015. All other claims lapse in time.

Under the various contracts of service clause 8 allowed for 30 days of annual leave.

The claimant testified that she was allowed time off to attend school and take her examinations and every October she would receive a double salary. Though the purpose of the double salary is not explained, such benefit taken into account, the due annual leave is accounted for.

Even where such double payment was not for annual leave, the claimant's work attendance and absence from duty to attend school and at the costs of the respondent accounts to time away from work with pay.

From the records filed by the claimant;

Page 46, there was no work attendance from 1st to 15th December, 2015;

Page 52, July, 2016 there is no work attendance for the full month;

Page 61, 1st to 14th August, 2016 there was no work attendance;

Page 73, 1st to 5th and 25th to 31st October, 2016 not at work;

Page 54, 14th to 31st November, 2016 there is no work attendance;

Page 63, 7th to 31st January, 2017 the claimant was not at work;

Page 60, in February, 2017 the claimant was not at work.

These are records filed by the claimant. Cumulatively for the duration annual leave is due, the claimant was absent from work for days over and above what she was entitled to under her contract of service at 30 days. This coupled with the admitted absence for 6 months from

January to June, 2015, to claim for payment for annual leave would be to reward gross misconduct. that is not the essence of fair labour practices.

With regard to the claim for a certificate of service, this is due for the period of service under the provisions of section 51 of the Employment Act, 2007.

Accordingly save for the issuance of a certificate of service, the claims made are found without merit and are hereby dismissed. The claimant shall pay costs to the respondents.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of:.....