



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 38 OF 2018

CLAUDETTE NAKHUMICHA ALUSACLAIMANT

VERSUS

CENTRAL MEMORIAL HOSPITAL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her alleged unfair and unlawful termination from employment. The Claimant averred that she was employed by the Respondent on 23rd February 2017 as a lecturer in Medical Laboratory with effect from 30th January 2017 on a 3 year contract which was renewable subject to satisfactory performance. She averred that she was earning Kshs. 22,000/- a month. The Claimant averred that she had a distinguished service and was never subjected to any disciplinary proceedings throughout her services with the Respondent and that in June 2017, the Respondent without any consultation, unilaterally altered the Claimant's terms and conditions of the contract by changing her position to a Laboratory Technician which position attracted a better package. The Claimant averred that despite the change, the Respondent kept on underpaying her. The Claimant averred that she worked diligently the Respondent unlawfully, unfairly and unprocedurally terminated her employment through a summary dismissal letter dated 4th November 2017. The Claimant averred that on 17th October 2017 she was called by the Respondent's Human Resource Manager Antony Wesonga, who informed her that there was a complaint made by a client named Eunice Njoki Ali who alleged that the Claimant had solicited money amounting to Kshs. 1,000/- from her by false pretences within the hospital premises. She averred that it was alleged that the amount in question was issued as fees for conducting laboratory tests for blood sugar, full haemogram and a pregnancy test. The Claimant averred that she was asked to write a letter giving an explanation of the incident and the tests she had carried out. The Claimant averred that she wrote a letter and attached copies of the results of the tests acknowledging that she did the tests and procedurally posted the results in the system. She however denied having received any monies as she had no mandate as a laboratory Technician to receive funds from a patient. She averred that in her entire employment period she has never received monies from any patient to conduct a laboratory test. The Claimant averred that the Respondent without conducting any investigations issued her with backdated warning letter dated 16th October 2017 and a suspension letter dated 17th October 2017 placing her on suspension without pay for 7 days with effect from 18th October 2017. She averred that the Human Resources Manager verbally advised her that he was aware that she did not receive any funds from the patient but the charges against her stood. The Claimant averred that after receiving the letters was required to report to his office on 25th October 2017 at 8.00a.m but the reason for reporting was never made known to her. The Claimant averred that she reported to the Human Resources Manager's office on 1st November 2017 as 25th October, 2017 was a holiday. She averred that she was surprised to be informed that she was to face a disciplinary panel and give an explanation on what transpired on 17th October 2017. The Claimant averred that the final decision of the panel was never communicated to her until the 6th November 2017 when she physically visited the Hospital and was handed a dismissal letter dated 4th November 2017. The Claimant averred that her termination was unlawful, arbitrary, unfair and unprocedural for hurriedly charging and suspending her without conducting proper investigations, suspending her without pay for 7 days, presuming that she was guilty of the offence even before pleading to the charges or appearing before the panel, not being issued with a hearing notice, never according her time to prepare for the hearing, not informing her of her right to appear in the disciplinary hearing with another employee or a shop floor union representative of her choice, not explaining the particulars of charges against her in a language that she understood, failing to provide her with a certificate of service, withholding her salary for October 2017, failing to prove the reasons for termination and subjecting her to a disciplinary process that failed to follow the prescribed procedure. The Claimant averred that her right to a fair administrative action as protected under Articles 47 and 50 of the Constitution was breached by the Respondent by subjecting her to a disciplinary hearing by ambush and without notice. She averred that the termination was instigated maliciously, in bad faith and her rights to reasonable working conditions under Article 41(2)(b) were violated. She averred that she was wrongfully dismissed without any valid reason and proper procedure as envisaged under the law. The Claimant sought a declaration that the termination of her employment was unlawful and unfair, that the Claimant's fundamental rights under Articles 41, 47 and 50 of the Constitution of Kenya were infringed by the Respondent and prayed for twelve month's salary compensation for unfair dismissal, payment of Kshs. 594,000/- being the salary for the remainder of the contract period from 1st November 2017 to 30th January 2020, payment of withheld salary for the month of October 2017, payment of one month's salary in lieu of notice, compensation for infringing her constitutional rights protected under Article 41(2)(b) of the Constitution, exemplary damages from malicious termination in line with Section 12 of the Employment and Labour Relations Court Act, certificate of service, a fine of Kshs. 100,000/- against the Respondent for violating Section 51(3) of the Employment Act, interest of the monetary sums from the date of filing suit plus costs of the suit.

2. The Respondent filed a response to the claim and in it averred that due process was followed in the summary dismissal of the Claimant after receiving a complaint from a patient. The Respondent averred that the Claimant colluded with one David Mburu Mwaura to unlawfully obtain money from the said patient and that the Claimant was lawfully dismissed for a gross misconduct as she conducted a laboratory test without evidence that the patient had been attended at the reception desk. The Respondent averred that the Claimant is not entitled to any of the reliefs sought as her claim is a sham, frivolous and an abuse of the court process. The Respondent prayed that the suit be dismissed with costs.

3. The Claimant testified and she adopted her statement and the list of documents as her evidence in chief. She stated that she was a lecturer from February 2017 and in May KMTTB closed the school and she was sent to Central Memorial to work as a lab technician with the same terms of the contract. She conceded that she tested the patient by the name Eunice Njoki after receiving receipts from her as was the routine. She denied having solicited for cash from the patient and maintained that she carried out the test with receipts. She testified that she does not deal with cash. She stated that she only knew that the patient had complained when she was called by HR and was informed of the complaint. She stated that she never met Eunice after carrying out the test on her.

4. The Respondent called its Hospital Administrator Mr. Anthony Wesonga who was the HR Manager at the time the Claimant was dismissed. He adopted his statement and the list of documents as his evidence in chief. He testified that the Claimant was dismissed for fraud and/or obtaining money by false pretences from a patient. He stated that the Claimant was suspended after the Respondent received a complaint from the patient. He testified that investigations were carried out and it was noticed that the Claimant together with others obtained money from the patient. He said that since she used to work in the lab, she had conducted lab tests on the patient without it going through the system. He testified that the Claimant had poor work ethic and for that reason, she had been issued with a warning letter dated 16th October 2017. He stated that the Claimant had a habit of going to work late and missing at her work station. He testified that the Respondent constituted a disciplinary panel which recommended that the Claimant be dismissed. He said that she was given 7 days to appeal the decision but she never appealed. He however did not produce the minutes of the meeting. He confirmed that the Claimant was not paid her terminal dues. He stated that the Claimant's position that was changed but not her terms.

5. The Claimant submitted that her dismissal was unfair and unlawful and she cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on procedural fairness and substantive justification. The Claimant submitted that the Respondent violated Section 41 of the Employment Act as she was not issued with a notice to show cause and/or a notice informing her of the disciplinary hearing. She submitted that what she was issued with was a suspension letter dated 17th October 2017 and a backdated warning letter dated 16th October 2017. The Claimant submitted that the suspension letter put her on suspension without pay for 7 days and that in the letter she was required to report to the HR manager's office on 25th October 2017 but the reason for the said 'reporting' was never made known to her. The Claimant submitted that she reported to the HRM office on 1st November 2017 after the HRM severally postponed the meetings and to her surprise she was ambushed and informed that she alongside two other colleagues charged with the same offence were to face a disciplinary panel to explain what transpired on 17th October 2017. The Claimant submitted that she appeared before the panel but she was told that she would be called the following day and be informed of the final decision by the panel. She submitted that she never received any communication up until 6th November 2017 when upon her visit to the hospital she was handed a dismissal letter dated 4th November 2017. The Claimant submitted that this was a total infringement of her constitutional rights as enshrined under Article 50 of the Constitution. The Claimant submitted that she was not issued with a hearing notice informing her of the hearing on 1st November 2017. She submitted that she was not accorded the opportunity to formally respond in writing to the allegations made against her and that she was not given ample time to prepare for her defence and call witnesses contrary to Article 47 of the Constitution. She submitted that additionally, the Respondent failed to avail or supply her with documents to be relied on so as to enable her prepare adequately for the disciplinary proceedings contrary to Article 35 and 50 of the Constitution and Section 4(3)(g) of the Fair Administrative Actions Act. The Claimant submitted that the Respondent's witness had indicated that there was a written complaint by the patient Eunice Njoki but that the same was never served on the Claimant. The Claimant submitted that she was thus subjected to an ambush. She cited the case of **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where it was held that '*in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.*' The Claimant submitted that the Respondent had failed to follow due process in notifying her of the hearing on 1st November 2017 and accordingly the termination lacked procedural fairness. To buttress her argument, the Claimant cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR**. The Claimant submitted that she was denied the right to representation as held in the case of **James Ondima Kabesa v Trojan International Limited [2017] eKLR**. She submitted that she was never informed of her right to representation by her employer and that she was never accorded an opportunity to appear before the disciplinary panel with an employee or a shop floor union representative of her choice which act was in violation of Section 41 of the Employment Act, Articles 41(1), 47, and 50 of the Constitution and Section 4(4)(a) of the Fair Administrative Action Act. The Claimant submitted that she had indicated in cross-examination that she opted not to appeal because the Respondent was biased and the procedure applied in her dismissal was flawed. She submitted that she still had the right to file the suit in view of Section 90 of the Employment Act which prescribes the cause of action to accrue immediately a termination takes place as it was stated in the case of **Vicky Kemunto Ocharo v Independent Policing Oversight Authority [2018] eKLR**. The Claimant submitted that her termination was unfair and relied on the case of **Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Limited [2014] eKLR** where Radido J. held that "*in my view, the summary dismissal of the claimant was not in compliance with the procedural fairness safeguards of section 41 of the Employment Act, because the claimant was not informed that his dismissal was under consideration, was not furnished with the charges to respond and was not given adequate time to make representations. The dismissal was therefore procedurally unfair.*" The Claimant also cited the case of **Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd [2013] eKLR** and Sections 43 and 45 of the Employment Act and submitted that the Respondent had failed to prove the reasons for dismissing her. She submitted that there was no evidence advanced by the Respondent indicating that she had committed a criminal offence and the Respondent had failed to prove that she abetted or was an accomplice in a scheme to obtain money by false pretences and/or commission of fraud. The Claimant submitted that there was no evidence on record to show that she received and pocketed Kshs. 1,000/- as a receipt for the transaction had been issued while clearly indicating the balance that the patient received, no report was made to the police if at all the Claimant had been involved in a criminal offence thus the reasons advanced by the Respondent were invalid and unfair and had failed to justify the grounds for termination. In closing, the Claimant submitted that the termination was unfair for want of due process and substantive fairness and she is therefore entitled to the reliefs sought in the statement of claim.

6. The Respondent submitted that from the evidence adduced in court it was apparent that due process was followed in the summary

dismissal of the Claimant's services for gross misconduct. The Respondent submitted that the Claimant failed to appeal against her alleged dismissal but instead rushed to court for redress. It submitted that the Claimant was justly summarily dismissed as she had colluded with other hospital staff to illegally obtain money from a patient for services which were insured and that this was unethical on the part of the Claimant and could have led to loss of business on the part of the Respondent. The Respondent urged the court to take into account the nature of the Claimant's work which required high moral and ethical standards towards patients as well as due diligence. The Respondent submitted that this court is the right forum to harshly deal with hospital staff who come to court with unclean hands having mistreated patients and expect to be treated with mercy. The Respondent prayed the court to find in its favour and dismiss the Claimant's claim with costs.

7. The dismissal of the Claimant followed an incident in which the Respondent asserts the Claimant conducted lab tests without following the process established. It was stated that the Claimant colluded with her colleagues to solicit and obtain cash from the patient who complained to the Respondent. The Claimant asserts that her suspension and subsequent dismissal were tinged with malice and illegality as she was ambushed. She concedes in her pleadings that she gave a written explanation as required of her by the Respondent. In this case it was alleged that the Claimant was found to have been in breach of the Respondent's operational requirements and was terminated after a hearing conducted by the Respondent. Under Section 43 of the Employment Act, it is incumbent upon the employee who alleges unfair or unlawful dismissal to prove it. A burden is imposed on the employer to justify the dismissal failing which the dismissal would be deemed to be unfair within the meaning of Section 45 of the Act. In this case the employer did not prove there was reason for the dismissal in terms of Section 43. It was alleged there was a disciplinary panel that heard the Claimant but no evidence of this was availed. Whereas an employer has every right to terminate for gross misconduct, the termination must accord with the law lest it falls within the purview of the dicta in the case of **Walter Ogal Anuro v Teachers Service Commission** (*supra*) where it was held that there must be both substantive and procedural fairness. A hearing under Section 41 of the Employment Act need not conform to a hearing under criminal trials and therefore there is no requirement to provide an employee facing a disciplinary hearing the same degree of accommodation as availed in criminal process such as provision of material the Respondent intends to rely on at the hearing. The Claimant asserts that she worked in October 2017 and there is no proof that she was paid for days worked. She is entitled in law to her salary for days worked in October 2017 as well as her certificate of service. Having not proved issuance of the certificate as provided for under Section 51 the Respondent is ordered to issue the certificate in accordance with the law within 7 days failing which it will pay a fine of Kshs. 100,000/-. The Claimant seeks some relief that cannot be granted as the Court cannot order the payment of her salary till the date of expiry of her contract. Instead, under Section 49 of the Employment Act she would be entitled to receiving compensation. The Claimant is therefore entitled to the following reliefs:-

- a. Kshs. 22,000/- being her October salary
- b. Compensation capped at 6 months – Kshs. 132,000/-
- c. Costs of the suit
- d. Interest at court rates to run from October 2017 on the sum ordered in a) above
- e. Interest at court rates on the sum ordered in b) above to run from date of judgment till payment in full
- f. Certificate of service which must be issued within 7 failing which a fine of Kshs. 100,000/- for failure to issue a certificate of service will be imposed by default.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days. On lapse of the 14 days if any execution is to issue it must be sanctioned by the Court.

It is so ordered.

Dated and delivered at Nyeri this 30th day of March 2020

Nzioki wa Makau

JUDGE