



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 39 OF 2018

DAVID MBURU MWAURACLAIMANT

VERSUS

CENTRAL MEMORIAL HOSPITAL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged unfair and unlawful termination from employment. The Claimant averred that he was employed by the Respondent on permanent and pensionable basis as a clinical officer with effect from June 2017 earning a salary of Kshs. 23,300/- a month. The Claimant averred that he had a distinguished service and was never subjected to any disciplinary proceedings throughout his services with the Respondent. He averred that he worked diligently until 1st November 2017 when the Respondent unlawfully, unfairly and unprocedurally terminated his employment by a letter dated 4th November 2017. The Claimant averred that on 17th October 2017 he was called by the Respondent's Human Resource Manager Antony Wesonga who informed him that there was a complaint made by a client named Eunice Njoki Ali who had alleged that the Claimant had solicited money amounting to Kshs. 1,000/- from her by false pretences within the hospital premises. The Claimant averred that it was alleged that the said amount was issued as fees for conducting laboratory tests for blood sugar, full haemogram and a pregnancy test. The Claimant averred that he had informed the patient that full haemogram is not covered under her NHIF cover and that she was required to pay. The Claimant averred that the patient subsequently paid Kshs. 1,000/- which the Claimant handed to the receptionist who subsequently issued a system generated receipt with the balance indicated at the back. The Claimant averred that without conducting any investigations, the Respondent issued him with a suspension letter dated 17th October 2017 placing him on suspension without pay for 7 days with effect from 18th October 2017. The Claimant averred that after receiving the letters was required to report to the Human Resources Manager's office on 25th October 2017 at 8.00a.m but the reason for reporting was never made known to him. The Claimant averred that he reported to the Human Resources Manager's office on 1st November 2017 as 25th October 2017 was a holiday. He averred that he was surprised to be informed that he was to face a disciplinary panel and give an explanation as to what had transpired on 17th October 2017. The Claimant averred that notably during the hearing he was charged with one more offence which the panel termed as fraud. The Claimant averred that the final decision of the panel was never communicated to him until 6th November 2017 when he was told by his colleague Claudette Aluso to physically visit the hospital whereat he was handed a summary dismissal letter dated 4th November 2017. The Claimant averred that his termination was unlawful, arbitrary, unfair and unprocedural. He averred that the Respondent hurriedly charged and suspended him without conducting proper investigations, suspending him without pay for 7 days, presuming that he 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 him time to prepare for the hearing, not being informed of his right to appear at the disciplinary hearing with another employee or a shop floor union representative of his choice, not being furnished the particulars of charges against him in a language that he understands, failing to provide a certificate of service, withholding his salary for October 2017, failing to prove the reasons for termination and subjecting him to a disciplinary process that failed to follow the prescribed procedure. The Claimant averred that his right to a fair administrative action as enshrined under Articles 47 and 50 was breached by the Respondent by subjecting him to a disciplinary hearing by ambush and without notice. He averred that the termination was instigated maliciously, in bad faith and his rights to reasonable working conditions under Article 41(2)(b) were violated. He averred that he was wrongfully dismissed without any valid reason and proper procedure, as envisaged under the law. The Claimant sought a declaration that the termination of his employment was unlawful and unfair, that his fundamental rights under Articles 41, 47 and 50 of the Constitution of Kenya were infringed by the Respondent. He also sought twelve month's salary compensation for unfair dismissal, payment of withheld salary for October 2017, payment of one month's salary in lieu of notice, exemplary damages for 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 on the monetary sums sought from the date of filing suit as well as the costs of the suit.

2. In its defence, the Respondent denied that the Claimant was its permanent and pensionable employee. The Respondent averred that the Claimant was summarily dismissed for backdating and illegally issuing an off duty medical sheet to one Steven Gesaire Musongo and for unlawfully soliciting money in the sum of Kshs. 1,000/- from one Eunice Njoki Ali. The Respondent averred that the Claimant's acts were gross misconduct warranting the summary dismissal. The Respondent averred that the Claimant is not entitled to any of the reliefs sought as his 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 as did the Respondent's witness Anthony Wesonga. The Claimant adopted his statement and the list of documents as his evidence in chief and stated that he was employed as a clinical officer on permanent and pensionable terms and not on locum basis. He testified that he asked the patient to pay Kshs. 1,000/- because he had instructions from the hospital that NHIF and those under the national scheme had certain results that could not be paid for. He said that the money was paid at the reception and the patient was told to pick her balance of Kshs. 200/-. He testified that he was not aware of the issue of a patient named Stephen Onsongo as he was not the one who backdated his sick leave. He said that the signature on the sick leave was not his. He testified that he was ambushed with the issue of backdated leave as he had not heard of the complaint before and the matter was only raised on the day of the hearing

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 and testified that the Claimant was employed as a temporary reliever for a clinical officer who had gone on maternity leave and was therefore working on locum. He testified that according to investigations carried by a general investigator at Kenindia Assurance Company who were the insurers of Stephen Gesairo Onsongo, the Claimant had issued a sick off form which was signed by the Claimant and had the Respondent's stamp. He stated that when the Respondent tried to check if the patient was treated in their facility, they did not find his name in the electronic system. He stated that the date on the sick off was at least a month before David joined the Respondent and therefore it was backdated. He testified that the treatment did not emanate from the Respondent and upon constituting a disciplinary panel and giving the Claimant an opportunity to present his defence, the finding was that looking at the totality of the fraud, they decided to terminate the contract of the Claimant who was employed on a temporary basis.

5. The Claimant submitted that the dismissal was unlawful and unfair within the meaning of the law. He 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 he was not issued with a notice to show cause and/or a notice informing him of the disciplinary hearing. He cited the case of **Nazareno Kariuki v Feed the Children Kenya [2013] eKLR** where it was held that because of severe consequences arising from disciplinary process, an employee facing such a process must be specifically notified that what they are going through is in fact a disciplinary process with its full ramifications and not just fellowship or cup or tea. He submitted that what he was issued with was a suspension letter dated 17th October 2017 and a backdated warning letter dated 16th October 2017. The suspension letter put the Claimant on suspension without pay for 7 days and in the letter the Claimant was required to report to the HR manager's office on 25th October 2017, however the reason for the said 'reporting' was never made known to him. The Claimant submitted that he was ambushed to attend a disciplinary hearing without being accorded adequate and/or ample time to prepare for the hearing, put defence and/or call witnesses contrary to Article 47 of the Constitution. The Claimant submitted that the Respondent failed to avail or supply him any documents as required by law to enable him to adequately prepare for the disciplinary proceedings contrary to Articles 35 and 50 of the Constitution and Section 4(3)(g) of the Fair Administrative Act. The Claimant submitted that the Respondent's witness had indicated that there was a written complaint by the patient, one Eunice Njoki but the same was never served on the Claimant. The Claimant 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 him of the hearing on 1st November 2017 and that accordingly the termination lacked procedural fairness. The Claimant in further support of his argument cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR**. The Claimant submitted that he was denied the right to representation as held in the case of **James Ondima Kabesa v Trojan International Limited [2017] eKLR**. The Claimant submitted that he was not informed of this right by his employer and that he was never accorded an opportunity to appear before the disciplinary panel with an employee or a shop floor union representative of his 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 Act. The Claimant submitted that he 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 was stated in the case of **Vicky Kemunto Ocharo v Independent Policing Oversight Authority [2018] eKLR**. The Claimant submitted that his termination was unfair and he 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 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 him and submitted that there was no evidence adduced by the Respondent demonstrating that he had committed a criminal offence. He submitted that the Respondent also failed to prove that he 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 he committed a criminal offence, there is no evidence on record to show that he received and pocketed the amount of Kshs. 1,000/- as a receipt for the said 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. The Claimant submitted that his contract was permanent and that in his employment he had never been informed that he was on a temporary contract. He submitted that if at all his contract was temporary, his suspension letter or dismissal letter should have indicated the fact that the his contract was temporary as alleged by the Respondent. He submitted that the claim by the Respondent that his contract was temporary is an afterthought and a clandestine move to defeat his pursuit of justice. The Claimant submitted that the termination was unfair for want of due process and substantive fairness. He submitted that he was therefore entitled to the reliefs sought in the statement of claim.

6. The Respondent submitted that there was an exhibit produced which expressly indicated that the Claimant employment was on locum/temporary basis as he was engaged to relieve another employee who was on maternity leave. The Respondent submitted that the Claimant conveniently omitted to include the said document in his list of documents and that the Claimant failed to show how he was employed by the Respondent and under what terms. The Respondent submitted that from the evidence adduced in court it is apparent that due process was followed in the summary dismissal of the Claimant for gross misconduct. The Respondent submitted that the Claimant failed to appeal against his dismissal but instead rushed to court for redress. It submitted that the Claimant was justly summarily dismissed as he had colluded with other hospital staff to illegally obtain money from a patient for services which were insured which was unethical on the part of the Claimant and could have led to loss of business on the part of the Respondent. The Respondent submitted that the second serious case was discovered after the Claimant had been dismissed as he had backdated a treatment note for a person who had not been treated at the Respondent's hospital which was an act of gross misconduct and even criminal in nature and goes to show the kind of person the Claimant really was. 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 and also 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 for the Respondent and dismiss the Claimant's claim with costs.

7. The Claimant was not a permanent and pensionable employee of the Respondent. He lied to court both in his pleadings and the testimony he adduced. He was dismissed for having solicited cash from a patient at the Respondent's facility. The Respondent asserts it also established after an investigation by a third party on behalf of an insurer that the Claimant had forged a sick off note for a person who had not been treated at the Respondent's facility. These acts of gross misconduct were reason for the dismissal. Under Section 43 of the Employment Act, it is incumbent upon the employee who alleges unfair or unlawful dismissal to prove it in court. On the other hand, 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 employee was involved in misdeeds that led to the dismissal. It would seem however, the employer went about it the wrong way. The employer demonstrated the dismissal was justified but in view of the fact that the dismissal was not in conformity with Section 41, the employee will be entitled to one month's salary as compensation as well as his pay for October 2017. The rest of his claims flounder and fail as he did not prove the claims. As he had to move court for the relief obtained he will be entitled to costs for the award made. He is also entitled to the issuance of a certificate of service. Since none was availed the same must be issued within 7 days failing which the Respondent will be liable in addition to an order compelling its issuance to pay a fine of Kshs. 100,000/- should there be failure to comply with the order on the certificate of service. The Claimant is therefore entitled to the following reliefs:-

- a. Kshs. 23,300/- being October salary
- b. Compensation capped at 1 month – Kshs. 23,300/-
- c. Costs of the suit limited to the award in a) and b) above
- 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