



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1933 OF 2015

EPHANTUS WAMBUA MACHARIA.....CLAIMANT

V

PRESBYTERIAN CHURCH OF EAST AFRICA1ST RESPONDENT

PRESBYTERIAN FOUNDATION.....2nd RESPONDENT

JUDGMENT

1. This Cause initially proceeded to hearing *ex-parte* after the Presbyterian Church of East Africa and Presbyterian Foundation (Respondents) failed to attend the hearing on 30 May 2019. The Court delivered judgment on 21 June 2019.
2. On 20 November 2019, the parties entered a consent to have the Cause heard afresh and the Cause was heard on 20 January 2020.
3. Ephantus Wambua Macharia (Claimant), the Respondents' Hospital Administrator and another witness testified on behalf of the Respondents.
4. The Claimant filed his submissions on 28 January 2020.
5. The Respondents submissions were not on file by the agreed deadline. It is regrettable that despite being indulged by having hearing begin afresh, the Respondents did not see the need to file their submissions on time.
6. The Court has considered the pleadings, evidence and the submissions on record and condensed the Issues for determination as examined hereunder.

Background

6. On 8 September 2008, the Presbyterian Church of East Africa, *Kikuyu Hospital* offered Ephantus Wambua Macharia (Claimant) employment as an Ophthalmic Clinical Officer for a period of 2 years.
7. Around 2 September 2011, the Claimant opted to terminate the contract, but on 29 February 2012, the Respondents offered him a new 3-year renewable contract. The contract was to lapse on 31 March 2015.
8. On 5 January 2015, the Claimant sought for a renewal of the contract, and the Respondents acceded to the request on 16 March 2015.
9. The renewed contract was to run for 5 years.
10. Barely 2 months after the renewal, on 8 May 2015, the Respondents' Hospital Administrator wrote to the Claimant asking him to submit an incident report before 11 May 2015 responding to an allegation that he had referred a patient elsewhere for medical services.
11. The letter was a follow up of meetings held on 5 May 2015 and 8 May 2015.
12. The Claimant responded on 11 May 2015, and on 29 June 2015, he was informed through a letter of even date of the termination of his contract.

13. The Claimant was dissatisfied, and after seeking legal advice instituted the instant legal proceedings alleging unfair termination of employment and breach of contract.

14. The Respondents filed a *Response to the Statement of Claim* on 1 March 2016.

Whether the Respondent unfairly terminated the Claimant's contract

Procedural fairness

15. Section 35(1)(c) of the Employment Act, 2007 envisages *written notice of termination of employment* of at least 28 days in advance where the employee is paid by the month (unless it is a case of summary dismissal).

16. Section 41 of the Act envisages a hearing wherein the employee is afforded an opportunity to make representations.

17. Clause 9 of the contract dated 29 February 2012, which was incorporated in the renewed contract of 2015 provided for the giving of 1-month notice, or pay in lieu thereof. The option of summary dismissal was also incorporated into the contract.

18. The Claimant was called to a meeting where the Respondents' Hospital Administrator, Human Resources Manager, Financial & Management Accountant, Ophthalmic Clinical Officer in charge and a nurse were in attendance on 5 May 2015.

19. The meeting was followed up with a written request to the Claimant on 8 May 2015 to tender a written incident report on or before 11 May 2015. The Claimant responded on 11 May 2015.

20. On 18 May 2015, the Respondents' Hospital Administrator invited the Claimant to attend a disciplinary hearing on 19 May 2015. He was informed of the right to be accompanied by a colleague. The Claimant attended the hearing.

21. The hearing was followed with a letter dated 29 June 2015 informing the Claimant of the termination of his employment.

22. The Court is satisfied that the Claimant was informed of the allegations to confront and was offered both written and oral opportunity to defend himself.

23. The Court, therefore, concludes that the Respondents were in compliance with the statutory requirements on procedural fairness.

Substantive fairness

24. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondents had the burden of not only proving, but proving as valid and fair the reason(s) for terminating the Claimant's employment.

25. The reason which led to the termination of the Claimant's contract was that he referred a patient to buy eyeglasses elsewhere thus depriving the Respondents of revenue.

26. The Respondents led evidence from the patient who was allegedly referred by the Claimant to purchase eyeglasses from a different facility. The Claimant denied that he referred the patient to purchase the eyeglasses.

27. The Court observed the patient while giving her testimony on the circumstances under which she was referred to purchase eyeglasses outside the Respondents facility and how she complained immediately to the Hospital Administrator.

28. The Claimant attempted to assail the credibility of the patient, but in the view of the Court failed.

29. The Court believes the testimony of the patient that the Claimant referred her elsewhere.

30. The pertinent question then that would be determinative of the allegation of unfair termination of employment is whether the Claimant's decision to refer the patient to purchase eyeglasses elsewhere would constitute valid and fair reason(s) to warrant termination of employment.

31. The Claimant contended that once a medical practitioner issues a prescription to a patient, the prescription becomes the property of the patient and that the patient would be free to purchase the prescribed drugs or items anywhere.

32. Although testifying that the Respondents had a policy against referral of patients' elsewhere, the Respondents did not produce any such policy in Court or show that the Claimant was made aware of such a policy.

33. None of the parties disclosed whether there are any standards or protocols on patients' rights in Kenya, despite the Court posing the question to the witnesses.

34. In the course of writing this judgment, the Court found out that there is a *Kenya National Patients' Rights Charter* issued by the Ministry of Health in October 2013.

35. The Charter indicates that it was developed after wide stakeholder consultations. It cannot be that the Respondents were not aware of it. Being an official document, the Court can take judicial notice of it.

36. Among the patients' rights outlined in the Charter are the rights of a patient to choose a healthcare provider and to informed consent to treatment.

37. In the view of the Court, it would, therefore, be contrary to a patient's right to force the patient to procure medicines or other medical items from a facility. A medical facility must not use any type of coercion, hard or soft to induce a patient to purchase prescriptions from its facility.

38. To the Court, a patient like any other person has a right to self-determination and right to information to make an informed choice within the health field and any facility policy to the contrary risks running afoul of constitutional rights.

39. The Court would agree with the proposition by the Claimant that a prescription is the property of a patient. The patient in this case had the option to purchase the prescribed eyeglasses anywhere and the mere fact that the Claimant directed her elsewhere could not have been a valid or fair reason for summarily dismissal.

40. In referring the patient elsewhere, the Claimant was not breaching any fundamental contractual obligation, and if the Respondents had a policy against such referral, it is invalid to the extent it is contrary to the *Kenya National Patients' Rights Charter*.

41. The Court, regrettably and based on the scant material on record can only conclude that the reason which led to the termination of the Claimant's employment was neither valid nor fair.

Pay in lieu of notice

42. With the conclusion, the Court holds that the Claimant is entitled to the equivalent of 1-month salary in lieu of notice (salary was Kshs 84,994/- according to the schedule of terminal dues prepared by the Respondents).

Compensation

43. Considering that the Claimant served the Respondent for about 6 years of cumulative service, the Court is of the view that compensation equivalent to 6 months gross salary would be appropriate.

Breach of contract

44. The Claimant sought Kshs 4,844,658/- on account of *lost income* for the balance of contract (57 months).

45. The contract document did not provide for payment of *lost income* in case of premature termination.

46. On whether there is a legal anchor to the head of the claim for *lost income*, this Court will endorse as sound in our jurisdiction the principle set out in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 where the Supreme Court of Uganda held that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

47. The Claimant, considering his professional status should have in any case moved to mitigate any income loses after the decision by the Respondents to bring the contractual relationship to an end.

48. The Claimant did not disclose during testimony what attempts if any he took to mitigate the potential income loses.

Conclusion and Orders

49. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(i) Pay in lieu of notice Kshs 84,994/-

(ii) Compensation Kshs 509,964/-

TOTAL **Kshs 594,958/-**

50. The Claimant is denied costs for failing to serve his submissions.

Delivered, dated and signed in Nairobi on this 6th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Warui instructed by Warui & Co. Advocates

For Respondent Mr. Mogire instructed by Amuga & Co. Advocates

Court Assistant Judy Maina