



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 211 OF 2016

ALEXANDER IRUNGU WANJIRU..... CLAIMANT

-VERSUS-

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A MATER MISERICORDIAE
HOSPITAL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29th May, 2020)

JUDGMENT

The claimant filed a statement of claim on 16.02.2016 through Wesonga, Mutembei & Kigen Advocates. The Claimant prayed for judgment against the respondent for:

- a) An order of reinstatement of the claimant to the respondent's work place.
- b) An order that the termination letter dated 12.02.2016 is void and salary be paid to the claimant until the date of judgment.
- c) In alternative and in addition to (a) a sum of Kshs.17, 390, 000.00 as particularized in paragraph 29 (i.e. one-month salary in lieu of notice Kshs. 470,000.00; 24 months' salary for unfair termination Kshs.11, 280, 000.00; Kshs. 5, 640, 000.00 service pay for termination of employment before the expiry of the contract.)
- d) Certificate of service and gratuity under clause 9 of the contract of employment.
- e) Any other relief as the Honourable Court may deem just and expedient in the circumstances.
- f) Costs of the suit.

The respondent filed the memorandum of response on 22.02.2017 through Chiuri Kirui & Rugo Advocates. The respondent prayed that claimant's suit is dismissed with costs. The claimant filed a reply to the response.

To answer the **1st issue** for determination, there is no dispute that the parties were in a contract of service throughout the material time. The respondent initially employed the claimant in May 2014 as a Quality Assurance Manager and later in February 2015 as Director of Operations and Administration, a position he was confirmed to in June 2015 as per the letter dated 13.07.2015 at Kshs.470, 000.00 per month effective 01.06.2015 and signed by Sr. Anne Itotia, Head of Trustees, Mater Hospital. The letter of the contract of employment was dated 15.07.2015 (signed by Dr. Agnes Chege, Ag. Chief Executive Officer) and was commencing 01.06.2015 to 30.05.2017 being a tenure of 2 years. The claimant accepted the employment by signing on 15.07.2015.

To answer the **2nd issue** for determination the Court returns that the claimant's employment with the respondent was terminated by the respondent's letter dated 12.02.2016. The letter addressed to the claimant stated as follows:

“Dear Mr. Irungu,

RE: TERMINATION OF EMPLOYMENT

During the Disciplinary hearing held on 11th February 2016, you were unable to exonerate yourself from following the

charges against you, where it was evident that:

- You irregularly awarded a tender to a company (Kenya Medical Engineering) and proceeded to make them an offer and they commenced the work immediately without having met the requirements within the stipulated time frame. You also failed to take expert advice on behalf of the Hospital and went ahead to award tender to a company that had not met obligations to the contract.
- Between 25th and 26th January, you amended the procurement policy document, MH-PUR-POL 01(2) to indicate that your Office had the discretion to determine the awarding or rejecting of any tender in situations of urgency of items projects or services which was in gross violation of the Hospital tender process. You then proceeded to use the changed policy to justify the tender award.
- You had directed the procurement office to source for Cafeteria supplies through a supplier (Elysian Produce Farm) who was supplying at extremely high prices compared to the market which was not in the best interest of the organization.
- That there has been mismanagement of Staff in the manner of, promotions, demotion and transfers and award of salary increments to procurement staff without following the due process. It also emerged that you were also interfering with work process while on leave, (in that you were issuing contradictory instructions to staff contrary to what they had been instructed).

The foregoing is gross misconduct as per the provision of the Employment Act, section 44 subsection 4(c) and (g) and in view of this, and in line with your employment contract clause 11 with The Mater Hospital, you are hereby informed that your services have been terminated with effect from 12th February 2016.

You are now required to make the necessary clearance with the Hospital to facilitate payment of your final dues.

Yours faithfully,

Signed

Dr. Agness Chege

Ag. Chief Executive Officer

The 3rd issue for determination is whether the termination of the claimant's employment was unfair. The claimant has pleaded that on 11.02.2016 he attended the disciplinary hearing and further requested for more time to prepare and identify a witness and also requested for documentary evidence substantiating the allegations. He further pleads that as at 11.02.2016 there was a court order issued in Cause No. 141 of 2016 at Nairobi between the claimant and Agnes Chege and Victor Ngáni. The orders given by Abuodha J on 10.02.2016 in that case included:

- 1) That the claimant be and is hereby granted leave to file and serve a further affidavit on the respondent within 7 days from today's date.
- 2) That in the meanwhile, the respondent's counsel is hereby directed as an officer of the Court to give firm advice to his clients not to do or omit to do anything that would unduly interfere with their contractual relations with the claimant.
- 3) That the claimant being still in respondent's employment is entitled to right and treatments obtaining to other employees in the respondent's employment.
- 4) That the commencement of the suit before the Court must not be used as a reason to bully or unfairly treat the claimant.

It is pleaded for the claimant that the 1st respondent in Cause No.141 of 2016 had executed the claimant's contract of employment and the disciplinary hearing proceeded despite the court order having been served. It is pleaded that in view of the said court order and in view that the claimant had asked for time to avail a witness and to obtain documentary evidence, the subsequent dismissal by the letter dated 12.02.2016 was unfair. In particular, the claimant was condemned unheard and his functions were taken away per the memo dated 10.02.2016 and long before the disciplinary hearing and termination so that the termination was predetermined.

For the respondent it is pleaded as follows. That the reasons for termination as contained in the show-cause letter and the letter of termination were valid. That the claimant was accorded due process of a show-cause letter dated 02.02.2016, and, a disciplinary hearing on 11.02.2016 and 12.02.2016 prior to the termination.

The Court has considered the material on record. The evidence is that the claimant received the show cause letter which set out the particulars of the allegations in detail. The show-cause letter was dated 02.02.2016 and it set out five (5) allegations against the claimant. The allegations included the following:

- a) Alteration of the procurement policy to give himself (as chairman of the tender committee the discretion to determine the awarding or rejecting of any tender in situations of urgency of items or projects and services and in absence of more than half of the members and later convene the committee to ratify the award. The illegal alteration was said to have been on 25.01.2016 but made to

look like it had been by the Governing Council on 20.01.2016 and thereafter posted on the intranet as part of the respondent's quality assurance document.

b) The claimant's failure to take expert advice on behalf of the Hospital and failure to follow the tendering procedure and illegally awarding installation of medical gases to Kenya Engineering who had not met the obligations of the contract, they had not signed the contract, they had not handed in performance bond or insurance and had demanded 60% upfront payment contrary to the relevant respondent's policy. The claimant had awarded Kenya Medical Engineering without involving the Mater Tender Committee (as per the irregularly altered policy).

c) The claimant had directed procurement that Elysian Supply to make supplies to the cafeteria but the prices were inflated and therefore not in the Hospital's interest.

d) The claimant had irregularly promoted Purity Ranguma to acting procurement manager without her having required qualifications in procurement and demoting Christine Kanini who had qualifications.

e) Award of salaries to procurement staff was irregular as the job evaluation was going on.

The claimant was required to respond by 04.02.2016 failing disciplinary action would follow and which could lead to summary dismissal. The letter was signed by Dr. Agnes K. Chege, Ag. CEO. The claimant by an email on 03.02.2016 wrote stating that he was fully aware of the letter and what was expected and that it was within his right to seek information from anybody and anytime.

The claimant in his evidence confirmed that he received the show cause letter and he attended the disciplinary hearing. The Court has considered the court order in cause 141 of 2016 and returns that the order did not relate to the disciplinary proceedings and its existence did not impair the proceedings in any material respect. To the extent that the claimant received the show cause letter, was invited to a disciplinary hearing, and attended the hearing, the Court returns that the due process of a notice and hearing envisaged in section 43 of the Employment Act, 2007 was complied with. The claimant testified that some of the tender committee members were also members of the disciplinary committee and they were to be his witnesses. However, the Court returns that at the record of the disciplinary hearing does not show that the claimant raised such concerns and nowhere prior to the hearing or at the hearing did the claimant name his proposed witnesses. Thus the Court finds that the disciplinary process met the basic tenets of fairness.

On the reasons to terminate, the claimant testified that he issued a conditional letter awarding the tender on 05.01.2016 and the tender committee met on 12.01.2016. The claimant also testified that he did not question the validity of the minutes of the disciplinary hearing of 11.02.2016. The minutes show that the claimant attended the hearing. The Committee's recommendations were as follows:

- 1) All agreed that based on the facts as presented the claimant was guilty and the case was for termination. Members requested that additional scrutiny of the documents be sort so as to firm up the case.
- 2) The Director Pastoral Care was assigned to speak to the claimant to consider resigning.
- 3) Meeting to be held on Monday to conclude the matter following the feedback from the Director of Pastoral Care meeting with the claimant.

The respondent's witness No. 1 (RW1) was Dr. Agnes Kabita Chege, the acting CEO at all material times. RW 1 testified that the change on the procurement policy was effected by Freda Kamundi on 04.02.2016 and whereas she had given the claimant a show cause letter on 26.01.2016 and the claimant had given the conditional letter to Kenya Medical Engineering on 05.01.2016. She confirmed that on 26.01.2016 the claimant had not accessed the policy document. The Court returns that as at termination, the respondent has therefore failed to show that the claimant had altered the respondent's tender policy as had been alleged and had further scrutiny been done, it would have been established that the allegation was baseless.

On failure to follow expert advice RW1 testified that at the material time Lawrence Mulela was the respondent's expert and Julius Owino was the maintenance expert and they both participated in the award in issue. The two discussed and found that Kenya Medical Engineering was the most suited to win the award. On the basis of that evidence the Court finds that the allegation on failure to follow expert advice will collapse as not established.

RW1 testified that she had no evidence to show that the claimant had directed award to a supplier for cafeteria supplies and at inflated prices and the Court returns that the allegation will collapse as not substantiated as at the time of termination.

RW1 testified that the promotions in issue were by letters signed by the Human Resource Manager and at a time when RW1 was on leave and copied to RW1. RW1 further testified that the role of promotion decisions was outside the scope of the claimant's job description. The Court returns that the allegation about promotions, salary increment and demotions will collapse as not valid as at the time of termination because RW1 confirmed that the claimant was not involved at all. RW1 testified that there was no evidence that the claimant signed the recommendation for promotion or appointments in issue.

RW1 also confirmed that the Quality Assurance Manager had been terminated upon accusations of altering the procurement policy irregularly.

The Court returns that RW1 who made the decision by her evidence has confirmed that there was no valid reason to terminate the contract of service and the Court finds that evidence conclusive on that point. Taking that evidence into account, the Court returns that the termination of the claimant's contract of service was unfair for want of valid reasons as at the time of termination. The Court finds that a scrutiny of the

record of the disciplinary hearing as exhibited does not establish the validity of the reasons as at termination and as provided for in section 43 of the Employment Act, 2007. The Court finds that the termination was unfair in substance or merits.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1) The claimant was dismissed on 15.02.2016 by the letter dated 12.02.2016. The claimant's contract was lapsing on 30.05.2017 so that he had over 12 months of service to go. The claimant desired to continue in employment and otherwise had a clean record of service. He was dismissed in circumstances whereby he had requested for time to get documents and witnesses and that was not accorded (in the opinion of the Court amounting to an aggravating factor against the respondent). Considering the findings within the provisions of section 49 of the Employment Act, 2007 and the claimant not having been shown to have contributed to his termination, the claimant is awarded 12 months' salaries in compensation making Kshs. 470, 000.00 x 12 thus **Kshs. 5,640,000.00**.

2) RW1 testified that she had no evidence to show that the claimant had been paid 15 days worked in February 2016 and he is awarded half month salary making **Kshs.235, 000.00**. Further the termination was unfair and abrupt and the claimant is entitled to one month pay in lieu of notice making **Kshs. 470,000.00** as prayed for and as per contract and section 35 of the Act.

3) The claimant prayed for service pay of Kshs.5, 640,000.00. Clause 9 on gratuity provided that the claimant will be entitled to 7.5% of his annual basic salary as gratuity for every year worked and that more details on the gratuity scheme were available in HR Department. The claimant had worked from 01.06.2015 to 15.02.2016. The Court considers that in absence of any other material before the Court and on a balance of probability the claimant is entitled to prorate gratuity for service pay within the terms of the agreement being 6.5 months' x Kshs. 470,000 x 7.5% making **Kshs.229, 125.00**.

4) The Court considers that the relationship between the parties was strained irreparably and in view of the more than 3 years that have lapsed, the award of reinstatement is not only impracticable to implement but also barred by statute under section 12 of the Employment and Labour Relations Court Act, 2011.

5) The claimant is entitled to a certificate of service and having succeeded in his claim is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination of the claimant's employment by the respondent was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs. 6, 574, 125.00** (less lawful PAYE) by 01.10.2020 failing interest at court rates to be payable thereon at court rates from the date of this judgment till the date of full payment.
- 3) The respondent to deliver to the claimant a certificate of service in 30 days from the date of this judgment.
- 4) In view of the prevailing Covid 19 situation, there be stay of execution until 01.10.2020.
- 5) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 29th May, 2020**.

BYRAM ONGAYA

JUDGE