



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 4 OF 2019

DR. RUTAGANDA VIATEUR.....CLAIMANT

VERSUS

EMBU CHILDREN'S HOSPITAL (TENRI).....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking relief for the abridgement of his contract with the Respondent. He averred that he was employed by the Respondent as a dental surgeon and was summarily suspended via SMS on 21st February 2019 with no reasons being offered for the unlawful suspension. He averred that the contract he had had only one month left before renewal. The Claimant averred that the termination was unlawful as the Respondent did not give the stipulated 3 notices as provided for and that the suspension was communicated via SMS through the hospital's whatsapp group in order to embarrass the Claimant. The Claimant averred that he was not given a chance to answer the charges revealed to him as required in law. The Claimant averred that during his employment he was overworked as he did jobs meant for more than one person. He averred that he was evicted from the house he lived in despite there being no rent arrears. The Claimant averred that he was threatened with dire consequences by the chief executive officer of the Respondent if he revealed the unprofessional ordeals he went through when he was on the line of duty and that the CEO often used nasty language on calls and other whatsapp groups ridiculing and belittling the Claimant. The Claimant sought a declaration that his suspension was unlawful, Kshs. 200,000/- being February 2019 dues, one month salary for March 2019 – Kshs. 200,000/-, Kshs. 110,000/- for 11 days remaining on annual leave, Kshs. 200,000/- from March 2019 till the official termination, Kshs. 100,000/- for accumulated off days, general damages for professional malice against the Claimant and costs of the claim.

2. The Respondent's defence was to the effect that the Claimant was employed as a dental surgeon vide a letter dated 13th March 2018 and the appointment confirmed on 29th August 2018. The Respondent averred that soon after the Claimant was confirmed, his performance took a turn for the worse whereby he displayed incompetence in the performance of his duties exposing the Respondent to possible legal action for negligence. The Respondent averred that the Claimant was informed of the complaint from one of the patients he mishandled vide a letter dated 25th October 2018 and was reprimanded and given an opportunity to improve. The Respondent averred that the Claimant disregarded the warning and persisted in being negligent and unprofessional in his duties and contempt for authority prompting further warning and reprimand by the hospital's management. The Respondent averred that the Claimant's incompetence in the performance of his duties, failures to adhere to the working hours and constant insubordination led to the termination on 29th February 2019 vide a letter and not sms as alleged in the claim. The Respondent averred that the decision to terminate was in strict adherence to the principles of natural justice and in conformity with the provisions of the Employment Act. The Respondent denied each and every allegation contained in the Claimant's claim and sought the dismissal of the suit with costs.

3. Parties opted to have the matter disposed of by way of documentation and written submissions in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules. The Claimant submitted that the issues for determination was whether the Respondent's suspension was unlawful, whether the suspension as via SMS on the whatsapp group, whether the Respondent adhered to the due procedures set out in law, whether the Claimant was in breach of the terms of employment and whether the Claimant is entitled to the relief sought. He submitted that the suspension by SMS was on 20th February 2019 and the dismissal letter was therefore backdated as the suspension was for one month and was unpaid. He submitted that it was odd he would be suspended for one month and then dismissed the next day. The Claimant submitted that the dismissal letter produced as evidence by the Respondent was unsigned and was not served on him. The Claimant submitted that the Respondent had not availed his reply to the letter of 25th October 2018 which the Respondent had alleged was not responded to yet he replied to the letter. The Claimant submitted that the law provided for 3 months notice before dismissal yet his dismissal immediately followed his suspension. The Claimant submitted that the letter of 21st February 2019 was invalid as it was a sham, backdated and only written in haste upon the filing of the suit herein. The Claimant submitted that under Section 41 of the Employment Act he was entitled to a hearing before termination and the Respondent violated this. He submitted that there was no evidence that he was called and given an explanation in a language he understood before the termination. The Claimant cited the case of **Fred Ondari Makori v The Management Committee of Ministry of Works Sports Club [2013] eKLR** which supported the submissions on failure to abide by the laid down procedures on hearing. The Claimant submitted that he was entitled to payment upon termination and since there was none he submitted that he was entitled to the said payment and cited the case of **Juliet Oyando v Hippora Business Solutions (EA) Limited [2016]**

eKLR. The Claimant submitted that the actions of suspending and his alleged termination did not follow the law and he cited the cases of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** and **James Kabengi Mugo v Syngenta East Africa Limited [2013] eKLR** on fair procedure. The Claimant submitted that the Respondent accused him of gross misconduct but did not provide him with any evidence of the alleged gross misconduct. The Claimant submitted that the assertion that he failed to attend to disciplinary hearings were mere allegations as no evidence was adduced of this alleged failure. The Claimant submitted that his alleged poor performance was not backed by any evidence as his evaluation rated him 7 out of 10 and that there was nothing adduced to show he was professionally negligent. He submitted that the Respondent could not congratulate him for his performance on 23rd September 2018 and accuse him of persistent poor performance on 23rd October 2018. He submitted that he had declined to attend to patients who had been attended to by unauthorised workers at the hospital. He submitted that the workers are not authorised to perform root canal operations according to the Kenya Medical Practitioners and Dentists Board. The Claimant submitted that the allegation he mishandled a patient by calling the biomedical technicians was false as he called the technicians to repair faulty machines. He submitted that under Section 43(1) of the Employment Act it was incumbent on the Respondent to prove the reasons for the termination and where the employer fails to do so the dismissal was unlawful. The Claimant submitted that the Respondent wanted him to attend to patients without dental problems and to sign claim forms in the absence of patients which was unheard of. He submitted that he was entitled to the reliefs sought and cited the cases of **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** and **Peterson Ndung'u & 5 Others v Kenya Power and Lighting Company Limited [2014] eKLR**. The Claimant submitted that not paying his salary was unlawful as the salary was protected under Part IV of the Employment Act even during suspension. The Claimant submitted that the Respondent was still indicated as his employer and he needed a release letter as he could not obtain alternative employment without such release.

4. The Respondent on its part submitted that the termination of the Claimant was not by SMS or summary. The Respondent submitted that the termination was fair and within the Respondent's contractual rights as per the contract dated 13th March 2018. The Respondent submitted that summary dismissal is not illegal *per se* but that it did not summarily dismiss the Claimant. The Respondent submitted that the Claimant was issued with a warning letter dated 25th October 2018, 15th February 2019 and ultimately the dismissal letter on 21st February 2019 which was at least 4 months notice. The Respondent submitted that there was justification in the dismissal as the letters alluded to as read with Section 44 gave justification for the dismissal. The Respondent submitted that the letters reveal fundamental breaches of the obligations by the Claimant arising out of the contract of employment. The Respondent submitted that the letters disclose serious gross misconduct by the Claimant so as to justify dismissal. The Respondent submitted that it acted fairly and was justified in dismissing the Claimant on 21st February 2019. The Respondent submitted that having submitted that the dismissal was fair and justified it was their surmise that the Claimant is not entitled to the reliefs sought.

5. The Claimant is stated to have been dismissed for misconduct. Under Section 43 of the Employment Act 2007, the law provides as follows:

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair, within the meaning of section 45.

(2) The reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Under Section 41 of the Employment Act, before dismissing an employee for gross misconduct an employer is required to give the employee the safeguards under the law as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The Claimant's dismissal on 21st February 2019 did not follow any hearing as contemplated under Section 41 and as evidenced by the correspondence between the parties was summary in nature as there was no notice given nor was the Claimant asked to give any explanation before the dismissal. The Respondent by so doing breached the terms of engagement. There was no iota of proof that the Claimant had been negligent or mishandled patients as mere insinuations on a letter do not make for evidence. The Respondent did not show any such evidence and the dismissal of the Claimant for misconduct as captured in the letter of dismissal was therefore unlawful and unfair within the meaning of the law. The Claimant was entitled to receive due notice being one month's notice or payment of one month's salary in lieu of such notice. He had adverted to 3 months which is not provided for in his contract or the law. In regard to the untaken leave and off days the Respondent being the keeper of records did not challenge the claim by the employee by availing proof to the contrary as the Claimant produced a leave application form indicating he had a balance of 11 days. He is entitled to the leave not taken. Unfortunately the Claimant did not demonstrate the entitlement to the 10 off days he alleged to be due. The finding of the court from the foregoing analysis is that the Respondent's dismissal of the Claimant was unfair and unlawful. The Respondent is therefore liable to the Claimant as follows:-

(a) One month's salary in lieu of notice – Kshs. 250,000/-

(b) Salary for February 2019 – Kshs. 250,000/-

(c) 4 month's salary as compensation for the unlawful dismissal – Kshs. 1,000,000/-

(d) Costs of the suit

(e) Certificate of service in terms of Section 50 of the Employment Act

(f) Interest at Court rates on the sums in (a), (b), (c) above from the date of judgment till payment in full.

6. This decision was rendered online with 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. An automatic stay is granted for 14 days in line with the guidelines issued by the Hon. The Chief Justice.

It is so ordered.

Dated and delivered at Nyeri this 7th day of May 2020

Nzioki wa Makau

JUDGE