



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 62 OF 2018

BETWEEN

CHARLES MOKUA NYAMARI.....CLAIMANT

VERSUS

TUDOR HEALTH CARE LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matthew Nyabena & Company Advocates for the Claimant

Odhiambo S.E. & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 6th February 2018. He states, he was employed by the Respondent as a Clinical Officer in December 2015. He earned a monthly salary of Kshs. 30,000. He was summarily dismissed by the Respondent on 2nd May 2017. He states, the decision was not based on valid reasons, and was not executed fairly, in accordance with the Employment Act 2007. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 30,000.
- b. Unpaid salary for April at Kshs. 30,000.
- c. Unpaid salary for May at Kshs. 2,308.
- d. Unpaid leave at Kshs. 8,750.
- e. Severance pay at Kshs. 30,000.
- f. 12 months' salary in compensation for unfair termination at Kshs. 360,000.
- g. Overtime pay at Kshs. 270,000.

Total...Kshs. 731,058.

- h. Costs.
- i. Interest.
- j. Declaration that termination was unfair and unlawful.

k. Certificate of Service to issue.

l. Any other suitable relief.

2. The Respondent filed its Statement of Response on 7th May 2018. It is conceded that the Claimant worked for the Respondent as a Clinical Officer. Termination of his contract was fair. He is not entitled to Kshs. 731,058 as prayed, but to Kshs. 24,400 less statutory deductions. The Respondent prays for dismissal of the Claim with costs.

3. Parties gave their evidence and rested their respective cases, on 24th February 2020. The Claimant gave evidence, as did Tom Otieno Abala, Respondent's Human Resource Assistant. They filed Closing Submissions in the month of May 2020, and the file was couriered in the month of June 2020 to the Trial Judge outside of the Court Station, for preparation of Judgment, under the travel and physical congregation restrictions imposed globally, by the outbreak of covid-19.

4. The Claimant restated the contents of his Pleadings in his oral evidence. He took leave of 7 days ending 2nd May 2017. On return, he was advised by the Respondent that there was no more work. It was alleged that he had written a sick-off sheet for one Dickson improperly, and received Kshs. 300 from Dickson. This allegation was not made before termination, but after. The Claimant did not write a letter of apology, exhibited by the Respondent. He saw the letter after termination. He however saw the sick-off sheet. He is a Clinical Officer, and authorized to issue sick-off sheets. He was never called for a disciplinary hearing. Termination was wrong.

5. Cross-examined, the Claimant told the Court that he was dismissed by word of mouth. He was employed in December 2015. He did not have any document to show this. He signed a Verifying Affidavit, on filing the Claim. The letter of dismissal is part of the documents. He signed prescription form. Dickson was the patient. The Claimant was based at Kengeleni. He did not know where Dickson was, at the time of giving evidence. The Claimant did not apologize over the sick-off sheet. He went straight to his Advocates upon termination. He was shown an undated letter by his Advocates, allegedly written by him. He wrote the unsigned, undated letter. He was subscribed to N.S.S.F. He did not have evidence of overtime worked. He was paid nothing on termination. He handed over to the Respondent. He did not go on annual leave in 2016. He did for the period shown in leave forms exhibited by the Respondent. He seeks leave for the year 2017/2018, which was due in April 2017. He went on first leave around August 2016. He was not given a fair hearing. He was not engaged in any act of gross misconduct. He was not involved in forgery. He worked on locum [temporary basis in medical circles] for the initial 3 months, in December 2015. The letter of employment issued in April 2016. Redirected, he confirmed that he started working in December 2015. He did not retain patient records.

6. Abala told the Court that Respondent's Administration ought to be informed, when sick-off sheets are issued. Dickson was employed by Nakumatt Holdings. He had asked for off-duty days, which was denied by Nakumatt. After sick-off sheet issued, Nakumatt made enquiry from the Respondent. It was not a genuine sick-off sheet. The Claimant was summarily dismissed. He wrote by hand, a letter of apology and another letter complaining that he was unfairly dismissed [exhibits 4 and 5 of the Respondent's documents]. He signed the leave application form on record.

7. Cross-examined, Abala told the Court that, he is not registered with the Institute of Human Resource Management. The owner of the Respondent business would know the date when the Claimant was employed. There is no document in Court to say that a Clinical Officer cannot issue sick-off sheet. The Claimant attended to Dickson. He issued 3 day sick-off. Nakumatt Holdings staff attendance sick sheet, has a serial number 79990. The Officer who sees the patient, signs the sheet. The document is indicated to have been signed by Francis Akoche. This is not the Claimant. Abala did not know who Francis Akoche is. The Employee's name is given to be Dickson Machuki, not Dickson Nyabuga. This could be the same person. Termination was on 2nd May 2017. The Respondent did not write to the Claimant before termination. He was heard. There are no minutes of the disciplinary hearing. Abala did not know if the Claimant was owed salary for April 2017. The Claimant would be entitled to earned leave. Redirected, the Witness explained that the Nakumatt document came from Nakumatt. It was not owned by the Respondent. It is signed by the Claimant. An issue was raised by Nakumatt. The Claimant would be entitled to earned leave. He would be entitled to pro-rata leave. He is not owed any leave days. He does not merit severance pay.

8. Was the Claimant's contract terminated on valid ground and fairly? Is he entitled to the prayers sought?

The Court Finds:-

9. The Claimant started working for the Respondent on locum basis, in December 2015. He was taken in on regular basis, with effect from April 2016. His contract was terminated by the Respondent on 2nd May 2017. He was alleged to have issued a sick-off sheet to one Dickson Nyabuga, an Employee of Nakumatt Holdings, irregularly.

10. Respondent's Witness explained that the issue was raised by Nakumatt Holdings, the said Employee having applied for off-duty days which application was denied by the Employer. The Employee then forced the issue through sick-off sheet, said to have been issued by the Claimant.

11. The document titled 'Staff Attendance Sick Sheet,' under the banner of Nakumatt Holdings, exhibited by the Respondent, appears to have been an internally generated document. It is a secondary document, in relation to the medical document issued by Tudor Clinic. It has inconsistencies such as on the Employee's name. It is indicated to have been passed by one Francis Amoche. This of course is not the name of the Claimant. Whoever filled the document however, appears to have relied on the Tudor Healthcare Prescription Form, dated 21st April 2017.

12. This Form was exhibited by both Parties. It is undoubtedly with regard to a patient who was attended to by the Claimant. He recommended Dickson rests for 3 days. He signed the Form. Nakumatt Holdings would read mischief in grant by a health practitioner, of 3 days of sick rest, having declined the same Employee his request for off-duty days earlier. The Employee, in collusion with whoever issued him the sick-off sheet, would appear in the eye of Nakumatt Holdings, to have been bent on forcing the hand of Nakumatt Holdings, to

release the Employee from duty momentarily, as had been desired by the Employee from the beginning.

13. Another document which is commonly exhibited by the Parties, is a handwritten letter of apology, dated 22nd April 2017, whose authorship, is attributed to the Claimant. The Court is persuaded the letter of apology was written by the Claimant, and it represents a true account of the incident it makes reference to.

14. The Court does not think it is a decisive factor, whether the Claimant was authorized to issue sick-off sheets. The problem appears to be that he issued a sick-off sheet which appears to have been intended to secure an Employee of Nakumatt Holdings, days of rest, which the Employer had refused to grant earlier.

15. The Claimant failed to discharge his duty as a Clinical Officer, properly and in accordance with the ethos of medical practice.

16. The Respondent had valid reason to justify termination under Section 43 and 45 of the Employment Act.

17. The incident occurred on 21st April 2017. The Claimant wrote on 22nd April 2017 apologizing and conceding that he was involved in an act of gross misconduct the previous day. He promised never to repeat the misconduct.

18. Having admitted his offence, and sought pardon, the Court is of the view that the Respondent was not bound to go into motions of disciplinary hearing. There was nothing to be enquired into further, and nothing to be heard, in terms of Section 41 of the Employment Act. The Respondent could accept the apology, and retain the Claimant, or take any other decision including dismissal. It opted to dismiss the Claimant. It was a reasonable decision, considering the Respondent is a medical practice, with certain professional ethics to maintain, and with a name to protect.

19. The Court is satisfied that termination was based on valid ground, and executed fairly, under the Employment Act.

20. The prayer for compensation is declined. Notice pay is not due, the Respondent having shown there was an act of gross misconduct warranting summary dismissal.

21. The Claimant was offered salary for 30 days, having been dismissed on 2nd May 2017. The salary seems to be the full salary for the month of April 2017. The contract between the Parties was still alive until 2nd May 2017. **The Court allows the prayer for salary for the month of April 2017 at Kshs. 30,000.** He deserves salary for **the 2 days he was an Employee of the Respondent in the month of May 2017, which is granted at Kshs. 2,308.**

22. The leave application form dated 30th November 2016, indicates the Claimant had nil balance, after applying for the days indicated therein. The last leave application form dated 22nd April 2017, indicates leave applied for, of 7 days would be offset from annual leave of 2017/2018. The Claimant was on leave between 22nd April 2017 and 2nd May 2017. He has not established his prayer for pending leave amounting to Kshs. 8,750.

23. He did not leave employment on redundancy, to seek severance pay, under Section 40 of the Employment Act.

24. There is no evidence of overtime worked, amounting to overtime pay of Kshs. 270,000.

25. **Certificate of Service shall be released to the Claimant by the Respondent forthwith.**

26. **No order on the cost.**

27. **Interest allowed at 16% per annum from the end of 30 day stay of execution granted herein.**

28. **The Respondent is granted 30 day stay of execution, in light of the effect coronavirus pandemic has on the ability of businesses to meet their financial obligations.**

IT IS ORDERED:-

a. The Respondent shall pay to the Claimant salary for the months of April and May 2017, at Kshs. 32,308.

b. Certificate of Service to issue.

c. No order on the costs.

d. Stay of execution granted for 30 days from the date of Judgment.

e. Interest allowed at the rate of 16% per annum from the date the order of stay of execution lapses.

Dated, signed and released to the Parties, at Chaka, Nyeri County, under the Covid -19 Judiciary Guidelines, and Rule 38 of the E&LRC [Procedure] Rules 2016, this 29th day of June 2020.

James Rika

Judge