



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 82 OF 2015

TERESA K. WABUKO.....CLAIMANT

VERSUS

THE BOARD OF GURU NANAK RAMGHARIA

SIKH HOSPITAL.....RESPONDENT

JUDGMENT

1. The Claimant's suit is contained in the Amended Memorandum of Claim filed on 11th November, 2017 by which she alleges that her employment was unfairly terminated by the respondent and seeks the following reliefs: -

- a. three months' notice.....Kshs. 90000.
- b. compensation for the wrongful and unfair termination equal to 12 months' pay.....Kshs. 360,000.
- c. 13 days worked in July 2013.....Kshs. 13,000.
- d. annual leave not given during the 2 years between June 2002 and May 2003.....Kshs. 60000.
- e. leave travelling allowance for the 2 years between June 2002 and May 2003.....Kshs. 6000.
- f. service gratuity for 11 years.....Kshs. 242,000.
- g. underpayments between June 2002 and June 2013.....kshs. 1,302,182
- h. Certificate of service,
- i. costs of the claim and interest.

2. The Respondent's defence is contained in the Amended Response filed on 6th November 2017 in which she avers that the Claimant was employed on 10th May, 2005 and not in 2002 as alleged. She further avers that she summarily dismissed the claimant for gross misconduct, namely, holding a meeting in the hospital's laundry department during working hours and without permission from the management. She prays for the suit to be dismissed because the dismissal was justified and that she computed and paid the claimant her terminal dues, but the claimant declined the cheque.

3. The suit went to full hearing and both parties tendered evidence and thereafter filed written submissions.

Claimant's case

4. The claimant testified as Cw1 and told the court that she was engaged verbally by the Respondent on 1st June 2002 as a Kenyan Registered Community Health Nurse on a consolidated salary of Ksh. 14,000/=. That on 10th May 2005, she signed a 2-year contract for a consolidated salary of 16,000 before being issued with an appointment letter dated 9th October 2008 for permanent employment effective 1st June 2007.

5. The Claimant worked until 12th July 2013, when she received a letter terminating her services from the Respondent on ground that she presided over a meeting with strangers and staff within the hospital premises. The letter advised her to collect a cheque of Kshs. 181,584.75 as the total amount of her terminal benefits, but did not specify the breakdown. She contended that she was dismissed without being accorded any hearing. As a result, she reported the matter to Kenya Union of Domestic Hotels, Education, Institutions and Hospital Workers (KUDHEIHA).

6. She further testified that the termination of her employment triggered industrial unrest by the rest of the workforce on 15th July, 2013, which culminated to the signing of return to work formulae between the union and the Respondent. Thereafter the dispute was reported to the Labour Office through her union pursuant to the said return to work formulae and a Mr. Ngugi was appointed as a Conciliator. The parties attended a joint conciliation meeting on 13/09/2003, but they failed to settle the dispute on the termination of her employment and the dispute was referred to Court.

7. She contended that the termination contravened the disciplinary procedure outlined in the CBA and the Employment Act and that the Respondent was malicious. She admitted that a meeting took place on the material day but contended that it was held during lunch break and it was for the Works Committee to discuss the termination of 4 employees who were members of the union. She contended that she attended the meeting as the Shop Steward because she lawfully represented the interests of the unionised staff.

8. She contended that the Respondent discriminatorily chose to terminate her services alone yet the said meeting was presided over by other union officials. Further, that the Respondent's action was meant to unduly influence union members to either withdraw or resign from the union so as to defeat the process of negotiating another CBA.

9. The Claimant further contended that she was grossly underpaid during her service with the Respondent and received a lower salary compared to her colleagues in the same job level and description. She therefore prayed for the dues set out in her Amended Memorandum of Claim, Certificate of service, costs of the suit and interest.

10. On cross examination, Cw1 admitted that she attended the Works Committee meeting on 4.7.2013 as the Shop Steward and the meeting was also attended by the Trade Union Officials at the Respondent's Laundry area. She maintained that the meeting was during lunch break and permission had been given by the HR Manager who had met the Trade Union Official before the meeting. She further maintained that the meeting was urgent because 4 union members had been served with termination letters by the respondent. She denied that she was the chair in the meeting.

11. She contended that she was discriminatorily paid lower pay than other Registered Nurses in the same hospital who were earning Kshs. 30,000 in 2013 as compared to her 27, 797 per month. She maintained that she joined the respondent on 1.6.2002 on an oral contract before being given a written contract in May 2005.

Respondent's case

12. The Respondent's Human Resource Manager, Ms Janet Thiong'o testified as Rw1 and told the court that the claimant was employed by the respondent on 10.5.2005 earning Kshs. 16000. She further testified that the Claimant was summarily dismissed for gross misconduct, for holding a meeting in the hospital's laundry department during working hours and without permission from the management. According to her, the meeting was illegal and it disrupted normal functioning of the hospital as sick patients were left unattended against the hospital policy which posed real danger to human lives.

13. She further testified that due process was followed before the termination contending that as a shop steward, the Claimant ought to have known better when to organize meetings but she instead incited workers against the management. She contended that the return to work formula alluded to by the claimant is a confirmation that there was an illegal and unprotected strike involving 36 of the 200 staff of the hospital. She contended that the claimant was not a first offender and stated that she had been served with previous warnings. In her view the dismissal was lawful.

14. She stated that after the termination the Claimant collected the computation sheet for her dues together with her cheque but she returned the same to the Respondent after advice from her union. She contended that the CBA produced by the Claimant was for the period of 1st July, 2009 to 30th June, 2011 and it did not cover the period in question. She further stated that the issue of underpayment does not arise and the claim for underpayment is totally misplaced because the claimant willingly entered into the contract. She also contended that the Claimant took all her leave days and was duly paid for the 13 days worked in July 2013 as part of the pay cheque she returned. She further contended that claims for service gratuity was also offered to her at the rate of 22 days for every completed year.

15. She stated that since the Claimant was rightfully dismissed, she is not entitled to any compensation for the alleged wrongful termination of employment and prayed for the dismissal of the suit with costs. However, on without prejudice basis, Rw1 stated that the claimant is only entitled to **Kshs. 181,584.76 after tax** as computed at paragraph 22 of the Amended Response and that she can collect the said dues on compassionate reasons.

16. On cross examination, Rw1 admitted that she joined the respondent on 16.9.2019 after the dismissal of the claimant from the hospital. He denied knowledge whether there were different salaries for employees in one group. He reiterated that the claimant was dismissed for holding a Works Committee meeting with strangers in the hospital. She further reiterated that there was a strike in 2013 but contended that she was unaware of the return to work formula after the strike. She further admitted that she did not look at the CBA filed herein by the claimant. she further admitted that she had no leave records for the claimant to produce.

Claimant's Submissions

17. The Claimant submitted that this is a case of unfair and wrongful termination of employment since fair procedure was not followed as required under the CBA and the Employment Act; that she was not accorded any hearing before the termination and the termination letter was not copied to her union; and that her dismissal was not justified because Rw1 acknowledged during cross-examination that the alleged illegal meeting was a meeting of the Works Committee. She therefore prayed for maximum compensation as prayed for in the Memorandum of Claim or as the Court deems appropriate considering her long service over a decade.

18. The Claimant further submitted that Rw1 did not produce employment records to disprove her claim for outstanding leave and urged the court to grant the same as prayed. She further relied on payslips of other nurses in the same job group to urge the court to grant her claim for salary underpayment. She maintained that she was a victim of discrimination and victimization for being a Shop Steward.

Respondent's Submissions

19. The Respondent submitted that the Claimant's services were terminated in line with **Sections 35 and 45 of the Employment Act** and not for any of the reasons under **section 46 of the Employment Act**; that the Claimant admitted there was indeed a meeting in the laundry area and she even listed the people present; that RW1 confirmed there was no evidence on the file that permission was sought for a union meeting during working hours; and that victimization for being Shop Steward did not arise because the Claimant had worked for more than a decade as a union member and 2 years as a shop steward with the Respondent. Finally she urged that the CBA produced by the Claimant was not in force at the time of the dismissal because it had expired according to **Clause 33**.

Issues for determination and Analysis

20. There is no dispute from the pleadings, evidence and termination that the claimant was employed by the respondent as a Registered Community Nurse until 13.7.2013 when she was dismissed summarily for gross misconduct. It is now trite law in Kenya that for termination of an employee's contract of service to pass the test of fairness, the employer must prove that it was grounded on a valid and fair reason(s) and that fair procedure was followed. Consequently, this suit turns on the following issues:

- a. Whether the termination of the Claimant's employment was grounded on valid and fair reason.
- b. Whether fair procedure was followed.
- c. Whether the Claimant is entitled to the reliefs sought.

Reason for the termination

21. **Section 44(4) of the Employment Act** provides for termination of an employee's services on grounds of misconduct while **Section 43 and 45(2)** of the Act provides for proof of the reason for termination in any legal proceedings challenging the termination. In this case, the claimant was dismissed for holding a meeting of the Works Committee during working hours, without permission and which meeting was attended by persons who were not staff of the hospital. The termination letter dated 12.7.2013 captured the reason for the dismissal as follows:

"RE: TERMINATION – GROSS MISCONDUCT

... the management is aware that on 4th July 2013 you held a meeting with strangers and staff in the Laundry department in the Hospital premises without asking for permission from the management during working hours.

That you have continued disrupting the normal operations of the hospital by conducting meetings with the staff during official working hours and inciting staff against the management.

The above amounts to gross misconduct and leaves the management with no option but to terminate your contract effective 12th July 2013..."

22. The claimant admitted that she attended the meeting on 4.7.2013 at the hospital's Laundry area and that Officials of the Trade Union attended to discuss union members who had been dismissed. However, she contended that she attended as the Shop Steward and the meeting took place during the lunch break.

23. I have carefully considered the evidence and the submissions by both sides and formed the opinion that the respondent has proved by evidence that the claimant attended the meeting on 4.7.2013 with both staff and non-staff union Officials at the hospital premises during working hours. The burden of proof is therefore on the claimant to prove that permission from the management was secured before holding the meeting at the hospital during working hours, and that the external union officials were allowed.

24. In my view the said burden of proof has not been discharged by the claimant nor did she deny that she continued to hold other meetings with staff during working hours as a result of which the services at the hospital were disrupted. Consequently, I find and hold that the reason for dismissing the claimant was valid and fair. I further agree with the respondent that the reason for the dismissal was not that the claimant was the Shop Steward as alleged but for participating in an unauthorized Works Committee meeting with strangers during working hours on 4.7.2013 and subsequent meetings with staff during working hours.

Procedure followed

25. **Section 45(2)** of the Employment Act states that the termination is unfair if due process in general is not adhered to as per Section 41 of the Act. The Claimant has contended that the Respondent did not follow the procedure under section 41 of the Act and the CBA while terminating her services thus rendering her dismissal unfair. The termination letter aforesaid did not mention any hearing before the summary dismissal and Rw1 did not adduce any evidence to rebut the claimant's case that the dismissal was done without according her any hearing as required. Section 41 of the Employment Act provides that: -

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 on 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."

26. In this case I am satisfied that the Respondent has failed to prove that she followed fair procedure before terminating the Claimant's services as required by law since she has not proved that the Claimant was accorded a fair hearing or allowed to defend herself before the termination. It is now trite law that even where an employee is deemed to have misconducted himself/herself the duty to follow fair procedure cannot be wished away by any employer. I gather support from **Donald Odeke –vs- Fidelity Security Ltd Cause No. 1998 of 2011** where Ndolo J observed that:

"An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.....it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair."

27. I have gathered more support from **Industrial Cause No. 146 of 2012-Alphonse Maghanga Mwachanya vs. Operation 680 Limited** where Radido J states;

".....in order for an employer to meet the legal requirements of procedural fairness section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following;

- i. Explained to the employee in a language the employee understood the reason why it was considering the termination.**
- ii. Allow a representative of the employee, being either a fellow employee or a shop floor union representative to be present during the information/explanation of the reason.**
- iii. Heard and considered any explanation by employee or his representative**
- iv. ..."**

28. Having found that the employer has herein failed to prove that she followed a fair procedure before dismissing the claimant, it is my duty to return that the dismissal of the claimant by the respondent vide the letter dated 12.7.2013 was unfair and wrongful within the meaning of section 45 of the Employment Act.

Reliefs

29. In view of the foregoing finding, the claimant is entitled to salary in lieu of notice plus compensation for the unfair and wrongful termination of her services by dint of section 49 of the Employment Act. The CBA produced provided for 3 months' notice or salary in lieu of notice for employees who served for over 10 years like the claimant. The termination letter also offered the claimant 3 months' salary in lieu of notice and as such I award her the same. I further award her 6 months' salary as compensation for unfair and wrongful termination considering her long service and also the fact that she contributed to her termination through misconduct.

30. The Respondent has admitted the claim for salary for the 13 days worked in July 2013, gratuity at 22 days for every completed year, annual leave for 2013 and travelling allowance as computed in paragraph 22 of its Response. Therefore, I award the said claims as admitted in the defence based on a period of 10 years' service from June 2002 because the respondent admitted in her submissions that the claimant had served for over a decade. The Claimant is further entitled to a Certificate of Service under **Section 51 of the Employment Act** and the Respondent should furnish the same to her.

31. As regards the claim for salary underpayment, the claimant produced payslips for other Nurses showing that they were earning Kshs.

30000 as opposed to her Kshs 27797. The slips are for the month of February and March but the year is unspecified. The slips for the other Nurses show that they were in Charge of something or they were theatre nurses. In the circumstances, I find that the claimant has not proved that she was serving in the same rank with the said other nurses. Consequently, I decline the claim for salary underpayment.

Conclusion and disposition

32. I have found that the dismissal of the claimant was unfair and wrongful within the meaning of section 45 of the Employment Act and she is entitled to damages. Consequently, I enter judgment for her in the following terms: -

Notice	Kshs. 83,391
Compensation	Kshs. 166,782
Salary for July 2013	Kshs. 12,045.36
Gratuity for 11 years	Kshs. 224,229.13
Annual leave for 2013	Kshs. 27,797
Travelling	<u>Kshs. 3500</u>
Total	<u>Kshs. 517,744.49</u>

The award is less statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered at Nairobi this 21st day of August 2020.

ONESMUS N, MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE