



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 241 OF 2018

WINNIE MATAYA NAMANGO.....CLAIMANT

VS

JOCHAM HOSPITAL LTD MOMBASA.....RESPONDENT

JUDGMENT

Introduction

1. By her Memorandum of Claim dated and filed in court on 17th April 2018, the Claimant, Winnie Mataya Namango seeks compensation for unlawful termination of employment plus terminal dues. In response to the Claimant's claim, the Respondent filed a Statement of Defence on 6th June 2018.

2. The matter went to full trial where the Claimant testified on her own behalf. Jacqueline Chamia testified for the Respondent. Both parties subsequently filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent as a Nurse in June 2013, initially on casual basis and later on fixed term contract from 9th December 2014.

4. The Claimant worked for the Respondent until 3rd January 2018, when she was summarily dismissed. At the time of dismissal, she earned a monthly salary of Kshs. 47,000.

5. The Claimant states that she had a clean employment record with no disciplinary issues.

6. The Claimant narrates the events leading to her dismissal as follows:

a) On 24th December 2017, there was an incident at the Hospital where the name of a patient appearing in an envelope containing prescribed drugs was erroneously altered/changed/cancelled by one of the Respondent's Nurses;

b) Word went round at the Hospital that it was the Claimant who had made the error. As a result, the Claimant was summoned by the Chief Administrator who made an inquiry as to whether or not the Claimant was the Nurse who was involved in the aforesaid error;

c) The Claimant duly informed the Chief Administrator that she was not the one who had made the error and that it was another Nurse known as Linet, working with the Claimant on the said date, who had made the alteration on the envelope containing the patient's medication;

d) On 31st December 2017 at around 8.00 am, while on duty in the Female Ward, the Claimant was approached by the Nurse Known as Linet, who verbally attacked her using profane remarks, accusing the Claimant of reporting her to the management. The Claimant was so overwhelmed by the embarrassment that she broke down in tears;

e) After recollecting herself, the Claimant reported the encounter to the Covering Nurse, one Mr. Njuguna;

f) Njuguna summoned Linet and inquired about the incident; Linet apologised and stated that she was only joking;

g) On 2nd January 2018, while off duty, the Claimant received a text message from a colleague informing her that there was a

rumour that she had been dismissed from employment. The Claimant called the In-Charge of the Female Ward who informed her that that was where her case was heading and that the Matron had said that the Claimant should not report to work the following day;

h) Despite being told not to report to work, the Claimant reported on duty on 3rd January 2018 as usual, since she had not received any official communication requiring her not to report;

i) Upon arrival, the Claimant was summoned by the Human Resource Manager who told her to go home and wait for further communication;

j) On 4th January 2018, the Claimant received a telephone call from the Human Resource Manager requesting her to pick a letter from his office;

k) On arrival, the Claimant was handed a summary dismissal letter dated 3rd January 2018 and was instructed to clear with the Respondent;

l) Upon receipt of the dismissal letter, the Claimant sought the help of the Human Resource Manager who directed her to go to the Matron. The Matron stated that she was not aware of the Claimant's case and directed her to the Chief Administrator;

m) The Claimant sought the Chief Administrator but did not find him; she instead talked to the Human Resource Manager who advised her to write a letter detailing what had happened in an effort to appeal against the dismissal;

n) On 10th January 2018, the Claimant wrote a letter reference 'apology' in an effort to appeal against the decision to summarily dismiss her pursuant to Section 2.18.4 of the Jocham Hospital Policies and Guidelines; the Claimant did not receive a response to this letter;

o) Within the month of January 2018, the Claimant was called by one of the Respondent's representatives who told her that her final dues, calculated as Kshs. 9,000 would be directed to a financial institution where the Claimant was servicing a loan.

7. The Claimant avers that the manner in which her employment was terminated by the Respondent was wrongful and unfair for the following reasons:

a) The reason given by the Respondent for her summary dismissal was not a valid and fair reason within the meaning of Section 45(2) of the Employment Act, 2007 as the Claimant was not at all involved in any exchange of words and was actually a victim of Linet's verbal attack; the said actions allegedly committed by the Claimant do not constitute gross misconduct as encapsulated under Section 44(4) of the Employment Act and Section 2.18.3 of the Jocham Hospital Policies and Guidelines;

b) It is clear from the summary dismissal letter dated 3rd January 2018 and the response to the demand letter dated 19th February 2018 that the Respondent did not give the Claimant notice prior to the summary dismissal and that the Respondent did not accord the Claimant an opportunity to be heard and defend herself in a disciplinary hearing contrary to the provisions of Section 41 of the Employment Act.

8. The Claimant therefore claims the following:

a) 12 months' salary in compensation.....Kshs. 564,000

b) 1 month's salary in lieu of notice.....47,000

c) Service pay for employment period not covered by NSSF.....89,510

d) Certificate of service

e) Costs plus interest

The Respondent's Case

9. In its Statement of Defence dated 5th June 2018 and filed in court on 6th June 2018, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim.

10. The Respondent however denies the allegations of unfair termination of employment made by the Claimant and states that the Claimant is not entitled to compensation.

11. In response to the claim for service pay, the Respondent states that the Claimant was a member of the Respondent's Staff Pension Scheme.

12. The Respondent states that the Claimant's Certificate of Service has been ready for collection.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

14. The Claimant produced a letter of dismissal dated 3rd January 2018, addressed to her by the Respondent stating:

"Dear Ms. Namango

RE: SUMMARY DISMISSAL FROM EMPLOYMENT

The management has decided to Summarily Dismiss you from employment with immediate effect.

The decision was arrived at out of an incident that happened on 31st December 2017 involving you and your colleagues in a confrontation and exchange of words at your work station, and in the presence of patients thus causing disturbance to the patients and tarnishing the image of the hospital.

This is a serious offence that cannot be tolerated hence the Dismissal from employment.

You are expected to do clearance with the Hospital immediately through the office of Human Resource.

Any monies due to you shall be calculated in due course.

Yours faithfully,

JOCHAM HOSPITAL

(signed)

Benjamin S. Wafula

CHIEF ADMINISTRATOR"

15. According to this letter, the Claimant was dismissed for gross misconduct particulars being involvement in a confrontation with colleagues at work on 31st December 2017.

16. The Claimant gave her version of the incident of 31st December 2017 as a verbal attack against her by her colleague Nurse, Linet. The Claimant told the Court that the attack by Linet followed an earlier incident on 24th December 2017, where there had been a mix up of prescribed medication for a patient in the Female Ward, where the Claimant and Linet were deployed. The Claimant's narration of events is confirmed by her letter of apology to the Respondent, soon after her dismissal.

17. The Respondent's Director, Jacqueline Chamia admitted in cross examination that she was aware of the incident of a mix up of patient medication on 24th December 2017. Chamia told the Court that she did not know who between the Claimant and Linet was to blame for the mix up. Chamia added that the Claimant and Linet blamed each other for the mix up. This testimony agrees with the Claimant's account.

18. Chamia sought to create a distinction between the incident of 24th December 2017 and the one on 31st December 2017. She was however not present on any of the two occasions and her testimony is at best hearsay.

19. Section 47(5) of the Employment Act provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.

20. The Claimant's case is that she was wrongfully dismissed as she did not engage in any confrontation as alleged by the Respondent; rather, she was attacked by her colleague for having reported an incident of mix up of patient medication by the said colleague.

21. Chamia stated generally that the Respondent had conducted investigations into the incidents of 24th December 2017 and 31st December 2017 but did not present any investigation report. What is more, not a single person who was actively involved in the two incidents was called as a witness. All the Respondent did was to throw statements at the Court without calling the makers for cross examination. I must say

here and now that these statements are of nil probative value.

22. The Court was referred to the decision in *Pius Machafu Isindu v Lavington. Security Guards Limited [2017] eKLR* where the Court of Appeal stated thus:

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

23. The Claimant testified and the Respondent did not disagree that the Claimant had informed the Chief Administrator that it was Linet who had mixed up patient medication on 24th December 2017. The Claimant further testified that she had reported the incident of 31st December 2017 to the Covering Nurse, one Mr. Njuguna.

24. The Chief Administrator and the Covering Nurse would have been crucial witnesses in this case. By choosing not to call them, the Respondent damaged its own case.

25. Overall, what emerges is that the Respondent failed to investigate two serious incidents at the work place and instead took the easy option of dismissing the Claimant without affording her a hearing. There is a price to pay for taking this shortcut.

26. The Respondent itself referred to the decision in *Muthaiga Country Club v Peter Ngau Nzioka [2019] eKLR* where the Court of Appeal affirmed that procedural fairness requirements of Section 41 of the Employment Act must be complied with.

27. In the end, I find and hold that the Respondent not only failed to establish a valid reason for summarily dismissing the Claimant as required under Section 43 of the Employment Act but also failed to adhere to the due process set by Section 41 of the Act.

Remedies

28. I therefore award the Claimant eight (8) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service as well as the Respondent’s unlawful conduct in executing the dismissal.

29. I further award the Claimant one (1) month’s salary in lieu of notice.

30. In support of her claim for service pay, the Claimant filed a provisional statement of account from the National Social Security Fund (NSSF). According to this statement, the Claimant was registered with NSSF on 2nd April 2014 while remittances to her account commenced in September 2014.

31. In her Memorandum of Claim, the Claimant states that she was initially employed as a casual employee from June 2013. This pleading, coupled with the fact that she did not provide her payslips for the period for which she claims service pay renders her claim on this limb doubtful.

32. Finally, I enter judgment in favour of the Claimant as follows:

a) 8 months’ salary in compensation.....Kshs. 376,000

b) 1 month’s salary in lieu of notice.....47,000

Total.....423,000

33. This amount will attract interest at court rates from the date of judgment until payment in full.

34. The Claimant is also entitled to a certificate of service plus costs of the case.

35. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OCTOBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft

Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Tindika for the Claimant

Mr. Mkomba for the Respondent