



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2268 OF 2014

MAINA MUNYUA.....CLAIMANT

VERSUS

AMREF HEALTH AFRICA (PREVIOUSLY AFRICA MEDICAL AND

RESEARCH FOUNDATION KENYA).....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The Claimant herein filed a Memorandum of Claim on 18th December 2014 through the firm of Watako Kirui and Company Advocates alleging the withholding of his remuneration and the unfair and unlawful termination. The Claimant seeks the following remedies:

- a) The Respondent pays unpaid salary for two weeks (10) days in May 2014 amounting to Kshs.59,964.86.
- b) The Respondent pay in lieu of leave days not taken (8 days) Kshs.47,979.89.
- c) Twelve months' salary compensation as damages for wrongful dismissal, Kshs.1,583,072.15.
- d) Any other remedy that this Court may deem fit to award.

The Respondent through Kaplan & Stratton filed a Memorandum of Defence on 23rd February 2015 denying the Claimant's termination was wrongful and unlawful as alleged.

On 20th April 2018 the parties agreed that the Claim be disposed off by way of written submissions. They subsequently filed and exchanged written submissions which were highlighted by counsels for the respective parties on 18th July 2018.

Claimant's Case

The Claimant submits that he was employed by the Respondent on 1st March 2002 as a laboratory Support staff on a contract for a period of 2 years commencing 1st March 2002 to 1st March 2004 and on 24th September 2002 he was confirmed as a Laboratory Support Staff. The Claimant states that his contract term was severally renewed and in June 2008 he was promoted to position of Project Assistant –Laboratory Technician. His contract of service was further extended for 2 years from 31st March 2012 to 30th March 2014 and was issued with a new service Agreement to suit his position as Project- Assistant Laboratory Programme.

He avers that on 7th October 2013 the Respondent convened a meeting to discuss the Claimant's qualifications. In the meeting, the Respondent indicated that it required the Claimant to have a practising licence issued by the Kenya Medical Laboratory Technicians and Technologists Board. He avers that he voluntarily obtained a provisional licence duly approved by the Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB), which allowed him to practice while his registration was being processed. He further avers that he obtained a letter confirming that he was waiting to sit for his final exams.

He avers that the Respondent failed to recognise his provisional licence to practice. He avers that while being employed and promoted he was never informed that the licence was mandatory for his position.

He avers that on 26th February 2014 the Respondent's Human Resource Manager, Laboratory Manager and Project Manager summoned him and questioned him on acquiring the licence from the Kenya Medical Laboratory Technicians and Technologist Board. He contends that having submitted a provisional licence the Respondent resolved to dismiss him on the said day.

He avers that his termination on 27th February 2014 was unlawful, unfair and unjust since he was replaced by an intern who did not possess a valid licence.

It is the Claimant's case that he was fully qualified for the position he was holding including his previous positions and that he had complied with the Respondent's rules and regulations. He alleges that few months after termination he received a valid licence from the Kenya Medical Laboratory Technicians and Technologist board on 17th October 2014 and that in a letter dated June 2014 he sought to explain the turn of events to the Director General but the letter did not elicit any response.

He alleges that he was not paid in lieu of 8 leave days as required under his contract of employment and law and he was also not paid by the Respondent for the 2 weeks he worked in May 2014.

Respondent's Case

The Respondent admits that the Claimant was employed as a Laboratory Support Staff and in June 2008 he was promoted to the position of Project Assistant- Laboratory Technician.

It is the Respondent's case that the Claimant's promotion to the position of Project Assistant – Laboratory Technician was on the mutual understanding that the Claimant would take steps to obtain the requirements for the position. Further, that during the course of his employment, all terms and conditions relating to the Claimant's employment were set out in his service agreement.

It is also the Respondent's case that the Claimant breached Clause 13 of the Service Agreement thus the Respondent was justified to terminate the Claimant.

The Respondent avers that in the year 2013 it began a process of international accreditation of its laboratory which took into consideration a number of issues including qualifications of its staff members involved in laboratory work. It avers that the Claimant informed the Respondent that he was yet to obtain his practicing licence which was in breach of Clause 13 of the Service Agreement.

The Respondent avers that it held a meeting with the Claimant on 7th October 2013 where the claimant was appraised on the importance of holding a valid practicing certificate. However, the Claimant informed the Respondent that although he had sat for his examinations he did not pass three papers and was scheduled to re-take them at the end of October 2013. The Respondent avers that the Claimant was given an opportunity to resit the three papers and made it arrangements for the Claimant to be off work. It is the Respondents case that the Claimant was informed that if he failed his examinations he would no longer be employed by the Respondent.

The Respondent avers that it made enquiries on the results on both 18th December 2013 and 20th February 2014 but the Claimant informed it that he did not pass all the papers. It states that a meeting was also held with the Claimant where he confirmed that he did not pass all the examinations. According to the Respondent, the Claimant's lack of a valid practicing licence was an obstruction to the conclusion of the international accreditation of the Respondent's laboratory.

The Respondent denies that the Claimant's termination was unlawful or wrongful. It states that he Claimant was paid all his dues and a Certificate of Service was issued to him. It further states that the Claimant worked for the Respondent until 30th April 2014 and did not work in May 2014. In addition, he is not entitled to payment of his leave days.

Claimant's submissions

The Claimant submitted that when he learnt of the accreditation process he voluntarily obtained and submitted to the Respondent a temporary licence from the Board which allowed him to practice provisionally. He submitted that the Board is the only institution mandated to issue licences and the said Board provisionally allowed the Claimant to practice. He further submitted that the Respondent has not shown any evidence disputing the validity of the provisional licence and has not given any other reason for termination.

The Claimant submitted that the accreditation process was voluntary and not mandatory since there were no timelines set for its completion or consequences for non-accreditation. Further that the accreditation is a process which started in 2013 and up to 2018 and yet to be completed.

The Claimant submitted that he had been serving in the position since 2007 with exemplary performance as per the appraisal forms devoid of any complaint with the Respondent. His termination was therefore unreasonable and unfair.

The Claimant submitted that the Respondent explained the reasons for considering his termination but the same was done in the absence of another employee of the Claimant's choice. It is the Claimant's further submissions that the Respondent did not consider the representation made by the Claimant since it disregarded the letter from the Board allowing him to practice provisionally.

The Claimant submitted that upon his termination an intern who did not possess a valid licence replaced him thus his termination was discriminatory. He submitted that if the Respondent was genuinely concerned with the Board's licence then it would not have replaced the Claimant with a less qualified person. He submits that the Respondent had engaged in unfair labour practice and breached the Claimant's rights under Article 41(1) of the Constitution. The claimant urged the court to consider the provisions of section 5 of the Employment Act.

The Claimant submitted that his termination was unfair, unlawful, wrongful and discriminatory and is therefore entitled to the damages for wrongful under section 49 of the Employment Act. The Claimant submitted that the Respondent has not proved any evidence showing that the Claimant did not report to work for the 14 days in the month of May or took the 8 days leave as claimed.

The Claimant in support of his case relied on the decision in **James Mwathi Nguri v Egerton University [2013] eKLR**.

Respondent's Submissions

The Respondent submitted that it had discharged its burden of proof in accordance with section 43(2) of the Employment Act 2007, which provides that the reasons for termination are matters that the employer at the time of the contract genuinely believed to exist. The Respondent submitted that the Claimant was aware that he was required to possess a valid practising certificate.

The Respondent submitted that the reason for the termination of the claimant's contract was clearly set out in the termination letter dated 27th February 2014. The Respondent relied on the case of **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** where the Court held:

"...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

The Respondent submitted that in adjudicating on the reasonableness of the employer's decision, this court is not entitled to substitute its own decision for that of the employer, particularly where the employer had exercised its discretion properly and in the best interest of the Company. The Respondent relied on the decisions in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** and **Nazareno Kariuki v Feed the Children Kenya [2013] eKLR**.

The Respondent submitted that the Claimant's termination was procedurally fair within the meaning of section 41 of the Act and that due process was followed before a decision was made to terminate the Claimant. The Respondent submitted that during the meeting held on 7th October 2013 the Claimant was duly notified that the Respondent's accreditation process looked into various issues including qualification of each staff member. The Respondent submitted that he Claimant confirmed in both his Memorandum of Claim and submissions that the Respondent explained to him the reasons for his termination.

The Respondent submitted that the Claimant's termination was procedurally fair within the meaning of section 41 of the Act and that due process was followed before a decision was made to terminate him. The Respondent submitted it complied with the requirements set out in **Anthony Mkala v Malindi Water & Sewerage Company Ltd [2013] eKLR** prior to termination as the Claimant was duly notified of the Respondent's accreditation process.

It is the Respondent's submissions that the Claimant failed to discharge the burden of proof under section 47(5) of the Act. In addition, the Claimant cannot take two contrary positions by stating that he had a provisional licence but also stating that he had not passed all his papers.

The Respondent further submitted that the Claimant has failed to prove elements of discrimination as the employee the claimant alleges was hired as a Project Assistant was qualified for the position.

The Respondent submitted that the Claimant is not entitled to 12 months compensation for wrongful termination since the termination was justified and warranted. Further, the Claimant is not entitled to unpaid salary for 2 weeks as he did not work in May 2014 and his services ended on 30th April 2014. On damages for discrimination the Respondent submitted that the Claimant's termination was solely premise on his lack of practising certificate.

The Respondent distinguished the authority cited by the Claimant, **James Mwathi Nguri v Egerton University [2013] eKLR**, and submitted that in that case the Court noted that the reason advanced by the employer in the retirement letter for lack of qualifications had never been an issue.

Determination

The parties herein do not dispute that the Claimant's termination was for the reason that he failed to acquire a practising certificate issued by the Kenya Medical and Laboratory Technicians and Technologists Board(KMLTTB). In particular, the Claimant's termination letter dated 27th February 2014 stated thus:

"Regrettably, your position has been affected by your lack of a valid licence to carry out the required duties and responsibilities despite the Organisation having given you chances to sit for the Board exams."

Contrary to the Claimant's position that poor performance was a reason for termination, no such reason was given for his termination in the letter dated 27th February 2014, neither did the meetings held with the Claimant revolve around his performance but rather his qualifications.

The issues for determination are thus the following:

- a) Whether the Claimant's termination was unfair.
- b) Whether the Claimant was discriminated for failure to possess a practising licence.

c) Whether the Claimant is entitled to the reliefs sought.

a) Whether the Claimant's termination was unfair

Reason for termination

The Claimant argues that the Respondent disregarded the provisional licence issued to him by the Board (KMLTTB) and that it was not known to him that the licence was mandatory for his position. The Respondent on its part alleges that the Claimant did not obtain the minimum requirements for the position and that he therefore breached the conditions set out in his service Agreement.

The Respondent's case is that it was in the process of international accreditation which took into consideration its staff's qualifications. Indeed, in the meeting held on 7th October 2013, the agenda was on staff issues in respect of the then ongoing laboratory accreditation. At the meeting the claimant stated that he had sat his examinations but did not pass three papers and that he was scheduled to re-take them at the end of October 2013. He was therefore requested to provide proof of this at the HR office and was given a chance to re-sit the three exams. He was informed that if he passed he would continue holding his position. In the said meeting it was agreed that should he not pass his exams he would be issued with 2 months separation notice.

The Claimant avers that pursuant to the meeting he submitted to the Respondent a letter confirming that he had been issued with provisional licence. However, the letter allowing the Claimant to practice provisionally is dated 12th February 2014. The requirement for him to produce a letter allowing him to practice was given in the meeting held on 7th October 2013. Thus as at 7th October 2013 the Claimant did not possess the letter issued to him by KMLTTB on 12th February 2014 allowing him to practice provisionally.

The Respondent contends that it was sceptical of the documentation provided by the Claimant in respect of his practising status being the letter dated 12th February 2014 since the Claimant had confirmed that he had not passed all his examinations. In his email dated 20th February 2014, the claimant stated that he had not yet passed one paper, Haematology, which he had booked to sit in May 2014. The email is reproduced below –

“Subject: FW: Exams Results – Maina Munyua

From: Maina Munyua

Sent: Thursday, February 20, 2014 10:34 AM

To: Julius Tome

Cc: Catherine Wamwangi; Jane Carter

Object: RE: Exams Results

Dear Mr Tome,

I did my Board exam whereby I was to sit for three papers; i.e. Microbiology, Parasitology and Haematology. I passed Parasitology and Microbiology and I was referred for Haematology. I have booked for the exam which I will take on May 2014. However, the Board has not given us the result slip because of a pending case challenging his appointment by the President as the Chairman of the Board. The Board has assured me that on passing my remaining paper, they will issue with practicing license as soon as possible.

Kind regards,

Maina”

In his letter dated 18th June 2014, the claimant admits the foregoing when he stated –

“I refer to the above subject. On reviewing the circumstances that led to my dismissal from employment, I have come to the conclusion that this was most unfair and unjust. I was dismissed from employment for not possessing a valid practising license from Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB). This is the Board that issues the licence in my case, when I was offered a contract, this was not a requirement. The licence was required as one of the many requirements for the laboratory to undergo for accreditation which is a process rather than an event.

In recognition of the importance of accreditation I registered-and did examination with KMLTTB and fulfilled most of the Board's requirement and I only remained with one paper which I was scheduled to take on May 2014. The KMLTTB issued me with a provisional practising licence pending my last paper. I presented this provisional practising licence to the Human Resource Manager – KCO Ms. Catherine Wamwangi but she said it was a fake document. Sadly no effort was made by her to find the validity of this document from the Board.”

In *Sarah Wanyaga Muchiri v Henry Kathii & another [2014] eKLR* Abuodha J held:

“The court concedes that improving the claimant’s professional skills would not only have benefited the respondent but the claimant as well.”

The Claimant does not deny that he was never accorded the required support while undertaking his studies.

In ***Kenya Petroleum Oil Workers Union v Kenya petroleum refineries Ltd [2013] eKLR*** Radido J held:

“It was not the case of the Respondent that the Grievant was not meeting set standards of quality and quantity but that the Grievant was not taking and completing trainings to enable him meet set standards and quality. Again it was not argued the Grievant’s poor performance was causing any operational problems but that the Respondent operates in a highly safety sensitive environment. [These] reasons were proved.”

From the foregoing it is clear that the claimant had been given ample notification and was aware that his contract would be terminated should he failed to achieve the qualifications to enable him hold the job. The respondent therefore had valid reason to terminate the employment of the claimant as he failed to achieve the qualification.

b) Whether the Claimant was discriminated for failure to possess a practising licence.

The Claimant argued that he was discriminated upon for failure to hold a valid licence and that he was replaced by an intern who was less qualified. It is the Respondent’s case that the alleged intern’s position was clear and that it is the Claimant who had hired her. The Claimant annexed the intern’s short term contract but the contract does not state the intern’s professional qualifications. The short term contract only indicates that her designation was that of Project Assistant (Laboratory Technologist). The claimant did not demonstrate that he was discriminated by the recruitment of the intern. Further, there was no sufficient proof that the alleged intern had not attained the professional qualifications required to hold the position of Project Assistant Laboratory Technologist.

I find that the Claimant has not proved that there was discrimination.

c) Whether the Claimant is entitled to the reliefs sought

Unpaid salary for 2 weeks (10 days) in May 2014

The Claimant argued that he worked for 10 days in the month of May and prayed for payment for the same. However, his termination letter was clear that his last working day was 30th April 2014. The Claimant is therefore not entitled to this claim as his last working day was clear and he did not prove that he worked for the 10 days claimed. The claim is dismissed.

Pay in lieu of 8 leave days not taken

The Claimant contended that he did not take 8 days leave. However, in his letter dated 18th June 2014 referred to above the claimant conceded that he was paid salary up to 30th April 2014, and was advised by the letter of termination to take his 8 days’ leave. He is not entitled to payment for leave days as he took his leave during the notice period.

Having failed to prove that the termination of his employment was unfair, the prayer for compensation fails and is dismissed.

The result is that the entire claim fails and is accordingly dismissed.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE