



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2033 OF 2015**

**GRACE ANYANGO OKEYO.....CLAIMANT**

**VERSUS**

**MARIE STOPES KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Grace Anyango Okeyo, the Claimant in this case, worked for the Respondent, in the position of Outreach Team Leader. She brought this claim following her dismissal on 3<sup>rd</sup> July 2015.
2. The Claimant's claim is contained in a Statement of Claim dated 11<sup>th</sup> November 2015 and filed in court on 13<sup>th</sup> November 2015. The Respondent filed a Statement of Defence on 27<sup>th</sup> September 2016.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Deputy Director-People Development, Rhoda Odhiambo.

**The Claimant's Case**

4. By an employment contract dated 27<sup>th</sup> August 2013, the Claimant was employed by the Respondent, in the position of Outreach Team Leader for Naivasha. The contract was to run from 16<sup>th</sup> September 2013 until 15<sup>th</sup> September 2015, with the possibility of renewal. The Claimant earned a monthly salary of Kshs. 65,000.
5. The Claimant worked for the Respondent until 3<sup>rd</sup> July 2015, when she was summarily dismissed. She states that the dismissal was wrongful and unfair in that there was no justifiable cause and she was not afforded an opportunity to be heard.
6. The Claimant now claims the following from the Respondent:
  - a) Kshs. 155,161 in lost remuneration for the remainder of the term of the contract, being 2 months and 12 days;
  - b) Kshs. 54,167 being unpaid leave for 25 days pursuant to clause 8 of the contract of employment;
  - c) House allowance @ 15% of gross salary for period of contract amounting to Kshs. 210,600;
  - d) Kshs. 780,000 being 12 months' salary in compensation for wrongful dismissal;
  - e) Costs plus interest

**The Respondent's Case**

7. In its Statement of Defence dated 26<sup>th</sup> September 2016 and filed in court on 27<sup>th</sup> September 2016, the Respondent admits having employed the Claimant as an Outreach Team Leader based at Naivasha. The Respondent states that the Claimant earned a consolidated monthly salary as Kshs. 61,204.

8. The Respondent avers that sometime in May 2015, following a number of support visits to various outreach programmes, the management noted glaring instances of malpractice and indiscipline at the Naivasha Outreach Programme.

9. On 20<sup>th</sup> May 2015, the Claimant was required to show cause why her Programme was lacking in customer care and coordination. The Claimant denied that the issues stemmed primarily from the Head Nurse's reluctance to seek counsel and adhere to instructions given by the Team Leader. The Claimant however undertook to have a discussion with the Head Nurse to resolve the issues.

10. On 23<sup>rd</sup> June 2015, the management invited the Claimant and her team to a disciplinary hearing regarding issues of:

- a) Compromised quality of services/malpractice and failure to meet set standards and protocols;
- b) Lack of support and mentorship by the Team Leader;
- c) Lack of coordination and cohesion within the team.

11. The Respondent states that the Claimant was given ample opportunity to raise her defence but she failed to exonerate herself. The Respondent adds that from the hearing and the feedback provided by the officers, it was apparent that the Claimant had failed in her leadership role and had deeply antagonised her team members, resulting in complete lack of coordination. The Respondent also accused the Claimant of failure to follow set standards.

12. On 3<sup>rd</sup> July 2015, the management reached the decision to dismiss the Claimant. The Respondent's case is that the Claimant was guilty of gross misconduct arising from negligence and failure to adhere to set standards.

### **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 was dismissed by letter dated 3<sup>rd</sup> July 2015, stating the following:

*"Dear Grace,*

#### **RE: SUMMARY DISMISSAL**

*Reference is made to your disciplinary hearing on 23<sup>rd</sup> June 2015 at Support Office following allegations failing (sic) to uphold Marie Stopes stipulated standards while discharging your duties.*

*During the hearing, it was clear you failed to uphold the ethics of your profession and Marie Stopes standards as a whole. You grossly failed to adhere to MSI guidelines and protocols when you provided services from a vehicle which not only posed as (sic) a medical risk to the clients but also put the organization at risk of litigation.*

*Additionally, unbecoming behavior was recorded from yourself during a visit to a government facility where you got into an argument with the person in charge. This reflected poorly on yourself and the organization.*

*It is in this regard that your employment contract has been terminated with effect from 3<sup>rd</sup> July 2015 under section (44) subsection (4c) of the Employment Act 2007.*

*Organize to hand over any organization's property in your possession to your Line Manager, and then proceed to the Support Office for clearance as the per clearance form. Your final dues will be processed as follows:*

*Days Worked in July 2015 and leave days owed to you, less any amounts owed to the organization and relevant statutory deductions.*

*The P&D Department will also facilitate the immediate refund of your personal contribution and partial employer's contribution from Jubilee Umbrella Scheme.*

*We wish you the very best in your future endeavors.*

*Yours faithfully,*

(Signed)

**Faustina Fynn-Nyame**

**COUNTRY DIRECTOR”**

15. The dismissal letter accuses the Claimant of failure to uphold ethics, standards, guidelines and protocols. On her part, the Claimant states that no such charges were ever presented to her for her response as required by law and rules of natural justice.

16. 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 with the employer.***

17. It is my considered view that for an employer to discharge its burden under Section 47(5), they must notify the affected employee of the exact charges facing them and give them an opportunity to respond to those charges.

18. This basic principle was well articulated in ***Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR*** where my brother **Radido J** reiterated that the ingredients of procedural fairness under Section 41 of the Employment Act consist of an employer's duty to notify an employee of charges facing them and the employee's right to respond to those charges.

19. In my understanding, the charges facing an employee are communicated to the employee by way of notice to show cause and if need be, by subsequent invitation to a personal hearing. What is clear is that by the time an employee is attending a disciplinary hearing, the charges they are facing need to be crystal clear.

20. It follows therefore that an employer who fails to discharge its responsibility under Sections 41 and 47(5) of the Employment Act cannot cure its inadequacies by justifying its actions before Court. Any court that allows an employer to take this route risks turning itself into a work place disciplinary panel, thus usurping a key responsibility of the employer. The procedural fairness requirements of Section 41 are for workplace processes, not judicial proceedings before the Court.

21. Prior to her dismissal, the Claimant and members of her team were summoned to the Respondent's Support Office on 23<sup>rd</sup> June 2015. From the dismissal letter, it would appear that the Respondent deemed the meeting of 23<sup>rd</sup> June 2015 to be a disciplinary meeting. The question to ask is whether the said meeting achieved the procedural fairness threshold set under Section 41 of the Employment Act.

22. The introduction to the minutes of the meeting held on 23<sup>rd</sup> June 2015 states:

**“There were reported cases of staff intimidation of team members by the Team Leader and cases of malpractice which fail to meet the set MSI standard and protocols. Reports of services being offered in the vehicle and multiple sites being visited daily came up. As a result of this the whole team was requested to report to Support Office so as to provide clarification around these issues.” [emphasis added]**

23. Two things emerge from this introduction; first, that it was a joint meeting with all team members and second, that the aim of the meeting was to seek clarification on issues reported to the Respondent's management. The Respondent's witness, Rhoda Odhiambo was unable to produce any letter addressed specifically to the Claimant on any of the issues mentioned either in the minutes of the meeting of 23<sup>rd</sup> June 2015 or the subsequent dismissal letter issued to the Claimant on 3<sup>rd</sup> July 2015.

24. Even with the most liberal approach, the Court was unable to agree with the Respondent that the joint meeting of 23<sup>rd</sup> June 2015 was a disciplinary meeting, as contemplated under Section 41 of the Employment Act.

25. In its decision in ***Nazareno Kariuki v Feed the Children Kenya [2013] eKLR*** this Court stated the following:

***“Since disciplinary processes have severe consequences an employer is required to notify an employee that what they are facing is a disciplinary process and not just fellowship or a cup of tea.”***

26. With the foregoing in view, the Court finds and holds that the Respondent missed the mark set by the mandatory procedural fairness requirements of Section 41 of the Employment Act and consequently failed to establish a valid reason for dismissing the Claimant. The dismissal was therefore wrongful and the Claimant is entitled to compensation.

#### **Remedies**

27. Flowing from these findings, I award the Claimant four (4) 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 conduct in effecting the dismissal.

28. From the evidence on record, the Claimant was paid in lieu of pending leave days. The claim thereon is therefore without basis and is

dismissed.

29. With regard to the claim for house allowance, the only thing to say is that the Claimant's contract provided for gross monthly pay, which would ordinarily include house allowance. This claim therefore also fails and is dismissed.

30. No basis was laid for the claim for pay for the remainder of the contract which must also fail.

31. Finally, I enter judgment in favour of the Claimant in the sum of **Kshs. 260,000** being compensation for wrongful dismissal.

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

33. The Claimant will have the costs of the case.

34. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JULY 2019**

**LINNET NDOLO**

**JUDGE**

**DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Babu for the Claimant

Miss Kanyiri for the Respondent