



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 36 OF 2018

GIKANDI SARAH WAMUYU.....CLAIMANT

VERSUS

CENTRAL MEMORIAL HOSPITAL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her alleged unfair and unlawful termination from employment. She averred that she was employed by the Respondent as a receptionist, health records and information personnel from 1st May 2017. She averred that she earned a monthly salary of Kshs. 15,248/- and that her employment was on permanent and pensionable terms. The Claimant averred that she diligently carried out her duties till 2nd November 2017 when the Respondent summarily terminated her services without any reason, legal justification or notice. The Claimant averred that on 1st November 2017 she was conducting orientation for a new employee when the hospital's director, one Dr. K.J. Shah, told her that in doing so, she had failed to observe the hospital's etiquette and that she had left the patients stranded. She averred that at that point in time there were more than 3 receptionists at the reception and there were no patients at the waiting area. The Claimant averred that director thereafter had brief discussions with the Claimant's supervisors Caroline Wamanji and Kioko after which he told the Claimant to go home and come the next day when the HR manager would be available. The Claimant averred that on the following day she reported for duty and worked until midday when the director called her and told her he did not want to see her. She averred that she was then asked to wait for him to consult the HR manager. The Claimant averred that the director then had a brief discussion with Wamanji and Kioko in her absence after which she was told to go home and await for a call informing of her fate that evening but before she left she requested for either a warning letter, suspension or dismissal letter but the HR insisted that he would call her. She averred that she was never called and tried reaching her employer to know whether she was suspended or dismissed in vain. The Claimant averred that she decided to physically visit the hospital and make an enquiry on 6th November, 2017 when she was informed that the Respondent had decided to summarily dismiss her from employment. The Claimant averred that the decision by the Respondent to terminate her services was unlawful, arbitrary, unfair and unprocedural as she was not informed of the reason for termination. She averred that she was mistreated and humiliated by the director in front of patients and was not taken through any disciplinary proceedings. She averred that her salary for the month of October and days worked in November was not paid. The Claimant averred that her termination was malicious, in bad faith and marred with irregularities and her right to fair administrative action as envisaged under Articles 41(1), 47, 50 of the Constitution breached. She averred that she was wrongfully dismissed without any valid reason and proper procedure as set out in the Employment Act. The Claimant sought judgment against the Respondent for a declaration that the termination of her services was unlawful and unfair and sought twelve month's salary compensation for unfair dismissal, payment of her withheld salary for the month of October and the days worked in November 2017, exemplary damages from malicious termination in line with Section 12 of the Employment Act, a certificate of service, the imposition of a fine of Kshs. 100,000/- against the Respondent for violating Section 51(3) of the Employment Act, interest from the date of filing suit as well as costs of the suit.

2. The defence by the Respondent averred that the Claimant was never dismissed and that she deserted duty after queries were raised on how she dealt with patients and especially her criminal acts of demanding money cash directly from patients. The Respondent denied breaching the Claimant's rights at any time or that she was entitled to the reliefs sought. The Respondent averred that the Claimant's claim is a sham, frivolous, vexatious and an abuse of the court process and thus sought the dismissal of the claim.

3. The Claimant testified and adopted her statement, produced the documents attached to her claim as exhibits. She stated that she was dismissed orally and in cross-examination denied she had gotten irritated or that she left the patients unattended. She testified that she had no patients at the time and that the patients came after she was done with the orientation. She denied absconding from work. In re-examination she stated that she was not issued with a summary dismissal letter or a letter inviting her for a hearing or a suspension. She testified that oral dismissal was the order of the day in the Respondent as the director would just yell at staff for no reason right in front of patients and just dismiss the employee after. She stated that she was not paid her October salary and the salary for days worked in November 2017.

4. The Respondent's witness was Anthony Alloys Wesonga the administrator of the Respondent who adopted his statement and produced the list of documents filed by the Respondent as evidence. He testified that the Claimant deserted her work but confirmed that there was no letter on record seeking to know her whereabouts. He stated that the Respondent only orally warned her of the criminal actions of asking patients

for money. He testified that the Respondent did not report her to the Police and there were no documents on record to support the allegations. He stated that the complaints were baseless and that is why they did not terminate her employment. That marked the end of oral testimony and parties were to file written submissions.

5. In her submissions, the Claimant submitted that at the time she was said to have left patients stranded there were no patients at the reception. She submitted that the issue of desertion of duty was an afterthought by the Respondent as this issue should have formed a basis of their response to the demand letter which the Respondent had failed to respond to. The Claimant submitted that the Respondent never produced any letter or correspondence from their office sent to the last known address of the Claimant on her alleged desertion of work and should as such be subjected to a disciplinary hearing. The Claimant submitted that the allegations of desertion of work are therefore baseless and unfounded. The Claimant submitted that the Respondent never produced any warning letters or written complaints to support their argument that complaints had been raised against the Claimant's dealings with patients and especially her alleged criminal and illegal acts of demanding cash from the patients. The Claimant submitted that the Respondent failed to discharge its burden of justifying the grounds of her termination as stipulated under Section 47(5) of the Employment Act. The Claimant submitted that the Respondent violated Section 41 of the Employment Act as she was not issued with a warning or notice to show cause and neither was she subjected to any disciplinary hearing even after all the allegations were made against her. She submitted that she was deprived her right to representation and that her dismissal was therefore marred by unprocedural unfairness. The Claimant relied on the case of **Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Limited [2014] eKLR** where Radido J. held that *"in my view, the summary dismissal of the claimant was not in compliance with the procedural fairness safeguards of section 41 of the Employment Act, because the claimant was not informed that his dismissal was under consideration, was not furnished with the charges to respond and was not given adequate time to make representations. The dismissal was therefore procedurally unfair."* The Claimant also cited the case of **Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd [2013] eKLR** and Sections 43 and 45 of the Employment Act and submitted that the Respondent failed to prove the reasons for dismissing her. She submitted that the reasons advanced by the Respondent are invalid and unfair and that the Respondent failed to justify the grounds for termination. The Claimant submitted that her termination was unfair for want of due process and substantive fairness and that she is entitled to the reliefs sought in her statement of claim.

6. The Respondent submitted that it never dismissed the Claimant from work and that from the evidence adduced in Court both by the Claimant and the Respondent, it was clear that the Claimant left employment on her own accord after "feeling humiliated" after she was reprimanded by Dr. K.J. Shah. The Respondent submitted that the Claimant ought to have appealed against her alleged dismissal either in writing or through the Labour Officer if she felt aggrieved. The Respondent submitted that since she did not do so goes to show that she left her employment on her own volition and her claim should be dismissed with costs to the Respondent.

7. The Claimant was dismissed in a most callous fashion. This was after a humiliating experience at the reception. It would seem the Respondent does not have a system in place for induction of workers and the Respondent's employees are left to train their colleagues on the job for which they get yelled at and dismissed by a raving director. That yelling in front of patients may explain why the hospital is an unknown as no patients would refer to it or rave about its services. If the Claimant had been involved in the misconduct the Respondent alleges where was the evidence of the same? As held in the case of **Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Limited (supra)** where Radido J. held that *in my view, the summary dismissal of the claimant was not in compliance with the procedural fairness safeguards of section 41 of the Employment Act, because the claimant was not informed that his dismissal was under consideration, was not furnished with the charges to respond and was not given adequate time to make representations. The dismissal was therefore procedurally unfair.* As the Respondent did not demonstrate that any disciplinary process was initiated, the resultant oral dismissal was therefore illegal and unfair as it did not accord with Section 41 of the Employment Act. No notice to show cause was issued nor was the alleged absenteeism from work recorded. The Respondent therefore did not discharge its burden under Section 43 of the Employment Act. The Claimant asserts she was not paid her October and November salary and the Respondent as employer failed to produce records in terms of Section 74. Having failed to prove the fact of payment of salary the Claimant would be entitled to the unpaid salary claimed. It may assist the Respondent's directors to acquaint themselves with the law on employment so that their actions may accord with the law. In this case the Claimant is entitled to:-

- i. Salary for October 2017 – Kshs. 15,248/-
- ii. Salary for days worked in November 2017 – Kshs. 1,016.50
- iii. One month's salary in lieu of notice – Kshs. 15,248/-
- iv. 12 month's salary as compensation – Kshs. 182,976/-
- v. Interest at court rates on the sums in i), ii) and iii) from date of filing suit till payment in full
- vi. Interest on the sums in iv) above at court rates from date of judgment till payment in full.
- vii. Certificate of service
- viii. Costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar