



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 37 OF 2018

RACHEAL WAITHERA MWANIKICLAIMANT

VERSUS

CENTRAL MEMORIAL HOSPITAL LIMITED.....RESPONDENT

JUDGMENT

1. The suit by the Claimant is for alleged unfair and unlawful termination from employment. The Claimant averred that she was employed by the Respondent as a receptionist in July 2016. She averred that she earned a monthly salary of Kshs. 15,248/- and that her terms of employment were permanent and pensionable. The Claimant averred that she diligently performed her duties until 1st November 2017 when the Respondent unlawfully, unfairly and unprocedurally terminated her employment. She averred that on 17th October 2017 she was called by the Respondent's Human Resource Manager Antony Wesonga who informed her that there was a complaint made by a client named Eunice Njoki who alleged that the Claimant had solicited Kshs. 1,000/- from her within the hospital premises. The Claimant averred that the said amount was fees for conducting laboratory tests for blood sugar, full haemogram and pregnancy test. The Claimant averred that she made it known to the Respondent that the said amount was received and the payment was entered into the system and the client issued with a computer-generated receipt. The Claimant averred that she did not pocket the cash and neither did she intend to do so. The Claimant averred that the Respondent without conducting any investigations issued the Claimant with a warning letter and a suspension letter dated 17th October 2017 and placed her on suspension without pay for 7 days with effect from 18th October 2017. The Claimant averred that she reported to the HRM's office on 1st November 2017 and was informed she and two other colleagues charged with the same offence were going to face a disciplinary panel and explain what transpired on 17th October 2017. The Claimant averred that she appeared before the disciplinary panel on 1st November 2017 and she was informed that she would be called the following day given the decision of the panel. The Claimant averred that she was however not called until 6th November 2017 when her colleague told her to visit the Hospital and was handed a summary dismissal letter dated 4th November 2017. The Claimant averred that her termination was unlawful, arbitrary, unfair and unprocedural and that she was hurriedly charged and suspended without the Respondent conducting proper investigations. She averred that the act of suspending her without pay for 7 days and the presumption that she was guilty of the offence even before hearing her, not according her time to prepare for the hearing, not informing her of her right to appear in the disciplinary hearing with another employee or a shop floor union representative of her choice, not explaining the particulars of charges against her in a language that she understood, failing to prove the reasons for termination and subjecting her to a disciplinary process that failed to follow the prescribed procedure was the basis of the unfair dismissal. The Claimant averred that her right to fair administrative action as provided for under Articles 47 and 50 of the Constitution was breached by the Respondent. She averred that by subjecting her to a disciplinary hearing by ambush and without notice and maliciously dismissing her were all in bad faith. The Claimant prayed for judgment against the Respondent for a declaration that the termination of her employment was unlawful and unfair, that her fundamental rights under Articles 41, 47 and 50 of the Constitution of Kenya were infringed by the Respondent. She also sought twelve month's salary compensation for unfair termination, payment of her withheld salary for October 2017, exemplary damages for malicious dismissal in line with Section 12 of the Employment Act, a certificate of service, and 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. In its defence, the Respondent averred that the Claimant's conduct was fraudulent and criminal in nature and that the Claimant admitted of her unlawful conduct in writing begging for forgiveness. The Respondent also averred that the Claimant had been warned in writing on 16th October 2017 for her gross misconduct after a patient by the name John Kuria had made a serious complaint for which the Claimant was pardoned after her written apology. The Respondent averred that the Claimant colluded with David Mburu Mwaura to defraud a patient named Eunice Njoki. The Respondent averred that the patient's husband complained to the hospital management and almost called his insurance company to complain and that this could have led to loss of business from the said insurance company. The Respondent averred that the Claimant's act was gross misconduct giving rise to her summary dismissal. It averred that the Claimant's suit is a sham, frivolous and an abuse of this honourable Court's process. The Respondent averred that the Claimant was not be entitled to the reliefs sought.

3. The Claimant filed a reply to defence and stated that she never admitted that her conduct was fraudulent and criminal in nature but rather she only gave an explanation as to what had transpired on 17th October 2017 prior to her unlawful dismissal.

4. The Claimant testified at the hearing and adopted her statement and produced the documents attached in her claim as exhibits. She stated that she only apologized for the mistake she made when the patient by the name John Kuria visited and she interchanged the quantity and costs on his invoice. She denied having received a warning letter and stated that she is the one who took the initiative to write the apology letter. The Claimant testified that a patient named Eunice Njoki was sent to carry out an FMG test by the CEO who was sitting next to her and the patient was to pay Kshs. 1,000/- which she input in the system and indicated Kshs. 200/- as balance as the cost of the test was Kshs. 800/-. She stated that she did not meet Eunice personally as the CEO is the one who told her about the patient's name in the system and made the payment to the cashier. She denied having solicited any funds from the patient and stated that after dismissal she did not appeal as the Respondent had already made the final decisions before the day she received her letter of dismissal.

5. The Respondent's witness Anthony Alloys Wesonga, an administrator of the Respondent, adopted his statement and produced the list of documents in the Respondent's response as evidence. He testified that the Claimant was dismissed for gross misconduct as she aided in what the Respondent considered a fraudulent enterprise. He stated that the Claimant colluded with the clinical officer David Mburu who received money from the patient without authorization as the patient should have paid before the test. He stated that the cost was Kshs. 800/- but the balance of Kshs. 200/- was only refunded after the matter was reported to management. In cross-examination he stated that there were further investigations by management but he did not have the report on record. He stated that the Claimant was issued with a warning letter and that she wrote an apology in reply. He testified that the Claimant was invited for a hearing on 25th October for a hearing but a change was communicated to her that the hearing will take place on 1st November 2017 even though it was not in writing. That marked the end of oral testimony and parties were to file submissions.

6. The Claimant submitted that her dismissal was unlawful and unfair for failing to adhere to the provisions of the law. The Claimant submitted that the Respondent violated Section 41 of the Employment Act as she was not issued with a notice to show cause why disciplinary action should not be taken against her and that what she was issued with was a suspension letter dated 17th October 2017 and a backdated warning letter dated 16th October 2017. She submitted that the suspension letter placed her on suspension without pay for 7 days and in the letter she was required to report to the HR manager's office on 25th October 2017. She submitted that however, the reason for the said 'reporting' was never made known to her. The Claimant submitted that she was also not issued with a hearing notice for 1st November 2017 as she received the information from her colleague who told her to avail herself at the HR's office on that date. She relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** which had made a pronouncement on procedural fairness and substantive justification. The Claimant submitted that she was not accorded the opportunity to formally respond in writing to the allegations made against her. She submitted that she was not given ample time to prepare for her defence or supplied with documents to be relied on so as to enable her prepare adequately for the disciplinary proceedings contrary to Articles 35 and 50 of the Constitution and Section 4(3)(g) of the Fair Administrative Actions Act. The Claimant submitted that the Respondent's witness had stated that there was a written complaint by the patient Eunice Njoki but that, however, the same was never served on the Claimant. She submitted that she was thus subjected to an ambush. The Claimant cited the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where it was held that *in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.* The Claimant submitted that the Respondent failed to follow due process in notifying her of the hearing on 1st November 2017 and that accordingly, the termination failed the procedural fairness test. The Claimant cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR**. The Claimant submitted that she was denied the right to representation as was pronounced in the case of **James Ondima Kabesa v Trojan International Limited [2017] eKLR**. She submitted that she was never informed of this right by her employer and she was never accorded an opportunity to appear before the disciplinary panel with an employee or a shop floor union representative of her own choice. She submitted that she still had the right to file the suit in view of Section 90 of the Employment Act which provides that a cause of action accrues immediately a termination takes place as it was stated in the case of **Vicky Kemunto Ocharo v Independent Policing Oversight Authority [2018] eKLR**. The Claimant submitted that her termination was therefore unfair and 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 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 had failed to prove the reasons for dismissing her. She submitted that there was no evidence adduced by the Respondent showing that she had committed a criminal offence. The Claimant submitted that the Respondent had failed to prove that she abetted or was an accomplice in a scheme to obtain money by false pretences and or in the commission of fraud. The Claimant submitted that there was no evidence on record to show that she received and pocketed Kshs. 1,000/- and stated that a receipt for the said transaction had been issued clearly indicating the balance that the patient received. She submitted that no report was made to the Police showing she was not involved in a criminal offence and that the reasons advanced by the Respondent were invalid and failed to justify the grounds for termination. The Claimant concluded that the termination was unfair for want of due process and substantive fairness and that she is therefore entitled to the reliefs sought in the statement of claim.

7. The Respondent submitted that from the evidence adduced in court it is apparent that due process was followed in the summary dismissal of the Claimant for gross misconduct. The Respondent submitted that the Claimant failed to appeal against her alleged dismissal but instead rushed to court for redress. It submitted that the Claimant was summarily dismissed for just cause as she had colluded with other hospital staff to illegally obtain money from a patient for services which were insured which was unethical on the part of the Claimant and could have led to loss of business on the part of the Respondent. The Respondent submitted that the Claimant was a repeat offender as she had been previously warned after a patient complained that she had given him a wrong dose of medicine. The Respondent submitted that this court is the right forum to harshly deal with hospital staff who come to court with unclean hands, having mistreated patients and expect to be treated with mercy. The Respondent urged the court to find for the Respondent and dismiss the Claimant's claim with costs.

8. The Claimant herein was dismissed for allegedly colluding with other hospital staff to defraud the Respondent's clients. The issue that falls for determination is whether the Claimant was wrongfully, unlawfully and unfairly terminated from her employment. Section 45(2) defines unfair termination and provides that no employer shall terminate the employment of an employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure. In addition, prior to dismissal for misconduct, an

employer has to give an employee the safeguards under Section 41 of the Employment Act. Section 41 provides as follows:-

41.(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 of 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.

9. The Claimant was alleged to have been granted a hearing and after the said hearing was summarily dismissed. From the evidence adduced, the hearing fell short of the requirements of Section 41 as to the notice of the intention to terminate, the explanation that is required in the presence of a colleague and the subsequent hearing in presence of her chosen representative. As this was not done, the dismissal is unlawful and unfair. As the Respondent attempted to have a modicum of process I will only award her 2 months salary as compensation as well as the costs of the suit. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. Two months salary as compensation – Kshs. 30,496/-
- b. Costs of the suit capped at Kshs. 25,000/-

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