REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 8 OF 2019

ARTHUR KAMARIYAGWE.....CLAIMANT

VERSUS

ARCHDIOCESE OF NYERI CONSOLATA HOSPITAL MATHARI.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged unlawful termination. The Claimant averred that he was employed by the Respondent through a letter of appointment dated 28th February 2017 to a position of Medical officer and stationed at the Respondent's Consolata Maternity and Children Hospital Nanyuki branch. The Claimant averred that upon completion of his probation and the Respondent being satisfied of his capability, he signed a contract of employment for a term of 3 years commencing from 1st June 2017 and ending on 31st May 2020 with a gross salary of Kshs. 220,000/- per month. The Claimant averred that the contract could be terminated by giving a 3 months' notice or by paying an amount equal to six months pay of the employee's gross salary. The Claimant averred that he worked diligently until 14th November 2018 when he was called from Consolata Mathari Nyeri branch for what was termed as a disciplinary meeting. The Claimant averred that in the said disciplinary meeting, it was alleged that he was incompetent and unable to perform his duty a fact which was untrue, farfetched and amounted to a ploy to unfairly force the Claimant out of employment. The Claimant averred that he was issued with a termination letter on 30th November 2018 terminating his contract of employment with effect from 3rd December 2018 for allegedly for not being fully qualified to continue serving. The Claimant averred that he had worked for 21 months without any complaint of his non-qualification and neither had he been warned for any negligence or acts of omission. The Claimant averred that through a letter dated 5th October 2018 he was invited to attend a disciplinary that was to take place on 9th October 2018 and the reason was indicated as "poor management of mothers during and after delivery" but he communicated his inability to attend. The Claimant averred that he then received a text message from HR on 10th November 2018 requiring him to attend a disciplinary meeting on 14th November, 2018. The Claimant averred that on both occasions the notices were too short and constituted unfairness on the part of the Respondent thus making the disciplinary process flawed, against the rules of natural justice and the termination was tainted with illegality and founded on no grounds at all. The Claimant averred further that he was not issued with any notice of termination and was not paid in lieu of notice. The Claimant averred that the termination contravened the provisions of Article 41(1) of the Constitution and he shall claim a declaration that his termination amounted to unfair labour practices. The Claimant prayed for a sum of Kshs. 1,320,000/- being payment of 6 months gross salary in lieu of notice, Kshs. 1,980,000/- being compensation for unfair and unlawful termination at 9 months gross salary, a declaration that his termination was unfair and unlawful and finally costs of the suit and interest.

2. The Respondent filed a response to the claim and denied its description, its *locus standi* and/or capacity to be sued and gave notice that it shall raise a preliminary objection on this ground. The Respondent averred that under the contract of employment between them, it reserved the right to summarily terminate the services of the Claimant for gross misconduct such as incompetence or negligence of duty risking the lives of patients. The Respondent denied that the Claimant worked diligently as it kept on receiving numerous complaints bordering on incompetence and negligence on the Claimant's part. The Respondent denied that the only way of terminating the Claimant was by giving a 3 months' notice or 6 months' salary in lieu of notice. The Respondent averred that the Claimant was served with an invitation for a hearing which took place on 14th November 2018 and that at the hearing he was confronted with 4 cases of medical incompetence and negligence in the management of patients in which he accepted 3 of them but he was still found culpable of the last case by the disciplinary committee. The Respondent denied that the notices were short or unfair or impacted in any way on the hearing process. The Respondent averred that following the disciplinary committee's recommendation summarily dismissed the Claimant for negligence and incompetence in the management of patients. The Respondent averred that the Claimant was not entitled to any notice of termination or any pay in lieu as he had notice through the letter inviting him for a disciplinary hearing and was summarily dismissed under the terms of the contract. The Respondent averred that this suit is misconceived, incompetent, bad in law, untenable, discloses no reasonable cause of action and denied that the Claimant is entitled to the reliefs sought. The Respondent thus prays that the Claimant's claim be dismissed with costs.

3. The Claimant filed a reply to the response to the claim and averred that the Respondent as sued is the employer according to the contract of employment dated 26th July 2017. He averred that incompetence was not expressly or by implication stated to be gross misconduct and he added that there were no complaints made against him and the Respondent was out for witch hunt. The Claimant averred that he never accepted any culpability on the alleged cases and averred that the minutes of the disciplinary meeting were altered and he craved for the

original record of the proceedings to be produced at the hearing. The Claimant averred that the allegations of being unqualified and incompetent could not be raised at this point as he had already worked for the Respondent for 21 years in the same capacity.

4. The Claimant testified and adopted his statement in chief and stated that he had worked for the Respondent for 21 months. He said that he was employed after a successful interview and was to work under probation for a period of three months. He stated that he proved himself and was confirmed to a three years contract after six months. He said that he was invited to answer 4 cases against him and when questions were put to him he responded but the minutes never showed how he responded. He stated that he never signed the minutes. He testified that he would see 60 - 100 patients every month. He stated that there were two doctors in charge and they had a friction when the other officer also applied for a study leave as he had earlier applied for leave in August as he wanted to proceed to Burundi which leave he had to personally follow up to the HR manager who approved it. He testified that he came back in September and that notably that is the time when the four cases were picked. He stated that he did not admit to being unqualified as he had a practicing license and the Respondents saw his documents. He maintained that as a doctor who took oath he would not mishandle any patient. He testified that out of all the four cases he acted diligently and no blame should be placed on him. He stated that they had dealt with more serious cases and he did not know why the 4 cases were highlighted. He added that he had worked for 21 months and that was the first time he had received a show cause. He maintained that Consolata Hospital Nyeri is his employer as that is what was indicated in his contract of employment. He testified that it was the management of the hospital that commenced disciplinary process. He stated that the Respondents failed to commence an arbitration process as indicated in the contract but rather summarily dismissed him even though the grounds for summary dismissal and misconduct did not lie. He testified that the Respondent did not follow the correct procedure for termination. In cross-examination he confirmed that he received a letter inviting him for a disciplinary hearing but he did not respond to it as he received it late. He admitted he was notified that he could attend with a representative but he attended without a representative. In re-examination he confirmed that he never was summoned by the Board for any negligence.

5. The Respondent's witness was Dr. Mbae Muriithi Japhet a Medical Director at Consolata Hospital Mathari who adopted his statement in evidence in chief and testified that the accusations of negligence against the Claimant had come from consultants and senior nurse Mr. Wilson Wachiuri. He stated that the negligence was related to 4 patients namely, Jackline Njeri, Karen Nkatha Mwenda, Grace Wangari and Florence Wairimu. He stated that Jackline Njeri had a prolonged rupture of membrane and the Claimant reviewed her 11 hours after rupture and recommended monitoring of the foetal heartbeat instead of administering antibiotics to avoid infections. He stated that the consequence was severe sepsis for the neonatal leading to hospitalization for 22 days and this amounted to negligence on the part of the Claimant. He stated that this was not an isolated case as those infections are common and that not every case where there is an infection there is negligence on the part of the doctor. He testified that the Claimant was called to come and review Karen but instead he gave instructions that the patient be given augmentation of labor. He stated that the Claimant failed to show up to ascertain if there was a problem and the right action was not taken as the baby had complications and had to stay in the High Dependency Unit for 21 days. He stated that the CT scan showed bleeding within the brain and they do not know the effect in future. He said that had the Claimant reviewed the patient personally this would not have occurred. He testified that Grace Wangari's case was that she was on follow-up and diagnosed with diabetes and when she came to clinic she was having convulsions. He said that she was supposed to be admitted and the baby be delivered immediately via Caesarian Section (CS) and the Claimant failed to do that when he was called and instead gave instructions to lower the blood pressure. He stated that the mother went home and was brought back unconscious which was a case for emergency CS. He stated that the last patient, Florence Wairimu, was a mother who had three pregnancies with poor outcome and this meant that the hospital had to take good care of her. He stated that the patient was scheduled for CS on the 5th and she had low abdominal pain which showed labour and she was to be reviewed and observed. He stated that the baby was delivered pre-term. He stated that where there is elective surgery, the doctor needs to review before executing and that the Claimant was negligent in that regard. He testified that the Claimant had admitted to the first 3 cases but for the last one he said that it was a planned surgery and he was not at fault. He stated that the standard practice was to review but the Claimant deviated from it. He testified that the hearing process was fair as the Claimant was given enough time to respond and to come with a representative. He testified that they gave reasons for termination and the termination letter had an arbitration clause but the Claimant did not refer the matter to arbitration. In cross-examination he confirmed that they do not have Archdiocese of Nyeri Consolata Hospital Mathari and as such it cannot sue or be sued. He conceded that the agreement was between Archdiocese of Nyeri Consolata Mathari Hospital and the seal showed Consolata Mathari Hospital and the contract indicated that the Claimant was employed by Archdiocese of Nyeri Consolata Hospital Mathari. He testified that by picking the four cases that occurred in September 2018 does not mean the Claimant had been diligent from the time he was employed as the consultants had complained that he was incompetent but they elected to act in September 2018. He confirmed he did not have any evidence of any earlier or any other complaints. He confirmed that he was not present when the four incidences occurred and the nurse who made calls to the Claimant was not present at the disciplinary meeting and neither was she a witness in court. He stated that he is not aware of any complaint to the Board and he confirmed that the hospital did not forward any complaint to the Board. He confirmed that a doctor cannot force an admission but standard practice requires that he asks for the waiver which shows the patient declined the doctor's instructions. He testified that doctors differ in opinions and confirmed that a scheduled CS is timed. He confirmed that the minutes were indeed taken but they were not signed by all the people who attended the meeting. That marked the end of oral testimony

6. The Claimants submitted that four issues arose for determination namely, whether the Claimant was accorded a fair hearing, whether the termination was unfair, whether the Respondent is properly sued and whether the court has jurisdiction. He relied on the case of **Postal Corporation of Kenya *v* Andrew Tanui [2019] eKLR** and Section 41 of the Employment Act and submitted that he was not accorded due process. The Claimant submitted that he was invited to the disciplinary meeting via an SMS which notice was too short and that needless to say, this procedure of inviting an employee is unacceptable in law. It was submitted that this raises questions of whether the Claimant was informed of the reasons for the disciplinary meeting, whether he was advised to appear with a representative of his choice. He submitted that it was admitted by the Respondent's own witness that there was nothing to show how the Claimant was invited to the meeting. He asserted that even if the Respondent would want to argue that the earlier meeting had indicated the charge, even that letter was vague as it did not clearly inform the Claimant what he would be specifically required to answer to. He submitted that in any case the meeting was conducted a month later and the grounds could as well have changed thus necessitating a fresh notice and invitation letter. The Claimant submitted that there is no evidence that the patients' files used during the disciplinary proceeding were ever supplied to him to prepare for trial. The Claimant submitted that in view of the foregoing, the Respondent did not accord him a fair hearing and it did not comply with the rules of natural justice. He submitted that the Respondent terminated his services as a consequence of the said hearing which was procedurally flawed and that therefore, the termination violated Sections 41 and 45 of the Employment Act as there was no due process followed as well as there was no valid reason as the termination did not relate to the conduct of the Claimant, capacity or compatibility. He submitted that the reasons lack of qualifications as advanced by the Respondent cannot be valid because he underwent a probation period whose purpose was to evaluate his competence or otherwise and was confirmed after the probation period. He submitted that it would have helped if the Respondent had picked cases of patients who were mishandled by the Claimant from the time of his employment to show some consistency

as all the cases complained of were concentrated in one month thus pointing at a concerted effort by the Respondents to find fault at all cost. He submitted that there was a disagreement with his superior about his leave and when he returned the Respondents decided to quickly look for reasons to terminate his services as the timing of all the allegations concerning the 4 cases was not a coincidence but a well-planned scheme by the Respondent to force him out of employment amounting to witch hunt. The Claimant submitted that that he satisfactorily handled each case and the negligence sought to be imputed on his part is too remote in the circumstances. The Claimant urged the court to note that no patient is shown to have complained against the Claimant and no complaint has ever been forwarded to the relevant Board. The Claimant submitted that the Respondent had failed to discharge the burden of proving the reasons for termination in accordance to Section 43 of the Employment Act and the termination was unfair and unlawful. As to whether the Respondent was properly sued, the Claimant submitted that the Respondent was not able to demonstrate that there is any other employer other than the one described in the letter of appointment and the contract. The Claimant submitted that the Respondent had not shown the court how it had powers to enter into a contract and even terminate yet it cannot be sued in the same capacity as an employer. The Claimant submitted that averment is hollow and should be disregarded. The Claimant submitted that this court has jurisdiction to handle this matter as it is settled law that the jurisdiction of a court to hear and determine disputes cannot be ousted by an arbitration clause in an agreement between parties. He relied on the case of **Bahari Transport Company *v* APA Insurance Co. Limited [2006] eKLR** and submitted that the Respondent could not oust the jurisdiction of this court to hear the matter as it did not seek to stay these proceedings through a formal application or otherwise. He submitted that in any event that would only have happened if the Respondent was keen on having the matter arbitrated but by its own conduct, the Respondent appears to have raised this argument as a sword to attack the Claimant. The Claimant submitted that the Respondent did not desire to have the matter arbitrated otherwise it should have done that in the first instance. The Claimant submitted that this claim is merited and the prayers sought should be granted.

7. The Respondent submitted that the Claimant had failed to prove his case on a balance of probabilities and from his pleadings it is clear that he knew he was being invited to a disciplinary hearing, the reasons for the disciplinary meeting being "poor management of mothers during and after delivery" and that the only complaint by the Claimant is that the notice was short. The Respondent submitted that the meeting of 8 th October 2018 did not take place and the hearing only took place on 14th September 2018 more than a month after the notification of the intended disciplinary meeting. The Respondent submitted that its witness confirmed that the Claimant was given notice of the disciplinary hearing and was heard by the disciplinary panel. The Respondent submitted that the Claimant risked the lives of mothers, unborn children and even the newly born as he never attended to pregnant mothers and when he did, he just took them to theatre without observing them. The Respondent asserted that this was a valid ground for dismissal. The Respondent submitted that Section 41 of the Employment Act was complied with as the Claimant was served with a letter dated 5th October 2018 which gave the reasons for hearing and intended termination in a language the Claimant understood, he was advised through the letter to have a representative of his choice, he was taken through a full hearing and he admitted to the allegations. The Respondent submitted that all the standards set out in **Postal Corporation of Kenya *v* Andrew K. Tanui [2019] eKLR** were all complied with. The Respondent relied on the case of **Kennedy Maina Mirera *v* Barclays Bank of Kenya Ltd [2018] eKLR** where it was held "*that the burden of proving that unfair termination has occurred rests on the employee, while the burden of justifying the ground for the termination shall rest on the employer.*" The Respondent submitted it had shown that it complied with the law and that it has discharged its burden under Section 43 by demonstrating that the procedure was fair and lawful. The Respondent submitted that the Claimant failed to show the capacity or the legal persona of the Respondent as he did not prove it is capable of being sued and the claim should fail on this ground. It prayed that the Claimant's claim be dismissed with costs.

8. The Claimant was a doctor who was employed by the Respondent according to the documents availed in court. The Respondent cannot assert a different persona as it held itself out as set out in the claim and went ahead to enter into a contract of employment with the Claimant. It cannot therefore disavow it is sued in the correct manner and in the name that it contracted with the Claimant. If the employer was different that was never revealed in the contract and as such the arguments advanced by the Respondent are hollow and an attempt at being devious. The Respondent is rightfully before the court. The Claimant was accused of negligence and was taken through the process under Section 41 where he was notified of the charges facing him and granted an opportunity to be heard. He asserts the Respondent did not accord him a fair hearing. He says he was charged with negligence and incompetence yet all the Respondent could do was point out 4 cases in September 2017. He argued that had he been negligent as alleged there would have been cases spread over the years. He thus asserts the Respondent was merely looking for a reason to dismiss him hence the 4 cases he was accused of mishandling. No complaint was shown to have been made to the Board for negligence and the alleged victims never complained. It was the Respondent's version that the nurse complained about the Claimant. Note the Claimant's supervisor did not complain but a subordinate who is not a medical doctor. In my considered view the cases were selected to achieve the aim of ensuring a dismissal as the Respondent perhaps was aware that if they looked hard enough they could find something to pin on the Claimant as they did. The Claimant was entitled to a dismissal in compliance with the law and in his case he was entitled to termination with notice given the provenance of the alleged reasons for termination. In his contract per the clause on termination, there was provision for payment of 6 months salary in lieu of notice as the notice period was set at 3 calendar months. As the termination meted out contravened the provisions of Article 41(1) of the Constitution and Section 41 of the Employment Act as the notice to appear to show cause served upon him was short and not properly documented. As the Respondent has not demonstrated that there were genuine reasons for dismissal the court finds that the Claimant was not properly discharged from his employ and he is accordingly entitled to the following:-

i. six months salary as notice – Kshs. 1,320,000/-

ii. 3 month's salary as compensation – Kshs. 660,000/-

iii. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 4th day of December 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar