



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 313 OF 2017

PETER NDERITU GITHAIGA.....CLAIMANT

VERSUS

THE DIOCESE OF MERU TRUSTEES (REGISTERED)

t/a ST. THERESA'S MISSION HOSPITAL KIIRUA.....RESPONDENT

JUDGMENT

1. The Claimant filed suit seeking recompense for the unfair/unlawful termination from employment by the Respondent on 9th December 2016. He averred that he was employed as a security guard on 14th August 2014 and earned Kshs. 11,885/-. The agreement was to be reviewed after a year and his salary was raised to Kshs. 12,085/- on 14th August 2015. He averred that on 9th December 2012, he had a disagreement with the HR Manager one Anita Muthaura over the issue of proceeding for annual leave whereby the Claimant was told that if he was not agreeable to stay, then he would not be retained by the Respondent. The Claimant averred that he begged the Respondent's HR manager to be permitted to proceed on leave and that it was then that he was notified that the Respondent had summarily terminated his services on allegation that he was asking for bribes of Kshs. 50/- from patient's visitors. He averred that prior to his dismissal, the Respondent did not prove the allegations or give him an opportunity to defend himself nor was he served with a show cause notice. He averred that as a result of the matters aforesaid, the dismissal was unfair, unprocedural, illegal and/or unlawful. He claimed compensation for the unlawful dismissal by way of damages, retirement benefits amounting to Kshs. 28,000/- paid to APA Life Umbrella Retirement Fund and one month's salary in lieu of notice – Kshs. 12,085/-. He also prayed for costs of the suit and interest.

2. The Respondent responded to the Claimant's claim through the defence filed on 27th September 2017. The Respondent averred that the Claimant absconded from duty and was absent without notice for several days leading to his dismissal. It was averred that the Claimant was given a chance to show cause both in writing which he never did and also afforded a hearing which he never attended. The Respondent denied dismissing the Claimant for corrupt practices and averred that this claim was prompted by his cousin's claim in ELRC No. 67 of 2016. It was averred that the Claimant had not cleared properly with the Respondent for him to be paid his dues by APA Life Umbrella Retirement Fund which is not payable by the Respondent but the insurance company if found due and payable. The Respondent stated that it suspected the Claimant had another job and that was why he had gone missing. The Respondent averred the Claimant was not honest in instituting the claim and that the suit should be dismissed with costs.

3. The Claimant testified on 5th February 2018 and stated that he was presently unemployed, having worked for the Respondent till 9th December 2016 when he was dismissed. He stated that he requested for 2 weeks as he had leave balance and wanted to take the leave days. He stated that the HR manager told him he would be dismissed because he had been taking 50/- from relatives of patients. He removed his uniform as directed and left. From then there was no communication and it was only in May 2017 that he was called and informed that there was a cheque from APA Insurance. He did not go as he thought the funds would be paid into his account. When he went to APA Insurance he found the funds had been credited to his account. He testified that he did not get his dues and thus sought payment of leave dues, the unpaid hours, damages for the loss of employment, the funds from APA.

4. In cross-examination he stated that he was 40 years old and had studied till Form 2. He joined the Respondent on 14th August 2015 and that there was an employment agreement. He stated that he had a one year contract and was permanent from 14th August 2015. He stated that he did not work with his cousin and that he knew Wambugu who had been dismissed a year prior. He testified that when he was dismissed he had not been at work and that he had gone to seek leave. He said that he had gone with his uniform and that he had waited for 8 months before filing suit. He stated that he knew the Respondent had an administrator named Sister Mary Agnes and that there a board of management. He confirmed that he never reported to the board of management or the sister in charge or lodge a complaint at the Labour Office at Meru. He testified that he did not have dismissal letter. He stated that he never went back after the dismissal as he felt threatened. He testified that his postal address and the telephone contacts he had given to the Respondent worked. He state that he did not come to court because Boniface had a case.

5. In re-examination he testified that he caused a demand letter to be written before commencing the action and that he had not filed the suit because of the Wambugu case.

6. The Respondent called Anita Muthaura who testified that she was the HR Manager of the Respondent. She stated that the Claimant worked from 16th August 2014 till 11th December 2016 when he absconded from work. She said that on 9th December 2016 she was not at work as she was studying for her exams. She testified that on 11th is when she was called by Douglas the security in-charge who informed her that the Claimant had not reported to work. She asked him to notify Gloria, her assistant, so that she could try and find out why the Claimant had not reported. She asked Douglas whether he had tried to communicate with the Claimant and his reply was that the Claimant was not picking his calls. When he did not show up on 12th, she asked her assistant to write a show cause letter which was scanned and sent to her for her signature. She stated that the letter gave the Claimant a duration in which he was to respond and she sent a copy to the labour office. A letter inviting the Claimant for a disciplinary hearing was sent after he did not respond to show cause. She testified that the letters were posted to the postal address the Claimant had given but he never responded to the show cause or attend the disciplinary hearing. The disciplinary hearing proceeded and a verdict passed which was that the Claimant be summarily dismissed and a letter communicating the dismissal dispatched but he never responded at all. She confirmed receiving a letter from the Claimant's advocates and the suit papers in 2017. She stated that on 9th December she was out of office and wondered who the Anita the Claimant met was. She testified that the pension funds are out of reach of the employer and that it was between the insurer and the employee alone as the Respondent does not receive the money. She stated that she had only heard about the 50/- bribe from patient's relatives from the Claimant.

7. In cross examination she testified that the Claimant was dismissed for absconding duty and that she was informed by Douglas that the Claimant was absent on 11th and 12th December after being on duty on 10th following a two day off on 8th and 9th December. She stated that the electronic system confirmed the Claimant was absent. She conceded that the records were not produced and the statements from her colleagues were not recorded. She said that the show cause letter was written on 12th December as she was absent on 11th and 12th December. She stated the action taken was before the 7 days in the manual had lapsed and he was given a show cause letter to explain why he was absent. She testified that by the time the disciplinary action was undertaken the Claimant had absented himself for less than 7 days. She confirmed that the letter to show cause did not have the postal address on it but that the Respondent had postal receipts though these were not attached. She stated the Claimant had a clean record and that the absenteeism was sufficient basis for summary dismissal. She indicated that the Respondent received the demand letter and did not respond to it. She confirmed that no witnesses were called at the disciplinary meeting such as the security in-charge. She stated that she could give the exam schedule and her leave form which were on her file. She indicated there was evidence but it was not before court.

8. In reexamination she stated that the Claimant was telephoned severally but he was not picking up. She testified that the dismissal was after the hearing on 22nd December 2016 and it was through post. She stated there was no response from the Claimant. The demand letter from the Claimant's lawyer was given to the Respondent's lawyer to deal with it. That marked the end of oral testimony.

9. Parties filed written submissions and the Claimant filed his submission on 22nd February 2018 and the Respondent filed submissions on 12th March 2018. The Claimant submitted the issues for determination in his case were

(a) Whether the Claimant was unlawfully dismissed from employment?

(b) What remedies are available to the Claimant?

(c) Who should bear the costs of this suit?

The Claimant submitted in the first issue as to whether there was procedural fairness in his dismissal. He argued that the Respondent asserted that he had been served with a show cause notice through the post. The Respondent witness testified that the show cause letter was posted to the Claimant and that it would take about 3 days for the letter to reach him. She stated that there were receipts to confirm postage was done but did not produce these alleged receipts. It was argued that it also the Respondent's testimony that similarly the letter inviting him to the disciplinary hearing was posted to him but yet again, the said receipts evidencing the posting of the letter was not produced. The Claimant submitted at the disciplinary meeting the security officer in-charge who had reported the Claimant as having failed to report to work was not called to give evidence against the Claimant. Neither was the assistant HR manager who had been directed by the Respondent's witness to draft the show cause letter and forward the same to the Respondent's witness called to testify. The Claimant submitted that in a nutshell, what was told to the disciplinary hearing was all hearsay notwithstanding that the two officers of the Respondent were available to confirm the incident. The Claimant argued that in view of the foregoing and on the strength of the testimony of the Respondent's witness who placed herself in Nairobi during the alleged absence by the Claimant, he was not afforded a fair hearing in terms of Section 41(1) and (2) of the Employment Act which provides for an employee to be accorded an opportunity to be heard. On substantive fairness, the Claimant submitted that under Section 43 and 45 of the Employment Act 2007 placed the burden of proving the reasons for dismissal on the employer. He submitted that in attempting to discharge the said burden, the Respondent's witness gave hearsay evidence that the Claimant was stated to be absent from work and that he was issued with the notice to show cause and invitation to the disciplinary hearing. The Claimant argued that it was noteworthy that none of the said officers was a witness for the Claimant and the Respondent did not avail any evidence in court to confirm the alleged absenteeism from duty by the Claimant. It was submitted that the Claimant in any event had written a demand letter seeking compensation on grounds of corruption but the Respondent did not respond to the demand letter to controvert the issue of corruption as indicated in the demand letter. He argued that the inference was that the Respondent was aware of the allegations of corruption against the Claimant. The Claimant submitted that the dismissal was not in accordance with the contract of service and in particular paragraph 9(ii) providing for the employer to treat the contract of service as terminated between the employer and employee where the employee absents himself from the place of work for a period of seven (7) consecutive days without permission and fails to tender a written satisfactory explanation thereof. It was submitted that the show cause letter was issued on 13th December 2016 when the Claimant was alleged to have absented himself from work on 11th December 2016 before the 7 days had not lapsed and therefore the employer's right to treat the contract of service as terminated did not crystalize. The Claimant urged the court to find that he had proved his case on a balance of probability and award compensation equivalent to a maximum of 12 months gross wages as sought in his memorandum of claim in terms of Section 49 of the Employment Act, 2007. The Claimant submitted that the summary dismissal by the Respondent was malicious and unfounded as the Respondent did not prove the validity of reasons for the dismissal as required by Section 43 and 45 of the Employment Act, 2007. The Claimant urged the court to consider he had a clean record prior to the dismissal.

10. The Respondent submitted that it was the Respondent's case that the Claimant was employed by the Respondent as a security guard at St Theresa Mission Hospital, Kiirua and it had a strong feeling that the Claimant had gotten a better job elsewhere. It was the case of the Respondent that the Claimant was not dismissed for corrupt practices but that his case was influenced by his cousin's case ELRC No. 67 of 2017. The Respondent asserted that Claimant had not at the time of filing the suit cleared with the Respondent and was thus dishonest in instituting the suit. The Respondent submitted that the termination of the Claimant's employment was called for and deserved. The Respondent submitted that according to the Claimant, he wanted to go on annual leave when there was disagreement with the human resource manager when he was ordered to surrender his uniform which he did in Ms. Muthaura's office. The Respondent was not sure if the Claimant walked out naked. However, the Claimant did not report this to the Hospital administrator whom he knew very well or to the chairman of the Board of Management. The Claimant did not write a letter of complaint and did not report to the county labour officer. The Respondent submitted that the Claimant did not try to collect any of his dues nor write a letter to claim the same. The Respondent submitted that the Claimant was guilty of absenteeism but cooked up his case after his cousin's case. The Respondent urged the court not to believe the Claimant under the circumstances and dismiss his case. The Respondent submitted that the Claimant had given his home address and confirmed the postal address was still active. It was argued that there was no reason why he should not have received all the letters sent to him. The Respondent wondered what the Claimant was relying on for his case as the manner of dismissal – oral dismissal or the written dismissal. The Respondent submitted that the Claimant failed to prove his case to the required standard and the suit ought to be dismissed.

11. It was the Claimant's case that he was orally dismissed by the Respondent's human resource manager for requesting to be permitted to go on annual leave and at the time of the said dismissal was accused of corruption, to wit, the solicitation of Kshs. 50/- from relatives of patients who were at the hospital. It was the Respondent's case that the Claimant absented himself from the place of work without cause on 11th December 2016, was asked to give an explanation through a show cause letter on 13th December 2016. He failed to show cause and was invited by letter of 17th December 2016 to a disciplinary hearing on 22nd December 2016 at the Respondent's Boardroom. It was the Claimant's case that the Respondent did not controvert the allegations of corruption as a basis for the oral dismissal he alleged and that he was not afforded an opportunity to defend himself against the allegation of corruption and therefore the dismissal was without any colour of

right. The Respondent's case was that there was no issue of corruption raised against the Claimant and that the Claimant was trying to be clever by half in making this unsubstantiated claim ostensibly because of the cousin's case in ELRC Cause No. 67 of 2016. The Respondent asserted that it had a very strong feeling about the Claimant having obtained a better job elsewhere hence the absenteeism.

12. In a suit such as this, the ingredients of Section 43 and 45 of the Employment Act come into focus. Under the Employment Act, 2007, there is provision for dismissal of an employee for various breaches. The Claimant and Respondent had between them a contract of service which set out the terms of the engagement. Absenteeism is one of the reasons that could lead to termination. It is clear the Claimant was dismissed. However, the manner of dismissal is at variance. The contract of employment at Clause 9. ii) provided as follows regarding absenteeism:-

If the employee absents him/herself from the place of work for a period of seven (07) consecutive days without permission and fails to tender a written satisfactory/reasonable explanation thereof to the employer, whether or not the employee intends to resume work, the employer shall be at liberty to:

(a) treat the same as termination of this contract without notice (i.e. breach of clause 9(i) herein above) in which event the employee shall be liable to pay one month salary. This is where the employer establishes that the employee does not intend to resume work; or

(b) take disciplinary action against the employee as it deems fit, where the employer establishes that the employee intends to resume work.

The termination by the Respondent on account of absentism was per the summary dismissal letter of 22nd December 2016 was in light of the foregoing an exercise of the employer's prerogative to dismiss for absenteeism. The Claimant was alleged to have been absent on 11th December 2016. The show cause letter seeking explanation was issued on 13th December 2016. This was some 5 days shy of the 7 days provided for under clause 9 ii) of the employment contract. Had the Respondent waited for the 7 days to lapse before issuing the letter to show cause prematurely, the strong suspicion it had about the Claimant having secured a better job would have been probably proved due to a sustained absence from work. The letter to show cause was jumping the gun. The Claimant was therefore terminated for reasons that were not fair in terms of Section 43 and 45 of the Employment Act. The Claimant came across as being economical with the truth as it was not clear if he was half naked as he left his employers place of work on 9th December 2016 when he alleges the HR manager of the Respondent orally dismissed him from work and ordered removal of uniform. As the Respondent remarked, the Claimant was a very clever person. However, it was incumbent under Section 74 of the Employment Act for the Respondent to keep records. If the employer had availed the records, it would have been clear when the employee was absent from work and perhaps shed light as to whether there was an oral dismissal on 9th December 2016 or not. Be that as it may, there was non-adherence to the terms of employment in the discharge of the services of the Claimant. In so far as the Employment Act is concerned, Section 49 provides the suitable remedies for a dismissal deemed unfair. In this case, the Claimant's inability to come across as honest works against him as regards the extent of compensation available to him. He proved the summary dismissal was unfair and his dismissal is thus reduced to normal termination with notice. He is therefore entitled to the following:

i) One month's salary in lieu of notice Ksh.12,085/=

ii) Two month's salary as compensation in terms of Section 49 of the Employment Act, 2007 Ksh.24,170

iii) Costs of the suit

iv) Interest on items i) and ii) above

v) Certificate of service in terms of Section 50 of the Employment Act, 2007.

13. The Claimant had sought retirement benefits. These are not within the purview of the Respondent as the Respondent, as any other employer, has no control in law over the retirement benefits of its employees. The Claimant's recourse for the dues lies elsewhere.

It is so ordered.

Dated and delivered at Meru this 10th day of May 2018

Nzioki wa Makau

JUDGE