



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1759 OF 2011**

**(formerly High Court CC No. 689 of 2004)**

**(Before Hon. Justice Hellen S. Wasilwa on 12<sup>th</sup> June, 2018)**

**GILBERT KAMBUNI ONGERI .....CLAIMANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL BOARD.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 3<sup>rd</sup> December 2012 through the firm of Obura Mbeche & Company Advocates, which Memorandum of Claim is filed pursuant to orders given within this cause following transfer of the suit from the High Court where it had originally been filed as HCC NO. 689 OF 2004.
2. The Claimant is seeking damages for unlawful dismissal, 6 months pay in lieu of notice, unpaid salaries, house allowance and medical allowance, outstanding leave days, general damages for wrongful imprisonment and defamation as well as interest on named damages
3. The Claimant avers that by a letter dated 28<sup>th</sup> January 1997, the Respondent employed the Claimant as a Senior Internal Auditor. The Claimant avers that he worked diligently and rose through the ranks to become to become a Finance Manager and as at February 2003 he was earning a basic salary of Kshs. 23,100 and a rental house allowance of Kshs. 40,000/=.
4. He states that the terms of the contract stated that either party could terminate the contract by giving to the other a reasonable notice of not less than 1 month and the Claimant contends that a reasonable notice for the post he held was 6 months.
5. He further avers that on or about 23<sup>rd</sup> October 2002 the Respondent's then Director, Mr. Onguti approved release of Kshs. 465,000 to him from the petty cash fund as a loan for purchase of a motor vehicle as was the norm in the organization and within the Directors mandate. He avers that by a letter dated 3<sup>rd</sup> February 2003, the Respondent purported to send the Claimant on compulsory leave with no explanation or any justifiable reason at all and he was ordered to hand over to one Alice Kindiga.
6. He avers that while on compulsory leave, he received a letter advising him to account for petty cash/imprest outstanding of Kshs. 465,000 failing which the same would be recovered from his salary to which he responded by way of a letter dated 4/3/2003.
7. He further states that by a letter dated 31<sup>st</sup> March 2003, the defendant purported to dismiss him from employment without notice on allegation that the plaintiff was guilty of misconduct and abuse of office which he contends was wrongful, in breach of his terms and conditions of service and violated the rules of natural justice.
8. He appealed the decision to dismiss him and owing to the non-responsiveness of the Respondent, he wrote to the Permanent Secretary in the ministry of health and on 26<sup>th</sup> June 2003 the Respondent wrote a letter to the Director of Criminal Investigations enclosing a report commissioned by the Respondent's board, falsely alleging that the Claimant together with other members of staff had been involved in flouting rules of procurement with impunity and that they should be investigated and prosecuted.
9. He also avers that on or about 4<sup>th</sup> February 2003, the Respondent instructed its security personnel or its security officers who in the course of their duty detained and confined the Claimant with no jurisdiction at all and the Claimant was so falsely imprisoned at the Respondent's premises for 4 hours and only released on intervention of the Police Officer Commanding Station- Kenyatta National Hospital. This humiliated and ridiculed him in the presence of his colleagues at the Respondent's Hospital and he stood shunned and avoided at the

instigation of the Respondent, its agents and/or servants.

10. The Claimants states that he was entitled to 6 months pay in lieu of notice and that at the time of his summary dismissal he had 70 days leave to his credit and despite demand and notice of intention to sue having been given, the defendant has neglected, refused and/or failed to make good of the Plaintiff's claim.

11. The Respondent filed their response where they admit that the Claimant was their employee but deny that he worked diligently and rose through ranks and put him to strict proof. They aver that the Claimant had committed an offence warranting his dismissal as defined in the Employees Code of Conduct as they deny that the then Respondent's Director Mr. Onguti approved the release of kshs. 465,000 to the Claimant from the petty cash fund as they have a car loan under its terms and conditions.

12. They further aver that the Claimant's Appeal was being considered and the respondents final decision was communicated to the Claimant vide a letter dated 2<sup>nd</sup> December 2003 and later referred the matter to the Director of Criminal Investigation for investigation and possible prosecution of the persons involved.

13. They also deny each and every computation of the Claimant's present or future dues as enumerated and state that it does not owe the Claimant the sums so reflected therein or at all. They aver that the Claimant's statement of claim as framed is bad in law, defective and ambiguous as it lacks merit and evidence.

### **Submissions**

14. The Claimant filed his submissions where he submits that the dismissal letter did not enumerate on the nature of the gross misconduct and abuse of office he was accused of as he was dismissed in 2003 and as such, the applicable law is to found in the repealed Employment Act Cap 226 of the laws of Kenya applicable at the material time. He was guided by the case of **Patricia Wangari Munene Vs Equity Bank Limited [2015]KLR.**

15. He avers that particulars of the defamation complained of are in the statement of claim where he submits that the words used by the Respondent to describe him are erroneous for the reasons that there was in fact no breach of procurement and no loss of any funds and the clear and ordinary meaning of those words depicted the claimant as dishonest, a thief, a fraudster and corrupt and as such he is entitled to general damages for defamation. He was guided by the case of **Kopar and Associates Limited Vs South Nyanza Sugar Company LIMITED [1992] Eklr.**

16. The Respondents filed their submissions where they submit that the Claimant's dismissal from employment was in accordance with the terms and conditions of their Employee Code of Conduct and all other enabling provisions of the law at that time as they relied on the Employment Act Cap 226 repealed. The Kenyatta National Hospital, terms and conditions of service. They relied on the case of **Ezekiel Nyangoya Okemwa vs Kenya Marine & Fisheries Research Institute [2016] Eklr.**

17. On the alleged claim of wrongful imprisonment, the Respondent submit that the allegations that the Claimant was physically assaulted by the Respondent's security staff and detained at the Respondent's premises was false and merely meant to tarnish the reputation of the Respondent as there has never been any reports to any police station or relevant law enforcement body.

18. The Respondent also aver that the Claimant's claim for defamation cannot meet the threshold to be considered as defamatory as the Claimant has not adduced any evidence in support of the said allegation as adduced by him in trial, they heavily relied on the case of **Phinehas Nyagah Vs Gitobu Imanyara [2013] eKLR** and as such the Claimant is merely on a fishing expedition to unjustly enrich himself through numerous claims of damages.

19. In conclusion, the Respondents state that the Claimant failed to prove his case and is not entitled to any relief sought as he caused the hospital huge financial losses when he misappropriated funds he was meant to manage in good faith. They therefore urge the Court to dismiss the Claimant's claim with costs to the Respondent and interest thereon.

20. I have examined all evidence and submissions of the parties. The issues for determination are as follows:

- 1) Whether the Respondents unfairly and unlawfully terminated the Claimant's services.***
- 2) Whether the Respondents committed or assaulted and false imprisonment of against the Claimant.***
- 3) Whether the Respondents defamed the Claimant's character.***
- 4) What remedies if any are available in the circumstances.***

21. On the 1<sup>st</sup> issue, I note that the events complained of occurred way back in 2003 and therefore this claim is guided by the provisions of the Repealed Employment Act (Cap 226 Laws of Kenya). Under this Act, the Respondent was not obliged to give reasons when dismissing an employee from duty. The Respondents however in the letter dated 31/3/2003 stated that they were dismissing Claimant on account of gross misconduct. The details of the misconduct was however not indicated.

22. Where as Cap 226 of Laws of Kenya did not mandate reasons being given for dismissal as is currently the case under the Employment Act 2007, the Respondents own Terms and Conditions of service which also guided the contract between the Claimant and Respondent provided as follows:- at page 6:-

**“Termination of Appointment**

.....

*An employee’s appointment may be terminated by dismissal and/or action that involves the application of disciplinary procedure set out in the Code of Conduct. Dismissal may result in the forfeiture of benefits otherwise accorded to employees on leaving the service .....*”

23. Disciplinary procedures are provided for under Part IX of the Respondents’ Manual and provide as follows:-

**“Supervisor’s Responsibility**

*Depending on the seriousness of the offence committed, it will be incumbent upon all those persons in the Hospital charged with the responsibility of supervising the work of others, to familiarize themselves with the due process of disciplining employees who fail to meet the required standards of work or conduct. In this regard, all such cases shall be treated fairly and justly, and the employee given a fair hearing to respond to charges brought against him. (Emphasis is mine).*

**Due process in Discipline**

*The Supervisor shall employ the following approach when dealing with cases of discipline:-*

- a) Conduct a preliminary investigation to establish the cause of unsatisfactory conduct.*
- b) .....*
- c) .....*
- d) Issue a written or official warning or caution.*
- e) Recommend more severe penalties on the continued breach of regulations or in cases warranting instant dismissal.*

**Preliminary investigations**

*When an employee is deemed to have committed an offence in terms of the provisions of this code, his immediate supervisor shall institute an investigation, taking into account any extenuating circumstances that occasioned the commission of such an offence. Where necessary a “show cause letter” may be addressed to the employee and shall always be addressed in case of gross misconduct (Emphasis is mine)”.*

24. I have set out the above procedures extracted from the Respondent’s own Human Resource Manual which provisions the Respondents never employed on the Claimant. The Claimant was never issued with any show cause letter, this Court is not informed as to whether any preliminary investigations were ever carried out, it is not clear whether due process was followed because no minutes of the disciplinary hearing were tabled before this Court.

25. It is therefore my finding that the Respondent flouted their own process and procedures before dismissing the Claimant and in this case treated him unfairly.

26. The Respondent had submitted that the Claimant was dismissed for improperly taking the Respondent’s money as imprest to buy a car. To this, the Claimant has informed Court that this was the normal practice and that in his case, this had been sanctioned by his boss, the Director.

27. Section X of the Respondent’s Human Resource Manual provides as follows:-

**“Advances and loans**

*In cases of emergencies when an employee, owing to circumstances beyond his control is placed in a difficult financial position requiring assistance from the hospital, the Director may grant an advance of salary. Such emergencies may include death in the family, burglary into an employee’s house and other cases as may be determined by the Director at his discretion based on the merits of each case.*

*Employees serving on permanent and pensionable, probationary or agreement terms, are eligible to apply for an advance of salary.*

*The maximum period for the repayment of the advance shall be 18 months”.*

28. The Claimant submitted that he took the advance salary as provided in the Human Resource Manual and this was sanctioned by his Director and therefore he committed no illegality.

29. I do find that indeed the Claimant took an advance salary which had been sanctioned by his Director. He never loaded this benefit upon himself as expected in the Respondent's Manual and it is my finding that the action by the Respondent to dismiss him citing gross misconduct on his part on account of the advance was unfair and unlawful

30. It is even more unfair that due process was never followed. I therefore make a finding that the dismissal of the Claimant was unfair and unlawful and in breach of rules of natural justice.

31. On the second issue, the Claimant has averred that upon dismissal, he was detained by the Respondents' guards for 4 hours and even assaulted. It is not clear whether this really happened as the Claimant never submitted evidence to prove the assault- no medical records were produced to prove the same. No evidence of the detention was also adduced before this Court. I therefore find that the allegation of assault and detention of the Claimant by the Respondent is not established.

32. On the 3<sup>rd</sup> issue, the Claimant has averred that he was defamed the way he was hounded out and humiliated in the eyes of right thinking members of Society.

33. He pleaded the particulars of the defamation in paragraph 18 to 28 of his claim.

34. He was questioned by the police and the Anti-Corruption agencies. This matter was not controverted by the Respondents in their evidence. The Respondents only stated that there was no defamation against the Claimant. There is however, proof by way of the letter written by the Respondents through its Director Appendix 13 which the Claimant aver contain falsehoods meant to defame him. The letter is full of details which the claimant was never asked to respond to and the same were authored when Claimant had already been dismissed.

35. It is my finding that the letter contains defamatory information and I therefore find that the character of the person of the Claimant was defamed by the actions of the Respondent.

36. In the circumstances having found as above, I find for the Claimant and I award him as follows:-

*1. 1 month salary in lieu of notice = 65,320/=.*

*2. 70 days leave pending = 153,156.20/=.*

*3. Unpaid salary and allowances for February and March 2003 and arrears owing = 374,798/=.*

*4. General damages for defamation Kshs.4,000,000/=.*

*5. Damages of 8 months salary for unfair termination = 8 x 65,320 = 522,560/=.*

**Total= 5,115,834/=**

*6. The Claimant is also entitled to payment of costs by the Respondent plus interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in open Court this 12<sup>th</sup> day of June, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Bonyo for Claimant – Present

Oketch holding brief for Gachuri for Respondent – Present