



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 13 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 26<sup>th</sup> July, 2018)**

**JUDITH APUDO ..... CLAIMANT**

**VERSUS**

**M.P. SHAH HOSPITAL ..... RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed her Memorandum of Claim on 13/1/2014 through the firm of Onyony & Company Advocates claiming unlawful, unfair and wrongful dismissal of Judith Apudo by the Respondent, breach of Claimant's labour right and discrimination by the Respondent.
2. The Claimant's evidence is that she was employed by the Respondent on 4.1.1995 as a Nurse on probation and subsequently confirmed to the position on 2.4.1995. She avers that she had a very good working record without any caution and warning.
3. She avers that without any reason at all, the Respondent unlawfully, unfairly, wrongfully and summarily terminated her appointment on or about 4.12.2012.
4. She avers that she was not accorded an opportunity to be heard in any time the hearing was slated. She avers that the hospital conjured up a plethora of excuses or reasons to delay and deny her the cardinal and fundamental right of being heard.
5. It was alleged by the Respondent that there was a strike and within the industrial action, the Claimant assaulted physically her superior M/s Achebe and contemporaneously caused malicious damage to the employer's property.
6. The Claimant avers that she never assaulted M/s Achebe as alleged and neither did she destroy any property belonging to the hospital.
7. The Claimant contends that she was discriminated against due to her age and health status.
8. The Claimant avers that she was dismissed wrongfully at 50 years and she suffered damages and prays that she be compensated for the remainder of her expected work period of 10 years and also be paid damages for the wrongful termination at 12 months' salary. She also seeks to be paid 5 million Kshs for loss of earnings. She seeks costs and interest.
9. The Claimant gave her sworn evidence and when cross-examined by Counsel for the Respondent she admitted being invited for a disciplinary hearing on 28/11/2012 (Appendix 7) but which she went. She avers that she did not go with other witnesses as she was told about representation outside the boardroom.
10. She says she raised an issue with the composition of the board and since they did not allow her, she believed they were biased against her. She avers she was paid 20,113/= and issued with a clearance letter.
11. In re-examination she avers that she was not told who external forces that were interfering were and the list of strangers she brought were not provided. She denies that in Appendix 9 she never indicated that she was not ready for hearing.
12. The Respondent filed their Memorandum of Respondent on 15/9/2014 through the Federation of Kenya Employers. They denied all the averments of the Claimant and contend that indeed the Claimant with other staff physically assaulted M/s Chinwendu Achebe on 5/11/2012, one of the Respondent's Senior Manager.

13. They aver that indeed the Claimant hit Ms. Achebe on the back, grabbed her hair and pulled out her hair band and hit her with an object. That Claimant assisted other staff members to carry out M/s Achebe out of her office to the hospital entrance. The Respondents attached Ms. Achebe's statement as Appendix 2.

14. They also aver that the Claimant was invited to a disciplinary hearing scheduled for 23<sup>rd</sup> November 2012. She was also informed of the reasons for the hearing and asked to come and explain herself and even bring an employee of her own choice for the hearing.

15. That she was also given time off on 12<sup>th</sup> November 2012 to 23<sup>rd</sup> November 2012 to prepare for the hearing. A copy of the letter inviting her for the hearing was attached as Appendix 3.

16. On 23<sup>rd</sup> November 2012, the scheduled hearing did not take place due to interference from external sources. The hearing was rescheduled to 26<sup>th</sup> November 2012 (Appendix 4) and on 24<sup>th</sup> November 2012, the Claimant wrote to Respondent requesting for more time to prepare for the disciplinary hearing. She also denied physically assaulting M/s Achebe and participating in any strike on 5<sup>th</sup> November 2012.

17. The Respondent aver that the scheduled hearing did not take place as the Claimant refused to attend. It was thus re-scheduled to 28<sup>th</sup> (Appendix 6).

18. On 28<sup>th</sup> November 2012, they aver that the Claimant did not attend the disciplinary hearing and instead wrote to the Respondent stating that the Respondent's earlier letter had not been clear on issues of representation and that she believed that the composition of the disciplinary committee was biased and one side.

19. On 4<sup>th</sup> December 2012, the Claimant was summarily dismissed from employment for gross misconduct. The Respondent aver that the Claimant was given an opportunity to defend herself before the disciplinary committee and she failed to attend.

20. The Respondent's case is that the Claimant was properly dismissed according to the law and paid all her terminal dues of Kshs.20,113/=. They therefore pray that the case be dismissed.

21. The Respondent called 1 (one) witness who reiterated evidence of Respondent as stated in their Memorandum of Response. On cross-examination, the witness stated that Chinwendu was physically assaulted on 5/11/2012 but she did not receive any treatment. He also indicated that the statement made by the said Chinwendu filed in Court as Appendix 2 was not signed by her.

22. On the issue of hospital property damaged, RW1 indicated that they did not have an inventory of the property allegedly damaged. He also indicated that the Respondent invited claimant for hearing but she made unreasonable demands. The witness also indicated that when the Claimant was invited to attend the hearing on 23.11.2012, she attended with strangers.

23. I have examined all the evidence of the parties plus the submissions filed. The issues for determination are as follows:-

**1. Whether there were valid reasons to warrant dismissal of the Claimant.**

**2. Whether due process was followed before the Claimant was dismissed.**

**3. What remedies to grant circumstances.**

24. On the first issue, the reasons given for Claimant's dismissal was that she physically assaulted her superior one M/s Achebe and also caused malicious damage to her employer's property. The evidence the Respondent wants to rely on to prove this aspect is thus Appendix 2 – the unsigned statement made by M/s Achebe concerning these events.

25. In choosing not to consider this statement as proof of the alleged assault, I note that Section 35(4) of Evidence Act states as follows:-

***“For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible”.***

26. The Respondent failed to call the alleged victim and the evidence they have submitted is an unsigned statement. This in my view is not good evidence. Other would be eye witnesses to the events of 5/11/2012 were also not called as witnesses.

27. It is the law that he who alleges must prove. The Respondent as an established hospital would have gone ahead to produce tangible evidence including CCTV camera captions to prove these events.

28. Section 43 of Employment Act states as follows:-

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

29. It is therefore imperative that the Respondent must have tangible proof of events complained of I believe they did not discharge this mandate and I therefore find that the Respondent had no valid reasons to dismiss the Claimant.

30. On issue of due process, the Respondent submitted that they summoned the Claimant for a disciplinary hearing but she failed or refused to attend.

31. The Respondent have however contended in paragraph 22 of their Memorandum of Claim that they invited Claimant for a hearing on 23.11.2012 at 9 am but due to interference from external sources, they were forced to reschedule.

32. The re-scheduled hearing never took place. The Respondents contend that the Claimant refused to attend. However, Appendix 7 of the Claimant's documents, Claimant sought for time to prepare for her defence. She also raised an issue with the composition of the disciplinary committee. These were concerns, which in my view the Respondent should have addressed in view of the provisions of Article 50 of the Constitution, which provides that, an accused person ought to be given adequate time to prepare his case and also to appear before an independent and impartial tribunal or body.

33. The Respondent chose to dismiss the Claimant after this without addressing her concern. In my view, the Respondent failed to give the Claimant an opportunity to defend herself.

34. Section 45(2) of Employment Act states as follows:-

***(2) A termination of employment by an employer is unfair if the employer fails to prove:***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure.***

35. In view of the fact that the Claimant was dismissed without valid reasons and without being given an opportunity to defend herself, I find her dismissal unfair and unjustified. I therefore award the Claimant as follows:-

***1. 1 months' salary in lieu of notice = 58,100/=.***

***2. 12 months' salary as damages for unlawful and unjustified dismissal = 12 x 58,100 = 697,200/=.***

***Total = 755,300/=***

***3. Payment of her pension benefits.***

***4. The Respondent will pay costs of this suit and interest at Court rates with effect from the date of this judgment.***

**Dated and delivered in open Court this 26<sup>th</sup> day of July, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties