



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET**

**CAUSE NO.107 OF 2017**

**CLAIRE VIKE .....CLAIMANT**

**VERSUS**

**ALEXANDRIA CANCER CENTRE AND**

**PALLIATIVE CARE HOSPITAL.....RESPONDENT**

**JUDGEMENT**

1. The claimant, a female adult was employed by the respondent, a licenced entity under the Medical Practitioners and Dentist Board as a private hospital by letter of appointment dated 26<sup>th</sup> April, 2016 for a period of 2 years term as a Nurse. The claimant was paid Kshs.15, 000.00 per month and which was increased due to good work performance to kshs.25, 000.00 from July, 2016.

2. The claim is that the claimant was paid her due salary through her bank account and without the issuance of a payment statement or pay slip and she could not tell if statutory payments had been deducted and remitted. For the duration of employment the claimant was entitled to 21 days leave but she did not go on such leave and was not paid in lieu thereof. Service gratuity was set out as a benefit under the contract at 10% on the annual consolidated salary but this was not paid.

3. The claim is also that the claimant worked from 7.30am to 6.30 pm and without a lunch break for 6 days a week. The claimant worked until 31<sup>st</sup> May, 2017 when the respondent terminated her employment unlawfully for the reasons that there was no reason given, there was no hearing and the termination was communicated over the phone. The claimant was not paid her terminal dues making the same unfair and contrary to fair procedure.

4. The claimant is seeking the following;

- a) Notice pay at Kshs.25,000.00;
- b) Untaken leave pay Kshs.25,000.00;
- c) Service gratuity Kshs.30,000.00;
- d) Unpaid overtime Kshs.78,000.00;
- e) Unpaid contract term of 11 months kshs.275,000.00;
- f) Comes nation at Khs.300,000.00; and
- g) Costs of the suit.
- h) Certificate of service.

5. The claimant testified in support of her case. Upon employment by the respondent the claimant worked diligently and her salary was increased over time. On 31<sup>st</sup> May, 2017 the claimant reported to work in the morning and found the gate locked. The manager and security guard were at the gate. The manager told her to go back home. At 7.45am the claimant called the Duty Nurse who was still at home who advised the claimant to go home and wait for the manager to communicate. The next day the claimant went back at work but the manager, Mr Odongo told her to go back home and for two weeks she waited without any communication.

6. The claimant also testified that her reporting time was 7.30am and would be at work for 12 hours each day.

7. The claimant was not issued with any communication. The respondent in defence has alleged that the claimant absconded duty but this is not true and the letter dated 19<sup>th</sup> June, 2017 is not true as this was not issued to the claimant and there was no hearing of any disciplinary matter.

8. In cross-examination, the claimant testified that she got the letter dated 19<sup>th</sup> June, 2017 through her advocates and she replied to the allegation made against her. The allegation that she reported late at work on 31<sup>st</sup> May, 2017 is not correct as he was not given a hearing. She had been late at work for a few minutes but there were other employees also late but were allowed access and reported to work but the claimant was sent away. The claimant was not given a hearing to explain herself in defence. Upon termination of employment, terminal dues were not paid.

Defence.

9. In response the respondent's case is that the claimant was in employment until 31<sup>st</sup> May, 2017 when she disappeared from duty. She absconded duty and was never terminated via a phone call as alleged. The claimant was not denied annual leave and was paid in lieu thereof. There was no service gratuity payment due and the salary paid was consolidated. The claimant was not subjected to work overtime and she worked within lawful hours and claims made in this regard are without basis.

10. The defence is also that the claimant was not denied access at work. The alleged breach of contract I without proof or evidence. The claimant is guilty of gross misconduct on the grounds that she arrived at work late, was incompetent, lacked diligence, she deserted duty and is guilty of absenteeism. The claims made should be dismissed.

11. The respondent called Mr Japheth Yegon as the witness and who testified that he is the human resource officer of the respondent and worked with the claimant. On 31<sup>st</sup> May, 2017 the claimant reported to work late and was told to wait at the gate for the general manager to come and give an explanation. The claimant was with other employees who had also reported late. The claimant opted to return home. The general manager found the other employees who explained themselves and were allowed to go to their duties.

12. The claimant was not dismissed. She was told to report back at work but has never returned. The respondent has a human resource manual which requires that when an employee is away for 3 days without authority, this amounts to desertion of duty.

13. On 19<sup>th</sup> June, 2017 the claimant was called to attend at a hearing but failed to turn up. Had the claimant attended as required, she would have been given a chance to give her defence. As the claimant remained absent, this was a case of absconding duty. When the claimant was called to collect her letter, she advised that it should be sent to her advocates. The claimant was never dismissed.

14. At the close of the hearing, both parties filed written submissions. In analysing the issues before court, the pleading, evidence and written submissions filed by the parties have been put into account. The issues which emerge for determination are;

Whether there is a case of unfair termination of employment; and

Whether the remedies sought are due.

15. Section 43 of the Employment Act, 2007 requires an employer before effecting termination of employment to prove the reason(s) for the termination and where an employer fails to do so, such termination of employment is deemed unfair within the meaning of section 45 of the Act.

16. The burden to give reasons is on the rationale that section 45(2) of the Employment Act, 2007 requires an employer to demonstrate that;

*(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.*

17. Even in a serious case that warrants summary dismissal, the employer must comply with the provisions of section 41(2) of the Employment Act, 2007.

18. Section 44(3) and (4) of the Employment Act, 2007 allow the employer to summarily dismiss an employee who is in breach of the contract of service or one who has grossly misconducted herself. Some of the reasons given in the Act which can warrant such summary action include; absenteeism, absconding duty and failure to abide the employer's lawful instructions.

19. However, even in a case where such summary action is justified due to the nature and conduct of the employee, the employer is bound by the provisions of section 41(2) of the Employment Act, 2007 and which requires that;

*(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.*

20. Where an employer is unable to hear the employee as required, it is upon the employer to demonstrate to the court the exceptional circumstances faced to justify the same.

21. In this case, the claimant testified that on 31<sup>st</sup> May, 2017 she reported at work late and found the gate locked. When the manager came, she was told to go home and await communication. Those at 7.45am the claimant called the Duty Nurse and who informed her to proceed home and wait communication.

22. This evidence is confirmed by the respondent's witness Mr Yegon but with a rider that the claimant was late on the material day together with other employees. They were told to wait for the general manager but the claimant opted to go away and never returned at work despite being invited to a hearing. Other employees were given a hearing on the same day and allowed to proceed to their duty stations.

23. There is letter dated 19<sup>th</sup> June, 2017 sent to the claimant. The claimant confirmed that she was called to receive this letter but directed that the same be sent to her lawyers.

24. In the letter reference is that; *Job abandonment*

*On 31<sup>st</sup> May, 2013 you came to work late despite several warnings, you were instructed to wait for the General Manager to handle your late coming issue but instead you went home and failed to show up for work for several days, after you came you apologised, the Nurse manager instructed you to write an apology letter which you didn't [you did not] without any explanation. You have been absent from work for 19 days without communication to the hospital management.*

...

*It is the decision of the hospital disciplinary committee that you inform the hospital in writing of the reasons for your absence within three days failure to which the hospital disciplinary committee will give its verdict after analysing your case.*

25. The claimant testified that she replied to this letter but there is no record on file.

26. On 8<sup>th</sup> June, 2017 the claimant instructed her advocates to issue a demand letter to the respondent and at page two paragraph two she asserts that;

*On 31<sup>st</sup> day of May 2017 around 7.33 am our client found the gate to the hospital closed. On enquiring she was informed by the gate man that there were orders from the manager that she shouldn't [should not] be allowed to enter her place of work ...*

27. The letter then goes ahead to make demands for payment of terminal dues and on the basis that the claimant had been unlawfully and without due process been dismissed from her employment.

28. There is no response by the claimant or through her advocates to the letter by the respondent directing her to attend to her notice on absconding duty and dated 19<sup>th</sup> June, 2017. I take it, the three days given to the claimant to show cause lapsed and were ignored.

29. In addressing procedures of section 44 read together with section 41(2) of the Employment Act, 2007 where an employee is not at work and the employer issues notice however short and the employee fails to address, the employer has met the requisite threshold in a case which warrants summary dismissal. When the claimant was invited to show cause vide letter dated 19<sup>th</sup> June, 2017 she failed to address. I take it the claimant was keen to be paid her terminal dues in accordance with her letter of demand dated 8<sup>th</sup> June, 2017. Despite not being issued with a termination letter and this being just 8 days after the incident of the claimant reporting late at work, she did not oblige the directions issued by the employer in the letter and notice of 19<sup>th</sup> June, 2017.

30. Even where the claimant was late at work with other employees, when the notice was issued to her, recourse was not to urge her case by asserting that other employees got late too! The notice issued was to the claimant and in accordance with her individual letter of appointment. To avoid responsibility and fail to reply to the show cause notice and rely on the fact that other employees were also reporting to work late, such was to invite the obvious. A case for summary dismissal.

31. The claim for unfair or unprocedural terminal of employment if therefore lost. The claimant was not keen to report back to work as demonstrated by her conduct of making demands on her employer just 8 days after she had reported to work late and when she was invited for hearing in the letter of 19<sup>th</sup> June, 2017 she opted not to attend. This is conduct by the claimant demonstrates she was not keen to keep her employment with the respondent. Despite there being no letter terminating the claimant's employment, absconding duty and failure to abide lawful directions fundamentally went against section 44(3) of the Employment Act, 2007. I find no case of unfair termination of employment.

32. On the above finding, the claims for compensation, notice pay and payment for the unspent term of the contract cannot stand. Such are dismissed.

33. On the claim for annual leave not taken, section 28 of the Employment Act, 2007 requires the employer to ensure that each employee has taken annual leave within 12 months of employment. Where such leave is taken, the duty is on the employer to keep the work records and when suit is filed to submit the same in line with section 10(6) and (7) of the Act. The respondent has not submitted such records and the averments that the claimant was paid for such leave days due is without evidence. Where the claimant worked from 26<sup>th</sup> April, 2016 to 31<sup>st</sup> May, 2017 she had earned her annual leave and is awarded kshs.25, 000.00.

34. On the claims for overtime dues, the claimant testified that she worked from 7.30am to 6.30pm. The reporting times are confirmed by the assertion that on 31<sup>st</sup> May, 2017 the claimant reported late for work when she was found at the gate at 7.33am.

35. Where indeed the respondent was firm and strict with regard to work hours, I take it there was a record of such work hours and schedule which the claimant violated on the material day and was thus locked out. As noted above, the duty is upon the employer to submit work records in a case such as this. In the absence of such a record and this being a contested issue, the evidence of the employee and claimant must be believed.

36. In the letter of appointment, the work hours are not agreed. Where the claimant worked from 7.30am to 6.30pm such forms extra 3 hours each day at work. The 3 extra hours each day should be compensated. For the 13 months at work, the claimant was at work for 6 days each week and all being 234 extra hours for the duration. For the same and based on the last due wage of Kshs.25, 000.00 the claimant is entitled to Kshs.24, 375.00 in overtime pay.

**Accordingly, judgement is entered for the claimant for leave pay due at Kshs.25,000.00; overtime pay Kshs.24,375.00; a Certificate of service to issue in accordance with section 51 of the Employment Act, 2007 and each party to bear own costs.**

**Read open court at Eldoret this 12<sup>th</sup> July 2018.**

**M. MBARU JUDGE**

**In the presence of:**

**Court Assistants: Nancy & Robert**

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