



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 292 OF 2017

BRIAN WEKESA MUKWANA.....CLAIMANT

VERSUS

FOCUS CLINICAL & DIAGNOSTICCENTRES LIMITED.....RESPONDENT

JUDGMENT

1. The suit by the Claimant against the Respondent is for the unlawful, wrongful and unfair summary dismissal of the Claimant. He averred that he was employed as a clinical officer of the Respondent on 10th January 2015 and was deployed at the Respondent's medical centre at Ishiara Market. He operated the branch alone till his dismissal. On appointment he was paid Kshs. 27,000/- per month and was on completion of the 2 months' probation confirmed into the position of branch manager and the salary reviewed to Kshs. 30,000/- a month. The Claimant averred that he was dismissed on 7th June 2017 having reported for duty as usual. It was stated in the dismissal letter that the directors had investigated a complaint against the Claimant by a client of the Respondent and had reached a verdict to terminate the Claimant's services. The Claimant averred that he was not given a chance to be heard by the Respondent on the complaint raised and that this contravened the law. The Claimant averred that the Respondent did not pay the terminal dues due to him and that he worked overtime every weekday and on Saturdays. He averred that he was not allowed to proceed on leave, that he worked on public holidays and was never paid in lieu of leave for the overtime worked. He was not housed by the Respondent and there was no agreement that the salary would be consolidated thus he was not paid house allowance contrary to the law. He thus sought payment of salary in lieu of notice – Kshs. 30,000/-, payment in lieu of leave Kshs. 75,000/-, refund of rent paid for Kerugoya house Kshs. 4,500/-, payment in lieu of public holidays Kshs. 107,692.30, unpaid house allowance Kshs. 117,000/-, payment for overtime Kshs. 243,149.04, payment in lieu of overtime worked on public holidays Kshs. 50,211.53, days worked in the month of June 2017 Kshs. 8,076.92 and 12 months compensation Kshs. 360,000/- all making a grand total of Kshs. 995,629.78. He sought a certificate of service, costs of the cause and interest on the sums claimed from the date of filing suit.

2. The Respondent opposed the suit and in the response to the memorandum of claim averred that the Claimant was summarily dismissed for gross misconduct for violation of medic/patient relationship wherein in the course of exercising his duties as a medic he inappropriately touched/caressed a patient thus necessitating the summary dismissal of the Claimant. The Respondent averred that the Claimant was paid all his terminal dues accruing to him following the summary dismissal. The Respondent averred that the Claimant proceeded on his annual leave as required and that he was paid every time he worked on public holidays. The Respondent averred that the Claimant's pay was consolidated as per his appointment and due to his summary dismissal was not entitled to a record of service. The Respondent sought the dismissal of the Claimant's claim with costs.

3. The Claimant testified and reiterated that he was summarily dismissed for no reason on 7th June 2017 and the reason that was given was breach of patient/doctor relationship. He stated that he knew the patient named Felistus Mutua and that his relationship with her never went beyond doctor/patient relationship. He testified that he was not charged for any offence of indecent assault. No complaint was preferred against him to the clinical officers council which regulates and controls the procedures and operations of clinical officers. He was not aware of any investigations undertaken. He stated that he was called and was told that the Respondent would investigate. He testified that he just saw an email terminating his services. He stated that he knew who the lady was and that she invited him sexually and he was curious to know who it was, he saw her photo on WhatsApp and put her off. He states she kept coming to the consultation room and that she had a fungal infection on her back and she tried to seduce him. He testified that he asked for transfer for personal reasons and he was not transferred. He stated he would not engage in such conduct with the client. He stated that he had never gone on leave since 2015 and had worked overtime including public holidays. He thus sought that the prayers he had in his claim be granted.

4. In cross exam he stated that he was employed and was given the rules and regulations. He denied that he breached the rules and regulations. He stated that she sent him text messages and was the one inviting him sexually. He testified that he did not inform his employer and that she kept on seducing him and that is what informed him to seek transfer. He stated that sexual matters were personal and he was not intent on telling the employer as he was moving away from it. He said that he was not informed of the investigations. He stated that the council of clinical officers does not regulate their day to day activities. He reiterated that he worked overtime and was not paid and that he had two off days a month and they were not allowed to go on leave. He admitted that he applied for leave but stated that it was not granted. He stated that he raised the issue of house allowance as he was renting the house he lived in. He confirmed that he had not produced any documents to show that he rented a house. In re-exam he stated that he never proceeded on leave and that he had off days which were rest days.

5. The Respondent called the director of the Respondent Charles Maina Kariuki. He stated that he knew the Claimant who was employed in 2015 as a clinical officer at Ishiara Market. He stated that the Claimant was a good clinician and that he was promoted to the position of manager of Ishiara Branch. He stated that a colleague of the Claimant reported an indecent assault against a patient by the Claimant. He stated that he called the complainant and she graphically described what had transpired. He called the Claimant and the Claimant stated that she was the one who had come on to him. He stated that the Claimant's response was to show him the messages they were exchanging. He stated that the messages were indicative of a quarrel. He recalled the Claimant had sought transfer and he did not know that there were underlying issues. He asked the lady why she did not report and she said that it was for the sake of her marriage because her husband was a CID officer. After investigations a decision was made to terminate the services of the Claimant. He testified that all the dues were paid and that the Claimant used to be given an incentive and that he went on leave for three weeks. He stated that the Claimant earned a consolidated salary inclusive of house allowance. He stated that the Claimant was not entitled to the prayers he had sought and that Ishiara Market was not busy.

6. In cross-examination he stated that investigations were conducted by him and that the victim was not willing for the purpose of her marriage and exposure to go to the Police. He undertook the investigations and the human resources department took action. He stated that the letter terminating the Claimant was via email. He testified that he was shown the SMS and whatsapp and that was sufficient investigation. He stated there was a patient/doctor relationship and exchange of nasty messages touching on love matters. He testified that the Claimant was threatening to expose her to her husband and that the Claimant must have gotten a way to do so as the husband called him and asked him to leave the matter alone. He stated that he informed the husband that he was protecting the wife who was feeling intimidated and she declined to come to testify in this matter though she had indicated she would. Naturally if she came her husband would be upset. He wondered why she would report to him if she was into the relationship knowing he was the employer. He stated that on the letter it was indicated that the salary was gross and the clinic would close at 6.00pm or earlier as it was not busy. He testified that the Claimant was paid in petty cash for the public holidays. He did not complain to the council of clinical officers though he knew of the complaint mechanism.

7. In re-examination he testified that he conducted the investigations and even saw the exchanges. He interrogated the Claimant's colleagues and spoke to the complainant. He stated that the correct thing would have been contact from the Claimant notifying him of the harassment by the lady and this was not reported to him.

8. The second witness for the defence was Catherine Wairimu who stated that she was the general manager and in charge of human resources. She stated that the Claimant used to apply for leave on email and he would fill a form. She confirmed that the Claimant was paid locum and there were petty cash vouchers for this. She stated that the clinics were strictly closed at 6.00pm

9. In cross-exam she stated that the Claimant used to apply for leave via email. She testified that there was a difference between a day off and leave days. A day off is given when an employee works on a weekend and that he would apply for leave. He was entitled to 21 days. She testified that on public holidays the clinics were open and they paid a locum and there were petty cash vouchers the Respondent had attached showing payment on public holidays. She stated that at Ishiara the clinic never opened on Sundays. She testified that there was a lady who complained at the clinic that she had been assaulted. The lady confided in one of the Claimant's colleagues and the director. She stated that the Claimant was spoken to before the suspension and that the Claimant was given an opportunity to defend himself and his side of the story was that she was seducing him. She did not know why he did not report and that when they were to meet the lady she shied off. She said the Respondent could not keep the Claimant at the clinic as patients were shying off.

10. In re-examination she stated that the Claimant filled leave forms and proceeded on leave and was given off like other staff. She stated that she was surprised that the Claimant came to court as he was willing to leave. She testified that the complainant was unwilling to talk given that her husband got involved. She stated that the gross misconduct was the reason for the dismissal.

11. The third witness for the Respondent was Cosmas Mutisya who stated that he worked for the Respondent at Ishiara and the complainant came to him and alleged that she was assaulted by the Claimant. He stated that she told him that the Claimant had caressed her and kissed her. He asked her whether she had reported but she stated that she did not want to disrupt her family. He reported the matter to the director and the director stated he would call the complainant. He did not know if the director called the complainant.

12. In cross-examination he testified that he knew the complainant from before his employment by the Respondent. He stated that she reported that she had been abused by the Claimant and that what caused her not to report was that her husband was a police officer. He decided to report to the director so that the Claimant could be warned.

13. In re-exam he stated that the complainant reported to him because she knew him. He did not report to the Police as she had said if the report was made to the Police she would have problems at home. That marked the end of oral testimony.

14. The parties were to file submissions. Only the Claimant filed submissions. The Claimant submitted that the dismissal was on account of alleged gross misconduct and that a hearing did not take place. The Claimant submitted that the evidence of the witnesses was hearsay evidence as none had seen the Claimant touching the complainant. Section 63(1) of the Evidence Act was cited in support of the submissions regarding the testimony as well as the cases of **Prime Bank Limited v Esige [2005] eKLR** and **Joseph Barasa v PC World Limited [2013] eKLR**. The Claimant submitted that the dismissal was not fair in terms of Section 41 and 45(1) of the Employment Act. The Claimant submitted that he was entitled to the prayers sought.

15. The Claimant was dismissed for gross misconduct. The allegations were misconduct in relation to a female patient. From the testimony adduced it was clear there was something afoot and the Claimant failed to raise the issue. In his words, matters of sexual nature are private. He sought a transfer perhaps due to the underlying tensions at the workplace brought about by the situation between him and the complainant. At the workplace, matters of a sexual nature such as the harassment that was alleged are not private. The Claimant was dismissed after an inquiry that was conducted by the director. It was not insufficient to found grounds for dismissal. The only shortfall was the absence of a hearing where the Claimant would be accompanied by a witness of his choice. I find that he was paid his terminal dues, leave and locum. He did not avail even a single request for any unpaid dues meaning the list of demands was made up for purposes of the suit. His conduct as a clinician was not impressive. If there was an issue with a client he should have raised it in the appropriate forum. I would therefore dismiss all his claims except for the absence of a hearing under Section 41 for which I would award him one month's salary

as compensation under Section 49 of the Employment Act. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE