



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 1218 OF 2014

LAWRENCE NYAMICHABA ONDARI.....CLAIMANT

VERSUS

NATIONAL HOSPITAL INSURANCE FUND....RESPONDENT

JUDGEMENT

1. The claimant filed a claim against the respondent on 22nd July 2014 in which he sought among others a declaration that the termination of his employment was unfair and unlawful. The claimant therefore sought an order for reinstatement to his previous position of General Manager Finance and Control with back salaries and allowances. In the alternative the claimant sought to be paid his terminal benefits and compensation. The claimant further sought damages for violation of his constitutional rights.
2. The background of the case as presented by the claimant's counsel was that he was employed as an accountant in the public sector in October, 1985 and later on 1st 2000 transferred to the respondent as a Senior Accountant. He served the respondent with diligence and was eventually promoted to the position of General Manager. On 21st November, 2013 the claimant was interdicted for the reason that he failed to act properly and observe prudence in execution of the responsibilities leading to loss of public funds.
3. The claimant while on interdiction was called upon to explain the loss which he did stating the payment followed proper procedures and that he exercised prudence and diligence as expected and that the payment saved public funds to the tune of Kshs 176,938/=. The claimant remained in interdiction until 27th February, 2014 when he was called by the respondent's CEO to go and collect a letter which he was expected to respond to the same day. The letter further required him to attend a hearing on 5th March, 2014. The claimant responded to the letter and his services were subsequently terminated on 10th March, 2014 on account of gross misconduct. He appealed against the dismissal and no response to the appeal was given according to him.
4. The respondent on its part stated that it was no true that the claimant was given only a day to respond to the allegations against him. According to the respondent the external auditors (EMU) presented an in-depth audit report dated January, 2014 on respondent's health care providers in which it was observed among others that the claimant together with other general managers failed to act on the audit report dated 12th November, 2012 and their own task team finding that Thika Road health Services be accredited afresh and the immediate suspension of Buruburu Health Centre from any dealings with the respondent.
5. The audit report further recommended that the claimant and other managers be called upon to provide explanation for failure to exercise due diligence in processing and authorization of irregular payments and disciplinary action be taken against them. According to the respondent, the claimant was invited to a special board meeting which discussed the findings of the external auditors report on 25th February, 2014 and that the claimant was required to provide input and his personal representation before the Board. After consideration of the claimant's representation, he was issued with a notice to show cause on 27th February, 2014 and required to make representation in writing to make representation in writing. The notice outlined specific issues being irregular payments and failure to enforce eligibility criteria for health service providers before processing payments.
6. According to the respondent, the claimant's acts and omissions amounted to gross misconduct contrary to clause 12.21.3 of the Human Resource Manual. On 10th March 2014 a full board meeting was held whereby the claimant's both oral and written representations and response to the external auditors report was discussed. According to the respondent, the Board found the claimant not to have demonstrated a deterrent measure to redress the issue of irregular payments even the ones he claimed to have stopped. The Board therefore invoked the provisions of clause 13.9.1(g) and 13.9.4.4 (a) and resolved to terminate the claimant's services.
7. The claimant appealed against the termination but the same was declined on the grounds that there was now evidence to change the decision that had already been made. In his submissions Mr Nyabena for the claimant contended that the law called for proof of reasons for termination as per section 43(1) of the Employment Act. According to Counsel the interdiction letter zoned three issues which were,

issuance of unique identifier codes, payment of additional Kshs 3,792,233/= to Thika Road Health Service and payment processed at the end of financial year.

8. The show cause letter added two issues namely payment to St Lovina Medical and Laboratory Services and payment of Kshs 13,533, 225/= to Kawangware health Centre. The claimant responded to the two letters extensively attaching annexures where possible to the effect that due diligence and prudence was observed and no public funds were lost in the process of making the payments. Counsel further submitted that the termination letter referred to an independent investigations carried out by EMU as the basis of termination yet the report absolved the claimant.

9. According to Counsel, it was evident that the Board did not consider the claimant's due diligence in averting the huge losses by stopping payments to BuruBuru Health Centre when contacted by the Bank. Counsel submitted that the initiator of the Hospital codes was an officer under the claimant who did so without consulting the claimant. Counsel further submitted that the reasons for which the claimant was interdicted were reframed on the show cause letter and finally terminated for were nonexistent owing to the responses made by the claimant.

10. According to council, no reason whatsoever was brought to the attention of the claimant for the termination. His responses were backed by EMU report and they remained unchallenged as at the time of termination. Counsel further submitted that the respondent cannot be heard to state that the reasons on the interdiction letter and those on the show cause letter should be termed as matter/issues the respondent at the time of terminating the claimant's services genuinely believed to exist.

11. On the issue of fair hearing counsel submitted that his client was not afforded an opportunity to all his views. According to counsel, the showcause letter dated 27th February, 2014 notified the claimant of a meeting to be held on 5th March, 2014. Once he responded to the letter on 28th February, 2014 the respondent did not constitute the board on 5th March, 2014. The claimant was therefore not heard. According to counsel the respondent has not exhibited minutes of any meeting where the claimant was called upon to exonerate himself. Counsel further submitted that on 10th March 2014 the claimant was called by the respondent's Chief Executive Officer and asked to report at the Boardroom and upon arrival he was informed that the Board had considered his case and a verdict had been reached to dismiss him from service and was consequently issued with a termination letter.

12. Mr Okuta for the respondent submitted that the claimant was invited to a special board meeting where the finding of the external auditors were discussed. The claimant was called upon to make his input on the EMU report before the Board which he did. According to counsel the external auditor's report presented an in-depth report dated January, 2014 on respondent's health care providers in Nairobi covering the period of November, 2013 to February, 2014 and according to counsel the auditors examined responses from the claimant and other general managers. The report revealed that the claimant and the other managers failed to act on the audits report dated 12th November, 2012 and their own task team finding that Thika Road Health Services be accredited a fresh and immediate suspension of BuruBuru health Centre from any dealings with respondent.

13. The report further accused the claimant of failure to exercise due diligence in the processing and authorization of irregular payments. According to counsel the audit report cumulatively revealed a loss of public funds in the excess of Kshs 26,596,878 and that the claimant was contractually bound and had a fiduciary duty to observe due diligence in the exercise of his functions as a departmental head. Counsel further submitted that the claimant failed to exonerate himself from the blame and infact admitted in his response to the notice to show cause of his failure to perform his duties diligently.

14. Mr Okuta also submitted that it was false for the claimant to allege that the EMU report exonerated him and that infact the report found major lapses in terms of poor judgement in exercise of due diligence. Concerning reasons for termination as provided under section 43 of the Act, Counsel submitted that the above reasons showed the claimant was guilty of gross misconduct hence deserved summary dismissal as provided under the Employment Act however, claimant's termination was reduced to normal termination of service.

15. Regarding procedure for termination, counsel submitted that the claimant was interdicted on 21st November, 2013 and was to report to the respondent's CEO once every week and was further required to submit in writing his representation on the issues that had been raised against him. The claimant was further availed a copy of the detailed preliminary audit for his information. Further the claimant was invited to a special board meeting on 25th February, 2014 where the EMU's findings were discussed and claimant was required to give his input and personal representation which he did.

16. After the representation, the claimant was issued with a notice to show cause on 27th February, 2014 and required to make his representation in writing which he did and subsequently appeared before the Board on 10th March, 2014 where his oral and written responses were discussed. According to counsel the foregoing were in line with the Human Resource Manual. Further that the process was in accordance with Section 41,43 and 45 of the Employment Act.

17. By a letter dated 21st November, 2013, the claimant was interdicted by the respondent on allegations that audit investigations carried out on outpatient centres in Nairobi in the course of the financial year 2012/2013 and the resultant report presented to the board on 6th November, 2013 revealed some financial irregularities concerning two facilities namely Anchor Medical Consultants (BuruBuru Health Services) and Thika Road Health Services both accredited to the respondent.

18. According to the letter the assessment of Thika Road health Services was unprocedural and flawed since this was done by staff from Industrial Area Office despite being under Buruburu Branch jurisdiction. The letter further informed the claimant that Thika Road Health Services received additional irregular payment of Kshs 3,792,233/ purportedly for the period 25th September, 2012 to 30th April, 2013 though members had been capitated at Anchor Medical Consultants. The claimant was thus asked to submit his representation to exonerate himself from the accusations or wait until the results of the in-depth investigations were received.

19. The claimant responded to the interdiction letter on 2nd December, 2013 responding to the accusations against him. On 27th February,

2014 the respondent issued the claimant with a show cause letter in which he was informed that the Efficiency Monitoring Unit had submitted their investigation report and that the report established sufficient ground to confirm the five initial charges contained in the letter of interdiction. The show cause letter stated that the EMU report established the claimant facilitated irregular payments to Buruburu Health Centre. The show cause letter further accused the claimant of allowing payment of Kshs 1,932,300 to St Lavina Medical and Laboratory Services knowing it was irregular. Further that the claimant allowed payment of Kshs 13,533,225 to Kawangware health Centre even after an audit investigation had queried the payments.

20. The letter concluded that the accusations were cases of negligence in the execution of the claimant's responsibilities and amounted to gross misconduct for which the respondent's Board of Management was considering severe disciplinary action against the claimant including summary dismissal. The claimant was however called upon to show cause why the intended disciplinary action should not be taken against him. The claimant was further invited to appear before the Board of Management for a hearing.

21. The claimant responded to these accusations in the show cause letter on 28th February, 2014 denying the accusations against him. He contended that the EMU report did not confirm any of the accusations against him. According to him, EMU report actually absolved him from the accusations. By a letter dated 10th March, 2014 the respondent terminated the claimant services on account of gross misconduct. According to the letter, the Board of Management considered the claimant's written and verbal representations but found no sufficient grounds or merit to exonerate him from the charges enumerated in the show cause letter.

22. The claimant in his memorandum of claim has sought that the court finds that the termination of his employment was unfair and unwarranted. Termination of employment will be considered unfair if the grounds for which termination is carried out are invalid or unjustifiable. Section 43(2) of the Employment Act provides that the reason or reasons for termination of service are the matters that the employer at the time of termination of contract genuinely believed to exist and which caused the employer to terminate the services of an employee.

23. The court must in all cases refrain from over analysing the reasons for which an employee's services have been terminated for there exists a danger of the court substituting its opinion on what it considers to be valid reasons for termination of service with that of the management. The test as provided under section 43(2) of the Act is whether the employer at the time of terminating the employee's services genuinely believed that there existed reasons to justify a termination. The standard of proof is of course on a balance of probabilities.

24. In this particular case the claimant who was the General Manager Finance and Control was accused of authorizing payment to a facility that was not procedurally accredited by the respondent resulting to financial loss to the respondent. The claimant did not deny the payments but sought to justify them by saying among other things that Thika Road Health Services and Anchor Road Medical Services were operated by a couple who at some point were together and received capitation funds from the respondent as a single unit. The respondent was not satisfied with the explanation by the claimant and felt the claimant could have withheld payment until the accreditation process was regularized for Thika Road Health Services (Buruburu Health Centre) - Kagina Plaza.

25. The respondent in its audit report for November 2012 observed that the accreditation process commences when the health facility applied to the fund or the General Manager – Benefit and Quality Assurance directs that certain health facilities be assessed and included if it meets the criteria. Once approval of the Board is obtained the facility will be gazetted and can commence offering services. With regard to the Buruburu facilities, it was observed that Thika Road Health Services – Kagina Plaza was assessed by only one quality assurance Officer and further that the Buruburu Branch of the respondent only came to know of the facility in September, 2012 through complaints from members of the scheme who got turned away from accessing out patient services. According to the report, the fact that the two facilities had been assessed and accredited as having one similar trade name was causing confusion to respondent's members.

26. As observed earlier, it was not for the court to audit the truth of reasons for termination of employment. All the court needs to ensure is that the reason put forward for dismissal or termination are reasons which the employer reasonably believed to exist and are reasons for which a reasonable employer would terminate the services of an employee. In this particular case the court is persuaded that there existed reasonable grounds for terminating the claimant's contract of employment.

27. Regarding the procedure for termination, the claimant was interdicted on 21st November, 2013 and furnished with reasons for termination. He was called upon to either take the early opportunity to exonerate himself or wait for the comprehensive investigation report. The claimant made his response by a letter dated 2nd December, 2013. On 27th February, 2014 he was further issued with a show cause letter and forwarded a copy of the EMU investigation report for his comment. The letter further invited him before the Board of Management for a hearing on 10th March, 2014. He responded to the show cause letter and attended the Board of Management hearing. The claimant's contract was subsequently terminated on 10th March, 2014. In the termination letter the respondent offered the claimant his terminal dues as per his contract of employment.

28. From the foregoing, the court finds itself not persuaded that the claimant was not afforded a fair hearing before termination of his contract.

29. In conclusion, the court finds the claim unmerited and dismisses the same with costs.

30. It is so ordered.

Dated at Nairobi this 28th day of September, 2018

Abuodha Jorum Nelson

Judge

Delivered this 28th day of September, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.