



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO.1766 OF 2013**

**WILLIAM MOGENI MOMANYI..... CLAIMANT**

**- VERSUS -**

**AGA KHAN UNIVERSITY HOSPITAL..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> October, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 31.10.2013 through Nchogu, Omwanza & Nyasimi Advocates. He prayed for judgment against the respondent for:

- a) Salary for the month of May 210 of Kshs.18, 740.00.
- b) Notice pay for three months at Kshs.18,740.00 per month Kshs.37, 480.00.
- c) Severance pay at the rate of 30 days for every completed year of service Kshs.18, 740.00 x5 making Kshs.93, 700.00.
- d) Damages for wrongful dismissal and unfair termination of employment contract as per section 49 and 50 of the Employment Act Kshs.18, 740.00 x 12 making Kshs.224, 880.00.
- e) A declaration that the termination of the contract of employment between the claimant and the respondent is and remains unlawful, therefore null and void.
- f) Certificate of service.
- g) Costs of the cause.

The memorandum of response was filed on 11.05.2015 through Oraro & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed by the respondent to the position of a Kitchen Attendant as per the letter of offer of employment dated 06.12.2005. The employment was effective 09.12.2005. The claimant's probationary service was successful and the appointment was confirmed by the letter dated 30.03.2006.

The claimant's case is that the respondent wrongfully and unfairly terminated the contract of service on 11.05.2010 on allegations of theft whereby the claimant was accused together with another employee with theft of the respondent's property. The claimant's further case is that the termination was abrupt and in contravention of law because there were no reasons for termination and there was no notice and hearing as stipulated in law. The 2 months' notice prescribed in the collective bargaining agreement was not served and the claimant further urges that no disciplinary hearing took place.

The respondent's case is that the criminal case was distinct from the dismissal process and the claimant was fairly and lawfully dismissed.

The evidence is that on 11.05.2010 the claimant was at work when he met his supervisor Alice Kariuki in company of the claimant's workmate one Stephen Kilonzi. Stephen Kilonzo was carrying some 2 Kg of rice and Alice informed the claimant that she wanted to know if the claimant had given the 2 Kg of rice to Stephen Kilonzo. The claimant told Alice that the claimant had not given the rice to Stephen

Kilonzo and the claimant proceeded to the kitchen. The matter was referred to the Personnel Manager and the claimant and Kilonzo recorded statements. The statement by Stephen Kilonzo does not mention that he was given the 2 Kg of rice by the claimant. The statement by the security guard says Stephen Kilonzo was found with the box containing 2 Kg of rice. The statement by Benjamin Katuta states that the claimant was pleading with Alice to forgive Stephen Kilonzo – meaning the claimant was not the culprit but was pleading that Stephen Kilonzo be forgiven for being found with the rice in unexplained circumstances. The claimant's statement was that he pleaded with Alice to forgive Kilonzo and the claimant even went on his knees in the process because Kilonzo and the claimant belonged to the same family but Alice said she must report the case because Kilonzo had been stealing towels. Alice stated in her statement that the claimant admitted that he had given the Rice to Kilonzo, the case involved many people and the claimant went on his knees pleading that Alice should not report the case because those involved would lose their jobs.

The Court has considered the evidence. There is no dispute that the letter of summary dismissal was issued on 11.05.2010 and there was no notice and hearing. However there is evidence that the claimant was given a chance to explain his defence but it was in the absence of a trade union representative as envisaged in section 41 of the Employment Act, 2007. The Court returns that there was no termination notice and disciplinary hearing. To that extent, the respondent failed to accord the claimant due process as per section 41 of the Act even though the allegations were grave and amounting to gross misconduct and entitling the respondent to dismiss summarily – that is, with a shorter notice than was envisaged in the contract of service or in the statute. The respondent has not established that as at the time of termination it had a valid reason to dismiss the claimant, namely, Kilonzo having told Alice that the claimant had given Kilonzo the rice in issue. The allegations remained unsubstantiated in view of the absence of the necessary hearing that should have established the truthfulness or otherwise of the allegations in issue. The conflicting statements that were recorded remained untested and it is not clear why the respondent acted upon the statement by Alice and disregarded the other statements. The Court finds that there was no valid reason for termination as at the time of termination as provided in section 43 of the Act as read with section 45 of the Act. The termination was unfair in substance and procedure and the claimant is awarded 6 months compensation under section 49 of the Employment Act, 2007 making **Kshs.112, 440.00**. While making that award the Court has considered that the claimant significantly contributed to his dismissal when he went on his knees pleading that Kilonzo was to be forgiven which must have led the respondent to believe that the claimant was culpable. That contribution is put at 50% thus the award of 6 months instead of the maximum 12 months' salaries under section 49 of the Act. The Court further returns that clause 9 of the CBA on termination with 3 months' notice or pay in lieu of notice will apply and the claimant is awarded **Kshs.37, 480.00** as prayed for.

The parties consented that the claimant be paid 11 days worked in May 2010 and the claimant is awarded **Kshs.6, 871.30** in that regard.

There were no submissions on the prayer for certificate of service which appears to have been issued and on severance pay and the prayers are deemed to have been abandoned or settled.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. Payment of **Kshs.156, 791.30** by 01.12.2018 failing interest to be payable at Court rates from the date of judgment till full payment.
2. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 26<sup>th</sup> October, 2018.**

**BYRAM ONGAYA**

**JUDGE**