



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2141 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

COSMOS MATEYA BURUNDI.....CLAIMANT

-VERSUS-

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 23rd October, 2012 seeking the following prayers:-

- i. Kshs. 142,688/= being sum not paid on interdiction.*
- ii. Compensation for wrongful dismissal to a maximum of 12 month's wages amounting to Kshs. 366,348.00*
- iii. Kshs. 30,529/= pay in lieu of notice*
- iv. Kshs. 30,529/= pay for leave for the year 2011*
- v. Costs of the suit*
- vi. Pension Scheme contribution and employer's contribution for 15 years*
- vii. Interest in (i),(ii), (iv) and (vi) above*
- viii. Any other reliefs as the court may deem fit.*

Facts of the case

2. The Claimant was employed by the Respondent on or about 14th July, 1995, as a Clerical Officer and at the time of dismissal he was earning monthly salary of Kshs 30,529/= inclusive of allowances. He avers that he carried out his duties with loyalty and diligence until 25th July, 2011 when the Respondent wrongfully and unlawfully dismissed him from his employment.

3. The Claimant further states that his services were terminated by the Respondent accusing him of criminal offences, causing his arrest and that charges were preferred against him vide Nairobi Criminal Case No. 8 of 2011. These charges were then withdrawn by the prosecution on 28th February, 2012 and no other charges have been preferred against him since then.

4. The Claimant avers that as a result of the wrongful and unlawful termination he lost all his employment benefits i.e:-

- a) Pay in lieu of Notice* *Kshs. 30,529/=*
- b) Pay for leave in 2011* *Kshs. 30,529/=*
- c) Money not paid during 7 months*

of interdiction

Kshs. 142,688/=

d) 12 months' salary compensation for

wrongful dismissal Kshs. 30,529*12

Kshs. 366,348/=

TOTAL

Kshs. 570,094/=

5. The Claimant further claims for payment for Pension Scheme contribution for 15 years of employment and the employer's contribution since he was a pensionable employee pursuant to Section 35(6) of the Employment Act, 2007.

6. The Claimant gave his evidence on 8th November, 2017 and reiterated the averments in the Memorandum of Claim adding that when he was charged at the Anti-Corruption Court he was placed on ½ salary and that his termination was effected even before the criminal case commenced and he was not subjected to any disciplinary hearing by the Respondent Hospital.

7. The Claimant further stated that he was not paid the ½ month salary during the period he was under interdiction. He urged the Court to allow his Claim as prayed.

8. On cross-examination CW1 stated that he was charged by the Anti-Corruption Court for allegedly receiving a bribe of Kshs. 6,000/=. He further stated that he did not receive any bribe and that the case was eventually withdrawn by the DPP.

9. On further cross-examination CW1 stated that he did receive the show cause letter dated 22nd March 2011 and did respond to the same and was dismissed. He further testified having been issued with a certificate of service by the Respondent Hospital.

10. The Claimant submits that his dismissal was wrongful/unfair and/or unlawful as it did not follow the procedure set out in Section 41(1), 43(1), 45(2) of the Employment Act, 2007. The Claimant further submitted that Sections 35(1) and 36 of the Employment Act were also not adhered to by the Respondent on the issue of notice. The Claimant for emphasis relied on the authority of **Kenfreight (E.A) Limited Versus Benson K. Nguti (2016) eKLR**, where it was held that:-

“Apart from issuing proper notice according to the contract(or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.”

11. The Claimant further submitted that he is entitled to the reliefs sought in the Memorandum of Claim and urged the Court to award the same as prayed.

12. The Respondent filed a Statement of Response dated 30th May, 2013, and filed in Court on 31st May, 2013, through the firm of Mereka & Company Advocates where they aver that the Claimant was dismissed from service after the Respondent established that on 28th January, 2011 at around 10.26 am, he received a bribe of Kshs. 6,000/- from Mr. Masagara, a relative to a patient at the hospital.

13. The Respondent avers that it had no role in the arrest and prosecution of the Claimant but only established the occurrence of the events through the Kenya Anti-Corruption Commission's investigation and that the Claimant was given a chance to defend himself against the claim but instead never denied the facts.

14. The Respondent further avers the Claimant was deemed to have corruptly solicited and received Kshs. 6,000/- contrary to the terms and conditions of service and the Public Officer Ethics Act (2003) and such behaviour is a serious gross misconduct which led to his dismissal from service with effect from 25th July, 2011.

15. The Respondents urged the Court to dismiss the Claim with costs.

16. On 22nd October, 2018 the Respondents witness (RW1, Walter Owino) testified on behalf of the Respondent Hospital. He stated that he was a Human Resources Officer at Kenyatta National Hospital. He reiterated the averments in the Statement of Response to the Memorandum of Claim filed in Court as well as his witness statement duly adopted as evidence.

17. RW1 testified that on 7th February 2011 the Respondent hospital interdicted the Claimant after it came to the attention of the hospital management that on 28th January, 2011 the Claimant had been arrested by Anti-Corruption Commission officers after he received a bribe of Kshs. 6,000/- from a relative of a patient (Alice Kerubo).

18. RW1 stated that the Respondent Hospital investigated the matter and found that the Claimant was found to be involved in corruption and receiving a bribe of Kshs. 6,000/= and that the Claimant was in fact charged in an Anti-Corruption Court for the offence.

19. RW1 further stated that the Claimant was issued with a Notice to show Cause and given seven (7) days to respond to the same. Following this the Claimant's services were terminated and that the Claimant did not appeal the discussion by the Hospital to terminate his services.

20. On Cross-examination RW1 stated that he was not aware of the outcome of the criminal case and whether the same was withdrawn and the reasons for the withdrawal.
21. On further cross-examination RW1 stated that the Respondent through its security department did conduct its own investigations and found that the Claimant had received the bribe.
22. He further stated that the Claimant has not cleared with the Respondent Hospital and his dues (Pension) are ready for collection.
23. RW1 further averred that the Respondent followed due process in terminating the Claimant's services. He urged the Court to dismiss the instant claim with costs.
24. The Respondent submitted that the Claimant was summarily dismissed due to gross misconduct as per the provisions of Section 44 of the Employment Act, 2007 for his alleged involvement for corruptly soliciting and receiving a bribe of Kshs. 6,000/-. The Respondent for emphasis relied on the authority of **Carter versus Value Truck Rental (Pty) Limited**.
25. The Respondent further submitted that the Claimant was issued with a 7 days' Notice to show cause why disciplinary action should not be taken against him. The Respondent Hospital conducted an internal investigations on the matter and considered the Claimant's response to the Notice to show cause and found that he was unfit to continue working for the Hospital thus his services were terminated. The Respondent for emphasis relied on the case of **Sappi Novoboord (Pty) Ltd Versus Bolleurs**, where it was held as follows:-
- “It is an implied term of the Contract of employment that the employee will act in good faith towards his employer and that he will serve his employer honestly and faithfully.”***
26. Further reliance was made to the authorities of **Premier Medical and Industrial Equipment Limited Versus Winkler at 867H; Jones Versus East Rand Exyention Gold Mining Company Limited 1917 TH 325 at 334** which held that if an employee does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.
27. Similar reference was made to the case of **JD Group Ltd Versus De Beer (1996) 17 ILJ 1103 (LAC) at 1112-12** where it is stated 'Honesty' in the employment context does not merely mean refraining from criminal acts; it embraces any conduct which involves deceit. The Respondent thus submitted that from the foregoing it could not retain the Claimant in its employment following the corruption allegations.
28. The Respondent further submitted that the Claimant's dismissal was procedural and that it was not in breach of the tenets of natural justice. It is further submitted that the Claimant is not entitled to the emoluments set out in paragraph 9 as he was summarily dismissed fairly.
29. The Respondent urged the Court to dismiss the Claimant's suit with costs.
30. I have examined all the evidence and submissions of the parties herein. It is not in doubt that the Claimant was arrested and charged with corruption charges by the Anti-Corruption Commission.
31. He has indicated that he was discharged of the corruption charges. That in itself would not be a determinant factor on whether he is guilty of an offence of gross misconduct to warrant summary dismissal as the criminal proceedings are independent proceedings to the employer's internal disciplinary processes and the later would also greatly determine whether an employee can be summarily dismissed or not.
32. From the Respondent's evidence, the Claimant is said to have been engaged in corruption and was even charged in Court.
33. Under Section 44(4) of Employment Act, this is a valid reason to summarily dismiss an employee. Section 44(4)(g) envisages that an employee may be summary dismissed from service if he commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
34. Since the Claimant was arrested and charged with a criminal case. It is my finding that the Respondent had valid reasons to dismiss the Claimant. That notwithstanding however, the Claimant was still entitled to due process.
35. On February 7th 2011, the Claimant was interdicted following his arrest by the Commission. He was also asked to show cause vide a letter dated 21.3.2011 as to why disciplinary action should not be taken against her. This letter was sent to the Claimant through the Chief Medical Records Officer, Kenyatta National Hospital.
36. The Claimant has denied receipt of the letter of show cause. It is not clear how this letter of show cause was served upon the Claimant who was on interdiction at the time.
37. After this day, the Respondent aver that disciplinary proceedings were conducted against the Claimant on 31.5.2011 and he was thereafter dismissed.
38. There is no letter inviting the Claimant to the said disciplinary hearing. It is clear that the disciplinary committee sat in the absence of the Claimant and deliberated on his case and recommended his dismissal. Indeed, this was not fare to the Claimant as he was condemned unheard.

39. In the circumstances, I find the dismissal of the Claimant unfair. However given that the Respondent had valid reason to dismiss him, I will award him as follows:-

1. *2 months' salary as compensation for unfair termination* = $2 \times 30,529 = 61,058/=$.

2. *1 month salary in lieu of notice* = 30,529/=.

3. *Unpaid ½ salary during interdiction* = 142,688/=.

4. *Prorata leave for year 2011 of 6 months* = $\frac{1}{2}$ of 30,529 = 15,264.5/=

TOTAL= 249,539/=

5. *Pension dues from the Pension Scheme.*

6. *The Respondent will pay costs of this suit plus interest at Court rate with effect from the date of this judgement.*

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjala for Respondent – Present

Claimant – Absent