



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2104 OF 2011

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

JOHN OCHIENG' OUMA.....CLAIMANT

-VERSUS-

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 14.12.2011 through the firm of Ochieng, Onyango, Kibet and Ohaga Advocates claiming unlawful termination. The Claimant's case is that he was employed by the Respondent on 20th December 2002 as a Supplies and Procurement Manager in the Supplies Procurement Department with a salary of Kshs.1,679,700 per annum.
2. The terms and condition of his employment were stipulated in the offer letter dated 20.12.2002 which he accepted on 3.1.2003. This appointment was subsequently confirmed and made permanent and pensionable on 5/2/2003 by a letter dated 17.5.2004 and 4/12/2006 annexed as JA 1 and JA 2.
3. He stated that he was a diligent worker and executed his duties with commitment and dedication throughout his terms of employment and never underwent any adverse disciplinary action or warnings.
4. He contends that on 22.9.2010 he was served with a letter by the Respondent alleging that he had initiated procurement of goods and services before approval of the budget and the annual procurement 2010/2011 plan which was also not aligned to the annual budget and that he had not been producing periodic procurement results to the office of the Deputy Director.
5. The letter required the Claimant to proceed for compulsory leave from 22.9.2010 and also prepare a handing over report and show why disciplinary action should not be taken against him.
6. He avers that he fully complied with the directions of the said letter.
7. He later received an interdiction letter dated 30th September 2010 from Miss Itambo, the Human Resource Manager informing him that he had been interdicted for presenting erroneous information to the Tender Committee which resulted in irregularities in the awards (Appendix JA 3).
8. The Claimant avers that the letter indicated that the Board of the Respondent was presented with a special audit report which outlined irregularities in Tender for ICT Quick Wins. That he was responsible for causing the Tender Committee to adjudicate and award the tender in which some of the tenders were not qualified to participate as per the advertised expression of interest. The letter further indicated that the Claimant was responsible for overseeing the alterations and manipulation of tender documents during the tender process and causing the accounting officer to sign a contract that had been fraudulently processed with serious financial implications on the hospital.
9. The Claimant was further accused of failing to undertake a market survey before tendering as is the normal practice.
10. The Respondent claimed that all these amounted to gross misconduct. The Claimant avers that he had never seen the audit report.
11. The Claimant avers that during the interdiction, he was never paid his ½ salary and was required to report to the Deputy Human Resource Manager once a week and only leave the duty station with permission from the Deputy Human Resource Manager.

12. The Claimant avers that the reporting caused him untold suffering travelling from his rural home where he had relocated to.
13. The Respondent constituted a committee which compelled his attendance on 15/3/2011. He raised an objection on this committee vide a letter dated 16.3.2011 (Appendix JA 6).
14. The Claimant states that he was required to attend the disciplinary proceedings but never received a statement of charges outlining the allegations and/or charges against him.
15. He also states he was never informed of his rights to have a representative during these presentations. He avers that he was dismissed on 28th April 2011 and the dismissal letter indicated that the defence he raised during the disciplinary hearing was not justified.
16. The Claimant seeks prayers as follows:-
- i. "A declaration that the Claimant was not availed the minimum statutory disciplinary procedure under the Employment Act, 2007 and thus his dismissal lacked in procedural fairness and to f extent amounted to unfair dismissal;*
 - ii. A declaration that the dismissal from employment of the Claimant by the respondent was substantively unfair;*
 - iii. Compensation to the Claimant to the maximum of twelve month's salary in the sum of Kshs. 1,679,700.00 to meet the ends of justice for unfair dismissal and loss of employment;*
 - iv. An order that the Respondent issue a certificate of service to the claimant in accordance with the law;*
 - v. An order for the payment of costs of the suit by the Respondent;*
 - vi. Interests on costs at court rate.*
17. The Respondent filed their Statement of Defence on 14/12/2012 through the firm of Lubullellah & Associates Advocates. They aver that the Claimant's interdiction and subsequent dismissal was done lawfully and within the provisions of the Hospital's Terms and Conditions of Service and Employment Act.
18. The Respondent also aver that there were valid reasons to believe that the Claimant in the course of his duties acted to the detriment of the Respondent and these actions actioned his interdiction and subsequent dismissal.
19. The Respondents also aver that the disciplinary committee was properly constituted pursuant to the provisions of the Terms and Conditions of Service and that the Claimant participated in a free and fair disciplinary process and that officers named in paragraph 10 of the Claim were not parties to the disciplinary process.
20. The Respondent therefore aver that the Claimant's dismissal was justified and pray that this claim be dismissed with costs.
21. The parties filed their respective submissions. This Court has considered the evidence and submissions herein. The issues for determination are as follows:-
- 1. Whether there were valid reasons to warrant Claimant's dismissal.*
 - 2. Whether the Claimant was subjected to a fair disciplinary process.*
 - 3. Whether the Claimant is entitled to the remedies sought.*
22. On the first issue, the Claimant was dismissed vide a letter dated 28.4.2011 which indicated that he was summary dismissed because he:-
- "Wilfully and* deliberately presented to the Management Tender Committee erroneous information which resulted in irregular procurement of goods and services and irregularities in the tender of ICT "Quick Wins," the details of which are already communicated to you contrary to Part VIII Section B 3(c) of the Terms and Conditions of Service which states that ***"If an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract; to have performed carefully and properly"* and Part VIII Section B 3 (g) *"If an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to have the substantial detriment of his employer or his employers properly"* which constitutes gross misconduct".****
23. The Respondent averred that the act or omission by the Claimant was contrary to Part VIII Section B3(c) of the Terms and Conditions of service which amounted to gross misconduct.
24. The Claimant was invited by the Respondent to respond to these allegations and he responded vide a letter dated 8/10/2010. He denied allegations as being untrue and unfair and not representative of the correct perspective.
25. After giving his explanation, the Claimant was invited for a committee disciplinary hearing. The Claimant averred that during the

meeting, the charges facing him were not put to him. The Respondent did not provide Court with the minutes of the disciplinary hearing. It is not therefore clear as to whether the charges facing the Claimant were clearly put to him and he was asked to respond. What responses if any made are not before Court too as the minutes of the hearing were not presented to Court.

26. In the absence of these crucial minutes, it is not possible to evaluate whether the reasons for which the Claimant was finally dismissed were valid reasons based on the proceedings of the disciplinary hearing.

27. The Claimant has indicated that the charges were not explained to him during the disciplinary hearing and thus the burden shifts to the Respondent to prove that indeed the Claimant was aware of the charges facing him and he was given an opportunity to answer to the said charges.

28. In my view, the Respondent failed to prove the reasons for the dismissal of the Claimant were valid. There is no indication that these reasons were tested and the Claimant failed to answer to them satisfactorily.

29. Also in absence of the crucial minutes showing the manner in which the disciplinary process was carried out, it is not possible to ascertain whether the process was fair or not.

30. Section 43 (2) of Employment Act envisages that there must be proper reasons for termination. These reasons must be genuinely believed to exist and must have been addressed to the accused and subjected to a hearing to establish if the Claimant has a worthwhile defence.

31. Section 45 of Employment Act states as follows:-

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..".

32. It is thus envisaged that the Respondent should not only have proper reasons before termination but that the Claimant should also be subjected to a fair hearing process.

33. In the instant case, the Respondent have failed to establish they had valid reasons to dismiss the Claimant and also subjected him to a fair hearing process. I therefore find the dismissal of the Claimant unfair and unjustified and I declare it so.

34. In terms of remedies sought, I award the Claimant:-

1. 9 months' salary as compensation for unfair termination = $9 \times 139,975 = 1,259,775/=$.

2. I also order the Respondent to issue the Claimant with a Certificate of Service.

3. The Respondent will pay costs of this suit plus interest at Court rates 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:

No appearance for Parties