



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 133 OF 2010

DR. WILFRED ISOE MAOSA.....CLAIMANT

VERSUS

MASABA HOSPITAL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 11.2.2011 seeking the following reliefs:

(a) A declaration that the termination of the Claimant’s employment was unlawful and against the rules of natural justice and contrary to the provisions of the Constitution and the Employment Act, 2007

(b) The claimant be reinstated to his position of employment without loss of benefit.

(c) In the alternative, the Respondent be ordered to pay damages equivalent to 12 months salary to the claimant and a certificate of service be issued

(d) The claimant prays that the Respondent do pay him in addition to benefits under paragraph 10 his terminal benefits as follows:

(i) Salary for months worked and not paid.....Kshs.143,700

(ii) 3 months salary in lieu of notice.....Ksh.431,100

(iii) 21 days leave.....Kshs.160,000

(iv) Salary deductions made and not remitted....Kshs. 83,649

(v) Service being one month salary for every year workedKshs.431,100

Kshs.1,249,549

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(e) Costs of the claim be provided for.

2. The respondent denied the alleged unlawful termination of the Claimant’s employment. She averred that termination was justified because the Claimant had misconducted himself by absenting himself from work without permission. She further averred that despite being served with show cause letter, the Claimant continued with his absence, failed to respond to the show cause letter and could not be traced. It is therefore the respondent’s case that the Claimant deserted his employment and he could not be traced even to serve him with a certificate service. She therefore prayed for the suit to be dismissed because the Claimant is not entitled to the reliefs sought. The suit came up for hearing on 25.9.2018 but the parties agreed to dispense with the hearing and instead dispose of the suit by written submissions on the basis of the pleadings and supporting documentary evidence filed.

3. The suit was heard on 16.4.2018 when the Claimant testified as CW1 but the respondent never called any witness despite being given several adjournments to do so. However, after the close of the hearing, both parties filed written submissions.

Claimant's Case

4. CW1 testified that he was employed by the respondent on 4.12.2006 as a Resident Doctor vide an appointment letter dated the same day. His salary was Kshs.143,700 per month. He further testified that he took leave but when he reported back, he was served with a suspension letter dated 13.5.2009. Thereafter he tried to seek audience with the Hospital Managers but it was in vain. He also tried to reach his colleagues in the Board of Management but they declined to meet him.

5. The Claimant further testified that, he was not paid any salary during the suspension. He contended that his services were terminated without prior hearing and no dues were paid to him. He denied ever absenting himself from work without leave and maintained that he was on his lawful leave. He further denied ever violating the hospital Human Resource Policy. He therefore prayed for the reliefs sought contending that he suffered after the termination because he had bank loans.

6. On cross examination, CW1 admitted that he was served with a suspension letter by the Human Resource Manager with direction to respond to the allegations made against therein. He further admitted that he never responded to the letter but instead he sought for audience with the administration but in vain. He further admitted that he never wrote to the respondent to protest the denial of audience. He however denied that he disappeared after receiving the suspension letter.

7. CW1 admitted that he was deducted NSSF dues but contended that they were never remitted to the fund. He contended that he was denied salary for the period he was on leave and after being served with suspension letter. He maintained that he still had 21 leave days outstanding before the suspension. He concluded by stating that the Hospital was a family business and the members of the family made his job difficult by giving conflicting instructions.

Claimant's Submission

8. The Claimant submitted that he was terminated without any valid reason and urged that his evidence on that matter was not controverted.

9. He further submitted that he was terminated without following the procedure provided by section 41 of the Employment Act because he was not accorded a hearing before being dismissed for the alleged misconduct.

10. Finally, he urged that his career as a Doctor was damaged by the said unlawful termination and prayed for compensation under section 49 and 50 of the Employment Act plus the other reliefs sought in claim.

Respondent's Submission

11. The respondent submitted that the Claimant abandoned his patients and his sensitive work and disappeared for over 30 days without a word or notice. That when he was served with suspension and asked to show cause why he should not be summarily dismissed but, he failed to defend himself. She maintained that the Claimant was accorded an opportunity to defend himself through the show cause letter but he waived it.

12. She relied on *Kenya Plantation & Agricultural Workers Union vs. Uniliver Tea Kenya Ltd [2011] eKLR* where the court found that the Claimant had failed to prove a case of unlawful termination against the employer. She therefore urged that a similar finding should be made herein because the Claimant has not proved unlawful termination by evidence.

Analysis and Determination

13. There is no dispute that the Claimant was employed by the respondent as a resident doctor from 4.12.2006 until 13.5.2009 when he was suspended for misconduct. The issues for determination are:

(a) whether the Claimant's contract of service was unlawfully/or unfairly terminated.

(b) Whether the reliefs sought should be granted.

Unlawful/unfair termination

14. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements Procedure is fair the employee is granted a fair hearing in terms of justice and equity.

Reasons

15. The reasons for terminating the Claimant's services herein were absence without leave and poor performance. The Claimant contended that his absence was authorised because he was on his lawful leave. The Claimant has however not produced any documentary prove or any other form of evidence to prove that his application for leave was granted by the management.

16. The burden of proof was upon him to demonstrate that he was permitted to be away upto 13.5.2009 when he was suspended. He has not discharged that burden and I return that he absented himself from duty without leave. Under section 44(4)(a) of the Employment Act, the absence from work without leave or lawful cause entitles the employer to dismiss the offending employee summarily. Consequently, I hold that there was a valid and fair reason for dismissing the Claimant.

Procedure followed

17. Under section 41 of the Act, before dismissing an employee on ground of misconduct, poor performance or physical incapacity, the employer is enjoined in mandatory terms to explain to the employee the reason for which termination is being considered. The said explanation must be in a language of the employee’s understanding and in the presence of another employee or shop floor union official who are both entitled to air their representation in response to the reasons cited by the employer. Finally, the employer must consider the views by the employee and his chose companion before deciding to dismiss the employee.

18. In this case, the said procedure was never followed. The respondent never explained the reason for the said default. She was able to serve the suspension letter but nor invitation for hearing. She knew his email address because she pleaded in her defence that the Claimant wrote email to her seeking extension of leave. I therefore opine that the failure to invite the Claimant for hearing after he failed to explain his absence as required by the suspension letter was not justified. Consequently, I return that the termination of the Claimant’s services was rendered unfair by the failure to grant him a fair hearing before dismissing him.

Reliefs:

19. In view of the foregoing finding, I make declaration that the termination of the Claimant’s employment was unfair and therefore unlawful as prayed.

20 I however decline to order his reinstatement because under section 12(3) of the Employment and Labour Relations Court Act, the court has no jurisdiction to make such order if 3 years have lapsed since the time of the impugned separation. I will therefore grant the alternative prayer of damages.

21. Under section 49 read with section 50 of the Act, I award the Claimant one month salary in lieu of notice plus 2 months salary as compensation for unfair termination. In awarding the said compensation, I have considered the short period of service and the fact that the Claimant contributed to his dismissal through misconduct. The claim for 3 months salary in lieu of notice was not proved by evidence and consequently, I have granted one month salary under section 35(1) (c) of the Act.

22. The claim for 21 days leave is dismissed for lack of particulars and evidence. Likewise the claim for refund of statutory deduction made but not remitted is dismissed for lack of particulars and evidence. Finally, the claim for service pay is dismissed because the Claimant was admittedly a contributor of the NSSF and he has not proved that the employer failed to remit his contributions.

Conclusion and Disposition

23. I have found that there was a valid reason for dismissing the Claimant from employment. I have however found the dismissal was unfair because it was done without following a fair procedure. I therefore enter judgment for the Claimant in the following terms:

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| Notice | Kshs.143,700 |
| Compensation | Kshs.287,400 |
| Total | Kshs.431,100 |

The Claimant will also have costs and interest at court rates from the date hereof. The award will also be paid less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 19th day of December, 2018

ONESMUS N. MAKAU

JUDGE