



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1283 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 13th December, 2018)

GODFREY OCHIENG OSESE.....CLAIMANT

VERSUS

AGA KHAN UNIVERSITY

HOSPITAL NAIROBI.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed his Memorandum of Claim on 6th August 2014 contending that his summary dismissal by the Respondent was unfair and unlawful. The Claimant therefore seeks the following reliefs;

1. An order that his termination be and is hereby declared unlawful and hence null and void.

2. The Respondent do engage the Claimant in work comparable to that in which he was employed prior to his dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period they have been working and out of office/work.

3. Reinstate the Claimant and treat him in all aspects as if the his employment had not been terminated.

2. In the alternative to reinstatement, the Claimant demands for monetary compensation as under:-

1. The Respondent be ordered to pay the Claimant terminal dues of Kshs. 634,500.00.

2. Interest on the amount of Kshs. 634,500 from the date of termination until payment in full at court rates.

3. Any other statutory entitlements

4. The Respondent to pay legal costs in the suit.

Claimant's case

3. The Claimant avers that he was employed by the Respondent as a Service Attendant in the Dispatch and Service Department, Facilities Management Division vide a letter of employment dated 22nd July 2011. Upon completion of his probation period, he was confirmed into employment and thereafter awarded certificates for his exemplary performance.

4. The Claimant further states that on 27th March 2014 the Respondent unlawfully summarily dismissed him and failed to give him his terminal dues in accordance with the terms of the letter of employment and the Collective Bargaining Agreement (CBA) between the Respondent and Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers (KUDHEIHA).

5. The Claimant states that he was assigned to pick a patient from room 233 and when he was leaving is when he saw a key hanging on the door of the opposite room 232. He entered room 232 and saw there was nobody but before he could step out Edna Masinde, a nurse asked him what he was doing. She thereafter called security who conducted a search on him but nothing was found on him.

6. In his testimony the Claimant stated that he was invited to a disciplinary hearing but was later summarily dismissed. He contends he was only paid his pension. He was neither paid his terminal dues nor did he receive his salary during his 2 months suspension.

7. It is the Claimant's case that having worked for the Respondent for 2 years he was entitled to 2 months' notice or two months in lieu of notice pursuant to the letter of employment and the CBA.

Respondent's case

8. The Respondent filed a Memorandum of Reply on 3rd October 2014 in which it admits that the Claimant had been employed by the Respondent as a Service Attendant and avers that the Claimant was bound by the terms of both the letter of employment and the CBA.

9. It avers that the Claimant was found by the Shift Leader having trespassed into the patient's room with his hands on a patient's purse. It is the Respondent's case that the Claimant was issued with a Show Cause Letter dated 23rd January 2014 and subsequently invited for a disciplinary hearing.

10. The Respondent further avers that it rendered its decision summarily dismissing the Claimant but the Claimant appealed the decision as provided in his letter dated 27th May 2014. However, the Respondent upheld its decision.

11. During the hearing, the Respondent called three witnesses, Dorothy Obiayo RW1, the Employee Relations Manager, Eddah Masinde RW2, a nurse and Leah Muriithi, RW3 a Nurse.

12. RW1 stated that the Claimant was invited to a disciplinary hearing. She stated that the Claimant gave an oral explanation and was allowed to call and cross-examine witnesses. RW2 stated that she found the Claimant in the room with his hand on a poach when RW3 entered the room. She stated that she left the incident to the security team. RW3 stated that she went to the room and found the Claimant and RW2 in the room. According to RW3 the Claimant was scared and that RW2 called the security.

13. The Respondent avers that the Claimant is not entitled to the Orders sought having accorded the Claimant an opportunity to be heard and on account of the fact that the Claimant was found in the process of committing a grave misconduct.

Claimant's Submissions

14. The Claimant in his written submission did not rely on any case law. He submitted that on 23rd January 2014, he was suspended from duty allegedly on being found in a patient's room, which is opposite a room where he had been assigned to pick a patient. The Claimant submits that the Respondent's witnesses and himself testified that nothing was found on the Claimant's body and nothing was missing in the room.

15. In respect of the disciplinary hearing, he submits that the Minutes of the Disciplinary Hearing held on 28th January 2014 do not lay any reason to support the conclusion. In addition, that the composition of the disciplinary committee and the minutes did not level charges which the Claimant was expected to answer.

16. The Claimant submits that the Respondent acted hurriedly and failed to produce any investigation report.

Respondent's Submissions

17. The Respondent in its written submissions submits that RW2 stated that she found the Claimant holding a patient's purse which was an act in breach of his contract of employment. The Claimant relied on Section 44 of the Employment Act, which provides that an employer may summarily dismiss an employee where his conduct indicates he has breached his obligations. The Respondent cited the case of **Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR** where it was held;

"It is not the role of the Court to re-enact the internal disciplinary process already undertaken at the work place."

18. The Respondent further submits that it was entitled to summarily dismiss the Claimant having satisfied all procedural requirements and in compliance with Section 41 (1) of the Employment Act. The Respondent cited the case of **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** which further cited the legal fairness requirements set out in Daniel **Kiplagat Kipkeibut v SMEP Deposit Taking Micro Finance Limited [2016] eKLR**.

19. The Respondent submits that investigations were conducted by the Respondent's security department. The Respondent further submits that the disciplinary committee included a Union shop steward and the reasons for the committee's decision were duly communicated to the Claimant.

20. In respect of the Claimant's terminal dues, the Respondent submits that the Claimant is not entitled to prayers ought as he was summarily dismissed and paid his salary during the suspension period. Moreover, the Claimant had not cleared with the Respondent in spite of being informed to collect his leave pay of 36 working days.

21. I have examined all the evidence and submissions of the Parties. The Claimant's evidence is that he was summarily dismissed ostensibly because of being found in a patient's room where he was not entitled to.

22. The Claimant aver that when he entered the patients room he had no intention to steal but had seen a key hanging on the door and wanted to check if it was ok.

23. The Respondents contend that this was an act of theft which called for summary dismissal and that the Claimant was taken through the disciplinary process.

24. The Respondents aver that they also took Claimant through the disciplinary process.

25. The question then is whether there was a valid reason to warrant summary dismissal of the Claimant.

26. Section 45(2) of Employment Act 2007 provides instances where summary dismissal can be effected. The instances are listed 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

iii) that the employment was terminated in accordance with fair procedure..".

27. The Respondent have contended that Claimant trespassed in a patient's room with intent to steal, a fact that the Claimant denied.

28. Indeed trespass in itself is not a valid reason to warrant summary dismissal. Suspension with intent to steal too is not a ground for summary dismissal. Section 44(4) of Employment Act explains explicitly when an employee may be summarily dismissed.

29. In the case of the Claimant herein summarily dismissal was not the appropriate cause of action. The Respondent if they felt so strongly that the Claimant had breached his duty they should have terminated him.

30. In the circumstances, I find the dismissal of the Claimant was unfair and unjustified. I will convert the dismissal to a normal termination and award the Claimant as follows:-

1. 1 month's salary in lieu of notice = 30,031/=

2. Unutilized 42 leave days = $43/30 \times 30,031 = 42,043.40/=$

3. Claimant's salary from time of suspension on 23rd January 2014 to 27th March 2014 = $3 \times 30,031 = 90,093/=$.

4. 6 months' salary as compensation for unfair termination = $6 \times 30,031 = 180,186/=$.

Total = 342,353/=

5. 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 13th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ongicho for Claimant – Present

Respondent – Absent