



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.998 OF 2013

PATRICK KIILU MUNYAU CLAIMANT

VERSUS

THIKA NURSING HOME RESPONDENT

JUDGEMENT

Background

1. It is important to take a background to this case before getting into the issues.
2. The memorandum of claim was filed on 2nd July, 2013 and defence filed on 2nd August, 2013. On 24th October 2013 the 2nd respondent made application seeking to have the claim against him dismissed which was allowed on 27th May, 2014. Since, the claimant has made great effort to have the main claim heard, served the respondent with notices to take a hearing date but failed to attend and upon taking such a hearing date ex parte, served the respondent but all notices are received “under protest”. On 11th October, 2016 hearing was adjourned for the respondent to be served again. On 1st December, 2016, hearing was adjourned for the respondent to be served again. On 7th February, 2017 the court being satisfied that the respondent was served and the notice for hearing received by the respondent on 16th December, 2016 but the respondent opted to be absent, proceeded and heard the claimant.

Claim

3. The claimant was employed by the respondent on 15th June, 1985 as the Hospital Administrator. Such employment was terminated on 26th March, 2013 after the claimant had tendered his letter of resignation which the respondent instead of accepting it decided to terminate the claimant. The respondent failed to follow the collective bargaining agreement in pale and o terminal dues were paid. The termination was unfair and unlawful.

On 4. 3rd April, 2013 the claimant made demand and asked for the respondent to review its decision to terminate him to no avail. The claimant is seeking;

Pay for annual leave due at Kshs.21,500.00;

Leave allowance kshs.5,000.00;

4 days worked unpaid Kshs.5,735.00;

Gratuity/severance pay kshs.580,500.00;

Compensation; and

Costs of the suit.

4. The claimant testified in support of his case. Upon employment by the respondent he worked diligently until his summary dismissal on allegations that he was in possession of company cash of 6 months. The claimant as the Administrator was not handling cash as there was an accountant and secretary. Before he claimant was dismissed he had thought of leaving employment to start a business in his home town and therefore on 18th February, 2013 he handed in his letter of resignation with a one month notice taking effect in March, 2013. The claimant was instantly dismissed. When the respondent learnt of the resignation and before the claimant could serve the notice period, he was dismissed. The respondent did not want to pay the service pay for long service as had happened to other employee. The claimant had no previous record of misconduct and the summary dismissal was unfair and unjustified.

Defence

5. In defence, the respondent case is that he claimant was employed in 1993 when the current owner of the 1st respondent hospital bought it and he was summarily dismissed from his employment for gross misconduct, dishonesty, and theft of the hospital property. The remedies sought are not due and the claimant was not declared redundant to justify the claim for severance pay. The claim has no merit and should be dismissed.

6. As noted above, the respondent failed to attend at the hearing and no evidence was called. The defence is also devoid of any work record or evidence as required by the Court Rules read together with section 10(7) of the Employment Act.

Submissions

7. The claimant submits that for 27 years he worked for the respondent since 15th June, 1985 and on 18th February, 2013 he resigned from his position as an Administrator which was to take effect on 1st April, 2013. The respondent opted to dismiss the claimant. No reasons were given for the termination contrary to section 41 and 43 of the Employment Act and the dismissal was therefore flawed as held in **Kenneth Gichuru versus BOG St. Teresa Girls Secondary School, Cause No.1329 of 2011; Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eklr; Kenya Union of Commercial & Allied Workers versus Meru North Farmers Sacco Limited, Cause No.74 of 2013;**

Where an employer fails to follow the mandatory provisions of section 41 of the Employment Act, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair.

8. The claimant also submits that the provisions of section 45(2)(c) of the Employment Act were not followed and the termination of employment had no validity, was not justified and the remedies sought are due.

Determination

9. The contract of employment is that the same was issued 15th June, 1990 and overwritten by hand to be issued in 1985 but this is not countersigned by either party. I will take the original script as stating 1990.

10. On 18th February, 2013 he claimant resigned from his position as administrator. The Employment Act allow end of employment by termination, resignation, dismissal or lapse of a fixed term contract. The

resignation was not accepted. The claimant was summarily dismissed. The dismissal was on the reasons that;

... on several occasions you were in possession of patient's money and you did not issue receipts for the same.

On 30/8/12 you received Kshs.19,000 from Stanley Wandaka being hospital bill for Grace Naluyima. This amount of money was paid in cash pending production of NHIF card of the patient. Up to 25/3/2013 the money had not been receipted and the amount could not be traced in the hospital accounts or books.

11. Where an employee as grossly misconducted self, summary dismissal is allowed in accordance with section 44 of the Employment Act. However the safeguard to this right to dismissal is that the employer must ensure section 41(2) of the Act is followed;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make

12. For the respondent to thus issue a summary dismissal letter to the claimant on 26th March, 2013 over events that are alleged to have taken place on 30th August, 2012 and only do so after he had tended his letter of resignation is to engage in unfair labour practice. I find the claimant was not given a hearing and the allegations made in terms of matters set out under the summary dismissal notice of 26th March, 2013 are not supported by any evidence. In terms of section 45 of the Employment Act, the dismissal was unjustified and unfair.

Remedies

13. On the finding that the claimant was unfairly dismissed upon his resignation which was to take effect on 1st April, 2013 notice pay is due in accordance with section 35 of the Employment Act. The claimant is hereby awarded Kshs.21,500.00;

14. Annual leave due in terms of section 28 of the Employment Act is payable. The claimant is awarded Kshs.21,500.00.

15. The leave travel allowance is claimed at Kshs.5,000.00 but the basis for his claim is not set out. If this was the practice of the respondent, this was not part of the letter of employment. Such is declined.

16. the claim for severance pay is premised on the facts that the claimant served for 27 years and should be paid in accordance with the CBA. This was a case of summary dismissal under the provisions of section 44 of the Employment Act. A claim for severance pay only arise under section 40 of the Act where there is a redundancy. From the evidence on record, this did not stand out as a case of redundancy. Even where there is a service pay due, which is not part of the claim, there is no CBA attached to show how such was due and the claimant did not state which union he belonged to for the court to extract the applicable CBA for information on its terms. Front the claimant's payment statement, there were statutory deductions to NHIF and NSSF in accordance with section 35(5) and (6) and in the absence of a CBA, service pay is not due.

17. The claim for service pay cannot be made at the submissions stage. This is a substantive prayer and ought to be part of the orders sought in the Memorandum of Claim. Claim for severance pay is declined.

18. Claim for 4 days worked during the nurse strike are not gone into at all. The claimant does not set out what he did to warrant the claim for such pay. It is not demonstrated how the nurse strike caused the claimant to either work overtime nor had duties allocated outside his normal work hours or line of duty.

Such is declined.

19. Compensation is due in a case of unfair termination of employment in terms of section 49 of the Employment Act. On a salary of Kshs.21,500.00 the claimant is awarded 12 months' salary all at Kshs.258,000.00.

20. From the claimant's payment statement, he was making pension contributions of Kshs.1000.00 such should have been invested under the Retirement Benefits Authority Act (RBA) and a different set of Rules and Regulations are operative. Where such an amount was not invested for the claimant by the employer, such are all due with interest for the entire duration of contribution.

Judgement is hereby entered for the claimant against the respondent in the following terms;

- a. The dismissal of the claimant was unfair;**
- b. Compensation awarded at Kshs.258,000.00;**
- c. Notice pay at Kshs.21,500.00;**
- d. Leave pay Kshs.21,500.00; and**
- e. Costs of the suit.**

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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