



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 130 OF 2015**

***(Before D. K. N. Marete)***

**ISAAC NJOROGHE.....CLAIMANT**

**VERSUS**

**MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of an Ammended Memorandum of Claim amended on 12th April, 2016. The issues in dispute are therein cited as;

- 1. Wrongful, unprocedural and unfair termination of employment.*
- 2. Damages for violation of fundamental freedoms.*

The respondent in a Statement of Response dated 15th July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on 29th May, 2006, he was employed by the respondent as Cook II at a salary of Kshs. 4,599.00. He served with dedicatedly, unsavoury and without any meaningful warning/lawful warning in his record until the date of his wrongful termination on 23rd April, 2014.

It is the claimant's further case that he was suspended on allegations that he had stolen a bag of charcoal and engaged in unfair practices to which he responded vide a letter dated 15th August, 2013.

The claimant avers malicious and unlawful termination as follows;

- i. No evidence of investigation was availed to the claimant.*
- ii. The suspension letter alleged that the claimant was seen carrying an 'item' particulars of the item were not given.*
- iii. The suspension letter alleged that the claimant colluded with an unnamed colleague to steal;*
- iv. To date no report has been made to the police by the respondent regarding the alleged theft as is the due process of law;*

v. To date no criminal charges have been pressed against the claimant by the police regarding the alleged theft;

vi. Particular of the alleged corrupt practices as alleged in the suspension letter were never availed to the claimant;

vii. The claimant was never accorded a hearing nor an opportunity to call his witness in his defence.

viii. Results of the investigation that was conducted by the respondent were never availed to the claimant;

ix. The supervisors of the respondent had in the past and while in duty entrusted the claimant with the respondent's valuables and no allegations of theft had ever arisen;

x. The work station of the claimant was well secured by CCTV surveillance but during the disciplinary process of the claimant, the CCTV footage was never relied on by the respondent.

12. That the claimant avers that termination was unlawful/unfair and/or illegal on the following grounds;

i) The respondent did not give the claimant termination notice as provided by Section 35(1) c & 36 of the Employment Act;

ii) The respondent denied the claimant's employment without following the procedure laid down in the Employment Act specifically the procedure laid out in section 15 and 41 of the Employment Act;

iii) The respondent terminated the claimant's employment without proving that the reason for termination was valid as provided under section 43 of the Employment Act;

iv) The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under Section 15 of the Labour Institutions Act;

v) The respondent failed and/or neglected to give the claimant a certificate of service contrary to Section 51 of the Employment Act;

14. That Claimant avers the respondent's Board of Management acted unlawfully during the appeal process and in blatant contravention of the Constitution, principles of Equity on justice and equity and the Employment Act on grounds that;

i) He was never accorded a hearing during the Appeal process;

ii) The appeal process lasted a period of three months during which period he received no communication from the respondent; and

iii) No evidence of investigation was availed to him;

iv) The respondent expressly advised him that it would NOT entertain any further correspondence from him regarding the matter thus closing all avenues of redress.

He prays as follows;

a) The claim be allowed in entirety with costs be borne by the respondent;

b) Any other or further relief that this Honourable court may deem fit and just to grant.

## CLAIMS

1. A declaration that the termination of employment was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the claimant;
2. Compensation for the loss of prospective future earnings for 20 years based on the last gross salary earned;
3. General damages for unlawful, malicious termination and a violation of fundamental freedoms and rights as per the Bill of Rights;
4. A maximum compensation as per Section 49 (c) of the Employment Act and section 15 of the Labour Institutions Act;
5. A certificate of service as per Section 51 of the Employment Act;
6. Costs and interest of this suit.

Broken down as follows;

1. 1 month pay in lieu of notice Kshs 30,239
2. Hospital Staff pension dues
  - a) Employee Contributions  
1,353 per month\* 103 months Kshs 139,359
  - b) Employers Contributions  
2705 per month \* 103 months  
(For the period May 2006 to Jan 2014) Kshs 278,615
3. Pending Wages for August, 2013  
30,239 \* 7 days Kshs.7,055
4. 12 months wages for unfair terminations  
30,239 \* 12 months Kshs. 362,868
5. Unpaid salary for the period 29/7/2013 upto 23/4/2014  
Gross pay x number of months worked  
30,239 x 8.5 months Kshs. 257,031.50/-
6. Unpaid salary increment areas for the period July, 2012 to August, 2013 (See CBA)  
3315 x 13 months Kshs. 43, 095

7. Unpaid house allowance increment for the period

July, 2012 to August, 2013

Kshs 23,400

8. Loss of prospective future earnings

30,239\*12 months \* 20 years

Kshs 7,257,360

TOTAL

KSHS. 8,057,496

TOTAL

KSHS. 723,688.50/-

The respondent's case is that on the night of 21st May, 2013, the claimant colluded with one of his colleagues to steal charcoal from the Respondent's Amenity Main Kitchen as they were captured on CCTV camera carrying away the sack of charcoal towards the gate where his motorbike was parked. Investigations were lodged and later on the claimant was suspended from duty pending further investigation as he was being involved in corrupt practices and

committing an offence to the detriment of the respondent. At the same time the claimant was asked to show cause as to why disciplinary action should not be taken against him.

The claimant denied that he was carrying the charcoal towards his motorbike whereupon he was invited to a disciplinary advisory committee on 21st November, 2013.

*11. On 23/1/2014 the respondent separated officially with the claimant with effect from 20/11/2013 for the reason that he was involved in corrupt activities and also committing a criminal offence to the detriment of the respondent's property. The claimant was given 14 days to appeal against the decision to have his services terminated to the board of management.*

This was considered but failed and he was informed accordingly.

The respondent's further case is that the claimant was suspended as per the terms and conditions of service.

*15. The claimant was suspended as per the terms and conditions of service. The suspension letter clearly showed the kind of misconduct the claimant was facing. He was required to show cause at the same time why disciplinary action should not be taken against him. He responded to the charges.*

*16. In his response the claimant admitted that indeed the CCTV camera had captured him with his colleague but denied the fact that he was seen carrying the sack of charcoal towards where his motor bike was parked. This revelation from the claimant was self evident that he was indeed at the scene of the incident.*

The respondent's other case is that the claimant was invited for a disciplinary hearing at the respondent's premises where he was accompanied by a shop steward/ Mr. Paul Athing. The management presented its case and even presented the CCTV clips which the claimant did not deny. These charges were contained in his suspension and show cause letter therefore ousting a possibility of ambush on the claimant. He had been awarded adequate time to prepare for his defence.

It is upon these proceedings and the respondent's finding the defence unsustainable that the claimant's services were terminated. They had been complete loss of trust in the employment relationship. The claimant was issued with a termination letter which explained his right of appeal. His appeal however, through a letter dated 4th February, 2015 did not adduce any justifiable grounds for review of the decision of termination and this was sustained. A communication was done vide a letter dated 23rd February, 2014.

The issues for determination therefore are;

1. Whether the termination of employment for the claimant by the respondent was wrongful, unfair and unlawful.
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of the claim.

The matter came to court variously until the 2nd December, 2016 when it was heard *inter partes*.

The 1st issue for determination is whether the termination of employment for the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his evidence and written submissions reiterates his case of unlawful termination of employment. He also seeks to rely on a myriad of authorities in support of his case but these are not useful in the circumstances.

The claimant further sets out a case of unlawful termination and submits this was contrary to Section 45 (2) of the Employment Act as follows;

*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 employees conduct, capacity or compatibility or*
    - (ii) *based on the operational requirements of the employer and that*
  - (c) *That the employment was terminated in accordance with fair procedure*

He also seeks to rely on the authority of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment.

Section 45 (4) (b) of the Employment Act, 2007 provides as follows:-

*...that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee."*

He further sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

1. (a) *That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.*
2. (b) *That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
3. (c) *That the employer has heard and considered any explanations by the employee or their representative.*
4. (d) *Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

Again, in the case of **NICHOLUS MUASYA KYULA V FARMCHEM LIMITED INDUSTRIAL CAUSE NUMBER 1992 OF 2011; [2012] LLR 235 (ICK)** the court held that:-

*“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”*

In the case of **KABENGI MUGO V SYNGENTA EAST AFRICA LIMITED INDUSTRIAL CAUSE NUMBER 1476 OF 2011** where the court held that:-

*“The Kenyan employment law no longer accepts the ‘at will doctrine’ whereby an employer can fire employees at will, for any reason or no reason.”*

And lastly in the case of **DONALD ODEKE V FIDELITY SECURITY LIMITED INDUSTRIAL CAUSE NUMBER 1998 OF 2011; [2011] LLR 277** the honourable court held that:

*“It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair.”*

*..... in view of the a foregoing, there is no evidence that the Claimant was subjected*

*to either the procedure above, the disciplinary procedure set out in Section 41 of the Employment Act, 2007 or the Respondent's internal disciplinary procedural rules if any at all. The claimant submits that he was not issued with any notices to show cause and neither was he heard prior to termination from employment. Our prayer therefore is that you find*

*the procedure adopted by the Respondent by summarily terminating the Claimant irregular.*

*That the termination of the Claimant's employment was unfair for want of both substantive justification and procedural fairness.*

The respondent in her brief written submissions also reiterates her case for lawful termination of employment. This was based on the misconduct of the claimant at the work place from which he was led through due disciplinary process and found culpable and therefore terminated from employment. This is illustrated as follows;

*15. It is clear that the respondent could not continue to have the claimant as an employee as the trust had broken down. It was there within the limits placed on the employer to make such a decision of separating with the claimant. The decision was reasonable placed in similar circumstances any person could have done the same.*

*16. In the case of DE BEERS CONSOLIDATED MINES LIMITED -VS- THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION IN THE LABOUR APPEAL COURT OF SOUTH AFRICA IN Case No: JA 68/99 the court held that “I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being a such a serious degree as to be described as gross, then dismissal inter alia, an appropriate and fair sanction.*

*17. The court went on to analyze the issue of dishonesty and said-The seriousness of dishonesty – I.e whether it can be stigmatized as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business.*

The claimant in a Claimant’s Response to the respondent submissions dated 10th February, 2017 brings out an elaborate account and submissions in support of a case of unfair and unlawful termination of

employment. It is his submission that the disciplinary process lacked substantive and procedural fairness, particularly in that the claimant's appeal was not heard but unilaterally determined by the respondent. He also denies admission of the evidence of the respondent on his admission of theft. The claimant also submitted the evidence of the respondent in support of a defence was wanting and in any event, inadequate. This is good but I choose to disagree. The respondent's case overwhelms that of the claimant on a balance of probabilities and preponderance of evidence.

From the foregoing, it is observable that the claimant has failed to establish a case of unlawful termination of employment. The respondent's is the probable story and scenario and I therefore find a case of lawful termination of employment. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, she becomes disentitled to the relief sought. The 2nd issue for determination is thus answered.

I am therefore inclined to dismiss this claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 23rd day of March 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant.

Mr. Masese instructed by Federation of Kenya Employers for the Respondent.