



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 153 OF 2016

WILLIAM KINYANJUI KAMAU..... CLAIMANT

-VERSUS-

**THE SECRETARY HOSPITAL BOARD PCEA TUMUTUMU HOSPITAL.....
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17th March, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 30.06.2016 through Keli & Mwaura Associates. The claimant prayed for judgment against the respondent for wrongful and unfair termination and for payment of terminal dues including:

- a) Pay in lieu of termination notice Kshs.46, 175.00.
- b) Gratuity at 25% of basic salary Kshs.25,675 x3 years x 12 being Kshs.924, 300.00.
- c) Leave allowance for 2013 Kshs.3,500.00.
- d) Compensation for loss of employment 12 months x 46,175.00 making Kshs.554, 100.00.
- e) Issuance of a certificate of service.
- f) Costs of the suit.
- g) Any other further or better relief that the honourable court may deem fit to grant.

The response to the memorandum of claim and the counterclaim was filed on 20.07.2016 through Kinyua Kiama & Company Advocates. The respondent prayed for judgment against the claimant for:

- a) The claimant's claim to be dismissed with costs.
- b) The claimant to pay the respondent Kshs.1, 402, 483 together with interest at court rates of 12% from 07.06.2013 until payment in full.
- c) An order directing the claimant to clear with the respondent by surrendering back the job card issued to him and to refund the costs of putting up a public notice incurred as a result of his refusal to do so.

The claimant filed the reply to the defence and defence to counterclaim on 28.07.2015. The claimant prayed that the defence and counterclaim be dismissed with costs and judgment be entered in favour of the claimant as prayed for in the memorandum of claim.

By the letter dated 01.09.2011 the respondent employed the claimant as an accountant. By the letter dated 30.11.2011 the respondent confirmed the claimant in the position of accountant with effect from 01.10.2012.

By the letter dated 15.07.2013 the claimant was dismissed from employment with effect from 07.06.2013 on account of absconding duty from 07.06.2013.

The **1st issue** for determination is whether the dismissal of the claimant amounted to unfair termination of the contract of employment. RW was the respondent's Hospital Administrator one David Kariuki Maringa and he testified to support the respondent's case. RW's testimony was as follows. On 07.06.2013 the respondent's finance manager reported that the claimant was absent from duty. The finance manager reported that the claimant had informed the finance officer by telephone where the finance manager was to get the key to the safe and upon opening the safe, it was empty. The amount of money that was reported as missing from the safe was Kshs.1,402, 483.00. The finance officer called the claimant to report on duty on that day but the claimant's cell phone remained off. A report was made to the police in that regard and the claimant was traced by the police on 11.06.2013 and was subsequently charged with the offence of stealing by servant and at the time of hearing the present case, the criminal case was pending determination. On 18.06.2013 a suspension letter was issued against the claimant on account of absence from duty without permission from 07.06.2013 to 18.06.2013. The claimant failed to reply the allegations in the suspension letter and the Board decided that he be dismissed from the respondent's employment.

The claimant testified that he had no permission to be away from duty from 07.06.2013 to 11.06.2013.

Accordingly, the court has considered the evidence and finds that the respondent has established that there was a valid reason to dismiss the claimant as envisaged in section 43 of the Employment Act, 2007. The termination of the claimant's employment was not unfair.

To answer the **2nd issue** for determination, the court returns that the claimant is not entitled to any of the remedies as prayed for. First, the court has found that the termination was not unfair. Second, the claimant did not provide evidence and offer submissions to justify the other prayers. Accordingly, the prayers will fail.

The **3rd issue** is whether the respondent is entitled to prayers in the counterclaim. RW testified that the counterclaim is based on the respondent's case that the claimant stole the amount of money subject of the counterclaim. RW further testified that a determination as to whether the claimant stole as alleged was subject of the pending criminal case. RW further testified that the claimant had not been asked to explain about the missing money in an administrative disciplinary proceeding because it was subject of the police investigations and the pending criminal proceedings. Accordingly, the court returns that in view of the pending criminal proceedings, it cannot be said that the respondent has established that the claimant stole the money subject of the counterclaim. Accordingly, the counterclaim will fail in that regard.

The respondent offered no evidence about the prayer for refund of costs of putting up a public advertisement about claimant's termination, return of the job card, and requirement for the claimant to clear with the respondent. In the respondent's written submissions there is a summation of the evidence and indeed there was no mention of evidence given in that regard. Further the respondent's submissions urged nothing about that prayer. Thus the court returns that the prayer is deemed abandoned and is therefore declined.

In conclusion, judgment is hereby entered for the parties for dismissal of the memorandum of claim as well as the counterclaim with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 17th March, 2017.

BYRAM ONGAYA

JUDGE