



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1710 OF 2012

(CONSOLIDATED WITH

CAUSE NO. 1709 OF 2012)

VINCENT MURIITHI NJAGI1ST CLAIMANT

JOSPEH KURIA NJENG'ERE2ND CLAIMANT

VERSUS

THE ATTORNEY GENERALRESPONDENT

M/s Mwaniki for 1st claimant and 2nd claimant

M/s Beda for respondent

JUDGMENT

1. The claimant was a civil servant from 17th January 2008 and worked continuously until he was dismissed from employment on 25th July 2011, following allegations that the claimant together with his colleagues were involved in loss of drugs at Kerugoya District Hospital.
2. The claimant filed this suit on 24th September 2012 alleging that the dismissal was not for a lawful cause and that the respondent did not follow a fair procedure in dismissing the claimant from employment.
3. The claimant set out particulars of illegality and malice in the memoranda of claim as follows;
 - a.) That he was unlawfully suspended/interdicted before investigations were carried out to establish any wrong doing on his part.
 - b.) The respondent intentionally misrepresented to the claimant that upon interdiction, procedural fairness and justice would follow and that he would not be judged without his side of story being heard and considered.
 - c.) The claimant was interdicted and dismissed from duty in violation of Sections 41 and 44 of the Employment Act, 2007 (Act No. 11 of 2007).

d.) The claimant was denied the details of the wrongs disclosed by investigations, if any, prior to being subjected to the disciplinary process.

e.) The claimant was not given any notice and was never given a copy of the findings of the investigation report. The said denial contravened Article 35 of the Constitution.

f.) The decision is not based on any grounds permitted or envisaged under Sections 41 and 44 of the Employment Act, 2007.

4. The claimant prays that the suit be allowed with costs.

Response

5. The respondent set out the facts leading to the dismissal of the claimant from employment as follows;

a.) 1,000,000 tablets of Cotrimoxazole 960 mg was received from Kenya Pharma on 29th September, 2009 and no entries were made in the bincard to acknowledge receipt.

b.) There were no records in the department to show that the Cotrimoxazole 960 mg drugs were disposed despite there being a daily activity register.

c.) Failure to indicate the strength of the Cotrimoxazole issued that is whether 960 mg or 480 mg and not entering the counter requisitions and issue vouchers into the bincard.

d.) Failure to keep records of prescriptions to support how the drugs were dispensed and failure to fill in the Antibiotic register.

e.) Failure to account for 141,767 tables out of 1,000,000 tablets which is equivalent to 283.54 tins.

f.) Reported from National Drug Authority Uganda that they had seized Cotrimoxazole 960 mg batches manufactured in Kenya and which entered the country illegally.

g.) Confirmation by Mission for Essential Drugs that the batches seized, 920921, 920923, 920924, 920942 and 920943 were indeed received but not entered in the bincard.

h.) The drugs were withdrawn from the stores without raising the S11 counter requisition and issue voucher.

i.) The usage of the Cotrimoxazole 960 mg was not based on the batch number hence they could not account for the specific batches in question that is 920921, 920923, and 920924 respectively. Consolata Mission Hospital and Mukuru Reuben Clinic accounted for the drugs delivered to them from Kerugoya District Hospital

j.) There was no report made to the police about the missing drugs.

k.) It was further established that more G.O.K drugs were on sale in Kerugoya town whose source was likely to be Kerugoya District Hospital.

6. The respondent further states that the claimant was given opportunity to defend himself in terms of Section 41 of the Employment Act, 2007. The respondent relies on the letter dated 3rd May 2010 in this regard in which the respondent asked the claimant to show cause why the Government should not effect the final steps towards dismissal from the service.

7. The respondent states that Government considered the response by the claimant, the same was not credible and the claimant who was already under suspension was dismissed from service.

8. That by a letter dated 25th July 2011, the claimant appealed against the decision to dismiss him summarily from service. The appeal was considered and the dismissal was upheld.

9. The claimant prays for:

(a.) General and exemplary damages for unlawful termination of employment.

(b.) Pension applicable to civil servants in the claimant's job group at the time of termination of his employment.

(c.) Special damages in the sum of Kshs.1,059,863/=.

(d.) Interest on (a) and (b) above at court rates from the date of filing this suit.

(e.) Costs of this suit.

(f.) Any other or further relief the Honourable court may deem fit and just to grant.

Consolidation

10. The suit was consolidated with cause no. 1709 of 2012 (**Joseph K. Njeng'ere versus The Attorney General**) on 13th December 2012.

11. The two suits arose from the same facts and circumstances and the issues are the same. The only difference is that Joseph Njeng'ere was terminated from service on 1st August 2011 and the respondent has lodged a counter claim of Kshs.884,874.10/= being salaries and allowance for the period that the claimant allegedly absconded duty.

Testimony

12. The 1st claimant testified before Honourable Lady Justice Maureen Onyango. Mr. Vincent Mureithi Njagi, told the court that he responded to the notice to show cause by a letter dated 3rd May 2010 in which he explained that the consignment of drugs said to have been lost was received by the pharmacist in charge one Dr. Samson Kuhora on 29th September 2009.

13. That he was not involved in receiving and verifying the drugs which was the sole responsibility of the pharmacist.

14. That the respondent did not respond to his explanation nor was he called to a hearing. That he thereafter received a letter of dismissal dated 18th March 2011 in absence of any hearing at all in violation of Section 41 of the Act.

15. That he was not aware of the allegations made against him prior to his interdiction from duty.

16. The claimant concluded that he was innocent in every respect and his dismissal could only be explained by malice.

17. That the dismissal was backdated to the day of receipt of the letter of interdiction on 16th April 2010.

18. That upon making an appeal to his employer against the dismissal, he did not receive any response and was not called to a disciplinary hearing nor to an appeals hearing.

19. The claimant also did not receive the outcome of investigations conducted.

20. That the buck stopped with the Pharmacist since he received, verified and signed delivery notes of all

the drugs to the facility. That the Pharmacist also failed to record the consignment as required before storage.

21. The claimant was not charged with any offence and when he saw the investigation report before court, the same did not implicate him with the loss of drugs in any material way or at all. That he became aware of the loss during investigations. The claimant relied on documents attached to the memorandum of claim and explained that his actions in the course of duty were well documented.

Dr. Joseph Kuria Njeng'ere

22. The 2nd claimant gave a similar exculpatory testimony as the 1st claimant. On his part however the 2nd claimant received a response to his appeal which response confirmed the dismissal. He later got a letter claiming Kshs.884,874.10/= allegedly for salary and allowances received by him during the time he had absconded duty. He denied having absconded duty and no such claim was made against him at the time of dismissal.

23. The 2nd claimant denied any involvement in the alleged loss of drugs stating that the buck stopped with Dr. Kuhora who disappeared when investigations were called in. That the 1st and 2nd claimants participated in the investigations.

24. The 2nd claimant was not called to a disciplinary hearing nor to an appeals panel contrary to Section 41 of the Employment Act. No reasons were given for rejecting the appeal.

25. The dismissal was backdated to 29th April 2010 even though he received the letter of interdiction on 16th April 2010 and the letter of dismissal was dated 1st August 2011. The backdate was by 22 months. This was evidence of malice on the part of the respondent.

26. The 2nd claimant reiterates that he worked up to the date of suspension but not as alleged by the respondent that he absconded duty

Defence hearing

27. The respondent failed to bring its witnesses to testify on 28th July 2014, 28th January 2015, 10th November 2015 and 13th July 2016. On 13th July 2016, the court deemed the defence case closed for failure to bring any witnesses and gave directions on the filing of final submissions.

28. The claimant's case stands uncontroverted in all material respects therefore since the respondent did not adduce oral or documentary evidence before court in support of its court. Pleadings perse do not constitute evidence unless the documents are produced by consent of the parties which did not happen in the present case.

Determination

29. The oral and documentary evidence by the 1st and 2nd claimants consists reasonable and credible exculpation against those allegations made against them by the respondent and which led to their suspension and dismissal from service.

30. The pharmacist in charge Dr. Kuhora received and was over all accountable regarding all drugs received and stored at Kerugoya hospital.

31. There is absence of direct or circumstantial evidence implicating the 1st and 2nd claimants in the loss of the drugs. The respondent failed to produce any evidence in this respect.

32. The 1st and 2nd claimants have discharged the onus placed on them in terms of Section 47 (5) of the

Employment Act, to show that their summary dismissal was wrongful. On the converse, the respondent has failed to justify the reason for the dismissals.

33. The summarily dismissal of the 1st and 2nd claimant was therefore not for a valid reason in violation of Section 43 as read with Section 45 of the Act.

34. The 1st and 2nd claimant have demonstrated that they made explanation in response to the notice to show cause given to them by the respondent. They have buttressed this rebuttal in their oral testimony under oath before court.

35. The respondent failed to call the two to appear before a disciplinary hearing in terms of the disciplinary code and procedure that appertains in the Civil Service. The respondent therefore violated the right to a fair hearing of the 1st and 2nd claimant in the circumstances of this case, given the compelling explanation given by the claimants in their written responses.

36. The respondent, having failed to call any witness before court failed to demonstrate to the court that there was no need for a disciplinary hearing in this case in terms of Section 41 of the Act, which in any event is couched in mandatory terms.

37. In Mombasa ELRC Civil Appeal No. 76 of 2016, Kenya Ports Authority –vs– Fadhil Juma Kisuwa; Makhandia, Ouko and M’Inoti JJA had this to say on Section 41 of the Employment Act on requirements of a fair hearing

“The duty to hear an employee is limited to the employer explaining to the employee clearly the nature of the accusations for which it is contemplated that his employment be terminated and an opportunity for the employee to make representations, if any, which the employer will consider in deciding, one way or another. Only where the employee wishes to be accompanied at the hearing by another employee or a shop floor union representative, will it be necessary to hear him in their presence.”

Section 41 is in accord with the well-known rule of natural justice which are today constitutional principles.”

38. On the question whether the hearing must be oral the Court of Appeal said;

“it must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstance of particular case.”

39. In that particular case, the Court of Appeal found that even though there was no oral hearing, the court was satisfied that the respondent afforded the employee an opportunity as contemplated in Section 41 in that

“The respondent’s response to the show cause letter was hollow and did not offer any explanation regarding the forged documents yet that was the crux of the matter.”

40. In the present case, the 1st and 2nd claimants responded to the notice to show cause with tangible exculpatory statements addressing the crux of the matter and pointing where the blame lay. It was incumbent on the employer to constitute a disciplinary hearing which is clearly provided for in the civil service disciplinary code and procedures including an appeal to the Public Service Commission.

41. The respondent failed the fairness test contemplated under Section 41 as read with Section 45 of the Act.

42. The court finds that the summary dismissals of the 1st and 2nd claimants was substantively and procedurally unfair therefore.

43. The claimant is entitled to remedies provided under Section 49 of the Employment Act 2007 and other laws guiding this matter and this court finds accordingly.

Terminal Benefits

A. Withheld salary

44. Both claimants received half salary from April 2010 to February 2012. The court having found that the summary dismissal was unlawful, find that the withheld salary for 22 months calculated

$(22 \times \frac{1}{2} \times 46,081) = \text{Kshs.}506,891/=$ be paid to the 1st and 2nd claimants each.

B. Pension

45. The 1st and 2nd claimants are entitled to payment of pension applicable to civil servants in the 1st and 2nd claimants' job group with effect from the date of their summary dismissal.

C. Compensation

46. Compensation for wrongful and unfair dismissal is provided by Section 49 (1) (c) as read with subsection 49 (4) of the Employment Act.

47. The 1st and 2nd claimants were career pharmacists with good prospects of career advancement. They were falsely implicated in loss of drugs at their work station and their careers were maliciously brought to an end in the civil service. Their good names were tarnished, were not paid any terminal benefits and their being no evidence implicating them in the loss of drugs, the court finds that they did not contribute to the dismissal.

48. The 1st and 2nd claimants suffered immense loss and damage.

49. In the case of **Shankar Saklan versus DHC Global Forwarding (K) Ltd (2012) eKLR**, the court awarded 12 months' salary as compensation for wrongful summary dismissal.

50. Judicial precedents and the provisions of Section 19 (4) act as a guide in awarding compensation. However each case is to be treated on its own merits.

51. In the circumstance of this case, set out herein before, the court awards the 1st and 2nd claimants maxim compensation equivalent to 12 months gross salary provided under Section 49 (1) (c) of the Act for the wrongful summary dismissal.

Counterclaim

52. The counterclaim is dismissed for lack of evidence.

53. The final orders of the court are as follows;

The respondent to pay the;

1st Claimant

A. (i.) Kshs.506,891/= arrears salary.

(ii.) Pension from the date of termination.

(iii.) Compensation (12) months in the sum of Kshs.552,972/=.

2nd Claimant

(i.) Kshs.506,891/= arrears salary.

(ii.) Pension from the date of termination.

(iii.) Compensation (12) months in the sum of Kshs. 552,972/=.

B. Interests at court rates from date of judgment till payment in full.

C. Cost to follow the outcome.

Dated and delivered at Nairobi this 21st Day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE