



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 45 OF 2013**

**NICHOLAS TIMWEZI.....CLAIMANT**

**VERSUS**

**SOCIAL SERVICE LEAGUE (MP SHAH HOSPITAL).....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This action is brought by Nicholas Timwezi against his former employer, Social Service League (MP Shah Hospital). The claim is contained in a Memorandum of Claim dated 15<sup>th</sup> January 2013 and filed in Court on 16<sup>th</sup> January 2013. The Respondent filed a Memorandum of Defence on 28<sup>th</sup> March 2013 and the matter proceeded by way of written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a Staff Nurse at an entry salary of Kshs. 37,200 which was later increased to Kshs. 49,600 as at the time he left employment.

3. On 12<sup>th</sup> November 2012, the Claimant received notification of a disciplinary hearing on allegations that he had participated in an incident where one of the Respondent's senior managers, Chinwedu Achebe was assaulted and hospital property destroyed. In a subsequent letter dated 15<sup>th</sup> November 2012, the Claimant was advised to bring someone of their choice to the hearing.

4. On 26<sup>th</sup> November 2012 the Respondent wrote to the Claimant again asking him to attend the disciplinary hearing on 28<sup>th</sup> November 2012 on which date the Claimant asked for an adjournment as he was unwell. By letter dated 30<sup>th</sup> November 2012, the Respondent rescheduled the hearing to 3<sup>rd</sup> December 2012 upon which the Claimant notified the Respondent that he was still unwell and asked for a hearing on 6<sup>th</sup> December 2012.

5. On 4<sup>th</sup> December 2012, the Respondent summarily dismissed the Claimant alleging that the Claimant had frustrated the disciplinary hearing and that he had assaulted a member of management and destroyed hospital property.

6. The Claimant states that at a prior meeting held on 28<sup>th</sup> September 2012 between members of the management team and the union workers committee, the issue of harassment of workers by Chinwedu Achebe had been discussed. The workers had also written a complaint to the Respondent's Chief Executive Officer on 25<sup>th</sup> June 2012.

7. The Claimant adds that on 5<sup>th</sup> November 2012 when an alleged strike is said to have taken place, the Chairman of the Hospital, senior management and staff representatives met and agreed that management would address the issues and revert back to staff within a week.

8. It is the Claimant's case that his termination was unlawful and unfair. He now claims the following:

- a) Compensation for unlawful termination.....Kshs. 634,800
- b) Service pay for 5 years.....264,500
- c) Salary for December 2012.....52,900
- d) Costs

### **The Respondent's Case**

9. In its Memorandum of Defence filed on 28<sup>th</sup> March 2012, the Respondent admits having employed the Respondent as a Staff Nurse at a monthly salary of Kshs. 28,125 effective 1<sup>st</sup> December 2007.

10. While denying the Claimant's claim, the Respondent states that on 5<sup>th</sup> November 2012, the Claimant in the company of other employees participated in an illegal strike and physical attack on a senior manager of the Respondent, Chinwedu Achebe. The incident brought business at the Hospital to a standstill and the Police were called in to restore order.

11. Following this incident, forty six (46) employees were summoned to a disciplinary hearing and some had since been relieved of their duties. During the disciplinary hearings the Claimant was mentioned as one of the ring leaders in the incident and illegal strike.

12. On 12<sup>th</sup> November 2012, the Claimant was served with notification of a disciplinary hearing. He was informed of his right to be accompanied at the hearing by either a union representative or a fellow employee. On 23<sup>rd</sup> November 2012 when the disciplinary hearing was to be held, the Claimant appeared with persons who were neither union representatives nor fellow employees. The hearing was therefore rescheduled to 26<sup>th</sup> November 2012.

13. On 24<sup>th</sup> November 2012 the Claimant wrote to the Respondent requesting for more time to prepare his defence. He also sought to know the members of the Disciplinary Committee so as to gauge their impartiality. The Claimant further raised a raft of issues and asked for an extension of seven (7) days within which he was to be supplied with any documentary evidence against him.

14. The Respondent states that the Claimant's letter was received on 26<sup>th</sup> November 2012 which was the date of the hearing. The hearing did not proceed and was rescheduled for 28<sup>th</sup> November 2012 on which date the Claimant appeared late and stated that he was unwell. The Claimant was allowed to seek medical attention and the hearing was deferred to 3<sup>rd</sup> December 2012.

15. The Respondent goes on to state that the Claimant sought medical attention at its facility on 28<sup>th</sup> and 30<sup>th</sup> November 2012 and when he sought further medical attention on 3<sup>rd</sup> December 2012, the doctor certified him fit to resume work. The Respondent took this to mean that the Claimant could attend the disciplinary hearing and therefore declined to grant any further extension of time. Finally, the Claimant was summarily dismissed on 4<sup>th</sup> December 2012.

16. It is the Respondent's case that the summary dismissal was justifiable and fair.

### **Findings and Determination**

17. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

18. The Claimant's dismissal was communicated by letter dated 4<sup>th</sup> December 2012 stating as follows:

*"Dear Mr. Timwezi,*

#### **REF: SUMMARY DISMISSAL**

*Reference is made to our several letters according you an opportunity to appear before a management Disciplinary Hearing Committee on various dates between 23<sup>rd</sup> Nov 2012 and 3<sup>rd</sup> Dec 2012 in order to explain why disciplinary action should not be taken against you for the offence of assaulting a senior member of the management M/s. Achebe on 5<sup>th</sup> Nov 2012 within the Hospital premises and also maliciously causing damage to hospital property. You failed to appear before the Committee on all four occasions that you were accorded time and opportunity to be heard as required under Section 41 of the Employment Act 2007.*

*On 23<sup>rd</sup> November you disrupted the first Disciplinary Committee Hearings by bringing in strangers to participate and again on 26<sup>th</sup> Nov 2012 you failed to attend but instead wrote a letter making unreasonable conditions and allegations.*

*You were accorded another opportunity to appear before the disciplinary committee on 28<sup>th</sup> Nov 2012 but you called in sick and received treatment at the Hospital's Casualty Department. The meeting was called off and rescheduled for 3<sup>rd</sup> Dec 2012. On this date you reported as scheduled but again requested to be attended to by the doctor who reviewed your condition and confirmed you as fit to report on duty. You however reported back to the Committee stating that you were still unwell and wrote a letter to the same effect.*

*In the same letter you once again raised issues regarding your right to representation, an issue which has been clearly addressed in all prior communications inviting you to attend the disciplinary hearing. It is as well noted that in spite of being informed of your right to have another employee or a shop floor union representative of your choice present as provided by Section 42(1) of The Employment Act 2007; you have declined to bring one along on all the occasions you have been invited.*

*The management notes with concern that all efforts to accord you a fair hearing have clearly been frustrated by all manner of obstacles occasioned by yourself, needless to mention the time and resources allocated. Due to your lack of cooperation the management now has no option but to proceed to determine the matter without any further reference to you.*

*The management views the act of physically assaulting your superior and causing malicious damage to the employer's property as a serious gross (sic) misconduct that justifies summary dismissal in accordance with Section 44 of the Employment Act 2007 and has therefore decided to summarily dismiss you from the service of the organization with effect from the date of this letter.*

*You shall be paid your final dues up to and including the date of dismissal and receive your certificate of service after proper handing over of all company issues in your possession.*

*Yours faithfully,*

(Signed)

**FALGUNI CHUDASAMA**

**HUMAN RESOURCES MANAGER**”

19. According to this letter which is fairly detailed, the Claimant was accused of assaulting a member of the Respondent’s management and malicious damage to hospital property. While the Claimant was invited to a disciplinary hearing on account of these charges, he never got to respond.

20. The disciplinary hearing was first scheduled for 23<sup>rd</sup> November 2012 when the Claimant is said to have been accompanied by strangers thus occasioning an adjournment to 26<sup>th</sup> November 2012. On 24<sup>th</sup> November 2012 the Claimant wrote to the Respondent asking for at least seven (7) days to prepare his defence. He also asked for details on composition of the Disciplinary Committee and any documentary evidence against him.

21. A new date for the disciplinary hearing was set for 28<sup>th</sup> November 2012 on which date the Claimant called in sick and was allowed to seek medical attention at the Hospital. The hearing was postponed to 3<sup>rd</sup> December 2012 but the Claimant asked for a further extension up to 6<sup>th</sup> December 2012 on the ground that he was still unwell. This request was turned down and the Claimant was summarily dismissed on 4<sup>th</sup> December 2012.

22. The question now before the Court is whether the Claimant squandered the opportunity for a disciplinary hearing thus exposing himself to summary dismissal. According to the Respondent, the Claimant frustrated the disciplinary process by making many demands and excuses. The Respondent produced the Claimant’s medical records detailing his medical condition and progress. From these documents, the Court confirmed that as at 30<sup>th</sup> November 2012, the Claimant was still unwell.

23. In *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* this Court held that an employee facing disciplinary action must be given adequate opportunity to prepare their defence. Such an employee is also entitled to advance information on any documentary evidence against them.

24. The Claimant was certified fit to resume work on 3<sup>rd</sup> December 2012 and it seems to me unreasonable for the Respondent to insist on proceeding with the disciplinary hearing on this same day. Further, the Respondent did not respond to the Claimant’s request for information on the composition of the Disciplinary Panel and documentary evidence against him.

25. For these reasons the Court finds that the Respondent not only failed to establish a valid reason for the Claimant’s dismissal as required under Section 43 of the Employment Act, 2007 but also ignored the procedural fairness requirements under Section 41 of the Act.

### **Remedies**

26. Pursuant to the foregoing findings I award the Claimant six (6) months’ salary in compensation. In making this award I have taken into account the Claimant’s length of service and the Respondent’s conduct in the dismissal transaction. Since the dismissal was unlawful, the Claimant is entitled to one (1) month’s salary in lieu of notice in accordance with his employment contract. I further award the Claimant salary for four (4) days in December 2012.

27. According to his pay slip the Claimant was a contributing member of a private pension scheme as well as the National Social Security Fund. The claim for service pay must therefore fail.

28. Finally I enter judgment in favour of the Claimant in the following terms:

a) 6 months' salary in compensation.....	Kshs. 317,400
b) 1 month's salary in lieu of notice.....	52,900
c) Salary for 4 days in December 2012 (52,900/30x4).....	<u>7,053</u>
<b>Total.....</b>	<b>377,353</b>

29. The judgment amount will attract interest at court rates from the date of judgment until payment in full.

30. The Claimant will have the costs of this case.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF APRIL 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mang'erere for the Claimant

Miss Oyombe for the Respondent