



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

AT NYERI

CAUSE NO. 114 OF 2016

DENNIS MUTUMA.....CLAIMANT

-VERSUS-

GUNDUA FOUNDATION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 25.05.2016 through Igweta Murithi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's services was illegal, unlawful, and wrongful.
- b. The respondent to pay the claimant Kshs. 2, 214, 000.00 being salary arrears for 3 months Kshs. 165, 000.00 and Kshs. 2, 214, 000.00 being overtime worked and not paid.
- c. General damages for unlawful termination of employment.
- d. Statutory dues and retirement benefits.
- e. Costs of the dispute and interest on a, and b, hereof at court rates.
- f. Any other relief that the court may deem fit to grant in the circumstances.

The defence was filed on 15.07.2016 through Ng'ang'a Munene & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The respondent employed the claimant by the letter of appointment effective 26.03.2012 and at the respondent's inception. The claimant, like other nurses in the respondent's employment, was employed on a yearly renewable contract. The claimant's duties included handling maternity cases, consultations, nursing of patients and attending to emergencies. It is the claimant's case that the respondent's health centre had to operate 24 hours for 7 days. Thus, the claimant's case was that he was forced to work 16 hours instead of the normal 8 hours.

The claimant was housed by the respondent per agreement but on 01.05.2015 he decided to leave the staff housing accommodation because the house was too small for his family and the doctors advised that his

sick child was sickly due to the very low environmental temperatures at the health centre, where the respondent also housed the claimant.

The claimant's further testimony was that in June 2015 he started complaining about overtime and he requested the management to separate night and day shift. On 13.07.2015 the claimant received a termination letter. The termination letter stated that the respondent's board had decided to restructure so that the claimant's services were no longer required. The termination was stated to be due to redundancy upon the organisational restructuring. The letter stated that the claimant's last day at work was to be 13.07.2015 and he would be paid days worked till July 2015, any accrued leave days, any overtime accumulated and signed off, 2 months' pay in lieu of the termination notice, and severance pay for every year of service.

By the letter dated 13.07.2015, the claimant was paid by the respondent a sum of Kshs. 155, 660.00 and the claimant signed in acknowledgement of receipt and that he had read and accepted the pay as his full and final settlement and he had no further claims against the respondent.

The **1st issue** for determination is whether the signing of the acknowledgement and discharge precluded the claimant from filing the present suit. The court finds that the respondent was not thereby discharged of the claimant's claims for unfair termination. The court follows its opinion in **Duncan Mwirigi Arithi –Versus- Jhpiego Kenya [2015]eKLR** that the exit agreement and discharge of liability did not bar the claimant from urging the case of unfair termination because in any event, section 35 (4) of the Employment Act, 2007 provides that nothing in the section (on pay of service pay or pay in lieu of notice) affects the right of the employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with section 47 of the Act. Further the court follows the opinion in **Simon Muguku Gichuki –Versus- Taifa Sacco Society Limited [2012]eKLR** where **Ndolo J.** stated thus, **“Before proceeding to address the issue of remedies, I will dispense with the discharge note signed by the claimant to the effect that he had no further claims to make against the respondent. I take judicial notice that this is a common requirement by employers for departing employees. It is however expected that parties will work within the law. An employer cannot therefore circumvent their obligation to an employee by producing a form of discharge executed by an employee. If the law is not followed, no form of discharge can cure the irregularity. I have therefore disregarded the discharge note executed by the claimant in determining this case.”**

The **2nd issue** for determination is whether the termination was unfair. In the termination letter the respondent stated that the termination was due to redundancy on account of organisational restructuring. In the certificate of service titled **“Letter of Employment”**, the respondent stated that the claimant left the respondent's employment because the respondent required its staff to be living on the health centre's premises whereas the claimant relocated to Meru Town for personal reasons. The court finds that the reason for termination of the employment was not valid as envisaged in section 43 of the Employment Act, 2007 because clearly, the alleged redundancy never took place. The dismissal was therefore unfair for want of a valid reason. The court has considered the evidence and returns that it was a contractual term that the respondent provides housing accommodation for the claimant. The evidence is that the respondent satisfied that requirement but the claimant decided to leave the housing as provided and left unilaterally. The court finds that the claimant substantially contributed to his termination and is not awarded compensation for the unfair termination under section 49(1) (c) of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The claimant prayed for the respondent to pay the claimant Kshs. 2, 214, 000.00 being salary arrears for 3 months Kshs. 165, 000.00 and Kshs. 2, 214, 000.00 being overtime worked and not paid. There was no evidence and submissions to justify the prayer. The same is deemed abandoned.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the termination of the contract of employment between the parties on account of redundancy was unfair for want of a genuine reason for termination.

b. Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 5th May, 2017**.

BYRAM ONGAYA

JUDGE