



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 116 OF 2016

MARGARET WANJIRU NDEGWA.....CLAIMANT

-VERSUS-

THE BOARD OF TRUSTEES

NANYUKI COTTAGE HOSPITAL.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 23.05.2016 through Kimunya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that her termination was unfair and unlawful.
- b) Twelve (12) months gross salaries being damages for unfair termination.
- c) Unpaid monthly responsibility allowance for 8 years at Kshs.10, 000.00 per month.
- d) Costs of the claim.
- e) Interest at court rates.

The respondent filed the response to the claim and counterclaim on 13.09.2016 through Kariuki Mwangi & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs and judgment be entered against the claimant on the counterclaim for:

- a) A declaration that the contract of employment between the claimant and the respondent was null and void ab initio.
- b) Kshs.422, 000.00 paid to Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB) as a surcharge for illegally operating a medical laboratory while it was not registered.
- c) Kshs.567, 000.00 being excess payment to the claimant on voluntarily relinquishing the position of Medical Laboratory Superintendent or in-charge or manager.
- d) Kshs.1, 027,061.00 in overpriced supplies.

e) The claimant to bear costs of the counterclaim.

The respondent employed the claimant as a Laboratory Technologist on a one year contract renewal on annual basis and effective 1994. The claimant worked alone in the respondent's Laboratory until 2007 when she became the in-charge of the respondent's laboratory. The respondent's case is that the claimant was the laboratory in-charge from 1994 and not 2007. On 10.12.2013, the parties signed the detailed job description for the Laboratory In-Charge.

The claimant remained in the respondent's continuous service upon fixed term contracts which were enhanced to 2 year contracts per the last of such contracts signed on 12.05.2015 for the term 01.05.2015 to 30.04.2017. By the letter dated 28.09.2015 the respondent offered the claimant an option to continue on the system of 2 years' renewable contracts or to have a permanent contract of employment. The letter stated that if the claimant opted for a permanent contract, the same would take into account the duration she had served the hospital since her first appointment. On the same date, the claimant signed on the space provided on the letter signifying that she opted for the permanent contract.

The respondent addressed to the claimant the internal memorandum of 13.10.2015. The memorandum stated that high prices of laboratory supplies as purchased by the claimant had been observed. Further, a random sample of quotations from various sources indicated that the supplies would have been bought at lower prices. A sample of some of the items and comparison prices was attached on the memo. The memo concluded by requesting the claimant to provide to the respondent a written report by 5.00pm of that date explaining whether there had been competitive bidding for the items, whether the respondent got quality and best prices for all the purchased items, and any other issue the claimant wished to bring to the respondent's attention to assist in the clarifications.

The claimant replied by her note dated 13.10.2015 that there had been no competitive bidding. Further, the claimant replied that the respondent had got the best quality known to her but she was not sure of the best prices due to lack of competitive bidding; that she had not been allowed to order items from suppliers who did not have an account with the respondent; that some items were single sourced such as the pap smear kit from the main hospital's supplier; some items had been ordered from a new supplier as the current supplier did not have the item; and some items were unavailable when needed and could only be ordered when they became available.

The respondent served upon the claimant the offence sheet dated 10.04.2016. It was alleged that on diverse dates between May and August 2015, the claimant had purchased laboratory supplies without following the procedures. The particulars of the offence were stated to include:

a) Expensive supplies.

b) Failure, refusal, and neglect to register the hospital laboratory with KMLTTB, thus running the laboratory illegally from the date the claimant was appointed as the in-charge, up to September 2015.

c) As a result the hospital was made to pay penalties of Kshs.240, 000.00 for the years 2010 to 2015.

The offence sheet concluded by inviting the claimant to appear before the Disciplinary Committee on 11.04.2016 at 08.30am in the Boardroom. It stated that the claimant had a right to be accompanied by a person of her own choice and to call witnesses. The evidence on record suggests that the claimant attended the hearing but complained that she had not been accorded enough time to prepare her defence.

The respondent terminated the claimant's employment by the letter dated 11.04.2016. The letter stated as follows:

“Dear Madam,

TERMINATION OF EMPLOYMENT

You were our Laboratory in-Charge between 2007 and September 2015. When requested by the Hospital management to facilitate registration of the Lab, you demanded payment for use of your practicing licence, besides your normal salary. Between 2014 and August 2015, KMLTTB issued us notice of intended prosecution twice. Even after the KMLTTB issued the notices, you still refused, failed and or neglected to have the Lab registered. You therefore continued to operate the Lab illegally thus exposing the Hospital to criminal liability for operating an unlicensed Lab.

Further, the operating costs of the Lab were very high under your watch, which reduced drastically when you were removed from being in-Charge.

On 11th April 2016, you appeared before a Disciplinary Committee which found you liable for the above misconducts.

Your above actions and / or omissions are gross misconduct warranting summary dismissal. Your services are therefore terminated with effect from 11th April, 2016.

Please clear with the Hospital and collect your dues from Finance Department.

Yours faithfully,

For: NANYUKI COTTAGE HOSPITAL

Signed

BEN MWARANIA

Chief Executive Officer

Cc: Finance Department”

Being dissatisfied with the termination of her contract of employment, the claimant filed the present suit.

It is not in dispute that the claimant was the respondent's employee from 1994 to 11.04.2016.

The 1st issue for determination is whether the termination of the contract of employment between the parties was unfair. The reasons for the dismissal were two. First it was alleged that the claimant procured expensive laboratory supplies and without following the respondent's procurement procedures. Second it was the claimant's alleged failure, refusal, and neglect to register the hospital laboratory with KMLTTB, thus running the laboratory illegally from the date the claimant was appointed as the in-charge, up to September 2015.

On the first allegation the court returns that the respondent's procurement procedures that the claimant allegedly breached were not established at all. It is submitted for the respondent that comparisons of the prices for laboratory supplies were made between the prices the claimant had procured the supplies and the prices after the claimant had been relieved of the procurement duties. It was submitted for the respondent that the claimant failed to make the best bargains in procuring the respondent's laboratory supplies. The court finds that in making the said comparisons, it is obvious that the respondent never took into account the effect of the time variance or lapse on prices and it was logically difficult to hold the claimant liable for the variance in prices. The court further finds that the respondent's case was not that the same suppliers were willing to offer better prices (but for the claimant's failure to bargain) at the time the claimant procured the supplies. Further and most crucial in the court's findings, the respondent failed to rebut the claimant's explanation that there had been no competitive bidding instituted by the respondent; and that the respondent had got the best quality known to the claimant and that the claimant was not sure of the best prices due to lack of competitive bidding policy. The court finds that the

claimant's explanation that she had not been allowed to order items from suppliers who did not have an account with the respondent was not refuted by the respondent. The court finds that there is no reason to doubt the claimant's account that at the time she was involved in procurement of the respondent's laboratory supplies, some items were single sourced, such as the pap-smear kit from the main hospital's supplier. The court further finds that, in view of the material on record, there is no reason to doubt the claimant's explanation that some items had been ordered from a new supplier as the current supplier did not have the items in issue, and further, some items were unavailable when needed and could only be ordered when they became available. In particular, the court finds that the respondent failed to show or to offer explanation on how it resolved the cited crucial issues of facts during the disciplinary proceedings and the issues remained unresolved at the end of the hearing in court.

The court has found that the respondent did not establish the procurement procedures that were allegedly contravened by the claimant. In view of that finding and the deficient operational system in that regard, the court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus,

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”

In this case, the court finds that the alleged losses to the respondent were not established and the deficient procurement procedures on the part of the respondent could not be invoked to punish the claimant in the manner it was done.

Second it was the claimant's alleged failure, refusal, and neglect to register the hospital laboratory with KMLTTB, thus running the laboratory illegally from the date the claimant was appointed as the in-charge, up to September 2015. It is clear that the respondent was the owner of the laboratory. In that case, the prescribed statutory application form for approval to operate a private medical laboratory prescribed that the superintendent technologist not being a majority shareholder (like in the present case) had to be appointed in writing and had to accept the appointment in writing. It is not disputed between the parties that the statutory requirement for approval of the laboratory to operate came about long after the claimant had been employed by the respondent in 1994 and the court finds that the initial letter of appointment of the claimant by the respondent did not qualify for the new statutory letter of appointment as superintendent as per the prescription in the statutory form. The court finds that the evidence is clear that the claimant requested for enhanced terms of employment if she was to be appointed as the laboratory superintendent. In particular, she requested for some extra pay but which the claimant was unwilling to pay her. The court finds that by evidence, both parties were in agreement that once appointed as the laboratory superintendent, the claimant's documents would not be available for approval of another laboratory after they were used in the approval of the respondent's laboratory.

The court finds that it was due to the parties' failure to agree upon commensurate extra pay for the claimant, if the claimant was to be appointed the laboratory superintendent, which occasioned the untimely statutory approval to operate the respondent's laboratory. The court has found that the duty to apply for the approval vested in the respondent as the owner of the laboratory. Whereas in fact the claimant worked as the head of the respondent's laboratory, the court finds that the respondent failed to appoint her as superintendent for purposes of the emergent statutory approval and the claimant was not at fault as was alleged in the offence sheet and the termination letter. The court finds that the emergent

statutory requirement for the use of academic and professional certificates of qualified persons, such as the claimant, to approve operation of medical laboratories, was a fundamental shift in the terms and conditions of service as was initially agreed between the parties. The court further finds that the claimant had a genuine and well grounded grievance for extra pay if her certificates were to be used by the respondent in that regard. The court holds that the initiation of the complaint by the claimant was responsible and with good foundation and the initiation of the grievance would not constitute a fair reason for dismissal or imposition of other disciplinary penalty as envisaged in section 46 (h) of the Employment Act, 2007.

Thus, the court returns that the termination of the claimant's employment by the respondent was unfair for want of a valid reason for termination as envisaged in section 43 as read with section 47 (5) of the Employment Act, 2007.

The claimant lamented that she was served with the offence sheet on 10.04.2016 at about 8.00pm and was required to appear for disciplinary hearing the following morning at 8.30am. As submitted for the claimant, and in view of the gravity of the allegations, the very short time as was allowed was too short to enable the claimant to adequately prepare for the disciplinary hearing and in that regard, the employment was not terminated in a fair procedure as envisaged in section 45 (2) (c) of the Act.

To answer the 1st issue for determination the court returns that the termination of the contract of employment between the parties was unfair as it was unlawful.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the long service with a clean record. The court has considered the aggravating factor that the claimant was terminated for unlawful reason namely raising a responsible and founded grievance about extra pay if her certificates were to be used for purposes of the new statutory requirement for approval of the respondent's laboratory. The court has considered the aggravating factor that the termination was also due to deficient procurement procedures which the respondent had failed to institute. The court finds that the claimant did not contribute to the termination of the contract of employment and her previous record of service was substantially clean. In the circumstances and as submitted for the claimant she is awarded 12 months' salaries for unfair and unlawful termination at Kshs. 93,494.00 making **Kshs. 1, 121, 928.00** under section 49(1) (c) of the Employment Act, 2007.

While making the finding the court finds that despite signing the disclaimer discharging the respondent of further liability at receipt of some terminal dues, 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 claimant also prayed for responsibility allowance upon the allegation that she acted as the laboratory superintendent. The court has found that she was not appointed by the respondent as such and the court returns that the claim and prayer was unfounded and was not established.

The 3rd issue for determination is whether the respondent is entitled to the prayers in the counterclaim. The court makes findings as follows:

a) The respondent prayed for a declaration that the contract of employment between the claimant and the respondent was null and void *ab initio*. There was no evidence and submissions to support the prayer and the same is deemed to have been abandoned.

b) The respondent prayed for Kshs.422, 000.00 paid to Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB) as a surcharge for illegally operating a medical laboratory while it was not registered. The evidence was that the amount was paid as the due application fees, inspection fees, registration fees, and annual licence fees which was payable by the respondent to the Board. As there was no surcharge against the respondent by the Board and as was alleged and prayed for, the prayer will fail especially that the failure to register the laboratory has been found to have been due to the respondent's failure to address the claimant's valid grievance in that regard. The prayer will fail.

c) The respondent prayed for Kshs.567, 000.00 being excess payment to the claimant on voluntarily relinquishing the position of Medical Laboratory Superintendent or in-charge or manager. The court has found that the respondent did not appoint the claimant to the position of superintendent as prescribed in the relevant statutory form. The court further finds that the claimant was paid as agreed and for work performed. The prayer will therefore fail.

d) The respondent prayed for Kshs.1, 027,061.00 in overpriced supplies. The court has found that the alleged overpriced supplies were not established in view of the claimant's explanations in reply to the allegations as were levelled against her. The court has found that the respondent operated a deficient procurement system and the failures by the employer in that regard cannot be visited upon the claimant, the employee. The prayer will therefore fail.

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 by the respondent was unfair and unlawful.

b) The respondent to pay the claimant **Kshs. 1, 121, 928.00** for unfair or unlawful termination by 01.07.2017 failing interest to be payable thereon from the date of this judgment till full payment.

c) The counterclaim is dismissed.

d) The respondent to pay costs of the suit including the counterclaim.

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

BYRAM ONGAYA

JUDGE