



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

CAUSE NO. 31 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL OMONDI ADERA.....CLAIMANT

-Versus-

AGA KHAN HOSPITAL KISUMU.....RESPONDENT

JUDGMENT

The Respondent is a private company incorporated under the Companies Act providing medical services and has several branches in Kenya including Kisumu. The Claimant was employed at the Aga Khan Hospital Nairobi on 26th November 1992. By letter dated 25th January 2001 he was transferred to the Respondents Hospital in Kisumu in the capacity of Personnel Officer. By another letter dated 13th February 2002 the Claimant was promoted to the position of Personnel Manager, Aga Khan Hospital Kisumu. He was later promoted to the position of Human Resource Manager a position he held until 12th March 2012 when his employment contract was terminated.

The Claimant avers that the termination of his employment was unjustifiable, unlawful and unfair and seeks the following remedies:-

1. A declaration that the Respondent's purport termination of employment was unjustifiable unlawful and unfair in the circumstances.
2. General exemplary and aggravated damages for unfair and wrongful termination of employment.
3. Cumulative pay and interest on the loss of salary in gross compounded monthly occasioned by the unfair termination together with the days unpaid of salary in lieu of leave of the month served.
4. Interest on (2) and (3) of the courts rates of 14% from the date of filing the claim until conclusion.
5. Costs of this suit and interest thereon party and party as well as the client and advocate.

The Respondent filed a Reply/Defence to the Memorandum of Claim denying all allegations in the Statement of Claim. The Respondent on a without prejudice basis states in the Reply/Defence that the claimant was its employee. Claimant was on 26th April 2010, warned on several issues of misconduct. On 11th July concerns were raised over his failure to carry out a reference check prior to recruitment of staff thereby exposing the Hospital to risk of employment of incompetent staff and loss. In the same month the Claimant was warned for issuing a letter of recommendation to an employee who had been dismissed. In October 2011 the Claimant was accused of drawing water from the hospital for his personal use without

authority. In February 2012 the Claimant was accused of irregular recruitment. As a result of the irregular recruitment the Claimant was issued with 2 show cause letters dated 27th February 2012 and 1st March 2012. He was invited for a disciplinary hearing on 6th March 2012 but failed to attend and his employment contract was consequently terminated by letter dated 12th March 2012.

It is the Respondents averment that the termination was lawful and procedural and that it was lenient to the Claimant by terminating his employment contract rather than dismissing him summarily as the Claimant was guilty of gross misconduct under section 44(4) of the Employment Act (the Act).

The Respondent prays that he be dismissed with costs for being fatally and fundamentally defective.

At the hearing of the case the claimant testified on his behalf while the Respondent called 3 witnesses, RW1 DISMASS YALA, the Credit Controller, RW2 ASHFORD MUTWIRI GIDEON, the Pharmacist in Charge of Aga Khan Hospital Kisumu and RW3 MAUREEN ROSELINE ARWA, the Assistant Human Resource Manager. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that on Saturday 25th February 2012 he was attending MBA classes at Maseno University Town Campus. At around midday after finishing the morning lesson he proceeded to his office at the Hospital to sign letters he had left his secretary typing. Upon arrival at the office he found it open and the Finance Director was inside going through documents on his desk. The Claimant asked the Finance Director what he was looking for. He responded that he was looking for some documents. The Claimant asked him which documents so that the claimant could show him where they were but he responded that he did not need the Claimant's help as he knew what he was looking for. When the Claimant insisted the Finance Director informed him that he was looking for documents relating to some interview. The Claimant showed him where the documents were then asked him whether it was right for him to go to the Claimant's desk without his knowledge and peruse documents. The Finance Director responded that if the Claimant had a problem with that he could call the Chief Operating Officer (COO), Mr. Nadin Mavji. The Claimant called the COO on his cell phone. The COO came to his office while he was still arguing with the Finance Director and he expressed his displeasure to the COO. He informed the COO that having occupied that office for 10 years it had some of his personal things. The COO told him to remove all his personal things and then asked him to hand over the keys to the office and leave. The COO told the Claimant that he will communicate.

The Claimant testified that on Monday 27th February 2012 he received a letter titled "Show Cause and Suspension". The letter is reproduced below:

ADM/007/0254

1st March, 2012

MR. SAMUEL ADERA - P/R NO. 631

C/o Human Resource Department

Aga Khan Hospital Kisumu

P. O. Box 530-40100

KISUMU

Dear Mr. Adera,

RE: SHOW CAUSE and SUSPENSION

Subsequent to the letter dated 27th February, 2012, referring to the irregularities that have been noted in the recruitment process for the position of Pharmacy Clerk, we have come across a letter of recommendation issued by you to Ms. Pamela Mudhayi dated 26th July, 2011 recommending her to any potential employer. It is surprising that you issued this letter despite the fact that she was dismissed from the institution due to engaging in fraudulent activities. (See copy attached).

This is not only an irregular practice but is also likely to jeopardize the integrity of the institution.

You are requested to submit a written explanation on the above before close of business on Friday March 2, 2012.

In addition, in consideration of the magnitude of the allegations, a Disciplinary Hearing has been scheduled for Tuesday, March 6, 2012, at 11.00 am in the COO's Office.

During the hearing:

1. Evidence and witnesses pertaining to the matter referred to above, will be presented by representatives of the Hospital.
2. You will be given an opportunity to present your own evidence and witnesses pertaining to the same matters.

Please note, you have the right to be accompanied to this meeting by a colleague from the Hospital.

This hearing is held according to the Employee Discipline Policy and a copy of this policy is attached for your information. If you have any questions, please contact,

Yours sincerely,

NADIM MAWJI

CHIEF OPERATING OFFICE

CC. Medical Director

Finance and Administration Director

Nursing Director

The Claimant responded to the letter the same day. In his response he stated that the recruitment of pharmacy clerk was done procedurally. He urged the COO to do his own investigations on the same. The Claimant also complained in his response to the show cause letter that what he was subjected to on 25th February was as a result of a vendetta aimed at tarnishing his reputation and causing a strain between him and management.

On 1st March 2012 the Claimant received another Show Cause and Suspension letter. The letter accused him of issuing a letter of recommendation to a Ms. Pamela Mudhayi dated 26th July 2011 recommending her to potential employers despite the fact that she was dismissed due to engaging in fraudulent activities. He was accused of irregular practice likely to jeopardize the integrity of the Institution. The letter required him to submit his response before close of day on Friday 2nd March 2012. The letter further invited him to a disciplinary hearing on 6th March 2012 at 11 am in the COO's Office.

The letter further informed him that during the hearing evidence shall be presented by representatives of the Hospital and he will be given an opportunity to present his own evidence and witnesses.

The Claimant responded to the 2nd show cause letter on 1st March 2012, the same day he received it. In

his response he pointed out that it was the 2nd show cause letter and he did not know how many they will be, that it pointed to a witch-hunt and malice. On the substance of the letter the Claimant explained that the letter of recommendation he issued was a general letter indicating that the employee worked for the Hospital and did not stop any prospective employer from carrying out a background check.

The Claimant testified that he did not attend the disciplinary hearing as he was not going to get an impartial hearing since the people accusing him were the same people to hear the disciplinary case and make the decision on his fate. The Claimant testified that the letter of termination stated what he was entitled to. That he went and signed the discharge voucher so that he could be paid his terminal benefits and pension.

The Claimant testified that he had filed this suit because he felt that he was unlawfully terminated in a well orchestrated move based on the events of 25th February 2012. He prayed for justice and compensation as demanded in his statement of claim.

The Claimant stated that his gross salary at the time of termination was Kshs.173,020.

Respondent's Case

The Respondent's case as presented by the three witnesses is that there was a vacancy for pharmacy clerk which was done in February 2012. 3 candidates were interviewed and ranked. A recommendation was made by the panel which constituted RW2 and RW3 to recruit candidate No. 1 but the Claimant nullified the interview on grounds that one of the Candidates, one Rosemary had raised objections. A second interview was conducted and a total of 6 candidates were interviewed. The panel again ranked and selected candidate No. 1 to be recruited. The Claimant however did not go by the recommendation of the interview panel and selected Rosemary whom he issued a letter of appointment. The panel for the 2nd interview was composed of the Claimant, RW1 and RW2. RW2 who was the Head of Pharmacy where the pharmacy clerk would be posted learned about the appointment from Rosemary who was working at the Hospital as a volunteer and confronted the Claimant who informed him that he picked Rosemary because she was already working at the Hospital. RW2 objected and informed the Claimant that he expected candidate No. 1 to report for duty and not Rosemary. RW2 testified that at around the same time that he learned about the selection of Rosemary he met the COO who wanted to know how the interviews went. RW2 informed him about what the Claimant had done and that led to the investigations that culminated in the termination of the Claimant's employment contract.

The Respondent raised other issues against the Respondent for which apart from RW3 being taken through the documents filed in court no evidence was adduced. The documents refer to the Claimant's disciplinary record as far back as 2009 over which the Claimant had been issued cautionary letter which were resolved or he responded to and no further action was taken. I consider these to be unnecessary for the determination of the case and will therefore not go into details of the same.

Of relevance however is the issue of recommendation letter issued by the Claimant to one Pamela Mudhayi who had been summarily dismissed from employment for fraud and whose letter of dismissal the Claimant had signed.

Submissions

In the written submissions filed on behalf of the Claimant it is submitted that he was terminated without adequate notice and was not given a hearing. It was submitted that the employer is obliged to prove the grounds of termination under section 43 of the Act and that no fair and valid reason was given for the termination of the Claimant's contract of employment. It is further submitted that the Claimant was never notified of proceedings, never accorded enough time to prepare his defence and never present at the trial.

For the Respondent it was submitted that the Claimant committed breaches which fundamentally breached his obligations as demonstrated by the memos produced by the Respondent which the Claimant admitted. It was submitted that the Claimant actively interfered with interview process and abused his

position by pushing for recruitment of Rosemary. It was further submitted that the Claimant having summarily dismissing Pamela Mudhayi issued a glowing recommendation to prospective employers putting to risk the integrity and reputation of the Respondent. It was further submitted that the Claimant disregarded the invitation for a disciplinary hearing despite being the Human resource Manager and having himself handled disciplinary cases in his capacity as Human Resource Manager.

It was submitted that the evidence on record demonstrated that the Claimant was issued with a show cause and suspension letter on the issue of recruitment of pharmacy clerk and the recommendation to Pamela Mudhayi and that he admitted that he failed to attend the disciplinary hearing. The Respondent submitted that it complied with section 41 and 45 of the Act and the letter of termination clearly set out the grounds for termination as required by law.

On the remedies sought by the Claimant the respondent submitted that executed the discharge voucher which expressly discharged the Respondent from liability. The Respondent submitted that he is barred and precluded from maintaining the claim. The Respondent further submitted that the Claimant admitted having been paid as per letter of termination which covered salary for days worked, pension, 3 months notice less leave taken in advance and Kshs. 58,687 owed to the Respondent.

The Respondent submitted that the Claimant is not entitled to damages for unfair termination for reason that the termination was justified and procedurally correct.

The Respondent relied on the following cases in support of its case:

1. **CENTRAL BANK OF KENYA V NKABU**, Court of Appeal, Civil Appeal No.81 of 2000 where it was held:

"Assuming that the Respondent's dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of notice, that is, three months, and the trial judge erred in awarding him more"

2. **CENTRAL BANK OF KENYA v MARTIN KING'ORI**, Court of appeal, Civil Appeal No.334 of 2002 in which the honourable judges cited and followed the reasoning and findings in the above case of **Central Bank of Kenya v Nkabu**.

3. **KENYA REVENUE AUTHORITY v MURGANI**, Court of Appeal, Civil Appeal No.108 of 2009 where it was held:

Holding 3: *"A contracting party did not have to rely on misconduct in order to terminate a contract of service and a party could terminate such a contract without giving any reason. If the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice."*

4. **WALTER MUSI ANYANJE v HILTON INTERNATIONAL KENYA LTD & ANOTHER**, Court of Appeal No.269 of 2003, where it was stated at page 5, paragraph 6:

"this court in **Kenya Ports Authority v Edward Otieno (Civil Appeal No.120 of 1997 (unreported))** drawing support from the case of **Addis v Gramophone Company (1909) AC 488** emphatically stated that there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract. See also **Rift Valley Textiles Limited V Edward Onyango Oganda (Civil Appeal No.21 of 1992** and **Ombanya v Gailey & Roberts {1974} E.A LR.522**, where in the latter case it was stated by Muli J (as he then was) that:-

"I think it is established that where a person is employed and one of his terms of employment included a period of termination of that employment, the damages suffered at the wages for the period during which his normal notice would have been current"

The Respondent submitted that in view of the clear statements of the law expounded in the above decided cases the maximum sum that should be awarded if the court finds that the dismissal was wrongful is 1 month. That since the Respondent had already paid 3 months' salary there should be no further award.

On the prayer for: **"Cumulative pay and interest on the loss of salary in gross compounded monthly occasioned by the unfair termination together with the days unpaid of salary in lieu of leave of the month"**

The Respondent submitted that there is absolutely no legal grounding or basis for this claim in the Employment Act and the respondent did not in any way incapacitate the claimant so that he was incapable of finding other employment. The Respondent submitted that the claimant was in fact the HR Manager for the County Assembly of Homabay.

The Respondent submitted that the Claim appears to be seeking future earnings which is not provided for in the Employment Act or any other legislation, relying on the case of **ROBBERT KENNEDY MOI v HON ATTORNEY GENERAL & 2 OTHERS, NAIROBI INDUSTRIAL COURT CAUSE NO.885 OF 2012** where the court stated at page 12, paragraph 4:

"payment of salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. Section 49(4) (e) required that employees mitigate their losses. Being able bodied, the claimant was expected to move on with his life after the termination of his employment The claim for payment of salary for the unexpired period of the contract is therefore without merit and is dismissed."

The Respondent prayed that the claimant's suit be dismissed with costs.

Determination

I have considered the pleadings, the evidence and submissions together with cases referred to. The issues arising for determination are whether the termination of the Claimant's employment was fair and if he is entitled to the prayers sought.

For termination of employment to be fair an employer must comply with section 41 and 43 of the Employment Act (the Act). Section 45 provides that no employer may terminate the employment of an employee unfairly and further that failure to comply with either of the two sections would render the termination of employment unfair.

Section 41 provides as follows-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the

employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

In the present case the Claimant testified that he went to his office on a Saturday and found the Finance Director ransacking his desk. When he raised objection the Finance Director told him to talk to the COO if he had any problem with what he had done. The COO then came to the office and told him to remove

all his personal belongings from the office, took the office keys from the Claimant and told him to leave. That was on 25th February 2012. It was not until 27th February 2012 that the Claimant received a letter of show cause/suspension asking him to show cause why disciplinary action should not be taken against him within 72 hours. The letter further required him to report to the COO's Office on 2nd March, 2012 at 3pm but was not informed for what purpose. After responding to the letter he again received a second show cause/suspension letter dated 1st March 2012 requiring him to submit a response to the same by close of day on March, 2nd. The letter informed him of a disciplinary hearing on 6th March at 11 am in COO's office.

Did the foregoing comply with section 41? In my opinion the Respondent did not comply with the section. When an employer asks you to leave the office and take with you all your personal belongings and takes the keys to the office without giving you a letter explaining what is happening, he effectively terminates your employment verbally without giving you a hearing or a reason. What transpired thereafter was a mere attempt at sanitising a termination that had already taken place on 25th February 2012.

The foregoing notwithstanding, the letters of show cause/suspension raise issues of the intentions thereof. Why are there two show cause letters? Was it a witch hunt as alleged by the Claimant? The second show cause letter invites the Claimant to a hearing even before he had responded to the show cause letter. Had a determination already been made so that it was not necessary to see his response to the show cause letter before deciding if there was need for disciplinary action on the accusations in the second letter? What charges was the claimant to respond to at the disciplinary hearing that he was invited to before he responded to the charges in the show cause/suspension letter?

The Claimant was a Human Resource Manager who had worked with the Respondent for more than 10 years. Having worked for that long in a senior position and with a fairly clean record going by the documents in the Respondent's bundle the Claimant deserved to be treated in a respectable manner even if he was accused of misconduct. Sneaking into his office in his absence and ransacking it and then sending him away without a letter is not respectable treatment as much as the decision of the Claimant to refuse to go for the disciplinary hearing without any explanation was not responsible behaviour expected of an officer of his stature. Even if the Claimant was upset at the manner in which he had been treated he should have objected with dignity rather than defiance as he did.

Section 45(4)(b) of the Act provides that a termination of employment shall be unfair if in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. It is my opinion that in the circumstances of this case the Respondent did not act with justice and equity and that the employment of the Claimant was therefore terminated unfairly. It is indeed my opinion that the Claimant was effectively dismissed verbally on 25th February when he was asked to remove all his belongings from his office and hand over the keys to the COO. I therefore find and declare that the termination was unfair.

Remedies

The Claimant prayed for exemplary and aggravated damages for unfair termination, and cumulative pay and interest on the loss of salary occasioned by his unfair termination to the date of retirement. From the evidence on record, the Claimant was paid salary for days worked and signed a discharge voucher in respect thereof.

The Respondent has submitted that should the court find that the termination was unfair damages should be limited to notice period only as was held in the case of **Central Bank of Kenya v Nkabu; Central Bank of Kenya v Martin King'ori, Kenya Revenue Authority v Murgani and Walter Musi Anyanje v Hilton International Kenya LTD & Anor**. All these cases were decided before the enactment of the Employment Act 2007 and are therefore based on the common law position which is no longer applicable following enactment of the Act. The law applicable is section 49 of the Employment Act 2007 which provides for remedies available to an employee whose employment has been terminated unfairly. The law neither provides for exemplary nor aggravated damages which in any event are not applicable in cases of breach of private contracts as the present one. The Act provides for damages to a maximum of 12 months'

salary.

Taking into account all the circumstances of this case, and after applying the criteria under section 49(4) of the Act it is my opinion that it is reasonable to award the Claimant the maximum compensation. I therefore award him Kshs. 2,076,240 based on his gross monthly salary of Kshs. 173,020. The Respondent shall also pay the Claimant's costs of this suit.

Dated and signed and delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE