



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 67 OF 2016

BONIFACE WAMBUGU WACHIRA.....CLAIMANT

VERSUS

THE DIOCESE OF MERU TRUSTEES (REGISTERED) T/A ST. THERESA

MISSION HOSPITAL – KIIRUA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

JUDGMENT

The claimant filed the statement of claim on 06.04.2016 through C.M. King'ori & Company Advocates. The claimant subsequently changed advocates to Warutere & Associates and filed an amended statement of claim on 29.11.2016. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's summary dismissal from the employment with the respondents was unlawful and wrongful and unfair.
- b) General damages for unlawful or unfair termination.
- c) Costs of the suit and interest.

The respondent filed on 14.02.2017 a response to the amended statement of claim through Maitai Rimita & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed by the respondent as a security guard sometimes in November 2013.

The evidence by the claimant is clear. On 29.10.2015 he was at work deployed at the hospital's gate. Some two ladies arrived and they wished to visit a patient outside the hospital's visiting hours or period. The two ladies explained that it was urgent because the patient was due for an operation. The claimant stated that he therefore called the ward in-charge per standing procedures and one of the ladies was allowed to go into the ward to see the patient. The visitor allowed to enter was the patient's wife as the other one whose entry was declined was the patient's sister. The remaining visitor, the patient's sister, started to lament and she was referred to the matron by the claimant. The matter ended with the human resource office where the claimant was summoned and later discharged.

The following day on 30.10.2015 the human resource officer summoned the claimant and asked the claimant about the events of 29.10.2015. The human resource officer told the claimant that investigations had showed that on 22.10.2015 the two women (the visitors) had given the claimant Kshs.100 as a bribe to be permitted to enter the ward at about 10am to 11am (outside hospital's visiting hours) – at a time, the

human resource officer alleged, per claimant's evidence, that the claimant at time of the bribe was deployed at the ward gate but which the claimant denied stating he had been deployed at the barrier gate. By the letter dated 29.10.2015, the respondent suspended the claimant from work for 14 days effective 30.10.2015. The letter stated that the suspension was pending investigation into allegations of corruption against the claimant.

The claimant was invited to a disciplinary hearing on 16.11.2015. Events of 29.10.2015 were revisited. It was alleged that on 29.10.2015 the claimant had asked for a bribe of Kshs.50.00 so as to allow the visitor to see the patient at the ward outside the visiting hours. The claimant denied the allegation. The claimant was subsequently dismissed from employment by the letter dated 16.11.2015 and on account of collusion with patients' relatives during or before and after visiting hours.

The claimant reported a dispute at the labour office. Parties agreed on the final dues and the claimant acknowledged receipt of the dues with a disclaimer that he had no further claims against the respondent arising from his employment.

The **1st issue** for determination is if the signing of the discharge upon payment of the terminal dues precluded the claimant from filing the suit alleging unfair termination. The court returns 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 **2nd issue** for determination is whether the termination was unfair. The court has considered the evidence and all the material on record. The claimant was given a suspension, the allegations were discussed prior to and after the suspension and the claimant was given a formal hearing. In the circumstances of the case, the court returns that the respondent's actions and steps when taken cumulatively, accorded the claimant a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. However, on a balance of probability, the court returns that the respondent has not established that there was a valid reason for termination of the contract of employment at the time of dismissal of the claimant. In particular, the claimant was not allowed to interrogate or to cross-examine the visitors who alleged that they had bribed the claimant. The court has considered the gravity of allegations of corruption or bribery and is of the opinion that the claimant ought to have been given a better chance towards exculpation rather than going by mere allegations and which were never corroborated. Thus, the court returns that the termination of the claimant's employment was unfair or unlawful for want of a valid reason as per section 43 of the Employment Act, 2003.

The court has considered that the claimant desired to continue in employment and did not contribute to his termination. Taking into account the period served and the stated factors, the court awards him 6 months' gross salaries for unfair termination under section 49(1) (c) of the Act.

In conclusion, judgement is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the contract of employment was unfair for want of a valid

reason.

b) The respondent to pay the claimant 6 months' gross salaries at the rate of the monthly pay as at termination and to pay by 01.09.2017 failing interest at court rates to be payable thereon at court rates till full payment.

c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 14th July, 2017**.

BYRAM ONGAYA

JUDGE