REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 94 OF 2016

FLORIC KANGAI.....CLAIMANT

VERSUS

P.C.E.A CHOGORIA HOSPITAL.....1ST RESPONDENT

P.C.E.A CHOGORIA HOSPITAL, MANAGEMENT BOARD.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 13th October, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 12.05.2016 through Kiautha Arithi & Company Advocates. The response to the claim was filed on 04.07.2016 through Waruhiu. K'Owade & Ng'ang'a Advocates. The respondent prayed that the suit be dismissed with costs.

The amended memorandum of claim was filed on 05.10.2016. The claimant prayed for judgment against the respondent for:

> a) **Kshs. 5, 998, 641.00** being terminal dues including Kshs. 549, 340.00 withheld pay during suspension of 20 months x 27, 467.00; salary to retirement date 178 months x Kshs. 27, 467.00 making Kshs. 4, 889, 126.00; untaken leave for 3 months Kshs. 64, 401.00; pension based on basic salary Kshs. 20, 0007 x 210 months x 5% making Kshs.210, 074.00; interest on pension being Kshs. 210, 074 x 8% x 17 years making Kshs. 285, 700.00.
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> b) Compensation for wrongful dismissal.
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> c) Interest on (a) and (b) above.
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> d) Costs of the dispute.

An amended response to memorandum of claim was filed on 28.10.2016.

It is not disputed that the respondent employed the claimant effective 03.07.1995. She served as a social worker until dismissal on 19.08.2014.

It is the claimant's case that she had a child with a recurrent ailment so that she was required to provide constant and personal attendance. it was her case that the situation occassioned her frequent absence from work at short notices to her supervisor. The child's health could deteriorate suddenly and without notice.

It is the claimant's case that on 21.07.2014 the child suddenly became unwell and the claimant conveyed her predicament to her supervisor that she would be absent because she had to take the child to hospital. On 22.07.2014 the claimant reported on duty. By the letter dated 23.07.2014 the respondent informed the claimant that her supervisor had reported that the claimant had been absent from duty on Monday 21.07.2014 without leave, lawful cause or prior notice to the supervisor. Upon reporting on duty on 22.07.2014, the letter stated that the claimant had failed to report to her supervisor and had instead proceeded to absent herself from duty in the afternoon of 22.07.2014. The letter noted that the same was not the first of similar report of the claimant's absence and it was a gross misconduct that warranted a summary dismissal. The letter required her to show-cause why disciplinary action would not be taken against her and to do so by Thursday 24.07.2014 at 12.00am. The claimant appears to have replied by the letter of 24.07.2014 and that reply was found unsatisfactory. The claimant was invited to a disciplinary hearing on 25.07.2014. The hearing went on as scheduled and the claimant attended. The letter of 25.07.2014 then followed conveying the suspension of the claimant from employment without pay effective 26.07.2014. The respondent decided to summarily dismiss the claimant from employment by the letter dated 19.08.2014 and with immediate effect.

The claimant in cross-examination stated that on 21.07.2014 she had issued an SMS to her supervisor about her predicament but at 10.00am realised that the message had not been delivered by her phone as was expected – but that it had **"hanged"** and she later forwarded it to her supervisor. She admitted that she wrote to apologise about her absence from duty on 21.07.2014. She also confirmed that on 22.07.2014 she left duty at 01.40pm and resumed duty at 02.40pm long after the lunch hour running from 01.00pm to 02.00pm. During that time she confirmed that she had been outside the office dealing with Sacco issues and she believed that it was her membership of the Sacco that led to her termination.

The court has considered the claimant's evidence and the material on record. The court returns that the respondent accorded the claimant due process of a notice and a hearing as envisaged under section 41 of the Employment Act, 2007. The claimant has confirmed by her own evidence that on 21.07.2014 she had been absent from duty and as per her letter of apology. She has also confirmed of her own evidence that on the afternoon of 22.07.2014 she was absent from duty after lunch hour without permission and she had been attending to Sacco matters. In the circumstances the court returns that it has been established that the respondent had a genuine reason to dismiss the claimant from employment on account of unexplained or justified absence from duty. The reason was valid as envisaged in section 43 of the Employment Act, 2007. As the termination was not unfair, the court returns that the claimant is not entitled to pay during the period of suspension. While making that finding the court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR,** in which the court stated thus, "**The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."**

The next issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

a) Pay for salary for 178 months till retirement date has not been justified. The claimant has failed

to establish that her future earning capacity or gainful employment has diminished and as attributable to the respondent. The prayer will therefore fail.

b) The claimant testified that she had not less than 4 unutilised leave days and the respondent's witness stated that she had 10 leave days. The court returns that she is entitled to be paid the **10 leave days** in lieu of taking the leave.

c) As pension was contributed on monthly basis per payslips on record, the claimant is entitled to the pension as contributed and the prayer for pension for future days not worked and until retirement date as prayed for will fail as unjustified and not earned at all.

The court has considered that the submission made for the claimant that dismissal for absence of 1.5 days was not proportionate punishment. Considering that submission, all circumstances of the case, and balancing justice in the matter, the court considers that each party will bear own costs of the case.

In conclusion judgment is hereby entered in the suit for:

a) The respondent to pay the claimant the 10 days of leave by 01.11.2017.

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

Signed, dated and **delivered** in court at **Nyeri** this **Friday, 13th October, 2017.**

BYRAM ONGAYA

JUDGE