



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE NO. 531 OF 2016
TERESIA AKELLO OHANY.....CLAIMANT
VERSUS
MABATI ROLLING MILLS LIMITED
(OPERATING MABATI MEDICAL CENTRE).....RESPONDENT
JUDGMENT

Introduction

1. The Claimant brought this Suit on 6.7.2016 alleging that she was unfairly dismissed from employment by the Respondent and seeking damages for the unfair termination, severance pay, Certificate of Service, costs and interest. Thereafter the Claimant amended her statement of claim to plead her salary and to clarify the reliefs sought. The Respondent has however denied the alleged unfair termination of the Claimant's contract of service and averred that the termination was fair because there was a valid reason and that it was done after following a fair procedure. The issues for determination resolve around the manner of the termination and the reliefs sought.

Claimant's Case

2. The Claimant, testified as CW1 and called M/S Maimuna Rashid as CW2. She stated that she was employed by the Respondent on 19.4.2011 and confirmed on 7.12.2011 as the Nurse in Charge of the Respondent. Her salary per month was Kshs. 81600.

3. On 23.4.2016, she received M/S Maimuna Rashid in the Health Centre for check up as earlier advised by her because her delivery was overdue by three weeks. She confirmed that she had previously met the patient during her antenatal clinics in the Centre. She explained that on 23.4.2016, the patient was complaining of abdominal pains but on examination, she found that the patient was not in labour but she had urinary tract infection and candidiasis. She therefore administered some medication and advised her to rest and wait to be discharged to go home once she felt better because she was not in labour. At 1pm her shift ended and she handed over the patient to the clinical officer Mr. Boaz Oluga, who later handed over the patient to next clinical officer on duty M/S Margaret Mulongo.

4. At around 4 pm the same day, she received a frantic call from Margaret informing her that the patient was in labour and that it was progressing fast and requested her to rush to the Centre and review the patient because she (Margaret) was also expectant. She arrived at the Centre around 6.15pm and on examination she confirmed that the patient was indeed on labour and advised her husband Mr. Cecil

Kapanya to get transport to enable her transfer the patient to a better facility. However, the husband never returned for a while and the baby had to be delivered at the Centre as an emergency. The baby came out very fast but failed to cry. She therefore called Ruth Isaboke, a clinical officer in the Centre to assist her. The clinical officer confirmed that the baby had a heartbeat and she took the baby and ran to a taxi which the patient's husband had brought and rushed the baby to Mariakani Hospital to correct the breathing. However the baby was pronounced dead on arrival.

5. According to the Claimant, she acted professionally to save life and as such it was unfair for the Respondent to dismiss her for negligence. She admitted that she was given a hearing on 3.5.2016 in the company of a fellow employee of his choice, Mr. Boaz Oluga but contended that the termination was unfair because there was no Gynecologist or Senior Midwife. She confirmed that the cervical dilation was completed at 7.30 pm and she commenced her role as a midwife. She however denied that the allegation that she was to be paid Kshs. 8000 by the patient's husband for delivery of the baby at the Centre. She also denied the allegation that she acted negligently by failing to refer the patient to another hospital and contended that the clinical officer on duty, M/S Margaret Mulongo is the one who should have referred the patient to hospital if it was necessary to do so. She maintained that as a mere nurse, she should not be blamed for failure to refer a patient to the hospital when the patient was under the care of a clinical officer in the Health Centre.

6. CW2 is the patient who was attended to by the Claimant on 23.4.2016. She denied that her husband was to pay Kshs. 8000 to the Claimant for the delivery at the Health Centre. She further denied that the Claimant was negligent when she attended her on 23.4.2016 and blamed the incidence of the said date, on the act of God.

Defence Case

7. The Respondent's Administrator, Mr. Norman D'Souza testified as RW1. He stated that on 23.4.2016 he was on duty when he saw a couple visit the Health Centre at 9.30 am. They were CW2 and her husband. They went to see the Claimant who was the Nursing Officer, In-Charge of the Centre. The Claimant paid the money at the registration desk on behalf of the patient who was heavily pregnant. The Claimant put the patient in the observation room. His shift just like the Claimant's ended at 1 pm and they went home.

8. Later in the afternoon he received a call from the nurse on duty who informed him that the CW2 was in labour and was still at the observation room. He therefore referred the nurse to the clinical officer on duty M/S Margaret Mulongo. The clinical officer called the Claimant who arrived at the Health Centre after two hours and examined the patient and proceeded to conduct the delivery at the Centre where there was no delivery room, delivery bed, theater and incubators. According to him the Health Centre was only equipped to give primary health care and refer serious cases to other hospitals. He admitted that several deliveries had been done at the Centre but contended that they were done as an emergency.

9. He denied that the delivery by CW2 on 23.4.2016 was an emergency. He also contended that the failure by the Claimant to refer the patient to Mariakani hospital, just 3 kilometers away was an act of negligence. He further accused the Claimant of dishonesty because she alleged that the baby was delivered alive while in the hospital records, she indicated that the baby was still born.

10. He explained that before dismissal, the Claimant was given a chance to defend herself, both orally and in writing. More specifically he explained that the Claimant was invited to an oral hearing on 12.5.2016 in the company of a fellow employee of her choice and she came along with Mr. Boaz Oluga. After the hearing, the Claimant was dismissed on 14.5.2016.

Analysis and Determination

11. There is no dispute from the evidence and submissions that the Claimant was employed by the Respondent as the Nursing Officer in Charge of the Respondent from 2011 to 14.5.2016 when she was dismissed by the Respondent. The issues for determination are:-

a. Whether the termination was unfair.

b. Whether the reliefs sought should be granted.

Unfair Termination

12. Under section 45(2) of the Employment Act, termination of employee's by employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reasons for termination cited in the termination letter dated 14.5.2016 included"

a. Admitting expectant patient in the Healthcare Centre while she knew it had no facility for delivery.

b. Conducting a delivery at the Centre while fully aware that the Centre does not conduct deliveries.

c. Returning to the Centre to attend the patient while there was staff on duty and also a sub county hospital at Mariakani.

d. Failed to prepare proper documentation on the patient's medical card at the Centre which amounted to negligence.

13. After careful consideration of the evidence and the submissions presented by both parties, I am satisfied that the Respondent has proved on a balance of probability that there existed a valid reasons for terminating the services of the Claimant on 14.5.2016 as required under section 43 and 45 of the Act. The Claimant admitted on oath that she attended to CW2 during her ante natal clinics and confirmed that the patient's date of delivery was overdue by two weeks. She also admitted that she was in contact with the patient due to the delayed delivery and that she had advised the patient to go to the medical Centre on 23.4.2016. She also admitted that the patient complained of abdominal pains in the morning but she treated her of urinary track infection and admitted her to the observation room to be discharged when she became well. She even left the patient at the Centre under the watch of a junior nurse and went home for the weekend. Again she was called by the clinical officer and told that the patient was in intense labour, she did not advise that the patient be referred to a better hospital nearby but instead offered to travel from Mombasa to Mariakani, more than 2 hours journey. That when she finally arrived she stayed with the patient there for an hour until the baby started coming out and she delivered the baby alone while fully aware that the Medical Centre did not have the necessary facilities for conducting deliveries. Finally when the baby was born with breathing problems, she ran out with the baby, took a taxi and rushed the baby to Mariakani hospital 3 kilometers away without any life supporting equipment only for the baby to be declared dead on arrival. Thereafter she filled birth notification with false information that the baby was a still born. All the foregoing acts and omissions by the Claimant amount to negligent performance of duty which is misconduct warranting summary dismissal under section 44(4) of the Act. Even if the Claimant acted in good faith, that was immaterial because it resulted to loss of the very life she allegedly attempted to save.

14. In addition to the foregoing, I am satisfied that the Respondent has proved on a balance of probability that she followed a fair procedure before terminating the services of the Claimant. Section 41 of the Act requires that before the employer terminates the services of his employee on ground of misconduct under section 44 of the Act, poor performance or physical incapacity, he shall explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice, the reasons for which termination is contemplated and thereafter invite the accused employee and his chosen companion a chance to air their defence for consideration before the dismissal is decided. The Claimant admitted on oath that he was invited to several meetings to defend herself on the 23.4.2016 incidence and finally attended disciplinary hearing on 12.5.2016 in the company of Mr. Boaz Odunga, a clinical officer of the Respondent. Consequently, I find that the Respondent complied with the mandatory procedure of according a fair hearing to the Claimant before terminating her contract of service.

15. Having found herein above that the Respondent has proved on a balance of probability that there was valid and fair reason for terminating the services of the Claimant, and that she followed a fair procedure before terminating her services as required under section 45(2) of the Act, I now hold that the termination of the Claimants contract of service by the Respondent on 14.5.2016 was fair.

Reliefs

16. In view of the finding that the termination of the Claimant's service was fair, I decline to make the declaratory order sought and proceed to dismiss the Claimant for Damages for unfair termination. I also dismiss the claim for severance pay because there termination was not through redundancy. The claim for Certificate of Service is however granted because it is a statutory right under section 51 of the Act.

17. The Claimant prayed for any other relief as the court may deem fit. I have considered the foregoing request and the offer of terminal dues made by the Respondent vide the termination letters dated 14.5.2016 and formed the opinion that it meets the ends of justice to order the Respondent to pay the dues offered in the termination letter being:

a. One month salary in lieu of notice.

b. 14 days salary worked in May 2016.

c. Accrued leave.

The Claimant's gross pay per month was Kshs. 81600 and that is the basis upon which to assess the dues payable if at all the same has not yet been paid to her. The said award shall be subject to statutory deductions. Each party will bear her own costs.

Signed, Dated and Delivered at Mombasa this 24th day of November 2017.

ONESMUS MAKAU

JUDGE