



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 928 OF 2013

FESTUS KYALO MUTHIANI.....CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

Mr. Solonga for claimant

Mr. Muriuki for respondent

JUDGMENT

1. By a memorandum of claim dated 18th June 2013, the claimant brought this suit on 19th June 2013 seeking reinstatement to his position of Chief Security Officer, Kenyatta National Hospital and in the alternative, compensation for wrongful and unfair termination of employment.

2. The claimant also seeks interest on the award and costs of the suit.

Facts of the case

3. The claimant was employed by the respondent on 23rd July 2003 as a Senior Security Officer.

4. On 3rd May 2005 he was promoted to the position of Chief Security Officer. The claimant worked continuously, for a period of seven (7) years until his employment was terminated on 20th December 2011 on allegations that:-

1. The claimant used hospital resources for personal gain without authority contrary to the hospital terms and conditions of service.

2. The claimant used his office to facilitate credit to a client contrary to the hospital circular KNH/FIW1 35 dated 8th February 2009 which suspended credit facilities in the hospital.

3. The claimant knowingly signed gate passes allowing a client to carry hospital property using fake documents.

5. An *Ad hoc* committee was formed to carry out investigations and hear the case. The claimant objected to the composition of the *Ad hoc* committee for reasons that the chairperson and one member had previously been investigated by the claimant for misconduct in the course of his duties and would not be

impartial in the matter.

6. Furthermore, the committee demonstrated bias against the claimant by coaching witnesses to give false testimony. That the hearing proceeded in the absence of the claimant; introducing fresh charges against the claimant without notice and denying claimant opportunity to cross examine witness and to rebut their testimony.

7. That the termination was not for a valid reason and the procedure followed was not fair.

8. The claimant made and filed a witness statement dated 18th June 2013 contents of which he adopted under oath as his evidence in chief.

9. In his testimony, he told the court that in November 2010, he found one Millicent Awuor, an informer at his office and she requested the claimant to assist her friend by the name Joseph Gitau, who had lost a son. That the son was discharged from the hospital but due to outstanding hospital bill was unable to remove the body. Awuor informed the claimant that Mr. Gitau had raised Kshs.19,000/= but the total bill was about Kshs.48,000/=. Awuor wanted the client to be allowed to offset the bill in installments.

10. The claimant discussed the matter with Deputy Director Administration and Finance but on coming back to the office did not find M/s Awuor. The claimant then directed Mr. Gitau to go to the Social Worker Ward 3C to get assistance on the matter. The claimant asked a security guard by the name Moses Simiyu to direct Mr. Gitau to Ward 3C.

11. The claimant afterwards learnt that the client had given M/s Awuor Kshs.30,000/= out of which Kshs.11,000/= was payment of a personal debt.

12. The claimant denies having facilitated or any complicity in unlawfully getting money from Mr. Gitau and in providing Mr. Gitau with credit facility contrary to hospital policy.

13. The claimant told the court that he had previously investigated the chairman of the *Ad hoc* committee that investigated him and was found guilty of assaulting the Chief Public Relations Officer, Mr. Lihare. He was interdicted and reinstated after. The claimant had also investigated the Chief Administrative officer who was a member of the *Ad hoc* committee for facilitating credit to a relative and for giving out kiosks at Kenyatta Estate without Kenyatta National Hospital Chief Executive Officer's authority. He was interdicted for 1½ years and later reinstated.

14. The claimant therefore testified that the two were biased against him, a fact which led to the wrongful finding of guilty and termination of his employment.

15. The claimant appealed the decision to terminate his employment by a letter dated 4th January 2013. The Human Resource Committee of the Board deliberated the case and upheld the decision and appeal was rejected.

16. The claimant however denies all the charges and prays that the suit be allowed.

Response

17. The respondent filed a memorandum of response dated 26th March 2014 on 5th June 2014 with list of documents in support of the respondent's case. The respondent also called two witnesses – RWI Ms. Peris Nyawira Ndung'u, a Human Resource Officer and RW2 Mr. Michael Kihuga, the Senior Assistant Director Finance, of the respondent.

18. The respondent's case may be summarized as follows: -

1. It was Ms. Ndung'u's testimony that the Chief Accountant of the respondent, one Mr. Johnson

Nyaga raised a concern vide a memo dated 15th November 2010 that the claimant herein, Mr. Festus Muthiani and another staff member, one Ms. Millicent Awuor were facilitating fraudulent credit facilities and obtained funds from the father of a deceased patient.

2. Consequently, the Chief Internal Auditor, Mr. Michael Wamathai was mandated to carry out an investigative audit to establish the aforementioned allegations which he did and prepared an internal audit report dated 4th May 2011 in which it was reported that the claimant had indeed abetted corruption by facilitating credit/waiver of hospital bill for one Mr. Joseph Kamondo Giatu, the father of a deceased patient contrary to the hospital circular KHN/FIN/35 from the Chief Executive Officer to all Heads of Department dated 8th February 2009 suspending credit waiver facilities and which warned staff members to desist from facilitating credit or abscondments as the same amount to corruption and will attract severe disciplinary action.

3. It was also reported that the claimant had failed in his position as Chief Security officer by failing or neglecting to report fraudulent credit facilitation by Ms. Millicent Awuor to the relevant authorities as her actions were well within his knowledge.

4. Pursuant to the internal audit report, the respondent appointed an ad hoc committee to deliberate on the disciplinary case involving the claimant and Ms. Millicent Awuor.

5. The committee in the course of discharging its mandate discovered that in addition to facilitating fraudulent credit transfer, the claimant also used the respondent's motor vehicle to carry water to his house and on some occasions to drop a staff member on his instructions, which amounted to misuse of the hospital vehicle. In addition, he also signed gate passes allowing Mwame Suppliers to take waste paper from the hospital using fake documents.

6. The committee found that the claimant's conduct amounted to gross misconduct and recommended that his services with the hospital be terminated with immediate effect. The committee's recommendations were approved by management and the claimant was terminated with effect from 19th December 2011 on account of gross misconduct and loss of trust.

7. The decision to terminate was communicated to the claimant vide a letter dated 20th December 2011. In the same letter, he was also informed of his right of appeal.

8. The claimant exercised his right of appeal vide a letter dated 4th January 2012 to the Human Resources Committee of the respondent. The Human Resources Committee deliberated on the matter and noted that the claimant did not raise any new grounds to warrant a review of the case and dismissed the appeal which dismissal was communicated to the claimant vide a letter dated 16th July 2013.

9. Mr. Ndung'u informed the court that the position of the Chief Security Officer at the respondent has already been filled as the respondent appointed a replacement vide a letter of appointment dated 16th April 2014.

10. Mr. Kihuga testified that on or about 11th November 2010, the claimant herein came to his office stating that he needed help in facilitating a credit facility to one of the deceased patient's family. That Mr. Kihuga informed him that such request needed to follow due process.

11. Mr. Kihuga told the court that the next day, the 12th day of November 2010, one Moses Simiyu, one of the hospital's security officers came to his office accompanied by a man who identified himself as Joseph Gitau. Mr. Simiyu informed him that he had been sent by his boss, the claimant with instructions that he should help Mr. Gitau access credit facilities. He advised them to report to the office of the Chief Accountant as was the procedure.

12. Mr. Kihuga testified that later on, the claimant came to see him in his office and informed him that one of his informers had an issue at the Chief Accountant's Office and sought his intervention. That he inquired on the nature of the issue from the Chief Accountant, Mr. Nyaga who then came to his office accompanied by Ms. Awuor. They informed him that Ms. Awuor had irregularly obtained money from a hospital client and she needed assistance so that she does not lose her job. The Chief Accountant made a report to the Finance Manager on the 15th November 2010 on the incident and with a copy to himself and the Chief Internal Auditor.

13. It was Mr. Kihuga's testimony that the claimant approached him again and inquired whether he had talked to Mr. Nyaga regarding the matter and also what was contained in the report that Mr. Nyaga had forwarded and he gave him a copy. Mr. Kihuga told the court that following the report, the Chief Internal Auditor, Mr. Wamathai was mandated to carry out an investigative audit to establish the involvement of M/S Awuor in facilitating a fraudulent credit facility and obtaining Kshs.11,000/= from Mr. Gitau.

14. Mr. Kihuga told the court that the report revealed that Ms. Awuor, in her own recorded statement admitted that she had converted hospital funds into her own personal use. The audit report recommended disciplinary action against Ms. Awuor. That following the interdiction of Ms. Awuor, the claimant approached his office seeking assistance so that Ms. Awuor's interdiction be rescinded. He requested that she be allowed to refund the money she had obtained since she was his informer, instead of being interdicted.

15. He testified that after all investigations were conducted the claimant was found to have facilitated a fraudulent credit facility and was interdicted vide a letter dated 3rd December 2010 pending further investigations into the case. That following his interdiction, the claimant approached him again and forwarded a letter through his office stating that he was acting in good faith. That he sought Mr. Kihuga's intervention in reinstating him back to work.

16. Mr. Kihuga told the court that he was interviewed by the *Ad hoc* committee and he reiterated all the above. He told the court that it was a fact that the claimant tried to influence the outcome of the investigations by approaching him on several occasions seeking his help in protecting Ms. Awuor who herself confessed to have misappropriated hospital funds.

19. The respondent prays that the suit be dismissed with costs.

Determination

20. The issues that fall for determination are as follows: -

1. Whether the termination of the employment of the claimant was for a valid reason and in terms of a fair procedure.
2. Whether the claimant is entitled to reinstatement and in the alternative compensation.

Issue i

21. From the facts that are not in dispute, it is apparent that the respondent had a lawful cause to institute disciplinary proceedings against the claimant. The claimant misused his position of influence as a Chief Security Officer to assist clients of the hospital to obtain credit from the hospital for personal gain. The claimant also used his position to obtain a favourable outcome in respect of M/S Awuor.

22. The respondent lost money in the process courtesy of untoward conduct by one Millicent Awuor, a junior officer of the hospital with connivance and/or assistance from the claimant.

23. The respondent took the claimant through a lawful disciplinary process in which the claimant was given opportunity to explain the circumstances in which he found himself in the alleged misconduct. The

explanation by the claimant was deemed unsatisfactory and his employment was terminated.

24. The claimant was given opportunity to appeal to the Kenyatta National hospital Board of Management which he took advantage of but the appeal was refused and the termination confirmed.

25. The respondent complied with the provisions of Section 41, 43 and 45 of the Employment Act. There was a valid reason to terminate the employment of the claimant.

26. The allegations that the claimant was framed by biased officers who also participated in the disciplinary process is without merit. The facts of the case speak clearly that the claimant conducted himself in a manner that fell out of his sphere of responsibility contrary to the hospital policy and in the process facilitated theft from a desperate client who had lost a child and wanted to be assisted to get the body discharged for burial.

27. The termination was effected in terms of a fair procedure set out herein before and the suit is dismissed both on the merits and procedural fairness.

28. Accordingly, the remedies sought by the claimant are not merited. No terminal benefits are sought by the claimant in this matter other than the claim for reinstatement or compensation which are both refused.

29. Given that the respondent is a large government institution and the claimant has lost his job, it would be inequitable to order the claimant to pay costs of the suit.

30. Each party to shoulder their costs of the suit.

Dated, Signed and Delivered on this 10th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE