



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 152 OF 2016

(Before D. K. N. Marete)

VINCENT OSORO ONSONGO.....CLAIMANT

VERSUS

LWALA COMMUNITY ALLIANCE.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Statement of Claim dated 1st December, 2016. The issue in dispute is therein cited as;

Wrongful and unfair termination contrary section 41 and 45 of the Employment Act No.11 of 2007, wrongful dismissal and unfair termination under section 49 of the Employment Act No.11 of 2007 and Article 41 of the Constitution of Kenya.

The respondent in a Memorandum of Defence dated 5th December, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was an employee of the respondent vide an employment contract dated 1st September, 2015. He was not paid his terminal benefits on termination of employment.

The claimant's further case is that the respondent's action of termination of his services in a letter dated 30th September, 2016 without providing him an opportunity to be heard is unprocedural for being an affront to sections 41 and 45 of the Employment Acts, 2007. It is also a violation of Article 41 of the Constitution of Kenya, 2010 besides section 5, 7, 40, 43, 45 and 49 of the Employment Act, 2007 aforesaid.

The claimant's other case is that he was dismissed without being afforded an opportunity to be heard and therefore the fallacy and deformity of the termination of the employment. This was also draconian and unwarranted.

He claims as follows;

- a) *The respondent's termination of the claimant's employment was unfair and unlawful thus amounted to wrongful dismissal and unfair termination.*
- b) *Payment of his terminal benefits as set out and particularized hereunder*

(i) Date of employment 1st September, 2015

(ii) Position Nurse.

(iii) Date of termination 30th September, 2016

(iv) Salary at termination Kshs.36,000.00

CLAIMS:-

(i) Two month's salary in lieu of notice.....72,000.00

(ii) Severance pay 15 days for each completed year....18,000x 1.....18,000.00

(iii) Salary for the month of September 2016.....36,000.00

(iv) 12 months compensation36,000 x 12.....432,000.00

Total amount due
558,000.00

In the penultimate he prays as follows;

a) The respondents' termination of the claimant's employment was unfair and unlawful thus amounted to wrongful dismissal and unfair termination.

b) Payment of his terminal benefits amounting to Kshs.558,000.00.

c) The respondents to pay costs of this suit.

d) Interest (b) above.

The respondents case is that the claimant was employed by the respondent as a nurse at an initial gross monthly salary of Kshs.31,794.00 but this was increased to Kshs.36,000.00 with effect from 1st April , 2016. This was paid at the end of every month.

The respondent's further case is that in the course of his employment several vital hospital equipments such as Pulse oxymetry, Doppler, extension cable, Digital BP, Manual BP, MVA kit, surgical scissors, speculums and bucket got lost.

Her other case is that on 27th September, 2016 she held a meeting with a view to finding a solution to the rampant theft and or loss equipment at the clinic as follows;

(i) A general meeting of the organization.

(ii) A meeting involving all medical staff.

In this meeting it was realized that the likely scenario was that this theft was caused by people working in the clinical care programme and it was suggested that staff volunteer information on this.

On 30th September, 2016 a disciplinary panel comprising of Human Resource Manager, Operations Manager and Head of Clinical was formed and this requested the claimant to appear before it. Hitherto, he had been notified the ongoing investigation on loss of hospital equipment and also that his name had been mentioned adversely. He did not show cause as to why his service could not be terminated and was therefore handed a termination letter and a clearance form.

The respondent's other case is that on 5th October, 2016 the claimant went to finalize his clearance and was presented with his terminal benefits through his september payslip. He was also issued with a certificate of service and a discharge certificate but refused to sign it. He did not accept the terminal benefits either and said he did not need the money until a later date.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his written submissions dated 4th October, 2017 submits a case of unfair termination on grounds of non compliance with section 41 (2) and (2) of Employment Act, 2007 as follows;

Section 41 (1)

Subjection 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 in 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.

Section 41 (2)

Notwithstanding any other provisions 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, chose by the employee within subsection (1) make.

It is the claimant's case that he was not accorded a fair hearing as above provided.

The claimant amplifies this by relying on the authority of **Mary Chepogeno Kiptui v Kenya Pipeline Company Limited (2014)** where it was observed that;

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

The respondent has not filed written submissions in support of her defence. Apart from the pleadings and the contents thereof, there is no further documentary support for her defence. This can be attributed to the nature of the case and the issues involved. This was a case of alleged theft at the work place in which the claimant was incriminated. It is the respondent's case that disciplinary proceedings were held and involved the claimant. These led to the dismissal now complained of.

This is a matter of your word against mine. The parties face each other on a face off for the truth. It is a matter that can only be decided on a balance of probabilities.

On a test of balance of probabilities, this matter tilts in favour of the respondent. The claimant besides failing to demonstrate a case of unlawful termination of employment on grounds of lack of substantive and procedural fairness does not sound the probable of the two cases.

Ordinarily, employees would always want to retain their good employees. These are rare and apart. It is on this presumption that one would not expect an employer to rid off useful and valuable members of their work force. This is the probable situation here and therefore my conclusion. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case for unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of November 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Tombe instructed by Tombe & Company Advocates for the claimant.
2. Miss. Omwaka instructed by Mugoye & Associates Advocates for the respondent.