



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 158 OF 2016**

*(Before D. K. N. Marete)*

**JOY KHISA.....CLAIMANT**

**VERSUS**

**THE CATHOLIC DIOCESE OF ELDORET**

**(ST. JUDE PARISH HURUMA) .....RESPONDENT**

**JUDGEMENT**

This matter came to court vide a Memorandum of Claim dated 21st November, 2016. The issue in dispute is there in cited as;

*“Wrongful termination of employment”*

The respondent in a Respondent Response to Statement of Claim dated 24th January, 2017 denies the claim *in toto*.

The claimant’s case is that she was offered employment by the respondent on 1st June, 2013 as a nurse. This was to be for a term of 2 years but subject to negotiations for renewal. The contract was to expire on 31st May, 2015 but was however renewed for a term of 3 years with effect from 1st January, 2015 at a basic salary of Kshs.14,000.00. This also included other benefits including gratuity at a rate of 16 days pay for each completed year of service. This was standard term for all employees who had done 2 years.

The claimant’s other case is that some time on 5th April, 2016 she was forced to proceed on compulsory unpaid leave by the respondent on allegations that she had become an habitual late comer to office and also been unable to carry out routine duties on a daily basis at the place of work. She was required to report back with a response on 4th May, 2016.

The claimant did respond to this and put the respondent to proof of allegations of sending her on compulsory unpaid leave in her letter dated 15th April, 2016. The respondent thereafter served her with a letter of termination contract of employment with effect from 30th April, 2016 pursuant to a board meeting held on the 21st April, 2016 on the following grounds;

Ø *“Due to the re-organization and restructuring taking place at the dispensary on matters of operations and service delivery there is need to change the caliber of staff we shall employ”.*

Ø “And considering the reasons that necessitated my letter to you of 5<sup>th</sup> April 2016 as was brought to your knowledge the board has decided to invoke article 12 (a) of your contract of employment signed by you on 1<sup>st</sup> January 2015”

She prays as follows;

1. One month gross salary for April 2016 – Kshs 17,000/-
2. Two months pay in lieu of notice – Kshs 24,000/=
3. Annual Leave days due – Kshs 4,667/=
4. Gratuity calculated at 16 days per each completed year of service – Kshs 17,230/=
5. 12 months gross salary as compensation for wrongful loss of employment – Kshs 192,000/=
6. Special damages (Kshs 25,845/=)
7. Costs of the suit
8. Certificate of service
9. That the total terminal benefits of Kenya shillings two hundred and eighty thousand, seven hundred and forty two (Kshs 280,742/=) to be paid to Joy Khisa within two weeks from the date of the order in default the principal amount to attract interest at court rates and execution to issue.

The respondents case is an acknowledgement of the employment contract of the claimant *inter partes* and further states as follows;

- a) That the claimant was employed as nurse at the facility as a nurse for two year contract from the 1<sup>st</sup> of June 2013 which was subsequently renewed for a further two year contract on 1/01/2015 which was set to expire on the 31<sup>st</sup> December 2016.
- b) That the claimant’s basic salary was Kshs.14,000 with a housing allowance totaling Kshs.2,000 of Kshs.1,000 per months.
- c) That the claimant’s salary was subject statutory deductions.
- d) That the claimant had not qualified for gratuity as she had not served for more than 3 years after the signing of the employment contract.
- e) That the claimant was sent to a one-month compulsory leave for frequently reporting to work past the stipulated time and for failing and or neglecting to carry out her duties at her place of work.
- f) The claimant was requested to go sort the issues that were negatively affecting her performance at the place of work and to report.
- g) The claimant was requested to report to her employer a month later after sorting out the said issues and to resume her contractual duties.
- h) The claimant protested against being sent on compulsory leave vide a letter dated 5<sup>th</sup> April, 2016 but failed to show up at the respondent’s for deliberation on the same. Annexure marked CD

The respondent cites the following as the reasons for termination of the employment of the claimant;

- a) *Frequent absenteeism from her place of work*
- b) *Frequent reporting to work past the stipulated reporting time*
- c) *Abandoning her duties at the place of work by leaving before the stipulated time of 5.00 pm on most occasions; at times as early as noon.*
- d) *Neglect of duties at the St. Jude health facility by failing to make monthly reports to the Ministry of Health as required and as stipulated in the contract of employment. The claimant never prepared any report during her employment period.*
- e) *Failing to keep medical records at the facility as required of her.*
- f) *Not signing against the patient's treatment cards, an obligation required of her as per profession codes of conduct.*
- g) *Exceeding the number of allowed leave days without her employer's permission. Annexure marked CD 3*
- h) *Operating a mandazi sale business and other effects at the place of work during official working hours.*
- i) *The claimant has never come back to collect her terminal dues even after being advised to do so vide a letter dated the 2<sup>nd</sup> May, 2016. Annexure marked CD 4*

In conclusion, the respondent states her case thus;

- a) *The claimant neglected to perform her duties as envisaged under contract of employment duly signed by the parties herein.*
- b) *The claimant was accorded procedural fairness prior her termination from employment.*
- c) *The claimant was subjected to proper disciplinary measures as required under section 71 of the employment act.*
- d) *Proper notice was given.*
- e) *The respondent is not under duty to pay gratuity as the claimant had not met the conditions required.*
- f) *The respondent is not under duty to pay 2 months in lieu of notice and 12 month gross salary for loss of employment to the claimant where she was fairly and procedurally terminated.*
- g) *The claimant has neglected to report to the facility to clear with the institution; and thus a certificate of service cannot issue where the claimant has failed oblige with the respondent's call to the claimant to do the same.*

This matter came to court severally until the 23rd October, 2017 when the claimant, in the absence of the respondent prayed that it be determined by way of written submissions.

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's case as espoused in her written submission dated 30th October, 2017 is that she discharged her duties as set out in clause 3 of the Contract of Employment devoid of any warning letter or any disciplinary action from the parish (respondent) until the time of termination of employment on 30th April, 2016.

She also cites her letter of compulsory unpaid leave dated 5th April, 2016 from the director of the Parish Priest Fr. Sylvanus Wesonga which she faults for not clarifying or substantiating her lapses at work as follows;

*i. Which months I frequently reported on duty pas the stipulated time.*

*ii. Which day I failed to carry out my routine duties at my place of work.*

It is her further case that instead of substantiating and supporting this injustice of unpaid compulsory leave, the respondent issued her with a letter of termination on 2nd May, 2016, two days earlier than the agreed date of her explanation and expression of her desire to return to work. She submits as follows;

The claimant further submits a case of unprocedural, unfair and wrongful termination of employment. This was due to the absence of procedural and substantive fairness occasioned by the respondent's failure to;

*i) Act in accordance with justice and equity in terminating my contract of employment in accordance with the provisions of Section 45 (4), (b) of the Employment Act, 2007 Laws of Kenya.*

*ii) Apply procedural fairness stipulated in the provisions of Section 45 (5), (a) of the Employment Act, 2007 in reaching the decision to terminate my contract of employment and handling of my protest response letter dated 15<sup>th</sup> April, 2016 against the compulsory unpaid leave.*

*iii) Comply with the statutory procedural requirements set out in Section 45 (5), (c) of the Employment Act, 2007 Laws of Kenya*

*iv) Consider the existence of any previous warning letters issued to me by the Respondent 45(5), (f) of the Employment Act, 2007 Laws of Kenya*

The claimant in support of her case again cites a breach of sections 43 (1), 41 (1) and (2), 45 (1) and (2) of the Employment Act, 2007 and Article 50 (1) and (2) of the Constitution of Kenya, 2010 as follows;

*43(1) In any claim arising out of the termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.*

*41 (1) Subject to section 42(1), an employer shall before termination the employment on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands the reason from which the employer to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) of (4) hear and consider any representations which the employee may on grounds of misconduct or poor performance and the person if any chosen by the employee within subsection (1) make.*

Further section 45 (1) comes out thus;

*45 (1) of the Employment Act provides that no employer shall terminate the employment of an employee unfairly*

*(2) A termination of employment by an employer is unfair if the employer fails to prove-*

*a) That the reason for termination is valid;*

*b) That the reason for the termination is a fair reason –*

*(i) related to the employees conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*c) that the employment was terminated in accordance with fair procedure*

The claimant further sought to rely on the authority of **Shankar Saklani v DHL Forwarding (K) Ltd (2012) eKLR** where Ongaya, J. observed as follows;

*“In view of the wording and provisions of the Section the Court finds that the provisions are mandatory in scope and application and I particular the Court holds that; (sic.)*

*a) A hearing and notification on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on the grounds of misconduct, poor performance or physical incapacity of the employer;*

Further, in the authority of **Peter Apolo Ochieng v. Amedo Centre Kenya Limited [2016] eKLR** at paragraph 39 where Mbaru, J. observed as follows;

*The provisions with regard to fair procedure leading to a termination under section 41 of the Employment Act are mandatory. Where not followed, a termination becomes procedurally unfair. Without written proceedings setting out how the claimant was heard at the meeting held on 13<sup>th</sup> August 2009 and there being no representation to accompany the claimant, the resulting termination became unfair.*

In her brief and precise written submission dated 13th November, 2017 the respondent opines that this matter should have taken the motion of a trial prior to the taking of submissions. This is because a trial affords the parties an opportunity to test the assertions of each other through cross examination. This is all lost in a situation like this where written statements are adopted without the opportunity to cross examine. She further puts it thus;

*At the very least, it is desirable in our view that if written statements are adopted, the parties are allowed to cross examine the deponents on the contents of their statements.*

I agree with the assertion of the respondent but add that it is the duty of the parties to prosecute their causes, their style. In the current circumstances, the respondent was absent when the claimant adopted this style of proceedings. It was not imposed or at all. The respondent never raised a finger until now, too late in the day. Who carries the blame?

The respondent’s submissions are a reiteration of her case as elaborately set out hitherto. In such support, she submits as follows;

*That said, the respondent has raised grounds constituting gross misconduct on the part of the claimant. The complainant was guilty of persistent absenteeism and late reporting on duty without lawful excuse. It is also clear that the complainant persistently failed to maintain work records as*

required. This resulted in the respondent sending the complainant on compulsory leave. Under section 44 (a), (b) and (e) of the Employment Act, the respondent was entitled to summarily dismiss the complainant without notice for chronic absenteeism, neglect of duty and refusal to obey lawful orders. It is this option that the respondent adopted.

This matter is amply thrashed and presented by the parties. It shall however be determined on both the elements of evidence and particularly compliance with sections 41 (1) and (2) and 43 (1) of the Employment Act, 2007 – procedural and substantive fairness in the termination of employment. The parties herein present two divergent versions of the employment contract and events at the work place. The claimant recites a case of unfair termination in evidence and also through lack of procedural and substantive fairness in that no valid reason was issued for her termination and neither was she taken through disciplinary proceedings leading to her termination of employment. The respondent disputes this but does not offer proof of substantive and procedural fairness in so dealing. There is no display of evidence of disciplinary proceedings on her (respondent's) part.

A relook at the letter of termination by the respondent dated 2nd May, 2016 comes out as follows;

*The Dispensary Board Meeting held on 21<sup>st</sup> April, 2016 observed as follows;*

*i. Due to the re-organisation and restructuring taking place at the dispensary on matters of operations and service delivery there is need to change the caliber of the staff we shall employ.*

*ii. An considering the reasons that necessitated my letter to you of 5<sup>th</sup> April, 2016 as was brought to your knowledge the board has decided to invoke Article 12 (a) of your contract of employment signed by you on 1<sup>st</sup> January, 2016,*

*In that case therefore this is to inform you that your contract has been terminated as at 30<sup>th</sup> April, 2016.*

The reasons for termination presented herein are ambiguous and contradictory. The first one is grounded on a restructuring programme by the respondent whereas the latter is on misconduct. The two would not ordinarily work together. The clarity and justification for termination is therefore swept by the wayside. The respondent falters materially in her non compliance with fair labour practices. This matter therefore tilts in favour of the claimant. I therefore find a case of unlawful termination of employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case for unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. A declaration be and is hereby issued that the termination of employment of the claimant by the respondent was wrongful, unprocedural, unfair and unlawful.

ii. One months (1) salary in lieu of notice.....Kshs.17,000.00

iii. Salary for April, 2016 .....Kshs. 17,000.00

iv. Gratuity -  $Kshs.17,000.00 \times 16 \div 30 \times 1 \text{ year} = \dots\dots\dots Kshs. 9,066.60$

v. Six (6) months compensation of unlawful termination of

employment  $Kshs. 17000.00 \times 6 \text{ months} = \dots\dots\dots Kshs.102,000.00$

**Total of Claim.....Kshs.145,066.60**

vi. Costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 4th day of December, 2017.

**D.K.Njagi**

**Marete**

**JUDGE**

Appearances

1. Claimant in person.
2. Miss. Mokaya holding brief for Manani instructed by Manani Lilan & Mwetich Advocates for the respondent.