



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 168 OF 2012

JOEL ATUTI OKEBIRO CLAIMANT

VERSUS

KENYA HOSPITAL ASSOCIATION RESPONDENT

NAIROBI HOSPITAL)

(THE

Mr. Ongweso for the claimant

Mr. Bonyo for respondent

JUDGMENT

1. The suit was commenced vide a memorandum of claim dated 22nd February 2012 and amended on 2nd May 2012.
2. The claim is opposed by a memorandum of response filed on 10th September 2013.
3. The parties relied on documentation attached to the respective memorandum and oral testimony before court.

Brief facts of the case

4. The claimant was employed by the respondent on 3rd June 2008 as a security supervisor earning a salary of Kshs.58,580. The claimant received a letter of appointment stipulating the terms and conditions of service. He was placed on 6 months probation and was confirmed to the position on 1st December 2011. The claimant worked diligently and without blemish until his employment was terminated on 1st December 2011 on grounds that he had wrongfully provided a letter of reference to an employee of a security company that had been outsourced by the respondent. The said employee served at Nairobi Hospital and the respondent had requested that he be removed from that station for alleged misconduct.
5. The respondent accused the claimant for misusing his position and the respondent's letter head in doing a favourable reference for the employee.
6. The claimant denies the allegation and told the court that he made a reference to who it may concern for Mr. Robert Makori Oteri on a plain paper and not on the letter head of The Nairobi Hospital on 28th

July 2011. That by doing so he did not commit any offence because the reference was personal in nature upon request and only used the address of Nairobi Hospital for purposes of being contacted by whoever may use the reference he had provided.

7. That he was not aware of any policy of the respondent that prevented him from doing so. That in any event as the supervisor of Mr. Robert Makori Oteri, the reference he prepared for him was truthful and professional.

8. That the said Mr. Robert Makori Oteri worked for an outsourced security firm and was still stationed at Nairobi Hospital Finance department and was of good conduct. The recommendation letter was to assist the said Robert Makori Oteri find a job. That he never used his designation in the letter head as the reference was done purely on personal basis and on a plain paper.

9. That it would appear that Mr. Makori subsequently photocopied the reference letter using Nairobi Hospital letter head the claimant produced.

10. The claimant was served with a letter to show cause on 30th November 2011 and responded to the same on 1st December 2011.

11. On the same date, the 1st December 2011, the claimant's employment was terminated on the grounds that he had admitted writing a reference letter to an outsourced services guard stationed at the Hospital on a plain paper. That this brought his loyalty to the Hospital in question. That the claimant's conduct would lead to erosion of the Hospital's security and was unacceptable. The Hospital had therefore lost confidence in the claimant.

12. The claimant was paid salary up to and including 1st December 2011; one month's salary in lieu of notice; in lieu of outstanding leave days; less any other monies owed to the respondent.

13. The claimant prays for payment of lost income up to the envisaged retirement date at sixty (60) years being a period of eighteen (18) years.

14. In the memorandum of response the respondent denies all the particulars of claim and confirms that the claimant was dismissed for authoring an unauthorized recommendation letter on the respondent's letter head for Robert Makori Oteri, an outsourced guard stationed at the hospital in violation of the respondent's procedure thereby exposing the respondent to potential embarrassment.

15. **Determination**

- i. Whether the termination was for a valid reason;
- ii. Whether the termination was done in terms of a fair procedure;
- iii. Remedies if any due to the claimant.

Issue i

16. In terms of section 47(5) of the Employment Act, 2007, the claimant who seeks the court to find that termination of his employment was wrongful and unfair must demonstrate on a balance of probability that this is the case.

17. In the present case the claimant abused his position by granting an outsourced employee situated at the finance department of his employer a reference letter to seek alternative employment. Though the claimant alleges that the reference was given to the said employee by the claimant in his private capacity, the reputation of the respondent was put in peril because the said letter was on the respondent's letter head even though the claimant states that the initial letter was done on a plain paper.

18. The dispute as to whether it is the claimant or the recommended employee who placed the letter on

the respondent's letter head is neither here nor there. The debate exposes the folly by the claimant in abusing his position to perform an unauthorized business to the potential detriment of his employer.

19. The Employment Act, under section 43 places burden on an employer to rebut the evidence by the claimant by demonstrating that it had a valid reason to terminate the employment of its employee. The respondent has in the circumstances of this case discharged this onus. Clearly, the claimant was in the wrong. His conduct amounted to abuse of the position of security supervisor he had been given by the respondent.

20. It is the court's finding that the termination of the employment of the claimant was for a valid reason.

21. With regard to issue (ii) the claimant was served with a show cause notice and made a lengthy explanation of his conduct. The employer, just like the court was not satisfied with the explanation given by the claimant. His action amounted to misconduct and it caused the respondent to lose confidence in his services. The termination was done in terms of a fair procedure.

22. Regarding issue iii, the claimant was paid terminal benefits upon termination of his employment. The claimant in the amended memorandum of claim only seeks payment of lost income for eighteen (18) years he would have served to retirement. The court has found that the termination of his employment was for a valid reason and in terms of a fair procedure in compliance with section 45 of the Employment Act 2007.

23. Accordingly the suit is dismissed and each party to bear the cost of the suit.

Dated and delivered at Nairobi this 12th day of February 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE