



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

CAUSE NO. 375 OF 2013

MARGARET ADAGALA AMBE

CLAIMANT

V

MOI TEACHING & REFERRAL HOSPITAL

RESPONDENT

JUDGMENT

1. Margaret Adagala Ambe (Claimant) was engaged by Moi Teaching & Referral Hospital (Respondent) as a nurse around 1 July 2000. On 13 March 2002 she was confirmed.
2. On 13 March 2008, the Respondent issued the Claimant with a Surcharge/Final Warning and the reasons were that the Claimant had actively participated in unrest at the hospital on 26 June 2007 and damaged a hand-punch machine.
3. In a twist of events, the Respondent issued a show cause letter to the Claimant on 22 April 2008 asking her to explain within 7 days why disciplinary action should not be taken. The show cause notice outlined some 4 charges that the Claimant was expected to respond to.
4. The Claimant responded to the show cause through an undated letter and on 13 May 2008, the Respondent suspended her from office without pay pending further investigations.
5. A disciplinary hearing was held on 22 July 2008 by the Staff Disciplinary & Advisory Committee, and the Claimant attended and made representations after which the Committee recommended that she be dismissed
6. On 13 August 2008, the Respondent notified the Claimant that it had been decided to summarily dismiss her with effect from 13 May 2008.
7. The dismissal prompted the Claimant to report to her Union which in turn reported a trade dispute to the Minister for Labour. The Minister accepted the dispute and the parties went through conciliation. The parties were unable to resolve the dispute and the Conciliator issued a certificate of disagreement on 28 October 2010, which necessitated the present legal proceedings.
8. The Claimant alleges in her Statement of Claim that her dismissal was unfair because she was not accorded an opportunity to make representations before dismissal, she had been surcharged and issued with a final warning in respect of the same offences she was dismissed on account of and that preliminary investigations as required under contractual agreement were not conducted.

9. The Claimant in effect sought Kshs. 1,085,088/- being 3 months' salary in lieu of notice, May 2008 wages, service pay for 8 years and the equivalent of 12 months wages as damages.

10. The Respondent filed its Response on 30 January 2014 and the Cause was heard on 26 November 2015. The Claimant filed her submissions on 15 January 2015 (outside the agreed timeline of 30 December 2015) while the Respondents submissions were only filed on 15 March 2016.

11. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Respondent could reopen disciplinary proceedings against the Claimant, whether the summary dismissal of the Claimant was fair and appropriate remedies.*

Reopening of disciplinary proceedings

12. The Claimant was issued with a surcharge/final warning letter on 13 March 2008. According to the letter, the Respondent had established that the Claimant had damaged a hand-punch machine used for capturing attendance and was thus surcharged Kshs 18,194/50 which was recovered from her through the pay roll.

13. Further, the Claimant was issued with a final warning whose term was that any more misconduct would attract dismissal.

14. Clause 16.9.1 and 16.10.1 of the Terms and Conditions of Service governing the relationship between the Claimant and the Respondent allowed the imposition of a surcharge as a punishment or recovery of cost of any loss or damage to Respondent's property as part of the disciplinary process.

15. Clause 16.7.1 up to 16.7.4 of the same Terms and Conditions of Service also envisage the issuance of warnings as part of the disciplinary process.

16. But pursuant to clause 16.6.2 of the Terms, the Respondent was expected to follow due process and conduct preliminary investigations.

17. From the material placed before Court, there is no suggestion that the Respondent complied with its own internal disciplinary mechanisms before surcharging and issuing a final warning to the Claimant.

18. The surcharge and issuance of final warning were therefore in breach of the Respondent's own terms and conditions of employment and in this regard the surcharge and warning had no contractual basis and broadly the action was unfair in terms of Article 41 of the Constitution.

19. But what confounds the case here is that the Respondent proceeded to recover the surcharged amount from the Claimant, though it appears that the amount surcharged was later refunded when the disciplinary process was reopened.

20. In my view, the reopening of the disciplinary process after the Claimant had been surcharged and given a final warning was unfair despite and in spite of the flawed process. The Respondent ought to have bitten the bullet and left it at that.

Whether the dismissal was fair.

Procedural fairness

21. The Claimant was issued with a show cause letter which set out the allegations she had to meet. She was requested to make written explanations which she did after which an oral hearing was conducted.

22. The minutes show that the Claimant attended the disciplinary hearing and was asked questions and she made responses to the questions.

23. In my view, the process as conducted by the Respondent was in substantial compliance with the statutory requirements of procedural fairness/due process as envisaged by section 41 of the Employment Act, 2007.

Substantive fairness

24. The Respondent laid out some 4 charges against the Respondent to wit

(i) Having incited other employees to violence and/or disaffection against the Hospital Management.

(ii) Having committed or on reasonable and sufficient ground found to have committed a criminal offence by destroying the hand-punch machine which is your Employers property.

(iii) Acting or behaving in a manner that was considered morally indecent to patients, staff and other members of the Public.

(iv) Failing to comply or execute properly any valid order issued to you by the Director.

25. All the allegations set out the Claimant, if proved would constitute valid grounds for dismissal as they all go to the root of the contractual relationship.

26. In her response to the show cause letter, the Claimant admitted that she had failed to reply to the surcharge/final warning letter as requested, she participated in a demonstration though unwillingly, but she denied inciting other employees. She asked for a pardon.

27. With the admissions by the Claimant in her response, the Court is satisfied that the Respondent had valid reasons to dismiss her in terms of section 45(2) of the Employment Act, 2007.

28. However, that is not all that there is to it. An employer is also expected to act fairly and in accord with justice and equity in dismissing an employee.

29. In the case at hand, the Respondent had surcharged and given a final warning to the Claimant. Those were sanctions which were in accord with contractual terms.

30. In reopening the disciplinary process after sanctioning the Claimant, the Respondent was not acting fairly, or in accord with justice and equity. The summary dismissal on the same grounds could not have been fair.

31. The Court therefore reaches the conclusion that the Respondent has failed to demonstrate that the dismissal of the Claimant was for fair reasons and that it was in accord with justice and equity in terms of section 45(4) of the Employment Act, 2007.

Appropriate remedies/Orders

3 months' salary in lieu of notice

32. The Claimant did not demonstrate that her contract envisaged 3 months' notice of intention to terminate the relationship.

33. The default statutory 1 month as provided for in section 35(1)(c) of the Employment Act, 2007 therefore becomes the default and the Court finds that the Claimant ought to be paid the equivalent of 1 month salary in lieu of notice.

34. The pay slips produced show a basic pay of Kshs 27,117/-.

