



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 557 OF 2014**

**DANIEL NYAMONGO MATOKA**

**CLAIMANT**

**v**

**MOI TEACHING & REFERRAL HOSPITAL**

**RESPONDENT**

**JUDGMENT**

1. Daniel Nyamongo Matoka (Claimant) commenced legal proceedings against Moi Teaching & Referral Hospital (Respondent) on 28 October 2014 alleging that the termination of his employment was *unlawful, irregular, null and void and unfair*.
2. The Respondent filed a Response through the Federation of Kenya Employers on 26 June 2015, which prompted the Claimant to file a Reply to Defence on 29 October 2015.
3. The Cause was heard on 2 November 2015 and 27 January 2016. After close of hearing, the Claimant filed his submissions on 26 February 2016. The Respondent ought to have filed its submissions by 29 March 2016??????
4. The Court has considered the pleadings, evidence and submissions and adopted the issues for determination as outlined by the Claimant in his submissions, being, *whether the procedure for termination of the Claimant's employment was fair, whether the reason for termination was valid and whether the Claimant is entitled to the prayers sought*.

**Whether the procedure was fair**

5. The Respondent issued to the Claimant an Internal Memo dated 29 January 2013 and referenced *Warning Letter*. The memo informed the Claimant about a theft incident whereby he had been found with 2 wrapped cellular blankets without any reasons and that he should offer a written explanation why disciplinary action should not be taken against him.
6. The Claimant responded to the memo through a letter dated 1 February 2013, and this was followed by a suspension letter from the Respondent on 5 January 2013.
7. The suspension letter set out some 4 allegations and requested the Claimant to show cause/make representations within 7 days why he should not be dismissed.
8. The Claimant showed cause through a letter dated 8 February 2013, and the Respondent through a letter dated 7 June 2013 invited him to a hearing before the Respondent's Staff Disciplinary Advisory Committee to be held on 14 June 2013.
9. A hearing was held and the Respondent produced minutes of the hearing. The Committee recommended that the employment of the Claimant be terminated.
10. On 18 July 2013, the Respondent's Director wrote to the Claimant informing him of the termination of his employment effective 14 June 2013, and that he had a right of appeal within 14 days.
11. The Claimant appealed on 5 August 2013, and on 19 November 2013 the Chairman of the Respondent's Board of Management advised him that his dismissal had been upheld.

12. The Claimant asserted that he had a right to be heard during appeal in terms of the rules of natural justice and that his defence was not properly considered.
13. In examination in chief, he stated that a union representative was present during the hearing before the Disciplinary Committee though he was not his choice.
14. During cross examination, the Claimant admitted that he was asked questions during the hearing and that he also sought clarifications.
15. The Respondent's Senior Human Resources Officer who testified on its behalf stated that both a union official from the branch, Works Committee Chairman and a shop steward were present during the hearing. The minutes corroborate the testimony.
16. In my considered opinion, where an employee is a member of a union, the employer has no mandate or authority to pick which union representative or official appears on behalf of an employee facing disciplinary proceedings.
17. That is an issue best left to the employee and the Union, and if an employee is not satisfied, he ought to raise that with the union. The employer cannot be indicted in such cases and moreover in the instant case, the Claimant did not object to the union representatives who were present during the hearing at the hearing itself.
18. The Claimant did not demonstrate that a face to face hearing was contractually provided for. He also did not draw my attention to any statutory requirement on an oral hearing during appeal. The onus was on him and not the Respondent.
19. The Court has considered the testimony on the process as set out above and the requirements of section 41 of the Employment Act, 2007 and is satisfied that the process as carried out by the Respondent meet the said statutory requirements.
20. The termination of employment was procedurally fair.

### **Validity and fairness of the reason for termination**

21. The reason(s) why the employment of the Claimant was terminated were set out in the Internal Memo referenced *warning letter* and *the suspension letter/show cause notice* (theft of blankets).
22. The blankets in contention were discovered within a short time after being deposited by the Claimant outside the incinerator and the security office was immediately alerted.
23. In the first explanation, dated 1 February 2013, the Claimant stated that the fact that he handed over the items to the Incinerator Attendant was proof of the fact that he had no intention to steal the blankets.
24. What is clear and cannot be disputed is that the Claimant was found with the blankets.
25. The Court keenly listened to him in examination in chief and during cross examination, and at no point did he disclose exactly from which place he got the blankets, which he stated were wrapped.
26. However, the Respondent's witness stated that during investigations, the Claimant had stated that he had got the blankets in a black polythene bag from the isolation ward.
27. The witness testimony that wastes from the isolation ward were wrapped in red and yellow (highly infectious waste) unlike black wrappers for general waste was not challenged or controverted.
28. In my view, because the Claimant has failed to disclose or explain where he got the linens make it more probable that the blankets (which had not been used) were being taken away without authority and most probably were being stolen.
29. The Court therefore finds that the Respondent had and has proved valid and fair reasons to terminate the employment of the Claimant.

### **Appropriate remedies**

#### ***24% wage increment***

30. No evidential or contractual basis for a 24% wage increment was placed before the Court. The relief is declined.

#### ***Reinstatement***

31. With the finding that the termination of employment was fair, reinstatement as a remedy is unavailable to the Claimant.

***Pay in lieu of notice***

32. Because the employment of the Claimant was terminated after due process, (he was notified the action was contemplated, he cannot get pay in lieu of notice).

***Compensation***

33. With the conclusion that the termination of employment was fair, compensation pursuant to section 49(1) of the Employment Act, 2007 is legally untenable.

***Unpaid wages during suspension***

34. Only an extract of the Terms and Conditions of Service Booklet was produced. The provisions of the extract do not state what happens during suspension.

35. Relying on the common law principle that suspension without pay without contractual authority is unlawful (see *Joseph Otieno Akech v Rai Plywoods (K) Ltd* (2015) eKLR citing *McKenzie v Smith* (1976) IRLR 345), the Court reaches a conclusion that the Claimant is entitled to the Kshs 191,522/25 being unpaid wages during the period of suspension.

**Conclusion and Orders**

36. The Court finds and holds that the termination of employment of the Claimant was fair and the heads of relief dependent upon unfairness of termination of employment are not available and are dismissed.

37. However, the Court finds that the Claimant is entitled to and awards him

i. Unpaid wages during suspension Kshs 191,522/25

38. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of May 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Ms. Kibiriu instructed by Kanyi Ngure & Co. Advocates

For Respondent  
Employers

Mr. Masese, Senior Legal Officer, Federation of Kenya

Court Assistant

Nixon