



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

CAUSE NO.151 OF 2014

JOHN MWAURA MBUGUA.....CLAIMANT

VERSUS

THE BOARD OF TRUSTEES NANYUKI COTTAGE HOSPITAL....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 30th September, 2016)

JUDGMENT

The claimant filed the statement of claim on 31.10.2014 through Ngugi Kariuki & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Compensation for wrongful and unfair termination to a maximum of 12 months' salary at Kshs. 71, 086.00 per month making Kshs. 853, 032.00.
- b) General damages for degrading treatment.
- c) Costs and interests of this suit.
- d) Any other relief as the court may deem just to grant.

The respondent filed the response to the statement of claim on 08.10.2015 through J.M. Mwangi & Company Advocates. The respondent prayed for dismissal of the claimant's suit with costs.

The claimant is a clinical officer and was employed by the respondent from August 2011 to October 2012. The letter of termination dated 24.10.2012 was received by the claimant on 26.10.2012 which was the claimant's last day at work. The termination letter referred to the discussion on 22.10.2012 between the claimant, the Medical Officer in Charge and the Hospital Administrator where it was noted that:

- a) the claimant severally failed or delayed to respond to calls made by duty nurses whenever the claimant was the Clinical Officer on-call;
- b) some patients had raised issues of not wanting to see the claimant;
- c) the claimant gave conflicting reasons for being away on 5th to 6th October 2012 in circumstances whereby the claimant knew the other only clinician in the hospital would be involved in a surgery and hospital meetings thus the claimant left hospital on the 2 dates without a clinician to attend to patients; and

d) the claimant was called to attend to an emergency but none of his three cell telephone lines were answered.

The termination letter stated that the claimant had denied all the allegations and had demanded proof but the management had declined to line up the nurses who had called the claimant and the patients who had complained. By that letter the claimant's services were terminated effective 01.11.2012 on account of loss of confidence as per clause 8(b) and (c) of the contract of service which provided for 3 months' notice or pay in lieu for the period that fell short of the notice plus other dues that may have accrued up to the date of the termination.

The claimant's evidence was that on 5th October 2012 he was expected on duty but he had permission from his supervisor, Dr. Bhatt, the medical officer, to be away from 8.00am to 5.00pm. The permission was verbal and there was no policy on how employees would seek permission to be away. The claimant testified that he resumed duty at 5.00pm on 05.10.2012 as per the computer printout showing the patients he attended to as the clinician on-call that evening and through the night. On 06.10.2012 he testified that he was on duty from 8.00am to 5.00pm. The claimant further testified that on 30.09.2012 was a Sunday and he was not the clinician on call so that he was not on duty. On that date he had travelled to Eldoret to visit his parents and he saw a missed call on his cell telephone. Upon returning the call the nurse who picked it informed the claimant that the claimant had been looked for to sit in for another clinician who was not available as expected due to an emergency case which the other clinician had to attend to at the hospital.

The claimant testified that the disciplinary hearing was on 22.10.2012. The claimant was informed at the hearing that he was not available when he was called and therefore he would leave job effective 01.11.2012. The claimant was last at work on 26.10.2012 and he testified that he was replaced on 12.11.2013. The claimant's case was that the termination was unfair because he had been on duty whenever required to do so and the termination was without a valid reason. The claimant confirmed that he received terminal benefits of Kshs.213,792.00 and had signed a discharge clause that the respondent had no other liability against the claimant. The pay was for 3 months' salaries in lieu of termination notice and October 2012 salary.

The respondent's case per respondent witness No. 1 (RW1) is that the claimant's termination was a normal termination under the relevant contractual clause and he was paid full terminal benefits. RW1 testified that for a normal off the claimant did not need to make a written request to be away from duty. Respondent witness No.2 (RW2) testified that no minutes were taken for the meeting held on 22.10.2012. Further, at that meeting allegations were made against the claimant and RW2 confirmed that no time or chance was given for the claimant to reply. RW2 who was the claimant's immediate supervisor and the hospital medical officer at all material time testified that he could not recall if on 05.10.2012 he gave the claimant a verbal permission to be away. There was nothing filed in court to show that on 5th and 6th October 2012 the claimant had not been on duty despite RW2 testimony that such records were maintained on the computer. RW2 further testified that he used to report cases of absent staff to the hospital's administrator but in the claimant's case he had no records filed in court to show that such reports were ever made. RW2 concluded that the claimant might have been at work on 5th and 6th October per the records filed for the claimant.

The **1st issue** for determination is whether the claimant was entitled to file the present suit in view of the discharge in favour of the respondent signed on 27.10.2012. The claimant acknowledged receipt of Kshs.213, 792.00 in full and final settlement and discharge of all sums due to the claimant against the respondent including claims of re-instatement into the claimant's job or to further compensation arising out of the termination of the claimant's contract of employment. The discharge that the claimant signed is clear. It acknowledged that the employment had been terminated, that the claimant was being paid full and final settlement, and the respondent was being discharged from claims of re-instatement or compensation in view of the termination. The court has looked for but has not found anything in law that precluded the parties from making such contract. The court finds that the contract of discharge of liability between the parties validly extinguished the claimant's claims for unfair termination as is being advanced in the present suit. The claimant has not showed that the discharge was secured through fraud, duress,

mistake, undue influence or misrepresentation and the claimant cannot disown it. The court upholds the holding in Steve Mutua Munga –Versus- Homegrown (K) Limited & 2 Others [2013]eKLR that where there is nothing on record to vitiate the claimant's will to conclude the discharge, the discharge amounted to a valid and binding contract. The court further considers that the discharge was clear that no claims for reinstatement or for compensation would be filed. In view of that finding the claimant's suit will fail.

The court has considered that while purporting to terminate the contract as per the termination clause, the respondent at the same time introduced allegations of misconduct that had not been established at the disciplinary hearing. In such circumstances, each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the statement of claim with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 30th September, 2016.

BYRAM ONGAYA

JUDGE