



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.239 OF 2015

(Before D. K. N. Marete)

MARITIM JAPHET KIPLIMO.....CLAIMANT

VERSUS

MEDIHEAL HOSPITAL & FERTILITY CENTRE LIMITED.....RESPONDENT

JUDGMENT

This matter was incepted into court by way of a Memorandum of Claim dated 14th September, 2015. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent;*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of a certificate of service;*
- d. Who should pay costs and interests of the suit?*

The respondent vide a Respondent's Statement of Defence dated 30th September, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was orally employed as a supervisor at a salary of Kshs. 12,500.00 per month. He served well and without any warning until the 14th February, 2015 when he was unfairly terminated from employment. This was without any lawful reason or justification.

The claimant's further case is that when the 5th floor of the new wing caught fire on 14th February, 2015 at 1100 hours, he was not on duty. He only worked on 13th February, 2015 between 1800 hours and 600 hours on 14th February, 2015. He claims unprocedural termination from employment as follows;

7. Section 41 of the Employment Act 2007 provides that when an employee intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained

to him precisely the reasons for his termination from employment.

8. Section 43 of the Employment Act 2007 provides that any claim arising out of termination of a contract, the employer shall be required to proof the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

9. Section 45 (2) of the Employment Act 2007 provides that an unfair termination occurs when the employer fails to proof that:

a. The reason for termination is valid.

b. The reason for the termination is a fair reason(s)

c. The employment was terminated in accordance with fair procedure.

10. Section 44 (4) of the Employment Act lists matters which amount to gross misconduct and which entitles the employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusations leveled against him. The claimant submits that the respondent did not give him a chance to dispute the correctness of the accusations before dismissing him.

The claimant lists the following as grounds of unfair, unlawful and illegal termination of his employment;

a. The respondent terminated claimant's employment without following the laid down procedures in the Employment Act.

b. The respondent dismissed the claimant without proofing that the reason for the termination was valid.

c. The respondent did not give the claimant termination notice as required under Section 35 (b) of the Employment Act.

d. The respondent denied the claimant his lawful leave days contrary to the Employment Act.

e. The respondent failed to give the claimant certificate of service as required under section 51 of the Employment Act.

f. The respondent failed to reduce the engagement with the claimant into a written contract as required by the Employment Act.

g. The respondent failed to pay the claimant his house allowance and/or provide him with a house as per Section 31 of the Employment Act.

h. The respondent failed to regulate the claimants working hours as required under section 27 (1) of the Employment Act.

i. The respondent failed to pay the claimant her 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act and section 49 (c) of the Employment Act.

He claims as follows;

1. One month pay in lieu of notice

(Basic + House allowance)

	Kshs. 12,500 + Kshs. 1875.....	Kshs. 14,375/-
2. House allowance for the entire period worked		
	15% x 67 months (5.7yrs) x salary per month.....	Kshs.125,625/-
3. Leave dues for the entire period worked		
	(One month salary x the number of years worked)	
	14,375 x 5.7 years.....	Kshs.81,937.51/-
4. Compensation for unfair termination		
	(Section 49(c) of the Employment Act).....	Kshs.172,500/-
5. Wages for Feb 2015, (14 days)		
	1437/26 working days of the month x 14.....	Kshs.7,740/-
6. Severance pay, 15% salary per year x years worked		
	Kshs.172,500 x 5.7yrs x 15/100.....	Kshs.147,487.5/-
7. Overtime		
	45hrs per week (Statutory hours per week)	
	10hrs (worked per day) x 6 (days worked per week) = 60HRS – 45	
	15 hrs (overtime per week)	
	15hrs x 4 weeks= 60 hrs overtime per month x years worked (5.7 yrs)	
	60 x12x5.7=4104 (overtime hours for the entire period worked.)	
	4014 x 69.1 (Daily hourly rate)=.....	Kshs.283,586.4/-
	TOTAL.....	Kshs.833,251.41/-

In the penultimate the claimant prays as follows;

- a. Declaration that the dismissal was unlawful, unprocedural and unfair and in the circumstance the claimant is entitled to compensation as prayed for herein above.
- b. The sum of Kshs.833,251.41/- as set out at paragraph 12 above.
- c. Cost of this suit and interests on at court rates from time of filing suit until payment in full and
- d. A certificate of service as per section 51 of the Employment Act.
- e. Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent's case on the other hand is that there was no termination of the employment of the claimant as, in the first place, there was no contract of employment. She denies that the claimant was an employee of the respondent and further that there existed no relationship *inter partes* capable of

enforcement. The respondent's case is a blatant denial of the issues raised by the claimant and the prayer for dismissal with costs.

The matter took its turn in proceedings until the 19th July, 2016 when it was heard *inter partes*.

The issues for determination therefore are;

1. Whether there was termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant, if at all, was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this cause?

At the hearing of this matter the claimant reiterated his case as presented on the claim. He produced a name tag as exhibit No.1 in evidence of employment. He also produced NHIF card no. 30945.

On cross-examination the claimant again reiterated his testimony with a rider that he worked from Sunday to Sunday. He testified that he was off duty on the date of the fire and would not remember doing an apology letter. He further testified that he has not gotten back to his place of work after the fire incident. It is noted that the demeanor of the claimant at this stage was all telling and not depictive of truthfulness.

DW1- Maryline Langat testified that she worked for the respondent as hospital administrator. She remembers working with the claimant as a supervisor. The claimant, who was on duty on 14th February, 2015 on the night of the fire had not put off the boiler. He was not able to explain this but left the hospital to no return. He did an apology letter for not arranging the lab and also had an altercation with one of the workers. She acknowledged his employment but averred that he was not sacked but left never to return.

The claimant's written submissions also replicate his case.

The respondent similarly reiterates her case in her written submissions. This is a rendition of the workplace events and the negligence of the claimant leading to a fire outbreak. This led to his eventual departure from the workplace with no return to date.

This is a case of your word against mine. The parties present diametrically opposed versions of their cases. In the circumstances one would be forced to rely on the principles of balance of probability and preponderance of evidence in a determination of the issues in dispute. That is, which of the two sets of evidence by the parties is the more probable? Where does the evidence of the parties tend or seem to flow?

In the circumstances of this matter, the case tilts in favour of the respondent. She wins on a balance of probability and preponderance of evidence. Her case is more emphatic and seems the more likely of the two. The evidence and demeanor of the claimant is self defeating. I therefore find a case of lawful termination of the claimant by the respondent.

On a finding of lawful termination of employment, the claimant is not entitled to the relief sought. The 2nd issue for determination therefore lapses.

I am therefore inclined to dismiss this claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio, Kirwa & Company Advocates for the Claimant.
2. Mr. Wanyonyi instructed by M/s Kimaru Kiplagat & Company Advocates for the Respondent.