



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1854 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th November, 2016)

MARTIN O. OLUOCH

RICHARD W. MURIITHI

DANIEL I. METHU

HENRY N. GICHURU.....CLAIMANTS

VERSUS

THE BOARD OF MANAGEMENT

KENYATTA NATIONAL HOSPITAL

DR. MESCHACK ONGUTI.....RESPONDENTS

JUDGEMENT

1. The Claimants initially filed their claim before the Court on 27.3.2002 as HCCC No. 546/2002 through the firm of T.O. K'Opere & Company Advocates.
2. The Claimants had initially sought some interim orders to restrain the Respondents from evicting them from their staff house after their dismissal which application was dismissed.
3. It is however unfortunate that this matter remained pending in the High Court for a long period which is regrettable and was only transferred to the Employment and Labour Relations Court (ELRC) for disposal on 23.7.2014 and registered as Cause No. 1854/2014.
4. From the evidence of the Claimants, the 1st to 4th Claimants were employed by the 1st Respondent as Planning Manager, Chief Internal Auditor, Finance Manager and Supplies and Procurement Manager respectively at different times.
5. All the Claimants together with the 2nd Respondent, the Chief Legal Officer and Personnel and Training Manager formed the Hospital Management of Kenyatta National Hospital which deals with the day to day running of the Hospital. At the apex was the Board of Management appointed by the Minister in charge of Health.
6. The Claimants state that on or about 20.3.2002, the 2nd Respondent caused to be written and duly

signed a letter addressed to the Claimants individually and identical in nature titled “Termination of Appointment”.

7. In the said letter the 2nd Respondent alleged that the Hospital Management had decided to terminate the services of each of the Claimant’s.

8. They aver that the Hospital Management comprised of all the four Claimants and 2nd Respondent who at no time met and decided to terminate the Claimants’ services. They also contend that the Hospital Management has no authority to hire, confirm, promote or fire the Plaintiffs but rather it is the Board which is conferred with such powers which had not sat and decided to terminate the Plaintiffs as at 20.3.2002.

9. They further contend that the decision by the 2nd Defendant to terminate was without and/or in excess of his authority, irregular, unlawful and accordingly null and void *ab initio*. That the letter of termination was written in violation of their terms and conditions of service and the Hospital’s protocol and chain of command.

10. The Plaintiffs further aver that the letter in itself was an utter violation of the Rules of Natural Justice as they were never accorded an opportunity to be heard nor were they accused of any wrong doing or called upon to show cause as by law required. It also did not state the reasons for termination, they were never called upon to show cause why any disciplinary procedure should not be taken against them for any perceived violations.

11. The Plaintiffs aver that they relied wholly on their employment for their upkeep, livelihood and that of their families, due to the irregular and procedural termination they have suffered loss and damage. Further, they allege that due to the negative publicity that came along with the dismissal they have been unable to get alternative employment elsewhere. They therefore pray for their claim to be allowed as drawn.

12. The Defendants in their response deny the contents of the Plaint and put Plaintiffs to strict proof thereof.

13. In submissions the Claimants submit that the termination of their employment was unfair, unjustified, wrongful and there was no reason whatsoever given as is clear from the letters dated 20.3.2002.

14. They further submit that the 2nd Plaintiff who was 51 years 9 months old received a letter dated 3.4.2002, retiring him under the 50 year rule technically reversing the termination letter of 20.3.2002 but on 8.5.2002, he received yet another letter revoking the retirement under the 50 year rule on the grounds that the Plaintiffs had instituted legal proceedings against their removal. Subsequently all payment of his salary and related retirement benefits was stopped.

15. The Claimants submit that their dismissal was unlawful as it was done by the 2nd Respondent who had no authority to do so and later sought a meeting with the Board on 22.3.2002 to ratify his decision. This in their view is evidence that the 2nd Respondent acted ultra vires and rely on the case of **HCCC 2013 OF 1989 Charles Kariuki Wambugu vs. Kenya National Library Service Board** where it was held:

“a board cannot ratify unfair, unlawful and ultra vires acts of the Director of National Library Services.”

16. In addition the Claimants submit that their termination violated the rules of natural justice on the right to a fair hearing as they were not taken through any disciplinary process. They rely on the case of **Ezekiel Okemwa vs. Kenya Maritime & Fisheries Institute (2016) eKLR** where it was held that where an employee has been treated unfairly; his rights have been violated, the Court can grant remedies of aggravated damages over and above the remedies provided under Section 49 of the Act.

17. The Respondent in their submissions state that the Claimants failed to show that their services were unfairly terminated in breach of Sections 41, 43, 44, 45, 46, 49 and 50 of the Employment Act No. 11 of 2007. They state that there were several grounds to support the summary dismissal of the Claimants and maintain that due process was followed before their dismissal.

18. They submit that the Claimants were dismissed summarily because of their alleged criminal activities involving misappropriation of resources which entitled the Respondents to dismiss the Claimants under Section 44 (4)(g) of the Employment Act.

19. The Respondent further submits that the spirit of the Kenyan legislation is similar to what obtains in South Africa whose Labour Relations Act states that dismissal of an employee should be effected with "fair procedure". It proceeds to provide what constitutes fair procedure in a schedule to the Act titled "Code of Good Practice". Item 4 of the Code provides for fair hearing as follows:

"(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be formal enquiry. The employer should notify the employee of the allegations using a form and a language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written communication of that decision."

20. The Respondents in their submissions state that it could not be reasonably be expected of them to continue with the employment relationship with the Claimants for the relationship had broken down. They rely on the South African case of **National Union of Mine Workers and Another and the Commission for Conciliation, mediation and arbitration case No. J. R. 2512/2007** where it was held:

"The second Applicant clearly did not act with the necessary fiduciary duty as required by law especially having regard to his position, and the interests of the employer he was required to serve. In this respect, reference is made to Sappi Novoboord (Pty) Ltd vs. Bolleurs where it was held that an implied term of the contract of employment that an employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully... The relationship between the employer and employee has been described as a confidential one. The duty which an employee owes his employer is a fiduciary one which involves an obligation not to work against his master's interests. If an employee does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him..."

21. On the remedies sought the Respondents submit that full monthly salary together with allowance for the period the Claimants have been out of employment is superfluous since reinstatement is not possible. The Claim for salary inclusive of house allowance and pension until retirement should not be allowed as employment contracts are not lifetime commitment by an employer to an employee and cite the case of **East African Airways vs. Knight (1975) E.A.165** to buttress this position.

22. The Respondents also submit that the Claimants are not entitled to severance pay as the same only accrues upon redundancy which is not the case herein. They pray for the claim to be dismissed with costs.

23. Having considered the evidence and submissions of the parties herein, the issues for consideration are as follows:

- 1. Whether there were valid reasons to terminate the services of the Claimants.*
- 2. Whether due process was followed before the termination.*
- 3. What remedies if any the Claimants are entitled to.*

24. On the 1st issue, the letters of termination addressed to the Claimants are all in similar terms all dated 20.3.2002 stating as follows:

“Dear

Re: Termination of Appointment

This is to inform you that the Hospital Management has decided to terminate your services with immediate effect.

On termination you will be paid one month salary in lieu of notice. All other benefits due to you will be paid in accordance with the Hospital Terms and Conditions of Service.

You are hereby instructed to handover -----.

Yours faithfully

Dr. M. N. Ong’uti

Director “

25. Of course the letters do not give reasons for the termination. And even the Permanent Secretary Ministry of Health then in his letter of 21.3.2002, wrote to the Director of Kenyatta National Hospital asking for details of these termination and stating that he hoped the right procedures of termination of appointments in accordance with the Hospital Terms and Conditions of Service were followed in terminating the said appointments.

26. The Hospitals Terms and Conditions of Service Part XI indicate as follows:

“Cases Warranting Dismissal:

1. Statement of charges

(a) Where the Director considers it necessary to institute proceedings against an employee on the grounds that breach of discipline has been committed by the employee, he shall prefer charge(s) against that employee.

(b) Such charges shall be forwarded to the employee, including a brief statement of the allegations.

(c) The employee shall be required thereafter to reply to such charges through his immediate supervisor within 72 hours (three days) from the date of the letter or within such period as may be specified by the Director at his sole discretion.

(d) If the employee does not furnish a reply to any charge(s) forwarded to him under paragraph (c) above, within the period specified, the Director may proceed to take any disciplinary action as provided in this Code-----“.

27. The key area from this code is the fact that an employee who is to be dismissed should be supplied with a statement of charges. The statement is what sets out the offences if any that the employee has committed and also sets out the reasons that would warrant disciplinary action.

28. In case of the Claimants no such statements were submitted to them and therefore reasons for the termination were not disclosed. Infact the 2nd Respondent had to write to his boss, the Permanent

Secretary of Ministry of Health to explain why he had gone ahead to terminate the services of the Claimants.

29. It is therefore my finding that there were no valid reasons to warrant termination of services of the Claimants.

30. On the 2nd issue, the 1st Respondent Code of Conduct also set out the disciplinary process to be followed before the termination as above stating with the issuance of statement of charges to the employees as stated above under Part XI of the Code:

2. "...Disciplinary Committees

The Director may appoint Ad Hoc Disciplinary Committees to review and/or hear cases of serious or grave offences committed by employees under the provisions of this Code, and to advise on what action should be taken against such employees, after due process has been followed. Departmental Disciplinary Committees will also be set at Departmental level (DDC) to advise Heads of Departments and/or the Hospital Management on disciplinary cases emanating from a department.

3. Opportunity to Defend Oneself

The employee shall be given opportunity to defend himself before the Committees and to present evidence.

4. Recommendations of the Disciplinary Committee

The Disciplinary Committees, Departmental or Ad Hoc, having reviewed and heard the case against an employee, shall forward its findings to the Director with recommendations regarding the form of punishment, if any, or the Committee's opinion on how the case should be handled. The Director shall not be bound by the findings and/or recommendations of the Committee. The Director may delegate this responsibility to an officer or to a committee".

31. It is apparent that the Claimants were never subjected to the above measures nor procedures and the 1st Respondent breached their own Code of Terms of Conditions of Service.

32. The Code even provided that for procedures warranting summary dismissal and provided at Part XII 4(b) as follows:

1. An employee who is found in breach of discipline amounting to gross misconduct, after due process in terms of this Code may be liable to summary dismissal with loss of all benefits.

2. An employee shall be liable to summary dismissal where he is found in breach of discipline within 365 days of a final warning. "

33. In case of the Claimants, they were also not subjected to any warnings or due process warranting summary dismissal and therefore this Court finds that due process was never followed as provided in the 1st Respondent's Code of Terms and Conditions of Service.

34. I find that the termination of the Claimants was therefore unfair and unjustified for want of reasons and breach of rules of natural justice.

35. The Claimants were condemned unheard and I therefore award them as follows:

1. Equivalent of 12 months' salary as damages for unlawful and unjustified dismissal as follows:

1st Claimant – 70,655 x 12 = 847,860/=

2nd Claimant – 69,820 x 12 = 837,840/=

3rd Claimant – 67,485 x 12 = 809,820/=

4th Claimant – 80,085 x 12 = 961,020/=

2. Aggravated damages for unfair, unlawful, wrongful, malicious and ill-intentioned acts by 1st Respondent for their wrongful dismissal which was also broadcasted on 1 o'clock news being 1 million Kshs for each Claimant.

3. Claimants be paid their pension dues and any other dues they would have been entitled to at retirement.

4. The 1st Respondent to pay costs of this suit.

5. The amount due will attract interest at Court rates with effect from the date of this Judgment.

Read in open Court this 14th day of November, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

K'Opere for Claimants

Miss Abok for Respondent