



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1434 OF 2013**

**JEREMIAH MAINA.....CLAIMANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent seeking a declaration that the Respondent's letter dated 27<sup>th</sup> December 2012 summarily dismissing the Claimant from employment is unlawful and hence null and void as well as a declaration that the failure to call the Claimant for hearing of his appeal amounts to unfair labour practice. He thus sought an order directed at the Respondent to reinstate the Claimant and treat him as if the employment had not been terminated or an order directed at the Respondent to re-engage the Claimant in terms and/or work comparable to that which he was employed to prior to his dismissal and also for salary withheld from December 2012 till determination of the suit. In the alternative he sought a declaration that the termination of his employment was wrongful, damages for the wrongful termination, 12 months salary compensation, 3 months notice pay, pension benefits, confirmation of NSSF and NHIF contributions, certificate of service, costs of the suit and interest.
2. The Respondent filed a Statement of Response on 31<sup>st</sup> October 2013. In the Statement, the Respondent averred that the Claimant was not employed by it as a nursing officer I job group K8 in the accident and emergency department of the Respondent. The Respondent averred that the Claimant was acting without the knowledge and sanction of the Respondent. The Respondent averred that the Claimant was required to show cause and was subsequently dismissed. The Respondent thus urged that the suit by the Claimant be dismissed with costs.
3. The Claimant testified on 30<sup>th</sup> July 2014. The Claimant testified that he was a nurse by profession and was employed by the Respondent on 4<sup>th</sup> February 1998 and received a dismissal letter dated 27<sup>th</sup> December 2012 on 7<sup>th</sup> February 2013. He testified that he was elected as a National Treasurer of the National Nurses Association of Kenya and sought release to serve the association without pay. He testified that he sought to work on night shift so that he could attend to matters of the association. He testified that he was one of the persons pressing for registration of the nurses union. He referred to letters he wrote to the hospital asking for leave. He was arrested due to national strike that he and his colleagues in the yet to be registered nurses union called. He testified that as a leader of the strike he asked to be away. He received letter of dismissal together with the letter to show cause. He delivered the response in writing on 8<sup>th</sup> February 2013 and this was acknowledged. He testified that he attached the Court ruling that had ordered the striking

- nurses to go back to work. He denied absconding from duty as his whereabouts were known. He testified that he was entitled to 3 months notice pay and there should have been a preliminary investigation and communication of the breach before the dismissal. He testified that due process was not followed. He thus sought to be reinstated with full benefits and in the alternative that the dismissal was wrongful and order damages to be paid to the tune of 12 months salary, 3 months notice, confirm remittance of NSSF and NHIF dues, pension benefits as well as costs and interest of the suit.
4. He testified under cross examination that he served the letters on the Respondent but had not stamp or return of service. He stated that he made a request for release and never got a response. He stated that someone from HR came with a security officer and an Administration officer to Kibera Law Courts and tried to serve him with a letter. He did not receive it as he was in custody. He stated that the Respondent was not a party to the suit culminating in the ruling registering the nurses union. He testified that the Respondent stated it did not know of his whereabouts yet the association was in the premises of the Respondent. He conceded that absenteeism is a reason for summary dismissal.
  5. In his re-examination he stated that there was no practice of swearing affidavits each time a letter was served. He testified that he was released on bond after being arraigned in court and went back to his office and asked his supervisor if she had a letter for him and she said she did not. He denied being guilty of absconding from duty.
  6. The Respondent called Walter Owino HR officer with the Respondent. He testified that the department was informed by the Claimant's supervisor that the Claimant had absconded. The Claimant's salary was stopped as he was not on duty. He testified that the Claimant was asked to show cause as he was not on duty. He stated that the notice to show cause was served on 21<sup>st</sup> December 2012 at Kibera Law Courts. He testified that the Claimant was absent from duty without permission. The Claimant was summarily dismissed as the Claimant was deemed to have deserted duty. He testified that the Claimant wrote a letter of appeal but the management stood by its decision to dismiss him. He stated that the letters the Claimant wrote were not stamped received. He testified that the procedure was followed in termination of the Claimant. Regarding the pension he testified that the Claimant can seek the dues from the pension schemes run by AON Minet and Alexander Forbes. He testified that the Claimant could follow up on his NSSF and NHIF contributions from the institutions according to their rules. He stated that the Claimant was not entitled to notice pay as he was summarily dismissed.
  7. In cross-examination he testified that nurses at the Respondent subscribe to KUDHEIHA and not the Kenya Nurses Union. He testified that he could not give confirmation of the Respondent's nurses being members of the nurses union. He testified that his boss Peris Ndungu went to Kibera to serve the letter. The show cause is dated 18<sup>th</sup> December 2012 and it required him to respond within 3 days of the date. He testified that there was no warning letter on the Claimant's file. He stated the Claimant appealed and unless there is a special reason the employee does not appear on the appeal.
  8. In re-examination he testified that the disciplinary hearing was on account of absenteeism. He testified that the Claimant was given opportunity to defend himself.
  9. The parties filed written submissions. The Claimant filed submissions on 3<sup>rd</sup> November 2014. In the submissions the Claimant reiterated his evidence and submitted that he was entitled to the grant of prayers sought as the termination of his employment was unprocedural. He relied on the case of **Patrick Njuguna Kariuki v Del Monte (K) Ltd [2012] eKLR** and **Zephania Nyambane & Anor. v Nakuru Water and Sanitation Services Co. Ltd [2013] eKLR**.
  10. The Respondent filed submission on 17<sup>th</sup> November 2014. It submitted that the procedure to terminate the Claimant was fair and that the law required the employer to prove reasons for termination. The Respondent submitted that the dismissal was fair and within the law. The

Respondent relied on the cases of **Banking, Insurance & Finance Union v Barclays Bank of Kenya Ltd [2014] eKLR**, **Hudson Mudeheri v Garden Estate Academy [2014] eKLR** and **Daniel Raiti Ogeto v College Management Board Acting for Elgon View College Board [2014] eKLR**;

11. In the case before me the issue to determine is whether the Claimant's contract was properly terminated and if not what remedies lie. The Claimant was a nurse employed by the Respondent as such in 1998. The contract subsisted until termination on 27<sup>th</sup> December 2012. The Claimant during his service with the Respondent was elected as a Treasurer of the Nurses Association. In December 2012 he was arrested because of the nationwide strike by nurses and arraigned in court at the Kibera Law Courts. He testified that he was released on bond. He stated the nurses union was ultimately registered. He saw a HR official from the Respondent as well as a security officer at the law courts and thought they were there to console him. He did not receive the letter they had tried to deliver to him due to the fact that he was in custody. He testified that he returned to the association office after release and asked his supervisor the chief nurse whether there was any letter for him and he was told there was none.
12. The Respondent asserts the dismissal was proper and within the dictates of the law for the absenteeism of the Claimant. The Respondent's witness testified that the Claimant appealed the decision and the appeal was unsuccessful. He did not have an indication when the disciplinary hearing was held.
13. The Claimant was from all accounts ripe for dismissal. He had absconded from duty as evidenced by the letter from his supervisor. The permission he had sought to serve the nurses association was neither stamped nor indicated to have been received by the Respondent. It is interesting that he could claim to have corresponded with the CEO of the Respondent yet the letters are unstamped and there is no indication they were ever received. In any event, if they were received there was no reply. That does not mean he was released or that the letters were acquiesced to. The Claimant was absent from work as claimed by the Respondent in December 2012. What would have been a seamless resolution of the absenteeism was aggravated by the poor handling of the service of the letter to show cause. The letter was not served and therefore there was no opportunity accorded to the Claimant to show cause. I would therefore find the termination to have been unfair. Though there was basis for summary dismissal the manner it was carried out calls for sanction. In the premises I will enter judgment for the Claimant as follows:-
  - a. Declaration that the termination was unfair due to non adherence to procedure
  - b. Compensation for 3 months for unfair termination
  - c. Costs of the suit

The other aspects of the claim fail and are accordingly dismissed.

Orders accordingly.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of January 2015**

**Nzioki wa Makau**

**Judge**