



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 364 OF 2013

BETWEEN

MATHEW SILA KIMEU.....
CLAIMANT

VERSUS

NYALI CHILDREN HOSPITAL.....
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Ngure Advocate instructed by Njoroge Mwangi & Company Advocates for the Claimant

Mr. Obura J Advocate instructed by Obura J & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on 4th November 2013. He claims he was employed by the Respondent Hospital as a Clinical Officer, on 9th January 2012. He served under probation for 6 months and was confirmed on 1st October 2012, earning a consolidated monthly salary of Kshs. 50,000. He was to work under a renewable contract of 2 years. His contract was terminated on 19th August 2013, in circumstances he considers unfair and unlawful. He seeks for Award against the Respondent for:

[a] A declaration that the termination process as carried out by the Respondent, was unlawful and that the same amounted to an unfair termination.

[b] A declaration that the Respondent ought to issue the Claimant with a Certificate of Service.

[c] Gratuity; annual leave pay; 1 month salary in lieu of notice at Kshs. 50,000; 14 months' salary for unfair termination at Kshs. 700,000; severance pay for the 2 years under contract at Kshs. 600,000; and service pay for the 2 years under contract at Kshs. 44,955.

2. The Respondent filed its Statement of Response on the 4th December 2013. The Respondent states that the Claimant was, on 17th August 2013, supposed to report for the night shift at 7.30 p.m. He was to relieve the Clinical Officer who had been on day duty. The Claimant did not report. He absented himself without leave or lawful cause. Patients were turned away. The Hospital was compelled to close down for the night. It only reopened on 18th August 2013. The Claimant was dismissed fairly, in accordance with the law. He was paid his lawful dues. He was issued the Certificate of Service. He is not entitled to any of the orders listed above.

3. The Claimant testified, and closed his case, on the 5th November 2014. The Respondent called 4 Witnesses. Dr. Wanjiru Abuto, Ms. Yvonne Saka and Mr. Bernard Opodo Oudu testified on 9th December 2014. The last Witness Jane Mwenda Musyoka testified on 6th February 2015 bringing the hearing to a close.

The Claim

4. Mr. Kimeu told the Court he was engaged by the Respondent on 9th January 2014. His first monthly salary as per the letter of appointment dated 2nd January 2012 was Kshs. 45,000- consolidated. He was confirmed with effect from 1st October 2012 earning a consolidated salary of Kshs. 50,000 per month. He was placed on a 2 year renewable contract. He worked at the Respondent's Branches at Likoni and Mikindani in Mombasa.

5. He was dismissed on 19th August 2013. No reasons were given in the letter dismissing him. He was simply told his contract had been terminated. The reasons were given to his Advocate after the Claimant's letter of demand before the filing of Claim, was sent to the Respondent. The Respondent alleged the Claimant absconded duty.

6. The date of absconding was given as 17th August 2013. He was on night shift duty. He did not report. The Duty Rota was circulated to the staff on 1st August 2013. The Claimant was supposed to be attending the funeral meeting for his Sister on the date assigned night duty, the 17th August 2013.

7. The Claimant consulted the Assistant Administrator Jane, who was responsible for the preparation of the Rota. He suggested Clinical Officer Marylyn would relieve him on the night of 17th August 2013. Jane advised him not to engage Marylyn. He approached a different Clinical Officer Gilbert, who agreed to hold forte for the Claimant on the 17th August 2013.

8. Kimeu met the Director Dr. Abuto, who runs the Hospital. He discussed his leave of absence with Dr. Abuto. She advised him she would talk to Jane. The Doctor accepted the Claimant's reasons for being off-duty. This communication with Dr. Abuto was verbal. The Doctor sanctioned the Claimant's off-duty. He left for the burial meeting on the 17th August 2013. He was called by the day shift Officer on 17th August 2013 and told there were no Patients at the time she was leaving. Services were not interrupted.

9. On 18th August 2013, the Claimant returned and reported for night shift duty. Jane called the Claimant and advised he passes by their main Office at Nyali. He was while there, given a letter in an envelope and a delivery book. It was the letter of termination of employment. He was shocked. Jane did not tell him the reasons for the decision. She merely said she was given the letter to pass to him by Dr. Abuto.

10. His contract was to end in October 2014. Termination was unfair. Termination was on the 19th August 2013. He was asked to wait until end of the month for his dues. On 3rd September 2013, he found Kshs. 38,891 had been credited to his Bank Account by the Respondent. He did not know the details of the deposit. He instructed his Advocates who issued demand letter. This resulted in an additional sum of Kshs. 50,000 being deposited in his Bank Account. He did not know the details of the payments. It was later explained by the Respondent's Advocates that the payments comprised 1 month salary in lieu of notice at Kshs. 50,000. Kshs. 38,891 was probably for 18 days worked in August 2013.

11. The Claimant testified he is entitled to the balance of his salary for the 14 months left of his 2 year contract. He prays for service pay and severance pay. The Claimant's profession calls for continuity of service, and potential Employers will always ask the Claimant to fill the gaps in his career. He was issued a letter titled 'To Whom It May Concern.' This is not a Certificate of Service. It has the wrong dates. The Claimant did not abscond.

12. Cross-examined, the Claimant stated he worked from January 2012 to August 2013. He understood the Rules and Regulations in force at the Workplace. Staff consulted the Assistant Administrator Jane, in event they wished to be off-duty. Jane prepared the Duty Rota. He would consult her. She would advise if the desired off-duty was available or not. If dissatisfied, he would proceed to see Dr. Abuto.

14. He had lost a Sister in April 2013. He had been authorized to attend her burial on 15th April 2013. It was the 3rd death in the family. He was affected. He had sought the off days to attend a Welfare Group meeting [Chama Cha Mazishi] on the 17th August 2013. His attendance was prompted by the deaths in his family.

15. He agreed his earlier requests for off- days, had been written. All applications were granted. All leave above 2 days was applied for in writing. There was nothing to show an application for less than 2 days was supposed to be verbal. The Claimant did not abscond. He asked for permission. He made the request to Dr. Abuto at the Likoni Branch. It was normal for Dr. Abuto to visit Likoni. Dr. Abuto supervised the Claimant from a medical perspective.

16. The Claimant denied that he switched off his phone on 17th August 2013. He did not know who was supposed to relieve him on the night of 17th August 2013. Gilbert had called him earlier saying he had changed his mind about relieving the Claimant. Marylyn was at the Nyali Branch, Gilbert at Mikindani, while the Claimant was supposed to be at Likoni. He was told by Jane, on 19th August 2013 that Dr. Abuto did not wish to see him. It was not true that he said to Jane he had no obligation to give an explanation for his absence. He prays for service pay. He is a professional Clinical Officer. The letter 'To Whom It May Concern' bears the Claimant's name and shows the period worked. Kimeu testified it should be rectified to have the correct date and the title 'Certificate of Service.'

17. On redirection the Claimant stated he joined Chama Cha Mazishi as a result of the burden he experienced, on the death of his Sister. The off duty policy was that an Employee seeking 2 days or more off duty, did so in writing. It was not for the Claimant to know who would relieve him. He had consulted Dr. Abuto, and permission issued. He was not told the Hospital would close on the 17th August 2013. He consulted Jane on seeing the Duty Rota, and also consulted Colleagues and lastly, Dr. Abuto.

The Response

18. Dr. Abuto testified she is a Paediatrician. She practices at Nyali Children Hospital. She is one of the Senior Consultants and Directors. Kimeu was one of the Hospital's Clinical Officers. He was attached to the Likoni Branch. There are 2 Branches- Likoni and Mikindani. Nyali is the main Hospital. The Claimant's services were terminated by Jane Musyoka. He did not perform his duty at Likoni as expected. Dr. Abuto was unaware that the Claimant excused himself on the 17th August 2013. She did not excuse him on 8th August 2013 when she visited Likoni Branch. He did not make any request to her. Employees dealt with the Hospital Administration. Dr. Abuto dealt with the medical work, offering consultancies. She was confined to medical aspects. She was unaware that the Claimant sought to see her on termination. She was not at the Hospital when termination letter issued. If the Claimant had any issues with Patients, he would call the Doctor. He did not call her any time after termination.

19. Answering questions from the Claimant's Advocate, the Doctor testified she was aware the Claimant received a letter of termination of employment. She knew the reason given for the decision was that the Claimant had absconded duty. He was absent from the Likoni Branch. Patients were not attended to. Dr. Abuto did not deal with assignment of duties and deployment of staff. She signed the confirmation of employment, in her capacity as a Director. Employees were not barred from seeking her audience on

termination. The Claimant absconded on the night of 17th August 2013. He was on duty on 18th August 2013. Termination followed on 19th August 2013. The Branch could not have been shut down. There were Patients and emergencies to be attended to. She was sure termination was well handled by the concerned Officer. Dr. Abuto did not deal with the pay roll issues.

20. Yvonne Saka testified she worked at Likoni Branch on the 17th August 2013. She was the Clinical Officer serving during the day, at Likoni Branch, from 8.00 a.m. to 7.30 p.m. The Claimant was to take over from her at 7.30 p.m. He did not report that night. She reported to the Front Office Personnel that she was leaving. It was around 9.00 p.m. The Claimant was not there. She sent the Claimant an SMS text. He told her he was not the one to report that night.

The Rota showed Kimeu was supposed to be on duty that night.

21. Saka told the Court on cross-examination that she had worked for the Respondent at the time of her evidence, for 1 year. One was required to seek off days in writing. Request was put to Jane. One could also make an arrangement with a Colleague if 1 off duty day was in issue. 3 to 5 days required a written request. She did not know if the Claimant had a local arrangement with Jane. Saka texted Kimeu and confirmed to him he was supposed to be on duty. There were no In-Patients at the time. She could not recall if there were Out-Patients at the time she left. The Claimant later reported for duty. Saka could not recall if this was on 18th August 2013. She closed her testimony with the clarification that she had never herself, been on 1 day off duty. The rule was that one had to write a request. The Claimant did not tell Saka who would relieve him on 17th August 2013.

22. Respondent's Witness Number 3, Bernard Opondo Oudu stated he has worked for the Hospital since December 2011. He reported for night duties on the 17th August 2013 at the Likoni Branch. Saka was on duty. Oudu's role involved overseeing all Employees were on duty as scheduled. Saka left at 8.00p.m. Kimeu was to take over for the night shift in accordance with the Duty Rota, at 7.30 p.m. He did not report. Oudu called him. He did not pick the call. At 8.00 p.m. Oudu informed the Managing Director. The Managing Director informed Oudu to close down, and advise Clients they would not be seen as there was no Clinical Officer to attend to them. A number of Patients came. Oudu advised them to return the following day. His duty, he testified on cross-examination, was to ensure all Employees were on duty. He did not recall Saka discussing Kimeu's absence with him. There was a Nurse named Joel on the standby, who would take Patients' temperature, weight and general observation. The Nurse advised Patients to come the following day. Oudu eventually closed the hospital.

23. Jane described her duties to comprise oversight of the Front Office, Payroll and Duty Rota Administration. She prepared the Rota monthly. She knew Kimeu. He joined the Hospital as a Clinical Officer in 2012, leaving in 2013.

24. She prepared the Duty Rota, annexed to the Statement of Claim. Kimeu is shown to have been the Clinical Officer on duty, on the night of 17th August 2013. He did not turn up. He had called Jane asking for off days. She looked at the Rota and advised him it was impossible for him to be off duty. One of his Colleagues, Joseph, was on leave.

25. Requests for off days are normally done in writing. It does not matter if it is a 1 day off; request must be in writing. Kimeu had made previous requests in writing. He reported back on 18th August 2013. He did not explain his absence. He was called for his termination letter on 19th August 2013. He requested to talk to Dr. Abuto. She had not arrived. The Claimant left.

26. He was paid his terminal dues, comprising 1 month salary in lieu of notice at Kshs. 50,000; 10 days of annual leave at Kshs. 16,667; responsibility allowance of 17 days at Kshs. 2,833; and salary for 17 days worked at Kshs. 28,333. In total he was paid Kshs. 97,833, deposited directly to his Equity Bank Account Number [particulars withheld] at Digo Road Mombasa.

27. The Respondent did not issue the Certificate of Service immediately after termination. The document

was not ready. It issued later with a typographical error, which the Respondent is ready to correct, and re-issue. Kimeu does not merit the prayers sought.

28. Jane told the Court on cross-examination that she does not employ; Management does. She however signed the letter of termination, acting for the Management. Dr. Abuto does not terminate. The Claimant called Jane asking for off duty. She did not ask him to look for a reliever. She did not ask him to make his request in writing. The previous requests were for more than 1 day. It was not Jane who made the decision to close the Hospital during the night of 17th August 2013. She was not called and informed there was a gap in the night shift. She was told the Claimant reported on 18th August 2013. She called him on 19th August 2013 to pick the termination letter. She did not advise him it was the termination letter. He was not given the opportunity to explain his absence.

29. There were no letters of warning against him. He was paid Kshs. 97,833 in terminal dues. It was paid in 2 instalments. The first sum of Kshs. 47,833 was subjected to statutory deductions, with Kshs. 38,891 paid as the net sum. The second sum of Kshs. 50,000 was paid in whole. The Claimant was told on the 19th August 2013 that the Doctor was not in; not that she did not wish to see him. Jane conceded the letter of termination issued before any engagement with the Claimant.

Closing Submissions

30. The Claimant submits he took his off duty day on 17th August 2013, having satisfied himself fully that he had informed the Respondent. He informed Jane and Dr. Abuto. He made effort to get a Colleague to sit in for him. He returned on 18th August 2013 and went on working. The Respondent did not summon him to explain his absence. He was not heard. Termination went against Section 45 of the Employment Act. It was unfair.

31. He was not issued Certificate of Service in conformity with Section 51 of the Employment Act 2007. He merits compensation under Section 49 of the Employment Act 2007. He submits he is entitled to 1 month salary in lieu of notice at Kshs. 50,000; 18 days salary for days worked in August 2013 at Kshs. 30,000; 14 months' salary in compensation at Kshs. 700,000; severance pay for 2 years at Kshs. 600,000; service pay for 2 years at Kshs. 44,955; ex-gratia payment at Kshs. 100,000; annual leave pay commencing 1st October 2013 at Kshs. 50,000. In total his monetary claim is submitted at Kshs. 1,575,075. He acknowledges Kshs. 88,891 was deposited by the Respondent in his Account, but states he has not known the details of the payment to-date.

32. The Respondent submits the Claimant authored his own misfortune by abandoning his job and Patients. The Respondent was justified in taking its decision against the Claimant, under Section 44 [1] [a] of the Employment Act 2007. The Claimant left work on the night of 17th August 2013, without leave or other lawful cause.

33. The Respondent offers essential services. The Claimant was aware of this when he absconded. He failed to make request for leave of absence, as he had always requested previously.

34. The Respondent submits it is ready to issue the Claimant his Certificate of Service with such correction as is required. Notice pay is not payable, as the Claimant was summarily dismissed. 18 days worked in August 2013 were fully compensated. Compensation the equivalent of 14 months' salary is unmerited, termination having been fair. There is no legal basis for severance pay. Service pay is not payable under contract, and the Claimant was a Member of the National Social Security Fund, ineligible for service pay under Section 35[6] of the Employment Act 2007. Similarly he is not entitled to gratuity pay. He had not completed 1 year in service on termination, and did not merit annual leave. The Claim should be dismissed with costs.

35. The issues for determination are, as is traditionally the case with employment disputes, whether:

- a. *The Respondent terminated the Claimant's contract of employment for valid reason or reasons under Section 43 and 45 of the Employment Act 2007.*
- b. *The Respondent acted fairly under Section 41 and 45 of the Employment Act.*
- c. *The Claimant merits the pleaded remedies or any other suitable remedies.*

The Court Finds:-

36. The Nyali Children Hospital has its main Hospital at Nyali Mombasa. It has 2 Branches, in Mikindani and Likoni, both in Mombasa. The Claimant is a Clinical Officer. He was employed by the Hospital commencing 9th January 2012 at a monthly salary of Kshs. 45,000. He underwent probation, and was confirmed on 1st October 2012. His contract was for 2 years, commencing from 1st October 2012. His consolidated salary on confirmation was Kshs. 50,000. He signed a contract on confirmation, on the 19th October 2012. It is not disputed that the Claimant went away from his assigned place of duty at Likoni, on the night of 17th August 2013. He was the Clinical Officer supposed to be on duty. He travelled to his home upcountry on the night, to attend a meeting of a welfare Group, the Chama Cha Mazishi. It is agreed he reported back on duty on 18th August 2013. On 19th August 2013, the Respondent terminated the Claimant's contract. The reason for termination is not stated in the letter of termination dated 19th August 2013, but Parties agree termination was on the ground that the Claimant was off duty on the night of 17th August 2013.

37. Was this a valid termination reason as required under Section 43 and 45 of the Employment Act 2007? The Respondent gave evidence supporting the view that the Claimant's absence was without leave or lawful cause, and summary dismissal justifiable under Section 44 [1] [a] of the Employment Act 2007.

38. Dr. Abuto was not aware that the Claimant had sought and been granted off duty. She denied that the Claimant made any request for leave. Saka was the day shift Clinical Officer. She was to hand over to the Claimant. She contacted the Claimant as she was leaving. The Claimant told her he was not on duty. Oudu confirmed there was no reliever at the time Saka left, and the Claimant was supposed to take over for the night. Jane confirmed she was responsible for the preparation of the Duty Rota. The Claimant was on duty on the night and failed to show up. He was supposed to have made request for off duty in writing, as he had done before. He was specifically told by Jane it was not possible to be away on the night of 17th August 2013. All the Respondent's Witnesses agree the Branch at Likoni could not render services to its Patients. Oudu testified he was compelled to close the facility and refer Patients for treatment on the following day.

39. The Claimant on his part insists he was not supposed to make a written request for off duty of 1 day; a verbal request sufficed. He talked to Dr. Abuto as early as 8th August 2013 when the Rota was circulated, and she accepted his reason for the off duty. She told him she would talk to Jane the Assistant Administrator. He informed Jane. He arranged for other Clinical Officers Gilbert and Marylyn to stand in for him. These Officers did not eventually agree to relieve the Claimant. He was going to attend an important social engagement. He had lost his relatives and borne the burden of burying them. He needed to participate in the affairs of Chama Cha Mazishi to ease any such other burdens. He left in the knowledge that the Management was aware of, and had authorized, the Claimant's travel.

40. The evidence of the Respondent on validity of reason seems to this Court weightier than that of Kimeu. The Claimant's contract under clause [c] stated his working hours, were expected to fit 12 hours shift. Off duty days, it stated, would be provided for in the Duty Rota. The Clinical Officers were regulated strictly by the Duty Rota. Departure from the demands of the Rota would have to be evidenced in written communication.

41. The Claimant had taken off days earlier to attend to other social functions. These were in writing. He did not satisfy the Court why it should have been different where 1 day off duty was desired. Hospitals, by the nature of their work, do not follow the oral tradition; they work through written communication.

42. The Claimant was not able to say who would relieve him on the night of 17th August 2013. This was

necessary particularly as his effort to have Gilbert and Marylyn do so, had not been successful. Without the concurrence of the two alternative relievers, the Claimant should not just have turned away and left. There were efforts made by Saka to contact the Claimant. The Claimant simply told her he was not meant to be on duty, without alluding to any authorization to be off duty, or suggesting any local arrangement with his Colleagues.

43. In the end the Hospital was unable to operate at full capacity. Patients were deferred to the next day. The Court is of the view that the Claimant failed to adequately arrange for his absence in a way it would not interfere with the essential services which the Hospital renders. He underestimated his cog value, within the wheel that is Nyalı Hospital. It was perhaps unfortunate that he would ask in cross-examination of the Respondent's Witnesses whether there were any In-Patients; why the day shift Officer could not work overtime; and whether the Witnesses took details of any Patients who were attended to on the night. These questions portrayed the Claimant as a Clinical Officer lacking in compassion, who did not fully appreciate the effect of his absence, or the role the Hospital plays, in treatment of Patients. Was his presence necessary only when there were In-Patients? The questions certainly did not assist the Claimant in discounting the reason given by the Respondent, in justifying termination.

44. This case is similar in many respects to the ***Industrial Court at Mombasa Cause Number 199 of 2014 between Daniel Sirengo Wakhungu v. Sawa Sawa Academy [2014] e-KLR***. In this case a Teacher from Malindi left his teaching duties to attend to a social function upcountry. There was no express leave granted by the Employer. The Court observed “ *The Claimant was presenting the School with a fait accompli, not seeking leave. An Employee caught up in domestic emergencies should seek the leave of his Employer. This enables the Employer make arrangement for performance of the Employee's duty. The Claimant was in an important teaching position and needed help the School arrange for his absence, ensuring the Pupils were not left unattended to.*” Kimeu should have adequately helped the Hospital in identifying a solution to the problem his absence would create. He left his Patients unattended. Termination was fair on substantive justification, under Section 43, 45 and 47 of the Employment Act 2007.

45. The Respondent adopted the following procedure in terminating the Claimant's contract: the Claimant was away on 17th August 2013; he returned to duty on 18th August 2013; he worked the 18th August 2013; he was called by Jane on 19th August 2013 and asked to pick his letter at the Nyalı Main Hospital; he went there and was given the enveloped letter; he did not know, and had not up to this point learnt, about the termination decision; he found the letter of termination in the envelope; he requested to see Dr. Abuto; he was told she was not in; and lastly, the Claimant left.

46. This process did not meet the minimum statutory threshold, on fair procedure, contemplated by Section 41 and 45 of the Act. There were no charges against the Claimant. He was not required to show cause why disciplinary action should not ensue. He did not appear before any disciplinary panel. He was not heard. He found the letter of termination waiting, on his return. Termination was faulty, and the Claimant is entitled to compensation under Section 49 of the Act.

Remedies

47. *The Claimant is granted 3 months' salary at Kshs. 150,000 in compensation for unfair termination.*

48. His prayer for anticipatory salaries of 14 months for the remaining period of his 2 year contract has no foundation. There was valid reason justifying termination. He did not render any labour to the Hospital for the remainder of his contract and salaries for that period would not amount to fair remuneration. This prayer is rejected.

49. He seeks 1 month salary in lieu of notice. There is evidence the Respondent was kind enough to pay 1 month salary in notice pay, as part of the sum of Kshs. 97,833 deposited in the Claimant's Bank Account. There was no obligation on the part of the Respondent to pay notice pay, but there is evidence this was paid. A benefit conferred on the Employee by the Employer, is never withdrawn by the Court. The Claimant should leave it at that. It was quite dishonest of the Claimant to acknowledge receipt of the

amount deposited in his Account, while persisting on making a demand for notice pay, even after he heard the evidence of Jane on the details of the deposit made. There shall be no order on notice pay.

50. The claim for severance pay was completely unfounded. Severance pay is given under Section 40 of the Employment Act which governs termination based on redundancy. Nowhere in the dispute was it suggested that the Claimant left employment on redundancy.

51. The Claimant seeks service pay for 2 years contracted. This item is not given in the contract of employment. It is not available to him in law. Service pay under Section 35 of the Act is paid for *every year worked*. The Claimant had not worked for any year, but months, at the time of termination. Secondly, he was subscribed to the National Social Security Fund, and therefore ineligible for additional social security payments under Section 35 [6] of the Act. There similarly was no basis to ask for gratuity or ex gratia as submitted. These are prayers without any support in the contract or the law which governed the employment relationship.

52. Part of the money deposited in the Claimant's Account represented annual leave pay of 10 days and salary for 17 days worked in August 2013. The Claimant had not completed 1 year in service, and did not work on his shift on 17th August 2013. It is difficult to understand why he pursues additional annual leave pay and 18 days' salary. Even after he had the benefit of Jane's evidence on the details of the money deposited in his Account, the Claimant submits he merits the 2 items. This was unreasonable. Section 51 of the Act entitles the Claimant to the Certificate of Service. ***The Respondent shall re-issue the Certificate of Service with the desired amendments.***

IN SUM, IT IS HEREBY ORDERED:-

[a] Termination of the Claimant's contract was on valid ground, but procedurally flawed.

[b] The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant 3 months' gross salary at Kshs. 150,000 in compensation for unfair termination.

[c] Amended Certificate of Service be re-issued to the Claimant within the same period.

[d] No order on the costs and interest.

Dated and delivered at Mombasa this 26th day of June 2015

James Rika

Judge