



REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1172 OF 2010

JOYCE WAMBUI MURAGURI.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES P.C.E.A KIKUYU HOSPITAL.....RESPONDENT

JUDGMENT

1. The Claimant herein filed this suit on 7th October 2010. In the suit she sought the resolution of twin disputes she framed as the unlawful and wrongful termination on account of misconduct; and the failure by the Respondent to pay outstanding salary and terminal dues including allowances. She averred that she was by letter of appointment dated 13th January 1992 employed by the Respondent as a nursing officer at a monthly salary of Kshs. 2,125/- and over time she was promoted to higher positions and her pay rose to reach Kshs. 17,850/- at the time of separation. She was suspended by a letter dated 23rd June 2006 on unsubstantiated allegations that the Claimant acted against the Respondent's "Code of Conduct" and that during the suspension she was not paid salary and/or benefits or any part thereof in spite of follow-ups by the Claimant. She thus claimed the payment of salary and house allowance from 1st June 2006 till 30th June 2007, pay in lieu of notice, interest at court rates, general damages and costs of the suit.

2. The Respondent filed a Response to Statement of Claim on 5th November 2012. In the defence, the Respondent averred that while engaged on duty on 22nd July 2006 the Claimant engaged in an act of gross misconduct in that she involved herself in a fight with a female member of the public within the Respondent's hospital. This act necessitated the suspension with effect from 23rd June 2006 to facilitate investigations. The Respondent averred that the Claimant's conduct was fully investigated and in the course of investigations the Claimant was given a chance to explain herself and that the Claimant admitted to having been involved in a fight within the hospital with another lady over a love triangle. The Respondent found the Claimant's conduct to have constituted an act of gross misconduct and the decision to terminate the Claimant's services with effect from 23rd June 2006 was communicated vide a letter dated 27th March 2007. Jurisdiction of the Court was denied though in a Ruling dated 10th February 2012 Judge Kosgey ruled that this Court had jurisdiction.

3. The Claimant testified on 3rd April 2014 and reiterated her claim. She stated that she is a Registered Community Nurse and was employed at the material time by the Respondent. She was promoted through the years and at the time of her termination her job group was H and she earned 13,650/- and house allowance of 4,200/-. She was suspended on allegations that she had fought with an unnamed person. She was not told of the outcome of the investigation. She was terminated by letter of 28th March 2007 which informed her of a meeting held on 28th December 2006 whereat a decision to terminate her services for

gross misconduct was reached. She thus sought payment of the sums prayed for in her claim.

4. In cross examination by Mr. Amuga the Claimant testified that she had no problems with Catherine Angote the hospital administrator or with Joel Mungai the assistant hospital administrator. She stated that it was alleged she had fought with a co-wife. She narrated that she met the lady at the gate of the hospital and that the lady spoke to her in foul language and one of her colleagues escorted the lady out of the hospital and that they did not fight as she even had a plaster on her hand. She was suspended yet had been promoted 2 weeks prior to the incident. She testified that she received the letter of termination from the administrator in July 2008. She cleared with the hospital in 2010 and received Kshs. 35,965.80.

5. In re-exam she testified that she was not aware of who made the allegations that there was a fight. She testified that the claim was in respect of the dues which were from the date of suspension to termination in 2007.

6. The Respondent called the Assistant Administrator Mr. Joel Gicharu Mungai. He testified that he knew the Claimant who worked as a nurse at the Respondent's hospital. He testified that in June 2006 there was a commotion and a fight as the Claimant left from work. He testified there is a code of regulation and that the Claimant was suspended to facilitate investigations. The Claimant was to be investigated and the Board of Directors would then make a decision. He testified that the Claimant was dismissed after the Board of Directors met on 28th December 2006. The letter of termination was dispatched in 2008 through her postal address. She cleared on 3rd May 2010 and paid her dues. She had written a resignation letter on 7th June 2007 and that is when she was given her termination letter which had been dispatched by post in early 2007.

7. In cross-examination he testified that he was a Christian and knew that Elkanah had 2 wives, Abraham who had 2 wives and Solomon who had many wives. He testified that in the Old Testament people had more wives. He testified that entry and exit is through the main gate and the Main Gate is manned 24 hours a day. He did not see the incident and did not have the names of the witnesses who saw the incident. He admitted that he was not in the meeting to discuss the conduct of the Claimant and that the minutes of the meeting were not availed.

8. In re-exam he testified that there was an incident and there was confirmation of the same to the administrator and the director of nursing. He testified that procedure was followed and that the termination signed by Dr. Walia.

9. Parties filed submissions which reinforced their pleadings and evidence. The Claimant submitted that she was never summoned before the Board to be accorded a fair hearing and that no investigations were carried out. The Claimant relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Ezekiel Oira v Kenya Broadcasting Corporation & Another [2013] eKLR**, and **Dalmas Ogoye v KNTC Limited CA No. 125 of 1996** (unreported).

10. The Respondent submitted that the law applicable was the Employment Act cap 226 (now repealed). The Respondent relied on the case of **Republic v Chief Magistrates Court & 2 Others ex parte Antonina Auma Okoth Misc. Civil Application No. 994 of 2004** and that on the basis of that reasoning by the three judge bench and the provisions of the Interpretation and General Provisions Act cap 2 the cause of action was under cap 226. The Respondent submitted that the dismissal was in conformity with the Respondent's Code of Conduct and the provisions of Section 17 of the Employment Act cap 226. The Respondent submitted that the letter of suspension indicated that the Claimant was not to be paid while on suspension and that the termination took place in 2007 and thus the claim for pay of salary and house allowance during the suspension period could not succeed. The Respondent submitted that on the basis of **Mughal v Lakmer Techs Ltd [2002] 1 KLR 199** the measure of damages for unlawful dismissal is the amount the employee would have earned during the period of notice if the employment is terminable by notice. Other cases relied on were **Wanjohi v Mitchell Cotts Kenya Ltd [2002] 2 KLR 462**, **Barclays Bank of Kenya Ltd v Njau [2006] 1 KLR 93**, **Central Bank of Kenya v Nkabu [2002] 2 KLR 149**. It was submitted on the strength of these authorities general damages would not lie and that the suit should be dismissed as the Respondent dismissed the Claimant for good cause and paid all her dues.

11. It is not in dispute that the employment of the Claimant terminated in 2007. That was in the era of the Employment Act cap 226 now repealed. The remedies applicable would thus be limited to the reliefs available to a successful party under the repealed law.

12. The Claimant was employed by the Respondent and her services were terminated as per the letter of termination on 28th March 2007. She had been suspended on 23rd June 2006. It would appear that the Respondent made a decision to terminate the Claimant sometime in December 2006. This was communicated through the letter of termination. While doubt exists as to whether the letter was dispatched or not it is not in doubt that the services were terminated. In the premises the effective date of termination of the Claimant's services was on 28th March 2007. No termination can be made retroactively. In the premises the date of termination was 28th March 2007 and I would hold that whereas the Claimant was not actively engaged in provision of services she is entitled to pay for the period during which her employment subsisted from the date of suspension in June 2006 till termination in 2007. The Claimant was paid dues for June 2006 and thus her pay would be from July 2006 till March 2007 which would be Kshs. 160,650/-. Under the Employment Act cap 226 the termination of the Claimant for gross misconduct was permitted under Section 17 of the Act. The said Section provided as follows:-

17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -

(a) if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;

(b) if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work;

(c) if an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

(f) if, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty;

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

13. The law did not make any provision for termination summarily for the grounds the Respondent relies on. In the premises the proper way would have been to give notice of one month. As none was given the Claimant is entitled to Kshs. 17,850/- being salary for one month in lieu of notice.

14. On the strength of case law and the prevailing law, the only damages one would be entitled to in the cases predating the Employment Act 2007 is one month. In the premises as the termination was carried out without regard to the dictates of natural justice the Claimant is entitled to payment of one month's salary as damages. She will be entitled to costs as well.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of June 2014

Nzioki wa Makau

JUDGE