



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 218 OF 2013

ANTONY WANJAU KILONZO.....CLAIMANT

- VERSUS -

MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th June, 2014)

JUDGMENT

The claimant Antony Wanjau Kilonzo filed the statement of claim on 17.07.2013 through Andambi & Company Advocates. The claimant prayed for judgment against the respondent for orders as follows:

- a. **The termination of the claimant is declared unlawful and illegal from the very beginning.**
- b. **Upon such declaration, the respondent is ordered to reinstate the claimant under section 15 of the Labour Institutions Act No. 12 of 2007 to his job, or equally suitable job, without loss of any salary or allowances from the date of the purported summary dismissal i.e. on 14th February, 2011.**
- c. **That, the respondent be ordered to pay the claimant all allowances, privileges, benefits including promotions and any other legal dues lost during the period of dismissal as soon as possible or as per the court's directions.**
- d. **General damages as the court may deem fit.**
- e. **The respondent do pay the claimant full costs incurred over the claim.**
- f. **Any other remedy the court may deem fit to grant in the prevailing circumstances.**

The respondent Moi Teaching and Referral Hospital filed the memorandum of response on 16.08.2013 through Mburu Maina & Company Advocates. The respondent prayed that the claim be dismissed with costs.

It is not disputed that the claimant was employed by the respondent as a Pharmacy Technologist. The claimant was served with the interdiction and show-cause letter dated 23.11.2010. The letter noted with

great concern that the claimant had reneged and abdicated his duties as a Pharmacy Technologist. It was alleged that the claimant was involved in theft of oncology drugs. It was alleged that the claimant carelessly and improperly performed work which was his duty to have performed carefully and properly; and the claimant committed an offence against or to the substantial detriment of his employer. The letter invited the claimant to show-cause why the allegations did not constitute justifiable grounds for the claimant's termination. By that letter, the claimant was interdicted effective 19.11.2010 on half the basic pay and to report twice a week to his head of department. The claimant attended the hospital staff disciplinary advisory committee hearing and was subsequently terminated from employment by the letter dated 14.02.2011. The termination was effective 14.01.2011. The claimant was dissatisfied with the termination and he appealed against the termination but received no response.

The issues for determination are whether the termination was unfair and whether the claimant is entitled to the prayers made in the memorandum of claim.

For the 1st issue, the main point of dispute is whether the reason for the termination was valid.

The claimant's testimony was that he was scheduled to proceed on leave effective 1.11.2010. The monthly report was due on 29.10.2010 and on 1.11.2010, he prepared the relevant report of the stock before he proceeded on leave. The report was signed by the claimant and the other pharmacy technologists working under him in the oncology pharmacy namely Evans Wekesa and Julius Rotich. The oncology drugs in issue known as gemcitabine were present in the pharmacy as per the signed document of the 1.11.2010 stock take. RW1, Dr. Thomas K. Rotich was the respondent's senior pharmacist at the material time. RW1 confirmed that the movement of the drugs from the bulky store to the oncology pharmacy was regularly done because the relevant form was properly signed for the relevant authorities. RW2 further confirmed that after 1.11.2010, the claimant came back at the respondent's premises on 8.11.2010 so that if the drugs were stolen, it must have been when the claimant was on leave.

Taking the evidence into account, the court finds that there was no evidence linking the claimant to the disappearance of drugs that are said to have disappeared. The court finds that the respondent has failed to establish that the reason for termination was valid as it was not established that the alleged reasons as set out in the interdiction and show-cause letter that subsequently led to the termination existed at the time of the termination. The court finds that the termination was unfair under **section 43(1) of the Employment Act, 2007**.

The next issue for determination is whether the claimant is entitled to the prayers as made in the statement of claim. The court makes findings as follows.

The claimant prayed that the termination of the claimant be declared unlawful and illegal from the very beginning. The court has found that the termination was unfair and the claimant is entitled to the prayer as made.

The claimant prayed that upon such declaration, the respondent be ordered to reinstate the claimant under section 15 of the Labour Institutions Act No. 12 of 2007 to his job, or equally suitable job, without loss of any salary or allowances from the date of the purported summary dismissal i.e. on 14th February, 2011. It was submitted for the claimant that the relationship between the parties was so hostile and the claimant should be awarded compensation in lieu of reinstatement. Accordingly, the court finds that the claimant abandoned the claim for reinstatement.

It was prayed that the respondent be ordered to pay the claimant all allowances, privileges, benefits including promotions and any other legal dues lost during the period of dismissal as soon as possible or as per the court's directions. The court upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited [2013]eKLR**, where this court stated thus, **“The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement**

during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

The claimant was interdicted effective 19.11.2010 and terminated effective 14.01.2011. The parties were silent on whether the claimant got alternative employment after the termination. The court has found that the termination was unfair and taking the evidence into account, the claimant is entitled to all withheld salaries from 19.11.2010 to 14.01.2011 and in the circumstances, the court finds that the claimant is entitled to half basic salary being **Kshs.12,141.50** that was withheld.

The claimant prayed for general damages as the court may deem fit. The court considers that the claimant did not contribute to his termination. He had expectations for a long service as a public officer on permanent and pensionable terms. The claimant is awarded 12 months' gross salaries under section 49 (1) (c) at Kshs.33,783.00 per month being **Kshs.405,396.00**.

The claimant has succeeded in his claim and is entitled to the costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant **Kshs.417,537.50** by 1.08.2014, in default, interest to be payable at court rates from the date of the judgment till full payment.
- c. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday 20th June, 2014.

BYRAM ONGAYA

JUDGE