



**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2235 OF 2012**

CHARLES MAINA GITONGA.....CLAIMANT

**VERSUS**

THE KAREN HOSPITAL.....RESPONDENT

**JUDGMENT**

By a Memorandum of Claim dated 23<sup>rd</sup> October 2012 and filed in Court on 6<sup>th</sup> November 2012 the Claimant alleges irregular and unfair dismissal from employment by the Respondent and refusal to pay his terminal benefits. He seeks the following orders:-

- a. A declaration that the Claimant's dismissal was irregular, unfair and in breach of the Employment Act.
- b. The Claimant's terminal benefits, including his outstanding leave for 2012, one month's salary in lieu of notice and gratuity for the 6 years.
- c. General Damages for breach of contract and wrongful dismissal calculated at an amount equal to 12 months' salary.
- d. Punitive damages for victimization and subjection of the Claimant by the Respondent to inhuman treatment.
- e. Interest on (b) and (c) above.
- f. Costs of this suit.
- g. Any other / further relief that this Honorable Court may deem fit to grant in the interest of justice.

The Respondent filed a statement of defence on 21<sup>st</sup> December 2012 in which denies the allegations by the Claimant and allege gross misconduct and fundamental breach of contract by the Claimant.

The Respondent avers in the defence that the summary dismissal of the Claimant was justifiable. The Respondent however admits owing the Claimant Kshs 15,000 for days worked from 1<sup>st</sup> to 5<sup>th</sup> September 2012 and Shs. 84,000 for outstanding leave days. The Respondent prays for a declaration that the dismissal of the Claimant was lawful, dismissal of the Claim save what is admitted, an order compelling the Claimant to comply with Respondent's exit procedures, costs and interest.

The case was heard on 10<sup>th</sup> and 25<sup>th</sup> February 2014. The Claimant testified on his behalf while the Respondent called Mr. Polycarp Koome Kubai, its head of Human Resources. The Claimant was represented by Mr. Kimani instructed by Kimani Kiarie & Associates Advocates while the Respondent was represented by Mr. Kiunga instructed by Njoroge O. Kimani, Advocates.

The main facts of the Claim are not contested. The Respondent, Karen Hospital, is a private hospital operating in Karen area of Nairobi. The Claimant was employed by the Respondent as a pharmaceutical

technologist on 20<sup>th</sup> February 2007. No adverse record was mentioned or produced by the Respondent against the Claimant before the incident that led to his dismissal. He was a Supervisor.

His duties entailed supervising junior pharmaceutical technologists working under him.

On 5<sup>th</sup> September 2012 the Claimant was called by the Respondent's Chief Security Officer at about 9.00 am to accompany him to an undisclosed destination. They were found by another security Officer. They declined to disclose to him where they were going upon inquiry. They drove to Limuru his home town where they were joined by four police Officers. They went to a pharmacy owned by the Claimant. Before they entered the pharmacy they informed the Claimant that they wanted to search for stolen medicine. The search did not yield any unaccounted for medicine. The Claimant showed them invoices for all the medicines in the pharmacy. The search took about 3 hours. After that he was asked to take them to his home at Kabuku near St. Paul's University where they again searched his house but did not find what they were looking for. The Claimant was taken back to Karen Hospital. After about 30 minutes, the Chief Security Officer instructed him to leave the compound and go home.

On 17<sup>th</sup> September 2012 the Chief Security Officer called and asked the Claimant where he was so that the Chief Security Officer could deliver a message to him. The Claimant asked the Chief Security Officer to meet him at Karen Shopping Centre where he was given a letter. When he opened it he found that it was a dismissal letter dated 5<sup>th</sup> September 2012. The reason for dismissal was that the Claimant was running a competing business with that of his employer and therefore had fundamentally breached his obligations contained in his letter of appointment and the rules and regulations outlined in the Karen Hospital Human Resource manual. The letter required the Claimant to handover and clear with the Human Resource Department with immediate effect.

Both the Claimant and the Respondent filed written submissions. The issues for determination are as follows:-

1. Whether there was valid reason for dismissal of the claimant.
2. Whether the dismissal was in accordance with fair procedure.
3. Whether the Claimant is entitled to the prayers sought.

### **1. Was there valid reason for dismissal of the Claimant?**

The letter of dismissal gives the reasons for dismissal as running a business with that of his employer in breach of the rules and regulations in the Respondent's Human Resource Manual.

"Clause 3.5 of the Human Resource Manual attached to the Respondent's Defence reads as follows:-

An employee shall not either directly or indirectly during his/her employment with the company engage or be involved in any employment."

There is no provision in the Human Resource Manual preventing the Claimant from becoming an owner of any business. What is prohibited by the manual is direct or indirect employment.

The Claimant in his evidence stated that he is not employed anywhere. He owns a Chemist in which he has employed 2 employees.

Even if we were to take the reasons in the letter as genuine, a chemist in a small town like Limuru cannot be in competition with an ultra modern hospital in Nairobi. No clients of the Respondent would be diverted to travel to a small chemist in Limuru to seek treatment from there. Even if the Claimant was running a hospital in Limuru it would not be in competition with the Respondent. Their client base would be completely different.

I therefore find that there was no valid reason for dismissal of the Claimant.

## **2. Was the dismissal in accordance with fair procedure?**

Fair procedure is provided for in Section 41 of the Employment Act. It provides that the employee must be informed of the reasons for termination in the presence of another employee of his choice or a lemon shop floor official, must consider representations made by the employee and the person accompanying him.

The Respondent's Human Resource Manual does not provide for the procedure for discipline as provided in Section 12 of the Employment Act.

The Claimant was dismissed by letter dated 5<sup>th</sup> September 2012. He was told the reasons for dismissal, he was not even aware that he had been dismissed she was only told to go back home. RW1 Polycarp Koome Kubai testified that there was a report dated 10<sup>th</sup> September 2012 from Tigoni Police Station yet the Claimant was dismissed on 5<sup>th</sup> September 2012 before confirmation that he owned Medstop Pharmaceuticals Limuru. This means that a decision had been reached as at the time he was taken to Limuru to dismiss him and the search was to look for justification for the dismissal. In any event there was no need to take the Claimant all the way to Limuru and search both the pharmacy and the house just to get the particulars of ownership of his pharmacy.

I find that there was no fair procedure in the dismissal of the Claimant.

## **3. Is the Claimant entitled to his prayers?**

The Claimant prayed for several orders. I will consider them consider each one of them below.

### **a. A declaration that the Claimant's dismissal was irregular, unfair and in breach of the Employment Act.**

Having found that there was no valid reason or fair procedure, I declare the summary dismissal of the Claimant by the Respondent on 5<sup>th</sup> September 2012 unfair.

### **b. Terminal benefits**

#### **i. Notice**

Having been unfairly dismissed the Claimant is entitled to one months' salary in lieu of notice in terms of Section 49 (1) (a) of the Employment Act and Clauses of his letter of appointment. I therefore award him Shs . 90,000 being one month's salary in lieu of notice.

#### **ii. Leave**

The Respondent admitted owing the Claimant Shs. 84,000/- for 28 days leave. I therefore award the Claimant the said sum of Shs. 84,000/-.

#### **iii. Salary for days worked.**

The Respondent admitted owing the Claimant Shs. 15,000 being salary for 5 days worked from 1<sup>st</sup> to 5<sup>th</sup> September 2012. The Claimant however prays for salary up to 17<sup>th</sup> September 2012 being the date on which he received the letter of summary dismissal.

A dismissal does not take effect until it is communicated to the employee. The Respondent has not denied that the Claimant was served with the letter of dismissal on 17<sup>th</sup> September 2012.

I therefore find that the Claimant is entitled to Salary up to the date on which the summary dismissal was communicated to him on 17<sup>th</sup> September 2012. I therefore award him Shs. 51,000 on account of 17 days

worked in September 2012.

**iv. Gratuity for 6 years.**

Although there was a prayer for gratuity in the Memorandum of Claim, the Claimant did not mention it in his testimony and in the written submissions. He must have realized that he is not entitled to the same as he does not qualify for service gratuity under Section 35 (5) and (6) of the Employment Act while at the same time it is not provided for in either his letter of appointment or in the terms and conditions of his employment.

I will therefore make no orders in respect of the same.

**c. General Damages for wrongful dismissal.**

The Claimant has prayed for general damages for wrongful dismissal 12 month's Salary. Having found that he was unfairly dismissed, the

Claimant is entitled to compensation under Section 49 (1) (c) of the Employment Act.

I have considered the Claimant's length of service, the manner in which he was dismissed, his legitimate expectations and in my opinion 12 months' salary is reasonable compensation.

I therefore award the Claimant Shs. 1,080,000 being 12 months' salary as compensation for unfair dismissal.

**d. Punitive Damages for victimization and subjection of the Claimant by the Respondents to inhuman treatment.**

This Claim was withdrawn by the Claimant and I therefore make no orders in respect thereof.

I however wish to comment that this was a case deserving of general damages for unlawful detention, unlawful search and inhuman treatment. The Claimant was compelled to get into the Respondent's vehicle in the company of two Security Officers to be driven to a destination he did not know, his inquiries as to where he was being taken did not elicit any response, he was taken to his pharmacy

where a search was carried out for stolen medicine in the presence of his workers. He suffered embarrassment and humiliation. Being his home town there were people who know him and saw him in the presence of 4 policemen and two security officers being treated as a suspected thief. He was further humiliated by the search of his house at his home. To add insult to injury, the Claimant was sent home the same day by the Security Officer without being given any reason and in spite of having not found any stolen property in either his pharmacy or his house. He must have therefore suffered psychological trauma as a result. During his testimony the Claimant stated that he could not go back to Karen Hospital because everybody knew what had happened to him. He testified that he cannot go to look for work everywhere because of the dismissal.

For all those reasons the Claimant qualified to be awarded general damages. He however did not pray for the same and I will therefore not make any orders in respect of the inhuman treatment in terms of Article 23 of the Constitution.

**e. Interest and Costs**

Having been successful in his claim I award the Claimant costs of his claim.

The Respondent will also pay him interest at court rates from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of June 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Ms. Mungai holding brief for Claimant

No appearance for Respondent