



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 332 OF 2013

PETER MAROKO OMONDI

CLAIMANT

V

PANDYA MEMORIAL HOSPITAL

RESPONDENT

JUDGMENT

1. Peter Maroko Omondi (Claimant) was offered a two year renewable employment contract as a Kenya Registered Community Health Nurse by Pandya Memorial Hospital (Respondent) through a letter dated 19 January 2012. The letter of employment provided for the terms and conditions of employment.
2. On 9 February 2013, the Respondent notified the Claimant that it was terminating his contract by payment of one month salary in lieu of notice. The Claimant was aggrieved and on 26 April 2013, his legal advisers wrote a demand letter to the Respondent on the ground that the termination was in breach of the Employment Act, 2007 and seeking the monies the Claimant would have earned till expiry of the contract.
3. The Respondent replied to the demand on 30 April 2013 asserting that the termination was in accordance with the provisions of the Employment Act and seeking negotiations. But nothing came out of it and on 7 October 2013, the Claimant lodged a Memorandum of Claim against the Respondent stating the issue in dispute as *wrongful, unfair dismissal and refusal to pay dues the Claimant could have earned if he could have worked to the date of expiry of the fixed term contract*.
4. The Respondent was served and it filed a Memorandum of Reply on 4 November 2013. The Cause was heard on 21 May 2014 and 8 July 2014.

Claimant's case

5. The Claimant's case is that he went on leave from late December 2012 and he was supposed to resume duty on 9 February 2013 at 2.00pm, he was called at around 11.00 am by the Respondent's Nurse Manager to report to the Human Resources Manager. When he reported to the office, he found the two officers.
6. The two officers questioned him about a letter which was circulating after which he was issued with a dismissal letter.
7. On the process followed prior to the dismissal, the Claimant stated that he stayed in the Human Resources Manager's office for about five minutes and that he was not taken through a disciplinary process or asked to call a colleague.
8. Regarding the reasons for the dismissal, the Claimant stated that he was questioned about a list circulating but was not given further details when he requested for the same.

9. The Claimant further stated that he was a member of Kenya National Union of Nurses and that he did not incite his colleagues to go on strike though he was aware his colleagues had written a letter around December 2012 to the Respondent.
10. The Claimant denied that he asked or dared the Human Resources Manager three times to sack him.
11. He further stated that the dismissal letter did not provide any reasons for the dismissal and that the Respondent's Human Resources Manager told him no reasons would be given. He admitted that he was paid one month salary in lieu of notice.
12. In cross examination, the Claimant stated that he devoted his full attention to his duties but found time to engage in union activities as Interim union representative and that the Respondent's Human Resources Manager told him he had received information he was inciting nurses at Coast General Hospital.

Respondent's case

13. The Respondent called two witnesses, Henry Muchiri, its Human Resources Manager and Mariam Swaleh, the Director of Nursing.
14. In respect to the process followed prior to the decision to dismiss, Mr. Muchiri stated that he summoned the Claimant to his office after receiving a complaint of his rudeness and being abusive from the Administrator of Coast General Hospital and they attempted to have discussion with him in the presence of the Director of Nursing but he was arrogant and was not listening.
15. Mr. Muchiri stated that the purpose of calling the Claimant was not for disciplinary purposes and that he also discussed with him a letter written by nurses raising several grievances on salaries and allowances.
16. According to Mr. Muchiri, the Claimant at some point walked out and later returned demanding a dismissal letter and that by demanding a termination letter, the Claimant was undermining his authority, and he gave him his wish by giving him a termination letter.
17. On the reasons for dismissal, the witness stated that the Claimant had been seen on national news speaking about a then ongoing national strike by nurses and that sometime in December 2012, the Administrator of Coast General Hospital visited the Respondent and informed them that she had been informed that a nurse who had been rude to her was an employee of the Respondent.
18. The witness stated that he called the Claimant and advised him to be respectful and not abusive but he responded that he knew Dr. Shikelly was looking for him and he did not care whether he would be dismissed. The Claimant thereafter immediately went on leave.
19. The witness also stated that in January 2013 a letter was sneaked into the Respondent's Board Chairperson's office. The letter was raising concerns about salaries and allowances and that his consultations disclosed the letter was written on the advice of the Claimant. As a result, a decision was taken to call the Claimant who was on leave.
20. The Claimant denied knowledge of the letter and walked out and came back demanding to be given a termination letter severally and because this amounted to undermining his authority he decided to give him a dismissal letter though he had not planned to dismiss him. The dismissal, he stated was fair, though a disciplinary hearing was not held.
21. According to Mr. Muchiri, the Claimant asked to be dismissed and that the matter went before the Board of the Respondent and a decision was taken to dismiss him.
22. In cross examination, the witness stated that this was a case of constructive dismissal.
23. The second witness, the Director of Nursing, Mariam Swaleh stated that on 12 January 2013 he was called by the first witness together with the Respondent's Administrator, Rajesh Shukra and present was the Provincial Director of Medical Services, Hadijah Shikelly. In the meeting, the Provincial Director raised concerns that one of the Respondent's nurses was inciting nurses at the Coast General Hospital to down tools.
24. Later, the Claimant was called and he was very arrogant and was not listening and asked to be terminated holding his hips, and that the matter was taken to the Respondent's Board where a decision to terminate was taken.
25. In cross examination, the second witness stated that the Respondent had no problems working with employees involved in union activities and that the Claimant was dismissed due to his character and insubordination. She further stated she could not remember the reasons given in the

dismissal letter.

Issues for determination

26. The Court has considered the pleadings, evidence and submissions by the parties (filed on 22 July 2014 and 6 August 2014 respectively) and like in any other unfair termination complaint, the issues arising are mainly two, whether the dismissal was unfair and if so appropriate relief.

Whether dismissal was unfair

Procedural fairness

27. Section 41 of the Employment Act, 2007 requires an employer to inform an employee of the charges or allegations it has when contemplating to terminate the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*. The employee is entitled to a reasonable opportunity to state his or her case. If it is a case of summary dismissal, the employer is under an obligation to consider any representations made by the employee.
28. The Respondent's first witness admitted that no disciplinary hearing was held on the basis of the Claimant's behaviour/conduct.
29. According to Mr. Muchiri, the initial reason for summoning the Claimant was not for disciplinary purposes but for counseling. In the course of the counseling tempers flared and the Claimant is alleged to have requested to be given a termination letter.
30. The question therefore arises whether the Respondent was exempted or can be excused for not notifying the Claimant of the reasons contemplated for dismissing him and not affording him an opportunity to be heard.
31. In discussing the question, the Court must consider the context. The Respondent is a hospital with different departments. Mr. Muchiri was the head of human resources and must be taken as a professional human resource practitioner though his credentials were not disclosed.
32. And with a professional, some standards are expected. Was it proper for Mr. Muchiri to in the heat of things concede to the demand by the Claimant to give him a termination letter? Without purporting to substitute its own view for that of the Respondent, the Court would have expected Mr. Muchiri to allow things to cool down and thereafter commence the disciplinary process.
33. In the view of the Court, the procedural fairness safeguards of section 41 of the Employment Act, 2007 where applicable, cannot and ought not to be suspended on the basis of the unbecoming conduct of an employee.
34. Although it was stated that it is the Respondent's Board which took the decision to dismiss, being removed from the fireworks in the Human resources office, it was not disclosed when it met and whether the Claimant was granted an opportunity before it, if it was necessary.
35. The Respondent ought to have complied with the statutory requirements of fairness but did not and the Court finds the dismissal procedurally unfair.

Substantive fairness

36. The letter of dismissal did not give any reasons for the dismissal of the Claimant. But it made reference to the explanation offered by the Respondent's Human Resources Manager.
37. The Respondent purported to act pursuant to a contractual provision to terminate the contract by giving one month notice, but no reasons.
38. The Court needs to say a word or two about dismissal or termination of employment on notice or payment but without reasons. This Court dealt with the question in *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR and in *Alphonse Sulpice Mzenge v Mombasa Air Safari Ltd*, Mombasa Cause No. 110 of 2013 and in the latter case I held that

Prior to the Employment Act, 2007 an employer could dismiss an employee for a bad reason or no reason at all, provided it was on notice. That has now changed. Section 45 of the Employment Act has made serious inroads in regard to dismissals. An employer is under an obligation to prove the existence of good and valid reasons for dismissal even if

he gives notice.

39. Under the statutory regime in Kenya today, it is not open to an employer to terminate the services of an employee without cause by the giving of notice or payment in lieu of notice. Any provision in an employment contract which provides for termination on notice or pay in lieu of notice without giving reasons is unlawful and invalid. The Court states so, on the basis of sections 43 and 45 of the Employment Act, 2007. All terminations of employment must be on reasons which an employer is required to not only prove but prove as valid and fair reasons. Ordinary employees now have security of tenure against unfair terminations.
40. The dismissal letter did not give reasons. In Court, the Respondent offered the reason for the dismissal as insubordination and that the Claimant asked to be terminated and so was given what he requested for. Reference was also made to the case being one of constructive dismissal.
41. In submissions, the Respondent made extensive reference to the breakdown of mutual trust and confidence between the parties. Mutual trust and confidence has now attained a universally implied term status on all employment contracts. It has become widely applied and influential and it applies to both employers and employees. It is not necessary for the Court to delve on a discussion of the principle to determine the present complaint.
42. In the view of the Court, the action by the Respondent was taken in an atmosphere which was not conducive and tempers should have been allowed to cool. The dismissal was not in accord with justice and equity and thus was substantively unfair

Appropriate relief

Lost income

43. The Claimant sought Kshs 291,500/- being the remuneration he would have earned had he served the full tenure of the contract. The Claimant appeared to anchor this head of relief on section 12(3) (viii) and 4 of the Industrial Court Act.
44. I was not properly addressed on the extent of the orders the Court can grant under the *any other appropriate relief* jurisdiction, but in my view it cannot be a substantive relief but a relief or order ancillary or incidental to the substantive reliefs or orders sought. This prayer is denied.

Damages under section 49(1) (c) of the Employment Act, 2007

45. The equivalent of not more than twelve months gross wages is one of the primary remedies for unfair termination. It is a discretionary remedy exercised in consideration of any, some or all of the thirteen factors set out in section 49(4) of the Employment Act, 2007.
46. The Court has reached the conclusion that the dismissal of the Claimant was unfair. He stated in testimony that he works locum at a clinic in Bamburi. The Claimant's prospects to secure alternative employment as a nurse are above average. He was on a fixed term contract of 2 years which had 11 more months to run.
47. Considering the outlined factors, the Court would award the Claimant the equivalent of 4 months gross wages as compensation (section 49(1)(c) of the Employment Act, 2007 does not categorise the award either as compensation or damages but it is ordinarily accepted now that it is compensation).
48. Evidence before Court is that the Claimant was earning a gross remuneration of Kshs 26,500/-. The Court would assess the compensation at Kshs 106,000/-.
49. Before concluding, the Court wishes to thank the Advocates involved in the Cause for their industry and commitment to their respective clients' cases.

Conclusion and Orders

50. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and not in accord with justice and equity and awards him and orders the Respondent to pay him
 - a. 4 months gross wages as compensation Kshs 106,000/-

- 51.The relief for lost income is dismissed.
52.Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Mombasa on this 12th day of September 2014.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Momanyi instructed by Nchogu, Omwanza & Nyasimi Advocates
For Respondent	Mr. Wafula instructed by Cootow & Associates Advocates