



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 2402 OF 2012
DR. DANIEL MUCHIRICLAIMANT
VERSUS
KENYA RED CROSS SOCIETY RESPONDENT

JUDGEMENT

J W Rioba Advocate for the Claimant

Mrs Wetende Advocate for the Respondent

1. This is a claim seeking a declaration that the Claimant's employment was unlawfully terminated; it was wrongful and malicious and thus demands 12 months compensation for unfair and wrongful termination and non-issue of a certificate of service. The claim was filed on 28th November 2012 by the Claimant Dr Daniel Muchiri against the respondent, Kenya Red Cross Society. The Respondent filed the defence on 11th February 2013 and admitted the Claimant was their former employees and was summarily dismissed for gross misconduct and thus nothing is due in compensation or costs. Both parties were heard by call of witnesses, the Claimant testified in support of his case and also called Ms Nuria Mukhtar as a witness while the Respondent called two witnesses Mr Mohammed Adan and Ms Laura Mugo. At the close of the hearing both parties filed their written submissions.

Claimant's case

2. The Claimant is seeking a declaration that his employment was terminated unlawfully and maliciously through summary dismissal. This was not proper as the Respondent was driven by malice and thus is seeking compensation for the unfair termination.

3. The Claimant stated that he is a medical doctor current based in the Democratic Republic of Congo. The Respondent is a humanitarian relief agency established as a society. On 12th April 2012, the Claimant was employed by the Respondent as a medical doctor as Clinical Services Co-ordinator and in charge of Clinical Services at the Respondent work station in Daadab. The Respondent had human resource policy and procedures guidelines applicable to all its employees in Kenya. On 17th September 2012 the Respondent summarily dismissed the clamant following a suspension on 27th August 2012 and a show cause notice issued 24 hours prior which was withdrawn and replaced with one dated 3rd September 2012. Despite the short notices the Claimant was able to give a response through email dated 5th September 2012. Despite giving his defence, the Claimant was summarily dismissed in disregard that his contract was to end on 31st October 2012; terminated was to be precipitated by notice of one month or payment in lieu of such notice; the Respondent would pay a basic salary of Kshs.220, 000.00 per month

and that the applicable law would be followed. The summary dismissal was without notice and before his contract expired and thus malicious in that the Respondent was aware there was a written term contract, the termination was without reasons, there was no notification and the Claimant was not given adequate opportunity to be heard to interrogate the source of information relied by the Respondent to dismiss him. There was no chance of appeal granted and the summary dismissal was too harsh a sanction against him.

4. The claims by the Claimant against the Respondent are for;

- a. *A declaration that the Claimant's employment was unlawfully, wrongfully and maliciously terminated.*
- b. *12 months' compensation at the rate of Kshs220, 000.00 per month as statutory compensation for unfair and illegal termination and wrongful dismissal.*
- c. *A certificate of service*
- d. *Interest on (a) above at court rates*
- e. *Costs of the claim and interest thereon.*
- f. *Any other relief that this honourable court shall deem fit and just to grant in the circumstances.*

5. In evidence the Claimant stated that since his employment by the respondent, he was based at Daadab refugee camp where he undertook his duties diligently without any case of indiscipline. His contract of employment is dated 12th April 2012 with a monthly salary of Kshs.220, 000.00. He was to work until 31st June 2012 but the contract was extended to 31st October 2012 but he did not finish the extension period as he was summarily dismissed on 17th September 2012 on the grounds that he allowed a party to go on at the Respondent premises and compromised security. Other ground were that he used the property of the Respondent improperly causing security lights to be off which was gross misconduct. These allegations are not true.

6. The events leading to the summary dismissal are that on 17th August 2012, it was a Friday and most of the staff had left for Idd celebrations. The Claimant was left at the Daadab main camp with a few staff members who were at work. He was at work at 5pm and the living quarters were 12 kilometres away. After work hours at 5pm He left for his premises and later found his colleagues at the staff bar as they were not on duty. He found the people at the bar drinking; one person had a lap top with music on and the restaurant was providing drinks and food. The people at the bar were from different NGO based around Daadab and this was 12 kilometres away from the Respondent offices at base two which is between the bigger UN compound and the community all about one kilometre away. The people at the bar were there on their own volition and not under the control of the Claimant and this were off-work hours; he was not responsible for them. The canteen was open and people could buy food and drinks. There were about 20 people all engaged in their private business and the Claimant sat with the group and had his food and drinks and the music was on.

7. There was no policy of the Respondent to control such an event as this was outside work hours. The allegation that there was breach of security and that he switched off lights is not correct as the Claimant was not aware where the lights were controlled from and his position with the Respondent was not to control lights. The allegation that the Respondent motor vehicle was used to ferry drinks is not correct as every vehicle used there is a log book that must be signed stating the reasons for its movements. He used the vehicle at his disposal from the office to his place of residence. Where this vehicle was used improperly, the logistics officer was the responsible person to know.

8. The Claimant was issued with a show cause notice on 27th August 2012. He gave his response and on 3rd September 2012 he was suspended and a new notice to show cause issued. There were several allegations he was supposed to Respondent to;

1st allegation was that he used the community ambulance;

2nd allegation was that he allowed loud music; and

3rd allegation was that he interfered with the generator.

9. To these allegations the Claimant's response was that there was no party at the camp he just met his friends and had a drink and food. He did not authorise the use of Respondent vehicles as there are logbooks to show such use. The lights and generator at the camp were already faulty and he was not involved in switching them on or off. After this response, the next communication by the Respondent was summary dismissal. There was no notice or hearing to know what evidence existed to warrant such action. The human resource policy and procedure guidelines were not followed and therefore the termination was unfair and seeks compensation, costs and interest.

10. On cross-examination, the Claimant confirmed that this Friday 17th August 2012 was the eve of Idd celebration and he had been left in charge as his supervisor was on leave. Majority of residents in the area are Muslims and the holiday of Idd is important to them. There are also other NGO and organisations resident there like GIZ, MSF and UN missions. There are general security concerns in Daadab. Power is accessed through the generator and each organisation has one. The one at the camp was used for security purposes. At the bar there was a computer using power. It was not proper to put off light so as to play music on the computer. This particular camp was for the Respondent and those who visited it knew it belonged to the respondent. He was the most senior person left at the Respondent work place. The meeting at the bar with others was impromptu without prior planning. People just converged at the staff bar. It closed at midnight. There was no indecency or lights put off as this would compromise the respondents reputation and security. The policy of the Respondent was that while at the camp one was to maintain decorum and common sense. All Respondent vehicles movements are recorded on a logbook and the logistics officer can tell of any misuse. The resident community is about one kilometre away and any music from the staff bar could not reach to that point so as to cause disturbance.

11. The Claimant also confirmed that he was issued with two show cause letters and he gave his response. He was not called for hearing or given a chance to appeal. The contract was for a fixed period that had not ended.

12. The witness called in support of the Claimant's case was Ms Nuria Mukhtar Maria a former employee of the Respondent between Aprils to September 2012 as the Reproductive Health Coordinator. On 17th August 2012 she was at Daadab and after work proceeded to the living quarters when a friend called her to Base Two Camp. This was a different camp about 10 kilometres away where there was a party. She therefore joined others for the get-together for the Idd celebrations. There were about 20 people as majority of staff had left for home. Those present were from different agencies. The people had food and drinks with music playing with small speakers.

13. The witness also gave evidence that she is Muslim and this was the eve of Idd as a holy time. She was not offended with the party. Idd is for celebrations as it is a feast day and people celebrate. She does not drink alcohol as a practicing Muslim and had tea and soda at the party. By midnight the music was off and people left. She later left the Respondent employment for other ventures.

Respondent's case

14. The decision on summary dismissal was justified. This was done after the Claimant participated at a rowdy party at the respondent's work station in Daadab. The Claimant was left in charge and should have stopped the loud and rowdy party. He compromised security at the Respondent premises and their reputation and thus dismissal was justified.

15. The Respondent employed the Claimant as the Clinical Services Co-ordinator on a short term contract with effect from 16th April 2012 to 31st June 2012 and was extended to 31st October 2012. The Claimant was a senior member of staff at the Ifo refugee camp. On 17th August 2012 the Claimant without authorisation participated, allowed and failed to take any steps to prevent a rowdy party at the Ifo camp while he was in charge at the camp as the superior was on leave. The loud music playing at the party interfered with operations of the generator supplying power at the camp. There is no electricity

supplied to the camp and the Respondent together with other humanitarian agencies within Dadaab camps rely on the generator. Instead of putting off the music, the Claimant put off security lights as the camp and thus compromised the safety and security of the Respondent and other humanitarian agencies work stations as ifo camp is highly insecure.

16. The Respondent also stated that the Claimant utilised the respondent's vehicle to ferry alcohol to the respondent's work station contrary to policy regulations. By failing to stop the party, the Claimant caused the integrity and standing of the Respondent to disrepute amongst the other humanitarian agencies and surrounding community which was contrary to Respondent policy regulations. The Respondent therefore issued a show cause letter to the Claimant on 27th august 2012 and he gave his responses, on 3rd September the Claimant was suspended pending further investigations and on the 17th September 2012, the Respondent summarily dismissed the Claimant. the reasons for the dismissal were that he was complicit in compromising the security of the respondent's base camp. The Claimant had the right of appeal upon dismissal but he failed to do so.

17. The Respondent also stated that the Claimant was paid all his dues and nothing is outstanding. The Claimant was on a short term contract that was to expire on 31st October 2012 and as such the claim for 12 months compensation is unlawful and without legal basis. The claim should therefore be dismissed.

18. In evidence the Respondent called Mohamed Adan Mohammed working with the Respondent and at the material time he was the Security officer at Ifo Two Camp, a place 20 kilometres from Daadab camp. The camp has about 4000 refugees under the Respondent and a police station. On 17th August at 6pm the Claimant called him and said that he had a bash and needed help with security. He was head of operations as the main person was away at the time. The Claimant arrived at 6pm and arranged the Boma by taking tables out, seats and lights were hanging on a tree. Other people came from MSF, 15 kilometres away at Ifo Two Camp and 8 Kilometres from Ifo One Camp. There were 42 people who were not Respondent employees. They were all within the Respondent compound. Most of the staff had also left for Ramadhan period and there was Idd and many people had gone to celebrate. There was music from a computer attached to two big speakers which was not a usual occurrence at the camp.

19. The bash had alcohol and the Respondent vehicle was used to go to MSF to bring more alcohol. The vehicle left for Degale where there was more alcohol. The Claimant and Dr Mendi used the Respondent vehicle to get more alcohol. The Logistics Officer was not there and the Claimant remained in charge at this time.

20. That the witness only advised the Claimant on security issues. He remained at the main gate as there are bandits in the area, several times there have been shootings and killings and several agency staff were hijacked. Security is an issue of concern and those entire residents there were aware of these concerns. The witness therefore went to the tent and reduced the loud music but the Claimant went and increased the volume. There is no electricity provided by Kenya Power and the Respondent rely on a generator which is small and whenever there was a surge due to overuse, the light for security would go off. On this day the generator tipped and he went with Dr Kuyo and told the Claimant that there was a surge and this affected the kitchen and security lights. This was caused by the disco amplifier and the security lights that were being used for the speakers and computer. There were also houses with AC that also created the surge effect. He had to put off some security lights as they kept on tripping. This affected security operations. This was a high risk issue. At 2am he went and put off the music. All those at the bash were drunk at the time and he tried to talk to the Claimant but by then he was too drunk, he had shorts on and removed his t-shirt. He was drunk. Present was Dr Nuria Mukhtar is like the Claimant's wife and remained with the Claimant at the bash. She allocated tents. There are 42 tents and 10 houses and she gave them to MSF and GIZ staff as it was late and they could not leave Ifo Two Camp to their camps. Those at the bash were allocated tents without prior permission. Some Respondent staff complained that their tents locks were broken into. The bash was bad. He forced himself to provide security and stopped the loud music twice on this night.

21. The other witness for the Respondent was Ms Laura Mugo the respondent's human Resource Manager who testified that the Respondent as a humanitarian organisation provides healthcare services to

refugees at Daadab camp. The events of 17th august 2012 came to her attention. It was Idd weekend and a number of staffs are Muslims hence took time off to go home. There was a party and the problem was that security was compromised by the events that took place and there was a report that Respondent vehicle was used to ferry alcohol. As the human resource manager the issues had to be investigated and establish what had happened. The Claimant was in charge at the camp given that he was the most senior.

22. The witness also stated that she conducted the investigations herself. She went to Daadab and had a meeting with those at the camp and talked to the Claimant. she found out that there was a party and security was compromised as the generator was overloaded and tripped and lighting in the stamp went off which was serious lapse of security. As human resource manager she asked the Claimant to explain and a show cause was issued, he was later suspended and a new show cause was issued, further to the previous one to elaborate on what took place. The Claimant failed to address the issues raised against him. as the responsible person he was liable.

23. The policy of the Respondent is to give a person a chance to explain. The Claimant got the chance and failed to Respondent to the allegations against him by option to address unrelated issue. He was thus dismissed. He was given 14 days to appeal. He did not appeal. The Claimant had a contract that was ending on 31st October 2012. On 17th September 2012, the Claimant was dismissed as the Respondent could not wait for the contract to expire as security had been compromised under the watch of the Claimant. the dismissal was therefore justified.

24. In cross-examination the witness confirmed that there was an investigation into the incident, several people gave their statement but this report was not shared with the Claimant. these investigations took seven days and the show cause letter was done after investigations were complete. There was no oral hearing as the Respondent felt the show because notice was sufficient. This was a chance to explain. There was an ad hoc committee that took the decision on summary dismissal. The committee established that there was security breach and the Respondent owned the decision of the ad hoc committee. Even though the Claimant should have defended himself, he was aware of what had happened and therefore not a stranger to the process of his dismissal.

25. The witness also confirmed that there is a vehicle logbook, each has to have a security guard and these logs for the vehicle the Claimant used have not been produced. The Respondent has a canteen at the camp where alcohol is sold. Office hours run from 8 am to 5pm. There is no policy stopping employees from drinking alcohol. There is procedure for staff to apply before having a party which the Claimant failed to follow. This policy is not in writing. It is for security reason. The Claimant breached his contract and the Respondent was justified to use section 44(4) of the Employment Act. The grounds for summary dismissal were that the Claimant was in breach of his contract by;

- a. Allowing a party
- b. Placing security at risk
- c. Abuse of Respondent motor vehicle
- d. Paling loud music affecting those at the camp
- e. Causing security lights to be off compromising Respondent camp security

26. These were the facts that were in the show cause notice. The Claimant failed to give a satisfactory response. Hence the summary dismissal.

Submissions

27. The Claimant submitted that he was an employee of the Respondent and was summarily dismissed without a valid reason and hence his termination unfair. There was no disciplinary hearing to enable the Claimant defend himself pursuant to section 41 of the Employment Act. The allegations against him were never brought to his attention making the summary dismissal unprocedural as held in the case of **Miriam Kyalo versus MFI Office Solutions Limited [2013] eKLR**. the Respondent did not follow the human resource manual with regard to dismissal procedures. The Claimant is therefore entitled to the prayers sought.

28. The Respondent on their part submitted that the decision for summary dismissal of the Claimant was justified in that as a senior staff left responsible at the Respondent work place he compromised security and put into misuse the respondent's property by allowing a rowdy party to go on using the only available power from a generator knowing well that it served to secure the premises and allowing vehicles of the Respondent to ferry alcohol. The human resource policy was clear of these issues but the Claimant ignored the same. Section 44(4) (c) of the Employment Act allow an employer to dismissal an employee who neglects to perform his duties.

29. The Respondent also submitted that due process was followed. The Claimant was issued with a show cause notice with an outline of allegations against him, he was put on suspension and allowed to give his defence but failed to give a satisfactory response to all the allegations against him. the Human Resource Manger conducted investigations which informed the summary dismissal. The duty to prove there was unfair termination was on the Claimant which he did not discharge as held in the case of **Jackson Butiya versus EPK Cause No.335 of 2011**. The Claimant is therefore not entitled to the remedies sought.

Determination

Whether there the summary dismissal was justified

Whether there are any remedies

30. The Employment Act is crafted to ensure industrial harmony. This is for the benefit of the work force, the employee and the employer. That is why the Act is founded on key principles of fair labour practices.

31. Thus the drafter of the Employment Act, made provisions such as section 41 where the employer keen to discipline any employee must take such an employee through a process of hearing and such hearing must be before the union if the employee is unionised or if the employee chooses, in the presence of a fellow workmate. This connotes a scenario where the employee is present, to give a defence and also present, another employee as a witness of the hearing process. in such circumstances, the tenets of natural justice are achieved as any bias or lack of a fair decision would be witnessed by the employee present as the choice of the affected employee.

32. The Act also contemplated instances where an employer is to summarily dismiss an employee as under section 44. These instances though stated to be of summary nature are however qualified. Such qualification is that before summary dismissal an employee must be accorded rights as under section 41. In my view this is not an anomaly in the law. Hearing of an employee in the presence of another workmate even in serious cases that warrant summary dismissal is a good practice. This is the essence of what fair hearing and due process entails as even in a serious case of gross misconduct that warrants a summary action, the subject employee may have a good defence that is not within the knowledge of the employer. The adage that one is innocent until proven guilty resonates in such a scenario. Consequently the applications of section 41 of the Employment Act before taking the action that is summary or though notices before such termination is fundamental. This is more so when the Employment Act is read purposively. Sections 35 allow termination of employment with notice or payment in lieu of such notice while section 41 requires an employee to be heard before termination in the presence of another employee whereas section 44 allows summary dismissal. In such a scenario an employer has a remedy in each case, to terminate an employee through a notice or pay in lieu of such notice in a case such as under section 44 that require summary action but in due cognisance that before such summary action that the employer would pay in lieu of notice, such an employee must be heard.

33. It is not denied that on 17th August 2012, the Claimant was at his workplace, most staff had left for Idd celebrations or was on leave and he remained the most senior officer amongst the Respondent employees. There was a gathering at Ifo camp where the Claimant and other staff from various agencies around Daadab were having drinks and food and there was music playing. What is contested is that the gathering was rowdy, the music was loud; the computer playing the music was using speakers; these

speakers were linked to the available power from a generator that supplied power to the camp; the power from the generator was crucial to the area as it was the source of security lights in the area that is prone to bandits attacks; and the Claimant as the most senior officer of the Respondent present failed stop it.

34. The events that followed the subject party and or bash on the 17th of August 2012 are therefore crucial to note. It is important to outline;

On 27th August 2012, the Claimant was issued with a show cause letter;

On 3rd September the Claimant was suspended;

On 5th September the Claimant emailed his responses to the suspension letter;

On 17th September, the Claimant was summarily dismissed.

35. The respondent's human resource and policy manual at clause 15.3 on disciplinary procedures is insightful. At clause 15.3.2;

If an employee commits an offence, the immediate supervisor must immediately obtain the necessary evidence from the employee and available witnesses.

36. At 15.3.5;

In any investigations, employees are entitled to know the whole case against them and must be given adequate opportunity to prepare their defence. No evidence can be used against employees unless they have been given a copy of the same in writing.

37. At 15.3.10;

However, if an employee commits a breach of discipline, which is considered sufficiently serious to justify summary dismissal, the Head of Department shall recommend to the Secretary General that the employee be liable to dismissal.

38. Which procedure did the Respondent apply with regard to the acts alleged to have been committed by the Claimant on the 17th of August 2012? There was a show cause notice, suspension and then dismissal. The Claimant gave his written response to the show cause. The Respondent undertook an investigation by the Human Resource Manager going to the ground to get evidence from witnesses. There is no evidence that the Claimant was given a copy of the investigation report to enable him give his written defence on the basis of evidence against him. the dismissal that followed only came after the show causes notice, followed by a suspension and the investigation. It was not an instant decision as contemplated under the respondent's human resource and policy manual as at Clause 15.3.10. what then was the purpose of the suspension and the subsequent investigations?

39. Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows. See decision in **Frederic Owegi versus CFC Life Assurance Limited, Cause 1001 of 2012.**

40. To sanction an employee while on suspension is to putt the cart before the horse as it were. While on suspension, employee remains not knowing what allegations exists as the suspension is to aid

investigation and to allow formulation of charges. On the alternative, Where summary action is to be taken, there must exist a case on the face of given facts that do not require investigations spanning four weeks like in this case. These are instances as outlined under section 44(4) of the Employment Act that, one is absent from work; is intoxicated; careless, abusive; disobedient, is arrested or commits a criminal offence; such cognisable matters that do not require four weeks of investigations like in the instant case.

41. The Respondent failed to adhere to these due process procedure outlined in their human resource and policy manual and in law. Where due process is not followed in a scenario where the law is stated in mandatory terms as under section 41 read together with section 35 and 44 of the Employment Act, any outcome decision made against an employee amounts being unfair. Where there may be a good cause to terminate an employee but the employer fails to apply the correct procedure, any termination or dismissal becomes procedurally unfair. This was the case for the Claimant.

42. I note the Claimant submission that he was not given a chance to appeal. With the above outline, even where an appeal was allowed or not allowed, the procedure undertaken by the Respondent was inherently unfair led to one decision? Summary dismissal. This was an unfair labour practice. See the decision of this Court in **Industrial Cause No.100 of 2012, Collins Orotu Lukhale versus AAA Growers Limited** see also the analysis of what fair labour practices entail in labour relations in **Elizabeth Washeke and 62 Others versus Airtel (K) limited and Another, Cause No 1972 of 2013.**

Remedies

43. The Claimant is seeking for a declaration that his termination was unlawfully, wrongfully and maliciously. With the above analysis and finding that there was procedural unfairness section 49 of the Employment Act allow compensation. I note the Claimant was on a fixed term contract that was to expire two weeks before his termination on 31st October 2012 but on the finding that there was an unfair labour practice, the fact of expiry of his contract does not negate what is due with regard to compensation in a case where the court has established an unfair labour practice. The Claimant has however moved on and engaged in new employment. An award of three months gross monthly salary is found sufficient compensation.

44. A certificate of service is an unfettered right to every employee as under section 51 of the Employment Act. This should be granted immediately upon termination or dismissal of an employee. Where this is not issued in this case, the same to be release forthwith.

In conclusion, judgement is entered for the Claimant as against the Respondent in the following terms;

- a. **A declaration that the Claimant's summary dismissal was procedurally unfair;**
- b. **An award of kshs.660, 000.00;**
- c. **A certificate of service be issued to the Claimant forthwith; and**
- d. **Claimant granted 50% of his costs.**

Delivered in open Court at Nairobi this 7th Day of October 2014

M. Mbaru

JUDGE

In the presence of;

Lilian Njenga: Court Assistant

.....

