



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 287 of 2012

Jeremiah Seker Kimani.....Claimant

VERSUS

Africa Infectious Diseases Village Clinics Ltd.....Respondent

Mr. Enonda for Claimant

Mr. Omondi for Respondent

AWARD

The claimant was employed by the respondent on 1st March 2004, as a Nurse Assistant and was stationed at Mbirikani Aid village Clinic in Loitokitok. He worked continuously as such until 16th February 2011 when he was summarily dismissed following a disciplinary hearing wherein he was found guilty of molesting a female patient aged 15 years in the hospital ward in the cause of his night duties on 13th December 2010. He was also said to have received a written warning previously for a similar offence.

In his memorandum of claim, the Claimant denied the allegations leveled against him and he testified in support of his case under Oath. The highlight of his testimony was that at a disciplinary hearing held on 29th January, 2011 the alleged victim, who was 15 years old at the time did not identify him as the assailant who she testified approached her bed and started caressing her body, touching her breasts and other private parts .

He told the court that his dismissal was based on false allegations. He however added that he was on duty on the material night and knew a patient by name of Margret Sein who was a minor. She had gotten late to travel on the material day and he had offered her accommodation in the ward but did not touch her indecently as alleged. Upon his dismissal he reported the dispute to the Ministry of Labour for conciliation in terms of Section 65(1) of the Labour Relations, Act 2007.

One Mrs. S.E. Mukanga was appointed a conciliator. The parties made written presentations to the conciliator and a conciliation meeting was held on 4/10/2011. The dispute was however not resolved and the same was referred to this court for adjudication.

At the time of dismissal the Claimant earned a basic salary of Kshs.8,571/= and a House Allowance of Kshs.1,286/=. He seeks a declaration that his dismissal was unlawful and unfair and consequently should be paid damages for unlawful dismissal and severance pay for the period of 8 years he served the Respondent, interest and cost at court rates from the date of filling the claim until payment in full and any other relief the court may deem appropriate.

In its statement of defense the Respondent has traversed the allegations by the Claimant as contained in his memorandum of claim and states that the Claimant was 1st employed as a House keeper on 1st March 2004 and was subsequently promoted to the position of housekeeping supervisor and eventually to the position of a Nurse Assistant which position he held at the time he was summarily dismissed.

The Respondent called 3 witnesses in support of its case, the first of whom was Dorcas Mbatha Mutuku (RW1) who testified under Oath as follows:-

That she was presently employed in a saloon at Emali town. She was a patient at the Mbirikani Group Ranch Clinic at Loitokitok on 13th/12/2010. In the ward she slept, there was a young girl aged between 12-13 years on the bed next to hers. She knew the Claimant well as she had been admitted at the clinic for three (3) weeks while undergoing T.B Treatment. On the material night she had attended a clinic for review of her condition. She saw the Claimant walking around the ward and at some point he sat on the bed where the young girl was and he was holding her breasts. She covered herself and when she later uncovered herself she saw the curtain around the young girl's bed were drawn around it. Later on she saw the Claimant leaving the girl's bed. She immediately reported the matter to a Nurse she knew by the name of Vivian. Other patients in the ward who noticed what was going on were unhappy.

She told the court that she was at a later date called to a meeting to explain what she had seen on the material night. She also was called before the conciliator at the Nyayo House and had given evidence. She was subjected to close cross examination and was steadfast. She said she was sure she saw the Claimant holding the young girl in an indecent manner on the material night. She explained that she did not raise an alarm on the spot as she feared that the Claimant would victimize her. She added that any deviation between what she told the court and what is summarized in the report of the disciplinary hearing cannot be attributed to her and insisted that the correct version of events was as she had told the Court.

RW 2 was one Christine Gatwiri who also testified under Oath. She told the court that she worked at the said clinic. She was presently unemployed because the clinic had closed down on 30/11/2012. She said that she was the nurse on duty on 13/12/2010 and had reported to work at 11.00 p.m. The minor patient by the name of Margret Sein was in bed No. 4. She had gotten late to go home and had been offered accommodation by the Hospital. She explained that she had taken over that night from one Esther Nkatha. There were about six (6) patients in ward B that night and she was being assisted by the Claimant in her duties. That Between 1.30 -2.00 a.m. she looked for the claimant to assist her to feed a patient. She walked around calling out his name but he did not show up. The bed where the young girl slept had its curtains drawn around it at the time. She instead got another Nurse assistant by the Name of Agnes Sopiat to assist in feeding the patient with porridge.

The Claimant then re-appeared later on when the feeding exercise was over. She gave similar testimony at the disciplinary hearing and also recorded a statement at Loitokitok Police Station. She was firm in her testimony during cross examination.

The next witness (RW3) was Vivian Olango who was a Nurse at the material Clinic. She told the Court that when she reported on duty on the morning of 13/12/2010 (RW2) Christine Gatwiri handed over to her and she proceeded to conduct routine rounds in the wards. In ward B, she noticed that all the patients were unhappy and upon inquiry she was told by (RW1), Dorcas Mbatha and one Miriam Ndugwa, a Maasai old Lady, that, they had not slept well because suspicious activities were taking place in ward B during the Night in the Bed where the young girl slept. She reported the matter to the Team leader who proceeded to interview Dorcas Mbatha and the young girl about the matter. She was not cross examined.

The Team Leader Jane Katawa (RW4) told the Court that upon receipt of the report by Christine Gatwiri she interviewed the young girl and other witnesses. The girl, Margret Sein, told her that she had been harassed the whole night by a worker at the Clinic. She did not name him. The patients simply told her that there was "*Tabia Mbaya*" in the ward that night. She reported the matter to the supervisor who took it up leading to the disciplinary hearing.

The testimony by the four witness called by the Respondent was consistent in many material respects and is largely in tandem with the minutes recorded during the disciplinary meeting held on 20/1/2011.

Although, Margret Sein was not called to testify in this matter, in her statement to the police dated 25/1/2012 attached to the statement of defense and marked exhibit '10', she explained therein how one Nurse Assistant by the name of Jeremia Kimani had fondled her breasts while she slept at a Clinic in Loitokitok. She stated that he had proposed love to her but she had explained to him that she was still going to school. He adamantly wanted to have sex with her but he did not succeed because she made noise. She had reported the matter the following day to one Nurse.

Upon a careful evaluation of the Claimant's testimony and that by the witnesses for the Respondent, the Court is satisfied that the minor girl was late to go home on 13//12/2011 and was given accommodation at the material Clinic. That the Claimant was the officer on duty in ward B on the material night and was supposed to assist Christine Gatwiri, the Nurse on duty to take care of the patients. The court is also satisfied that, Dorcas Mbatha, a patient who was at the ward B at the time saw the Claimant, who she knew well, approach the bed of the young girl and touched her body parts indecently. That when Christine Gatwiri looked for the Claimant to assist in feeding a patient, he was nowhere to be found but he later emerged. This is consistent with the testimony of Dorcas Mbatha that the curtain around the bed of the young girl was drawn and suspicious activities were taking place therein.

It was not suggested by the Claimant that any other male was on duty in ward B on the Night of 13/12/2011. Clearly he had the opportunity to commit the acts complained of by the employer and the court upon evaluation of the testimony of various witnesses finds on a balance of probabilities that he had indeed indecently handled a minor patient while in the course of his duty.

The claimant has offered a bare denial and did not refute that on 20/2/2008 he had received a warning letter for having handled a patient in an improper manner among other issues raised in the letter annexed as 'exhibit 2' to the memorandum of Defense.

In terms of Section 44(1) as read with Section 44(3) of the Employment Act, 2007, "*the Employer may summarily dismiss an Employee without Notice when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service*".

Section 44 (4) enumerates gross misconduct that may justify summary dismissal to include:-

"(g) 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".

Sexual advances to an underage girl especially in the circumstances described to the court clearly satisfies the requirements of section 44(4)g of the Employment Act 2007.

The primary responsibility of a medical staff is to provide medical treatment to patients so as to protect their lives. A clinic in this case is under utmost responsibility through the staff it employs to treat patients decently. There is no room whatsoever for the kind of deviation by the Claimant from this primary responsibility by the staff of this Clinic or any other.

The conduct by the Claimant which the Court finds has been proven on a balance of probabilities amounts to a fundamental breach of his contract of service. Indeed, the Court is at a loss as to why the Claimant was not prosecuted for the alleged crime committed against a young girl and a patient who was at the mercy of his beastly conduct.

The Respondent has accordingly satisfied the requirements of Section 44 (4) in that it has shown on a balance of probabilities that it summarily dismissed the Claimant for a justifiable and lawful reason. Furthermore the dismissal was fair in all the circumstances of the case as it was for a valid reason and a fair procedure was followed before the dismissal was effected.

With regard to the claim for severance pay for 8 years, it is clear that the Claimant was registered with NSSF and the employer made contributions to the fund on his behalf. Appendix “6” to the statement of defense which is uncontroverted clearly shows that.

Section 35(6) of the Employment Act 2007, exempts an employee who is a member of “(d) *The National Social Security Fund*” from the provision of Section 35 (5) which guarantees employees employed on permanent terms service pay for every year worked.

The claim for severance pay is also dismissed.

Accordingly the Claimant’s case is dismissed with costs in its entirety.

It is so ordered.

DATED and DELIVERED in Nairobi this 16th day of January, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE