



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 3 of 2013

NAOMI J. MOROGO.....CLAIMANT

-VERSUS-

VALLEY HOSPITAL LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on 12th February, 2013)

JUDGMENT

The Claimant Naomi J. Morogo filed the memorandum of claim on 10.04.2012 through M/S Oumo and Company Advocates. The Respondent Valley Hospital Limited filed the Memorandum of Response on 04.05.2012 through Odhiambo and Odhiambo Advocates.

The Claimant has prayed for judgment against the Respondent for:

- a) **one month salary in lieu of the termination notice;**
- b) **severance pay for 11 years of service;**
- c) **commissions;**
- d) **compensation based on section 49 (c) of the Employment Act, 2007;**
- e) **a certificate of service as contained in section 51 of the Employment Act, 2007;**
- f) **the Respondent to pay costs of the cause; and**
- g) **any other relief this Honourable court may deem fit to grant.**

The Claimant was employed by the Respondent as a nurse with effect from 1.11.2000 as per the letter of appointment at folio 8 of the bundle of the memorandum of claim. The Claimant served the Respondent as per the terms of appointment until 7.12.2011 when the Respondent addressed the letter as follows:

**“7th December, 2011
Miss. Naomi Morogo
P. O BOX 15391**

NAKURU

Dear Madam,

RE: TERMINATION OF APPOINTMENT

The management of Valley Hospital has decided to terminate your appointment as a Nurse-In-Charge with effect from 7th December, 2011.

Please hand back any property that belongs to the Hospital to your supervisor, and then proceed to Accounts department to collect your dues which includes days worked, one month salary in lieu of notice and leave due if any.

Kindly note that any amount owed to the Hospital will be recovered from your dues.

Yours faithfully,

SIGNED

**Dr. G. Obwanga
ADMINISTRATIVE DIRECTOR”**

The claimant was paid the terminal dues as set out in the termination letter and her employment thereby came to an end. She had been in the Respondent’s continuous service for 11 complete years. In the memorandum of claim the Claimant alleged that the Respondent had summarily dismissed her in total contravention of section 44 of the Employment Act, 2007. In cases of summary dismissal under the section, it was pleaded and submitted, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Since the Respondent did not issue such a notice, the Claimant pleaded that the Respondent had offended the rule of law and justice as the Claimant was thereby highly demoralized, economically deprived and her life became hopeless. The termination, it was submitted for her, was therefore unfair and unlawful.

The Respondent on the other hand pleaded that it terminated the employment in accordance with the provisions of clause 9 of the letter of appointment which stated, thus **“After successful completion of the probation period a confirmed permanent employee or the company may terminate this agreement by giving a written notice of one calendar a month or lose a full months payment in lieu of such a notice.”** That the claimant had been paid the terminal dues in accordance with the clause and the Respondent was not liable as claimed by the Claimant. The Respondent further pleaded that in terminating the Claimant the Respondent had strictly complied with the provisions of section 36 which provides thus, **“36. Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”** It was then submitted for the Respondent that under subsection 35(1)(c) of the Act, the Respondent paid the Claimant a monthly salary and could validly terminate by paying a monthly salary in lieu of the 28 days termination notice prescribed under the subsection. Thus, the termination was lawful and the Respondent was not liable as claimed by the Claimant.

At the hearing the parties agreed that the undisputed issues included:

- a) **That the Claimant was an employee of the Respondent as pleaded.**
- b) **That the Claimant’s last gross salary was Ksh. 45,465.00.**
- c) **That there was a termination of the contract of employment on 7.12.2011.**
- d) **That the effective date of appointment was 01.11.2000 as per the letter of appointment.**

The parties identified the following disputed issues for determination by the court:

- a) **Whether the termination was summary dismissal or a termination within the contract of employment.**
- b) **Whether the Claimant is entitled to gratuity as claimed.**
- c) **If the Claimant is entitled to gratuity, whether the computation of the gratuity as claimed was fair.**

Both parties did not call any witness and they decided to rely on the documents filed in court. The court has considered the pleadings, material on record and the parties' respective submissions and makes the following findings:

1. Parties are bound by the provisions of the contract of employment and the relevant statutory provisions under the Employment Act, 2007. In the present case the parties agreed to a one month termination notice or payment of a month's salary in lieu of notice. It has been submitted for the Claimant that she served with due care and dedication and that it was unfair for the Respondent to suddenly terminate the employment relationship without giving a notice and without orally or otherwise informing the Claimant the reasons for the termination. The termination amounted to summary termination in contravention of the statutory provisions and therefore it was unlawful and unfair. The court has considered the respective submissions and finds that the termination amounted to a summary termination. Subsection 44(1) of the Employment Act, 2007 is clear that summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled to under a statutory provision or under the contractual term. In this case the employee was entitled to one month termination notice under the contract and 28 days termination notice under subsection 35(1)(c) of the Act. The issue that arises is whether the Respondent was entitled and whether it was lawful and fair to terminate the employment summarily.

Subsection 44(2) of the Act is clear in stating that, **"44. (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provisions or contractual term."** The provision is imperative that only in circumstances envisaged under section 44 of the Act is an employer permitted to invoke summary dismissal. It is the court's consistent and deeply held opinion that section 35 of the Act that permits termination of employment without giving due termination notice, and instead paying in lieu of the termination notice, must be understood within the clear provisions of section 44 of the Act on summary termination. Payment in lieu of termination notice is available only where, as envisaged under section 44, the employee has by his or her conduct indicated that he or she has fundamentally breached his obligations arising under the contract of service. Under subsection 44(4), such conduct is referred to as gross misconduct and examples are enumerated under the subsection. The court further finds that any contractual provision on termination of employment by paying in lieu of a termination notice must be construed to accrue and apply only where gross misconduct has been established against the employee as envisaged under section 44 of the Act; otherwise such provisions would be unlawful and in contravention of subsection 44(2) of the Act.

In making this holding, the court has been guided by the provisions of Article 47 of the constitution which provides that every person is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, the Article provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. The court finds that in the instant case the Claimant's livelihood which depended on her employment was at stake. The decision to terminate her employment obviously had serious adverse consequences and the Respondent was bound under the provisions of Article 10 on national values and principles of governance to uphold the Claimant's right to fair administrative action.

In **SHANKAR SAKLANI -VERSUS- DHL GLOBAL FORWARDING (K) LIMITED, Industrial Court Cause No. 562 of 2012 at Nairobi**, this court stated thus,

“Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.”

The court upholds that position and finds that contractual and statutory provisions for payment in lieu of a termination notice of a contract of service do not in themselves justify summary termination or removal or dismissal of an employee and under our employment constitutional or legislative framework and policy, such summary termination must accord the employee the right to be heard by the employer and reasons for the decision as provided for in Article 47 of the constitution and section 41 of the Employment Act, 2007. The court observes that sub-Article 47(3) mandates parliament to make legislation for realization of the right to fair administrative action and it is the court’s considered opinion that the Employment Act, 2007 is one such legislation.

In the present case the Claimant served diligently for eleven years without any warning for misconduct or poor performance. She was promoted due to her good performance. She was engaged as a professional nurse and after the excellent service the Respondent removed her from service without any notice and preparation. It is the court’s considered opinion that even if the Respondent wanted to separate as per a contractual term or statutory provision, the Claimant deserved preparation through a notice and a hearing. She also deserved some explanation and reasons to avoid any speculation and devastating or demoralizing effects that were the obvious consequences of a sudden or hasty termination. The court considers that human dignity demanded that the Respondent prepares the Claimant for the separation in line with the cited constitutional and statutory provisions. The court finds that the summary termination was unfair and the Claimant is entitled to compensation of **Ksh. 545,580** being twelve months’ gross salaries at Ksh. 45,465 per month.

2. The second issue for determination is whether the Claimant is entitled to the gratuity as claimed. There is no dispute that the claimant was a member of the National Social Security Fund. There was no dispute that the relevant remittances to the Fund were made. As submitted for the Respondent, the Claimant was therefore not entitled to service pay or gratuity in view of the provisions of subsection 35(6) of the Employment Act, 2007. The court finds as much and in the circumstances, the issue of whether the gratuity was fairly computed as claimed is thereby disposed as the Claimant is not entitled.

The preamble to our Constitution is plain clear that we are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Article 10 of the Constitution declares the national values and principles of governance to include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. The values and principles under the Article also include good governance, integrity transparency and accountability. Under the Article, the values and principles apply and bind all persons. The court holds, as per the constitutional provisions, that the values and principles bind employers and employees in public, private and all sectors. Article 159 (1) declares upholding of the purpose and principles in the Constitution through their protection and promotion as one of the cardinal principle in exercise of the judicial authority. For avoidance of doubt, the court is of the considered opinion that to uphold the enumerated

constitutional values and principles, human dignity demands that employers shall accord employees a termination notice and a hearing before making a termination decision which invariably has far reaching impact on the employees' well-being as individuals and elements of families, communities and the nation. The exceptions to notification and hearing are thin and rare as established in this judgment and employers are reminded to follow the wider path of genuine termination notice and hearing failing which, human dignity demands of this court to purge any breaches and restore human dignity through award of appropriate reliefs.

In conclusion judgment is entered for the Claimant against the Respondent for:

- a) **a declaration that the termination of the contract of employment was unfair;**
- b) **the Respondent to pay the Claimant Ksh. 545,580 plus interest at court rates from the date of this judgment till full payment;**
- c) **the Respondent to pay costs of the case; and**
- d) **the Respondent to issue and deliver the Claimant's certificate of service.**

Signed, dated and delivered in court at Nakuru this Tuesday 12th February, 2013.

BYRAM ONGAYA
JUDGE