



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 241 of 2012**

**CHARLES BWOMA ..... CLAIMANT**

**VERSUS**

**THE KENYATTA NATIONAL HOSPITAL MANAGEMENT BOARD .....RESPONDENT**

**JUDGMENT**

This is the judgment of Court in the case of Charles Bwoma, the Claimant, against the Kenyatta National Hospital Management Board, the Respondent.

The claimant filed the statement of claim on 15<sup>th</sup> February, 2012 through Rumba Kinuthia & Company Advocates.

The respondent's memorandum of Defence was filed on 9<sup>th</sup> May, 2012 together with a notice of Preliminary Objection both through Mwangi, Wahome & Company Advocates.

The Preliminary Objection stated that the claimant's alleged cause of action as pleaded in the statement of claim arose before the establishment of the Court. Accordingly, the court did not have the jurisdiction to try and to determine the matter. That Preliminary Objection was not argued. The jurisdiction of the court is not limited to a cause of action accruing after its establishment. The Industrial Court Act, 2011 provides for the jurisdiction of the court in Part III of the Act. Nowhere is the jurisdiction limited in the manner the Preliminary Objection purports to suggest. Accordingly, the court will proceed to consider this cause on its merits.

The claimant has pleaded that his dismissal from employment was unfair, unwarranted and without any justification as a result of which he claims and prays for judgment against the respondent for-

- (a) the sum of Kshs.2,892,907/=,
- (b) reinstatement to his employment as a Senior Nursing Officer;
- (c) costs of the suit;
- (d) interests on (a) and (e) above at court rates from the date of filing suit until payment in full; and
- (e) any other relief that the Honourable court may deem fit and just to grant.

On 14<sup>th</sup> May, 2012, the court directed that the cause would be heard on 16<sup>th</sup> October, 2012. The

Respondent was not represented in court but the claimant's counsel served the relevant hearing notice and filed the affidavit of service. The Respondent was not represented in court on 16<sup>th</sup> October, 2012 when the case proceeded to hearing. At the hearing the claimant testified as follows:

1. That he resided in the United Kingdom and he had specifically travelled to attend court.
2. The respondent employed him in July 1990 after he had completed his nursing education.
3. He was initially employed as Nursing Officer II and promoted to Nursing Officer II on 5<sup>th</sup> July, 1993, Nursing Officer I on 13<sup>th</sup> August, 1996 and finally Senior Nursing Officer with effect from 19<sup>th</sup> March, 2004.
4. During the service with the Respondent he undertook training including specialization in midwifery at Pumwani Hospital in 1994 and a Higher National Diploma in Community Health Nursing in 2002 and a Management Training Course in 2002.
5. During the service he was hardworking, efficient and a highly trusted officer earning himself the promotions.
6. On 24<sup>th</sup> February, 2006, he applied for annual leave because he had accumulated 75 leave days as per the Respondent's leave application form dated 24<sup>th</sup> February, 2006, which the claimant completed. The 75 days annual leave ran from 22<sup>nd</sup> February to 22<sup>nd</sup> June 2006. He was expected to resume duty on 23<sup>rd</sup> June, 2006.
7. The leave application was approved as per the leave application form completed by the claimant and the Personnel & Training Manager on 24<sup>th</sup> February, 2006.
8. The claimant proceeded on leave to United Kingdom where his family is residing. The Respondent had facilitated the claimant to process the Visa application by writing to the British High Commissioner the letter Ref. No. KNH/529325/143 dated 17<sup>th</sup> August, 2005 confirming that the claimant was the Respondent's employee. It is notable that the claimant produced the Original copy of the letter marked Exh. C 2 during the hearing of the Cause.
9. That during the vacation in the United Kingdom the Claimant became unwell. That he went to seek medical attention at the General Practitioner's medical facility. His medical problem was serious and he was sent to a specialized investigation. That he then telephoned the Respondent's Chief Nursing Office one Mrs. Owira. The Telephone conversation was not recorded.
10. That he had to undergo some operation and he faxed some documentation to his friend one Mr. Obiero who did not work for the Respondent. The document he faxed the said Mr. Obiero was a letter prescribing more medical attention.
11. The claimant produced to the court medical documents being letters marked Exhibit C.4 (a) to (h) being invitations from Hospital for him to go for medical attention. The letters included:
  - (a) dated 13<sup>th</sup> July 2006, from Edgware Community Hospital for an outpatient visit on 18<sup>th</sup> July 2006 at 10.50 am;
  - (b) dated 8<sup>th</sup> September 2006 from Royal Free Hospital for an outpatient consultant's appointment on 29<sup>th</sup> August, 2006;
  - (c) dated 8<sup>th</sup> September 2006 from Royal Free Hospital for a pre-assessment appointment on 25<sup>th</sup> September 2006 at 10.00 am;

- (d) dated 15<sup>th</sup> September, 2006 from Royal Free Hospital for a pre-admission appointment on 28<sup>th</sup> September 2006 at 2.00 p.m.;
- (e) dated 15<sup>th</sup> September 2006 from Royal Free Hospital for admission appointment on 12<sup>th</sup> October, 2006;
- (f) dated 25<sup>th</sup> September, 2006 for a pre-admission appointment on 28<sup>th</sup> September, 2006;
- (g) dated 13<sup>th</sup> October, 2006 from Royal Free Hospital for constant's appointment on 27<sup>th</sup> October, 2006; and
- (h) hospital appointment card No.12091982.

12. After the operation, the claimant stated that he developed some minor complications. He spoke to the Chief Nursing Officer of the Respondent on telephone and continued making telephone updates to the Respondent's Deputy Chief Nursing Officer. He was asked to improve and report to work thereafter.

13. As a further explanation of the medical attention he received, the claimant produced the letter dated 28<sup>th</sup> February, 2007 unsigned by Dr. Richard Seah, Associate GP, of Willow Tree Family Doctors. The letter stated as follows:

***“Our Ref: RS/PS  
28 February 2007  
To Whom It May Concern:***

***Dear Sir/Madam  
RE: Mr. Charles Bwoma -  
D.O.B. 31/12/65  
62 Uphill Drive, Kingsbury,***

***London, Nwa OBX***

***I am writing on behalf of Mr. Bwoma who I treated as a patient in general practice. He first came to see me in 2006 for a problem with his left foot. Investigations were done and I referred him on to Mr. N. Maruthainar, Consultant Orthopedic Surgeon at Royal Free Hospital in North London who operated on him. He developed a complication, which he was treated and improved. He also had a problem with his shoulder and I once again referred him to Mr. Maruthainar, more investigations were done and it was found he had a musculoskeletal problem.***

***The other problem that he came to see me with was his joints of the hands and lower limbs, which were thought to be inflammatory in nature. Investigations were done and was put on treatment though has not improved well.***

***I hope this letter provide the necessary information on him.***

***Yours faithfully***

***Dr. Richard Seah, Associate GP,  
Msc. MRCP DFFP DCH  
GMC 4643302”***

14. In March 2007, the claimant came back to Kenya and reported to the Chief Nursing Officer of the Respondent who referred him to the Respondent's Chief Personnel and Training Manager. The Chief Personnel and Training Officer listened to the claimant's explanations about what had happened to him in United Kingdom and referred him to the responsible Personnel Officer. The Officer informed the

Respondent that the Hospital had addressed him a letter at his last known address but the letter had been returned to the Respondent. The letter which was dated 20<sup>th</sup> November, 2006 was handed to the claimant. It was a dismissal letter. The letter stated as follows:

***“Mr. Charles M. Bwoma  
P.O. Box 19647-00202  
NAIROBI***

***Dear Sir,***

**RE: DISMISSAL FROM THE SERVICE**

***Further to this office letter Ref. No. KNH/529325/A/17 dated 18<sup>th</sup> August, 2006, the Hospital Management has established that you absented yourself from duty since 27<sup>th</sup> July, 2006 and you have not communicated to the Management the cause of your continued unauthorized absence from duty. Thus, your whereabouts to date remain unknown and you are subsequently deemed to have deserted duties with effect from the same date.***

***In the above circumstances, it has been decided that you should be and are hereby dismissed from the service with effect from 27<sup>th</sup> July, 2006 on account of desertion in line with Section XV Part VIII Clause A(2) of the Terms and Conditions of Service. On dismissal, you will be due withdrawal benefits under the Staff Superannuation Scheme upon submission of the attached Clearance Certificate duly completed and signed by the relevant Hospital authorities. Also sign the enclosed Official Secrets Act Declaration form for officers leaving the service for record purposes.***

***You may, if you so wish, appeal this decision through this office to the Chairman, KNH Appeals Board Committee within a period of fourteen (14) days from the date hereof.***

***Yours faithfully***

***SIGNED***

**FOR: PERSONNEL & TRAINING MANAGER**

***c.c. The Chief Nurse  
KNH”***

15. By the letter dated 26<sup>th</sup> March, 2007, the claimant appealed against the dismissal stating that he failed to report back after the annual leave on account of illness and not desertion as indicated in the dismissal letter.

16. By the letter dated 7<sup>th</sup> August, 2007 the Respondent’s Board of Management at its meeting of 25<sup>th</sup> July 2007 upheld the claimant’s dismissal with effect from 27<sup>th</sup> July 2006 on account of desertion of duty. The claimant was advised in the letter to treat the matter as closed since the Hospital would not enter into any further correspondence with him.

17. If the court ordered a reinstatement, the claimant testified, he would not be able to report back to the Respondent to work because he had high hopes for high profile jobs and he was undertaking studies due to end after 1.5 years from 16<sup>th</sup> October, 2012.

18. That all the claimant wanted was for the dismissal to be revoked or set aside to achieve a clean record of service with the Respondent to enable him present a good reference for the anticipated high profile jobs.

In the Respondent’s memorandum of Defence it was stated as follows:

(a) The Respondent did not receive any communication from the claimant as alleged by the claimant.

(b) The claimant was lawfully dismissed from employment for desertion in accordance with the provisions of the Employment Act and in accordance with the terms and conditions of service of his employment contract.

(c) The claimant was not entitled to the claims tabulated in the statement of claim.

The issues for determination are two:

1. Whether the termination was unfair.
2. Whether the claimant is entitled to the remedies as prayed for.

Counsel for the Claimant submitted that in view of the evidence on record, this was a clear case of unfair dismissal and the claimant is entitled to the prayers sought in the statement of claim and particulars set out in the statement.

Section 43 of the Employment Act provides as follows:

***“43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

The claimant proceeded on leave from 6<sup>th</sup> March, 2006 to 22<sup>nd</sup> June 2006. He was expected at work on 23<sup>rd</sup> June 2006. He did not address the Respondent a formal communication on his alleged predicament. The claimant was an experienced nurse at the Respondent’s Hospital. He failed to prove to this court that he took diligent steps to inform the Respondent that he was unwell while on annual leave in the United Kingdom. On that ground alone the court finds that the claimant deserted duty.

Were the grounds for absence from duty lawful and reasonable? With effect from 23<sup>rd</sup> June, 2006, the court finds that the claimant was absent from duty without permission. The absence was therefore not lawful.

The claimant testified that he reported back to the respondent in March 2007, about one year from the date he was expected back on 23<sup>rd</sup> June 2006. The reason he has given is that he was undergoing a medical procedure which involved minor complications. The pre-admission appointment is said to have been scheduled for 28<sup>th</sup> September, 2006 and the first outpatient visit was by the letter of 13<sup>th</sup> July, 2006.

First, the elaborate appointment letters spanning over several months show that the claimant was not under any medical emergency and he was at all material times in his faculties. He knew the Respondent’s addresses. He failed to communicate to the employer as expected. Further, he has not stated that the medical problem could not be handled back in Kenya.

Secondly the letter for the first outpatient appointment, as stated earlier, was dated 13<sup>th</sup> July, 2006. The claimant was expected back at work on 23<sup>rd</sup> June 2006. Thus, there were about 20 days that lapsed between the dates and before the alleged medical visits became due.

The claimant has not alleged any specific provisions of the terms and conditions of service in the Respondent’s establishment that were breached in his termination case. There were no submissions for the claimant or the specific provisions of the law that may have been breached in his termination.

The court has noted that the claimant is yearning for a clean record of service with the Respondent; so as

to achieve his burning desire for high profile jobs that he is sure will come his way soon or later. That is a good desire and wish on the part of the claimant. But, can a man earn goodness for which he is not willing or able to pay the due price? The court considers that an employee is not entitled to the employer's generosity especially where the employee has breached the tenets of the high fidelity entailed in the contract of service. The court finds that in this case the employee has failed to demonstrate that he was in an extremely difficult state of ill-health that he could not communicate and explain his absence from duty. The court further finds that the employee, the claimant, has failed to prove that the alleged ill-health could not be handled alongside discharging his duties as an employee. The letter by Doctor Richard Seah dated 28<sup>th</sup> February 2007 was not signed by the doctor and it did not state that the claimant had to rest or proceed on sick leave. It is not evidence that the claimant was, on account of ill-health, entitled to be away from work. The letter bears dim probative value and also show that the claimant was not keen to promptly communicate with the employer at the end of his leave on 22<sup>nd</sup> June, 2006. The purported letter is dated 28<sup>th</sup> February, 2007. Why did the claimant not obtain it promptly in June 2006? Why is the letter addressed to ***"To whom it may concern"*** and not specifically to the respondent? The court finds that in the circumstances of this case the claimant by filing this case attempts to reap where he did not sow; he wanted to reap where he did not plant.

Accordingly, the court finds that the termination of the employment of the claimant by the Respondent was fair because the reason was valid as it was true; the claimant deserted duties, he was not authorized to be absent and he had no reasonable cause to be absent.

The remedies prayed for by the claimant were predicated on a finding of unfair termination. Thus, the court finds that the claimant is not entitled to any of the remedies as prayed for. The claimant's case is therefore dismissed and judgment is entered in favour of the Respondent for the claimant to pay the costs of the cause.

Signed, dated and delivered in court at Nairobi this 19<sup>th</sup> day of October, 2012.

**BYRAM ONGAYA**

**JUDGE**