



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 332 OF 2015
BETWEEN
KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL
INSTITUTIONS AND HOSPITAL WORKERS [KUDHEIHA]CLAIMANT
VERSUS
BOARD OF MANAGEMENT AGA KHAN HOSPITAL
MOMBASA RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Hezron Onuong'a, Industrial Relations Officer for the Claimant

Ms. Beatrice Opolo Advocate instructed by the Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant Union brings this Claim on behalf its Member Rebecca Okwisa Amboko, [Grievant], a Health Care Assistant formerly employed by the Respondent Hospital. The Statement of Claim was filed on 20th May 2015. It is stated the Grievant was employed by the Respondent on 1st May 1997 and confirmed in the year 1999. She was summarily dismissed by the Respondent on 23rd February 2013, for failure to report back to duty on time after a period of annual leave break. She feels termination was unfair. The Claimant reported the existence of a dispute to the Cabinet Secretary for Labour. Conciliation at the Ministry level did not yield settlement. The Claimant prays for Judgment against the Respondent for:-

- a) A declaration that dismissal was unlawful and wrongful.
- b) The Grievant is reinstated as an Assistant Nurse without loss of benefits, seniority and privileges.

- c) In the alternative the Respondent pays the Grievant terminal dues as contained in schedule A of the Parties' CBA.
- d) The Respondent pays the Grievant 12 months' salary in compensation for unlawful summary dismissal.
- e) Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on 13th July 2015, conceding the Grievant was its employee. She was lawfully summarily dismissed for exceeding her annual leave days. She was to start her annual leave on 17th January 2013, which would end on 16th February 2013. The hospital policy requires staff to apply for leave a month in advance. The Grievant made her application on 17th December 2012. She proceeded on leave before approval. The dates were adjusted. The Unit Manager called her on 8th February 2013, reminding her about the return date of 16th February 2013. During the conversation, she requested to have an extension of 2 days, to enable her sort out personal matters. The request was granted, with new reporting date agreed to be 13th February 2013. She reported on 18th February 2013, 5 days after the agreed date. She was issued with a letter to show cause, why disciplinary action should not be taken against her. She replied. She was subsequently heard in the presence of her Trade Union Representative. A decision was made on 23rd February 2013 to summarily dismiss her. She was offered salary for days worked and pension in accordance with the rules of the Scheme applicable to her. She declined receipt of what was offered. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. The Parties were heard in full and closed their respective cases on 29th November 2016. The Grievant gave evidence, as did Respondents' Night Supervisor Jennifer Weya, and Assistant Head of Human Resources Daniel Shivanga Mwale.

4. The Grievant explained she applied for annual leave on 17th December 2012. Approval was made on 17th January 2013. The period would start on 17th January 2013, and lapse on 16th February 2013. She was taking her Child back to school. Her Supervisor called the Grievant asking her to report back before she had taken the Child back to school. She reported back on 18th February 2013. She was asked to show cause, why she should not be disciplined. She replied and apologized. She was heard in the presence of her Trade Union Representative and summarily dismissed.

5. On cross-examination she confirmed she was called by the Unit Manager and advised to report back. She told the Unit Manager there was a text book she was looking for, for her Son. She stated her prayers refer to Schedule 'A' of the CBA. She could not point out this Schedule to the Court. She closed her evidence on redirection, with the explanation that CBA clause 22 gave latitude of up to 14 days of absence without leave.

6. Night Supervisor Weya testified the Grievant went on annual leave on 2nd January 2013. She was expected back on 1st February 2013. She had not utilized 10 off-duty days. Weya therefore expected the Grievant back on 11th February 2013. She called the Grievant on 8th February 2013 reminding her about the reporting date. The Grievant made a request for extension of 2 days, saying she was taking her Son back to School. She was granted extension, to report back on 13th February 2013. She did not report back until 18th February 2013. Weya agreed on cross-examination that the Leave Application Form, and the letter to show cause, indicated different dates from what she gave the Court. The return date was indicated as 16th February 2013. She returned on 18th February 2013. According to Weya, the Grievant was 5 days late.

7. Mwale testified that the Claimant went on leave from 2nd January 2013, before approval was given. She was offered pension at Kshs. 84,957 and net terminal dues of Kshs. 952 which she rejected. Mwale agreed on cross-examination there was no record filed in Court by the Respondent showing the Grievant went on annual leave effective from 2nd January 2013. The Respondent deducted 5 days' salary for the days the Grievant was absent. She was also summarily dismissed for the same offence. Clause 22 of the CBA allows an Employee absence of up to 14 days before dismissal on the ground of absence. The Grievant was absent for 5 days. She had a clean record before the incident. Deduction of medical expenses incurred by her was made from her terminal dues resulting in the net sum of Kshs. 952. She had a medical cover for outpatient of up to Kshs. 27,000 and in-patient cover of up to Kshs. 350,000. Deduction was for the amount above her cover limit. Mwale did not have details of the medical expenses deducted.

The Court Finds:-

8. The Grievant was employed by the Respondent Hospital as a Health Care Assistant between 1st May 1997 and 23rd February 2013. She worked for 16 years.

9. She was summarily dismissed by the Respondent after reporting back for duty late, after a period of annual leave. She earned a monthly gross salary of Kshs. 22,396, as of the date of dismissal.

10. The dates when she was supposed to go on leave; and to return to work from leave, are not clear from the Pleadings filed the Parties, and from their Evidence. The Claimant and the Night Supervisor gave different accounts. The Leave Application Form and the minutes of the disciplinary hearing, all do not agree on the significant dates in this dispute.

11. The mix-up nonetheless does not pose an insurmountable barrier in search of a resolution to the dispute, because the Grievant and his Union, wrote to the Respondent, conceding the Grievant committed an employment offence, and apologizing for the offence.

12. There is letter written by the Grievant to the Respondent on 19th February 2013, in which she explains that she failed to report on duty on 16th and 17th February 2013.

13. On 28th February 2013, the Works Committee wrote to the Respondent asking that the Grievant is forgiven for what happened and given a last chance.

14. There is no shortage of material on record showing the Grievant was absent without the leave of the Respondent, and without lawful cause, and therefore subject to summary dismissal for an act of gross misconduct under Section 44 [4] of the Employment Act. A record of the disciplinary proceedings show the Union Representative conceded the Grievant was involved in a first offence, and asked she is granted a second chance. Although the dates on her leave history are confusing, there is adequate material to conclude she delayed returning to work, without authorization by the Respondent. Both the Grievant and the Claimant conceded there was an employment offence committed by the Grievant. It was not necessary therefore for the Grievant and the Claimant to appear to deny, or challenge, in the proceedings before the Court, that an employment offence took place.

15. There was a meeting held on 28th February 2013 involving the Works Committee and the Human Resources Office of the Respondent. This was to deliberate on an Appeal filed by the Grievant after dismissal. The meeting was attended by among others, Juma Mohamed, Human Resources Manager.

16. It was at this meeting that Management advised the Works Committee to write the letter of apology

of the same date. Significantly, Mohamed is quoted at the meeting as stating that the offence by the Grievant was not so serious to warrant summary dismissal. His view was that the Grievant should accept her mistake and make an apology.

17. The Respondent made an about-turn. In a letter dated 27th March 2013 addressed to the Works Committee, Mohamed stated the offence committed by the Grievant was grave, and summary dismissal warranted.

18. This is where the Court finds fault with the Respondent's decision. It is agreed the Grievant committed an offence, by extending her leave. She was heard and does not dispute fairness of the actual hearing. The Works Committee and Management deliberated after she lodged an Appeal. There was consensus the Grievant should accept she was at fault. She had in fact accepted this earlier and apologized. Her letter doing so is dated 19th February 2013. The Works Committee apologized as agreed, at the meeting of 28th February 2013. What then would be the reason for the Respondent to make an about-turn, after giving conditions for restitution of the Grievant, and after these conditions were promptly met" The disciplinary sanction of summary dismissal should not have been sustained, after the Appeal.

19. It is not lost on the Court that the Grievant was deducted salary for 5 days allegedly absent from work. If there was deduction made, this would appear to the Court to weaken the validity of sustaining the sanction of summary dismissal. It had also been proposed that the days of absence could be offset against off-duty days the Respondent owed the Grievant. It is not surprising that the Human Resources Manager, looking at the dispute in its totality, felt the Grievant's offence was minor and not deserving of the draconian sanction of summary dismissal.

20. The intention of the Parties was that the Grievant would be rehabilitated once she accepted her fault, apologized and asked for forgiveness. She would be justified in asking the Court to compel the Respondent to reinstate her.

21. However, it is now 4 years since she left employment. The law on reinstatement places a ceiling of 3 years in reinstating, counted from the date of termination.

22. Termination was unfair on the ground of the sanctioning. ***The Grievant is granted the equivalent of 4 months' salary in compensation for unfair termination at Kshs. 89,584.***

23. She certainly deserves terminal benefits in accordance with the CBA in force at the time she left employment. The Court was not provided with Schedule 'A' which the Claimant argues terminal dues should be based on. It is not proper that the Court orders as submitted by the Claimant that, Parties are directed to do their computation of the terminal dues and come back to Court for adoption. Litigation must be brought to an end promptly and effectively. There were no details of medical expenses incurred by the Grievant, provided to the Court by the Respondent, to warrant tabulation of the Grievant's terminal dues, after 16 years of service, and at a gut-wrenching Kshs. 952. No documents were provided showing the Grievant exceeded her medical cover limit. The relevant CBA has been availed to the Court. The Court shall allow terminal benefits under the CBA as shown in the paragraphs below.

24. Under clause 24 [a] of the CBA, an Employee with over 15 years of service is entitled to notice pay of 5 months, on termination. The Grievant worked for 16 years. ***She is granted notice pay of 5 months at Kshs. 111,980.***

25. ***She is allowed pension dues as offered by the Respondent, under clause 27 of the CBA, at***

Kshs. 84,957.

26. Certificate of Service shall be released to the Grievant in accordance with clause 28 of the CBA and Section 51 of the Employment Act 2007.

27. No order on the costs.

28. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

[a] It is declared termination was unfair in the sanctioning of the Grievant.

[b] The Respondent shall pay to the Grievant: the equivalent of 4 months' salary in compensation for unfair termination at Kshs. 89,584; notice pay of 5 months at Kshs. 111,980; and pension dues as offered at Kshs. 84,957, total- Kshs. 286,521.

[c] Certificate of Service to issue.

[d] No order on the costs.

[e] Interest granted at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 20th day of June 2017

James Rika

Judge



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