



**Chandoek v Mediheal Group of Hospitals (Cause 108 of 2018)
[2023] KEELRC 2446 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 108 OF 2018
DN NDERITU, J
OCTOBER 12, 2023**

BETWEEN

JOSEPH CHANDOEK CLAIMANT

AND

MEDIHEAL GROUP OF HOSPITALS RESPONDENT

JUDGMENT

Introduction

1. In a memorandum of claim dated 23rd April, July, 2018 filed through S.K. Mburu & Co Advocates the claimant prays for: -
 - a. Gross underpayments
 - b. Public holidays
 - c. Normal overtime
 - d. Annual Leave
 - e. One month's pay in lieu of notice
 - f. Compensation under Section 49(c) of the *Employment Act*.
 - g. Certificate of Service
2. Together with the statement of claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim.



3. On 26th June, 2018 the respondent entered appearance through Kipkorir Cheruiyot & Co Advocates and filed a memorandum of response to the claim. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits.
4. In addition to the response to the claim the respondent filed a witness statement by David Maina Mbae but this intended witness was later substituted with Violet Nyangisa Mwigai (RW1) who testified as the only witness for the respondent. A list of two documents and copies of the listed documents was also filed alongside the memorandum of response to the claim and a further list of documents and copies of the listed documents was filed in court on 25th July, 2018 by the respondent.
5. This cause came up for hearing in open court on 4th October, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on the same date with RW1 testifying and the respondent's case was closed.
6. Counsel for the both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant filed written submissions on 16th November, 2022, while counsel for the respondent filed on 30th January, 2023.

II. The Claimant's Case

7. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summarized as hereunder.
8. In his memorandum of claim, the claimant pleaded that he was engaged by the respondent, a hospital, as a laundry operator, on 8th November, 2011 at an agreed gross salary of Kshs 4,500/= per month. The said monthly salary was increased and enhanced from time to time and by the time the claimant left the employment on 12th February, 2018 the same allegedly stood at Kshs 12,858/=.
9. It is alleged that the claimant worked on 12 hours shift daily without compensation for the overtime beyond the recommended eight hours shift. It is also alleged that for the entire period that the claimant worked for the respondent he was not allowed to take his annual leave, except for two years out of six, and that he was not compensated for the accrued leave.
10. In regard to the circumstances leading to his alleged wrongful and unlawful dismissal, the claimant pleads that a co-worker, Evans, left a bag with a gate-keeper, Chebet, who handed over the bag to the claimant for safekeeping. The general manager of the respondent showed up as the claimant took possession of the bag and demanded to know what the bag was all about and its contents. The general manager demanded for a written explanation on why the claimant was in possession of the bag contrary to the applicable workplace guidelines and regulations of the respondent.
11. The management of the respondent was not satisfied with the written explanation from the claimant and on 15th February, 2018 the claimant was issued with a letter of suspension.
12. The claimant alleges that on 28th February, 2018 he was verbally dismissed by the general manager and informed that his terminal dues would be paid through his bank account. He alleges that on 9th March, 2018 a sum of Kshs 9,000/= was paid into his bank account which he considers a slap in the face as the same did not cater for what he considered to be his rightful terminal benefits.
13. It is the claimant's position that the dismissal was wrongful and unfair as the same fell short of the provisions in the *Employment Act* (the Act) for lack of both substantive and procedural fairness. He



- alleges that he was not informed of the charges against him, the evidence gathered, and he was not invited for a hearing to defend himself.
14. It is the claimant's pleading that he was grossly underpaid during his entire period of employment with the respondent. It is further alleged and pleaded that the respondent has failed, refused, and or neglected to issue him with a certificate of service.
 15. In his oral testimony in court the claimant reiterated the foregoing contents of the memorandum of claim as restated in his filed witness statement.
 16. The submissions by his counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the respondent. He added that prior to 2013 he was paid in cash but from 2013 his salary was paid into his bank account. He stated that he was paid basic pay plus house and commuter allowance.
 17. On work attendance, he stated that he used to sign manually and also identified into an electronic muster roll. He stated that his last day at work was 15th February, 2018.
 18. On the issue of the alleged bag belonging to a co-worker, Evans, which apparently became the source of the disciplinary issues culminating in the dismissal of the claimant, it is alleged that Evans had travelled to Nairobi and left the bag with Chebet, a gate-keeper, and that the claimant only took possession of the bag for safe custody for Evans to pick it upon returning. When the manager, Mr. Santosh, found the claimant in possession of the bag he demanded a written explanation on why the bag full of clothing items was in his possession. It appears the manager was suspicious that the bag contained items stolen from the hospital.
 19. The claimant stated that on 18th February, 2018 he was informed by the manager that he had been terminated and sent home. He stated that he was not contacted again by the respondent, he was neither given a hearing nor invited for a disciplinary hearing, and as stated above he was not paid his terminal dues. He produced his filed documents as exhibits 1 to 7.
 20. In cross-examination the claimant admitted that his last gross pay was Kshs 17,509/=. He admitted that he was suspended before termination but reiterated that he was not given a hearing. He denied that he had brought items to the laundry that did not belong to the hospital and maintained that he was wrongfully and unfairly dismissed.
 21. It is on the basis of the foregoing that the claimant is seeking for the prayers set out in the introductory part of this judgment. The submissions by his counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the respondent.

III. The Respondent's Case

22. The respondent's case is expressed in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions filed by its counsel. The respondent's case is summarized as hereunder.
23. In the filed response to the claim the respondent denies all the allegations levelled against it by the claimant and more so, that it is liable for the wrongful dismissal of the claimant from employment. It is pleaded that the claimant was regularly, fairly, and lawfully terminated and afforded due process both in substance and procedure. It is categorically denied that the claimant is entitled to the reliefs sought and it is urged that this claim be dismissed with costs.



24. In his testimony in court, RW1, the hospital administrator, reiterated the contents of the response to the claim and her filed witness statement. She produced as exhibits 1 to 9 the documents filed by the respondent.
25. In cross-examination she admitted that the claimant was not issued with a written contract. She also admitted that the claimant may have worked on public holidays but she alleged that he was compensated by additional off-duty on other days. However, upon taken through the muster roll she failed to identify the additional days that the claimant was allowed off-duty in compensation of the worked public holidays.
26. She admitted that except for 2015 (12 days), 2016 (12 days), and 2017 (24 days) the claimant did not take any other annual leave during the entire period that he worked for the respondent. And even then she did not avail records in confirmation that the claimant actually took the leave days as alleged. She said that the claimant was suspended from duty on 12th February, 2023 and terminated on 28th of the same month and year.
27. She confirmed that the claimant was dismissed after he failed to give a satisfactory explanation on why he was found in possession of a bag of clothes in the premises of the respondent contrary to guidelines and instructions given to him not to bring such items into the place of work. She admitted that the claimant was neither invited to nor heard in the disciplinary meeting of 12th February, 2018. She alleged that an investigation into the misconduct was carried out but she conceded that no report on the incident was filed in court. Likewise, an alleged letter of termination issued to the claimant was not availed in court.
28. She stated that a certificate of service is ready for collection by the claimant. She admitted that the gross monthly salary paid to the claimant as by February, 2018 was below the recommended minimum wage.
29. It is on the basis of the foregoing that the respondent is seeking the cause herein be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Issues For Determination

30. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the Claimant and RW1, and the submissions by counsel for both parties the court identifies the following issues for determination –
 - a. Was the Claimant wrongfully, unfairly, and unlawfully dismissed and or terminated by the Respondent?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. Dismissal/termination

31. The terms of engagement of the claimant by the Respondent are not in dispute. It is admitted that leading up to dismissal the claimant was not subjected to due process of the law. That is the testimony tendered by RW1, the only witness for the respondent. It is also admitted that no terminal dues were paid to the claimant.



32. Further, it is admitted that contrary to the provisions of Section 9 of the *Employment Act* (the Act) the respondent did not reduce the contract of employment with the claimant into writing. However, this court agrees with the submissions by counsel for the claimant that even if the claimant was at first engaged as a casual he became a month to month employee after the first 30 days of continuous engagement in accordance with Section 37(1)(a) of the Act. Counsel for the claimant has cited *Nyamawi Gambo V Mombasa Maize Millers Limited & Another* (2016) eKLR and *Kenya County Government Workers Union V County Government of Nyeri & Another* (2015) eKLR in support of that position.
32. The claimant's gross salary as in February, 2016 was Kshs 14,470/= going by the pay-slip for that month as availed and produced by the claimant. By July, 2017 the bank statement filed by the claimant shows that he was paid Kshs 15,952/= as net salary. As per the pay-slip for the month of February, 2017 produced by the respondent the gross pay for the claimant was Kshs 17,509/=.
32. During the hearing in court it was admitted that the claimant was neither invited nor heard in a disciplinary hearing. No evidence has been tendered to establish that indeed the claimant engaged in misconduct and exactly what laws, rules, guidelines, policies, or regulations he broke by possessing a bag of clothes that allegedly belonged to a co-worker. He was not supplied with the particulars of the charges that he faced and he was neither called nor invited to defend himself.
35. The evidence on record, and which this court believes, is that the claimant was suspended from duty on 15th February, 2018 and on 28th February, 2018 he was verbally terminated by the general manager and told never to set foot on the premises of the respondent.
36. In those circumstances, this court comes to the logical and reasonable conclusion and holds that the Respondent unfairly and wrongfully dismissed the Claimant without notice and without affording him both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the Act.
37. Counsel for the Claimant has correctly submitted on the above cited provisions in buttressing the argument that the dismissal was unwarranted, wrongful, unfair and unlawful. No letter of dismissal or termination was issued and served upon the claimant. The claimant was not subjected to disciplinary hearing as envisaged under the Act, Article 47 of *the Constitution*, and Sections 4 to 6 of the *Fair Administrative Action Act*. The minutes of the meeting of 13th February, 2018 are in respect of a disciplinary committee meeting in which the claimant was neither invited nor in attendance. In fact, the notice for the said meeting clearly indicates that it was addressed and intended for the members of the said committee.
38. Even if the respondent felt or even believed that the claimant had committed an offence to its detriment or to the detriment of its property, which this court finds unreasonable and ingenuous, the claimant was still entitled to due process of the law as of right. It is a cardinal principle of natural justice that no person should be condemned unheard.
39. Counsel for the respondent has cited various authorities on what constitutes wrongful dismissal or unlawful termination for lack of substantive and procedural fairness. Counsel has cited *George Okello Monyolo V Unilever Kenya Limited* (2019) eKLR, *Thomas Sila Nzivo V Bamburi Cement Limited* (2014) eKLR, and *Anthony Mkalla Chitavi V Malindi Water & Sewerage Company Co. Ltd* (2013) eKLR among many other decisions in advancing the argument that the claimant was afforded fair hearing. In my considered view, all the authorities cited by counsel support the case for the claimant to the effect that he was denied both substantive and procedural fairness. To the list provided by counsel for the respondent this court adds *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR,



Jane Nyandiko V Kenya Commercial Bank (2017) eKLR, and *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (2017) eKLR all of which in my view support the claimant's case on the wrongfulness, unfairness, and unlawfulness of the dismissal.

40. This is rather a straight forward matter which in my view the respondent should have settled without waiting to be sued in court. There is no evidence that the claimant was engaged in any misconduct and there is no dispute that he was not subjected to a disciplinary hearing in view of the so clear evidence from both sides.
41. The court has said enough in demonstrating that the claimant's dismissal was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness. It is so held and declared.

VI. Reliefs

42. Having held that the claimant was wrongfully, unfairly, and unlawfully dismissed for lack of notice, substantive, and procedural fairness, this court shall now consider each of the reliefs sought as hereunder.
43. Prayer (a) is for compensation for wrongful, unfair, and unlawful dismissal. The claimant is seeking the maximum award of 12 months salary under Section 49(1)(c) of the Act. The factors that this court should consider in making an award under this head are catered for under Section 49(4) of the Act. As at the time of suspension from duty on 15th February, 2018 the claimant had worked for the respondent for about seven years. He remained on suspension until 28th February, 2018 when he was verbally terminated by the general manager of the respondent, although the termination, which was in effect a dismissal, was not formally communicated to him.
44. The court has found and held that no evidence of misconduct was established against the claimant. The respondent has not expressed an interest in re-engaging the claimant. There is no doubt that the respondent treated the claimant in a most unfair and unlawful manner. The claimant was denied due process and there was no lawful reason for the dismissal. He was denied an opportunity for growth and livelihood.
45. Considering the entire evidence and circumstances of this case, this is a proper cause for an award of the maximum compensation of 12 months gross salary. Counsel for the claimant has submitted for an award of 12 months gross pay. Counsel has cited Legal Notice (LN) No. 112 of 1st May, 2017 stating that the basic salary for the claimant as of February, 2018 ought to have been Kshs 15,646/= and when the house allowance of Kshs 2,894/= is added the gross salary should amount to Kshs 18,540/= . Counsel for the respondent has not submitted on this aspect of this relief. The court confirms that as per the above LN that the monthly gross pay for the claimant ought to have been as submitted by counsel for the claimant.
46. The court awards compensation for wrongful, unfair, and unlawful dismissal equivalent to 12 months gross salary calculated as – Kshs 18,540/= *12= Kshs 222,480/=. This award is subject to statutory deductions.
47. Prayer (b) is for underpayments in the sum of Kshs 407,724.40. This claim covers the entire period during which the claimant worked for the respondent from November, 2011 to February, 2018. It is important at this juncture to indicate that Section 90 of the Act provides that employment and labour relations claims shall be filed in court within three years of the cause of action arising. Counting backwards the claimant may only be paid for claims that arose within three years prior to the filing of the cause in court on 23rd April, 2018. This means that any claim preceding 22nd April, 2015 shall not be considered as the same is time barred.



48. The court has gone through the legal notices cited in the memorandum of claim and agrees with counsel for the claimant on their appropriateness and applicability. There are no alternative or other legal notices cited by the respondent or its counsel which displace or invalidate those cited by counsel for the claimant. For the period from April, 2015 to February, 2018 the underpayments due and payable amount to Kshs 132,887.20 and this is the amount awarded to the claimant under this head.
49. Prayer (c) is for Kshs 97,295.71 for public holidays worked. Again, only claims not preceding three years to filing of the cause in court may be considered. As noted above that period goes back to April, 2015. The biometric check-in system record produced by the respondent covers the period from September, 2016 to May, 2017. During the covered period there is evidence that the claimant worked on public holidays such as 12th and 26th December, 2016. However, there is also evidence that the claimant did not work on all the other public holidays during the same period. The print-out is not complete and there is no record availed for 2015, and for January to August, 2016. Of course, Sections 10 and 74 of the Act place a duty and indeed an obligation upon an employer to keep and maintain employment records. Such records if availed in court should have assisted this court in arriving at a just and fair conclusion of this item.
50. In the circumstances, the court shall only award the amounts relating to the period from 1st May, 2015 to February, 2018. The respondent has failed to avail all the necessary records to dislodge the assertion by the claimant that he worked in all the public holidays falling within that period. The claimant is awarded Kshs 45,530.40.
51. Prayer (d) is for notice pay at Kshs 18,540/= being one month's gross pay. This amount is accordingly awarded as no notice was issued and served upon the claimant and the dismissal was wrongful, unfair, and unlawful.
52. Prayer (e) is for annual leave pay. Again, only annual leave for 2015, 2016, and 2017 may be considered. Although the respondent alleged that the claimant took some leave days in 2015, 2016, and 2017 no records were availed in court supporting that allegation. On a balance of probability, the claimant is awarded one month's gross pay for each of the above years calculated as Kshs 18,540/= * 3= Kshs 55,620/=. The claims in regard to the other years are time barred.
53. Prayer (f) for overtime was abandoned in view of the records availed by the respondent and the claimant's counsel submitted as such and hence no award is made under this head.
54. Prayer (g) is for an order that the respondent do supply the claimant with a certificate of service under Section 51 of the Act. The evidence on record is that the claimant worked for the respondent for over seven years. It is now over five years since he was dismissed and there is practically nothing left for him to clear with the respondent. In the circumstances, the respondent is ordered to unconditionally issue and deliver a certificate of service to the claimant within 30 days of this judgment. In any event, the evidence on record from the respondent is that the certificate was always ready for collection but the claimant failed to act. Let the same now be availed to the claimant as per this order.

VII. Costs

55. Costs follow the event and therefore the Claimant is awarded costs of this cause. There is no reason for this court departing from this established principle.

VIII. Disposal

56. In final disposal of this cause, this court issues the following orders: -



- a) A declaration be and is hereby issued that the termination of the claimant by the respondent amounted to wrongful, unfair, and unlawful dismissal.
- b) The claimant is awarded a total of Kshs 475,057.20 made up as follows –
 - i. Compensation for wrongful dismissal..... Kshs 222,480.00
 - ii. Underpayments.....Kshs 132,887.20
 - iii. Pay for public holidays worked..... Kshs 45,530.00
 - iv. Notice payKshs 18,540.00
 - v. Leave pay Kshs ...55,620.00
 - TotalKshs 475,057.20
- c) The respondent is hereby ordered to issue and deliver a certificate of service to the claimant within 30 days of this judgment.
- d) Costs of the cause to the claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 12TH DAY OF OCTOBER, 2023.

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DAVID NDERITU
JUDGE

