

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Order Review Hearing
Thursday, 17 October 2024**

Name of Registrant: Brian Munyuki

NMC PIN 08G2607E

Part(s) of the register: Nurses part of the register Sub part 1
RNMH: Mental health nurse, level 1 (15 November 2008)

Relevant Location: West Midlands

Type of case: Misconduct

Panel members: Adrian Ward (Chair, Lay member)
Sally Shearer (Registrant member)
Rachel Barber (Lay member)

Legal Assessor: Suzanne Palmer

Hearings Coordinator: Antonnea Johnson

Nursing and Midwifery Council: Represented by Tessa Ms Donovan, Case Presenter

Brian Munyuki: Not present and not represented

Order being reviewed: Suspension order (9 months)

Fitness to practise: Impaired

Outcome: **Striking-off order to come into effect at the end of 20 October 2024 in accordance with Article 30 (1)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Munyuki was not in attendance and that the Notice of Hearing had been sent to Mr Munyuki's registered email address by secure email on 17 September 2024.

Ms Donovan, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the substantive order being reviewed, the time, date and that the hearing was to be held virtually, including instructions on how to join and, amongst other things, information about Mr Munyuki's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

In the light of all of the information available, the panel was satisfied that Mr Munyuki has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mr Munyuki

The panel next considered whether it should proceed in the absence of Mr Munyuki. The panel had regard to Rule 21 and heard the submissions of Ms Donovan who invited the panel to continue in the absence of Mr Munyuki. She submitted that Mr Munyuki had voluntarily absented himself.

Ms Donovan submitted that there had been no engagement at all by Mr Munyuki with the NMC in relation to this hearing and, as a consequence, there was no reason to believe that an adjournment would secure his attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel has decided to proceed in the absence of Mr Munyuki. In reaching this decision, the panel has considered the submissions of Ms Donovan and the advice of the legal assessor. It has had particular regard to any relevant case law and to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr Munyuki;
- Mr Munyuki has not engaged with the NMC since his last hearing and appears to have disengaged from the proceedings altogether;
- Therefore, despite his attendance at all the previous review hearings, there is no reason to suppose that adjourning would secure his attendance at some future date; and
- There is a strong public interest in the expeditious review of the case given that the order is due to expire in 4 days.

In these circumstances, the panel has decided that it is fair to proceed in the absence of Mr Munyuki.

Decision and reasons on application for hearing to be held in private

At the outset of the hearing, Ms Donovan made a request that this case be held in private on the basis that proper exploration of Mr Munyuki's case involves references to [PRIVATE]. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

The panel determined to go into private session in connection with [PRIVATE] as and when such issues are raised in order to preserve the fine balance of Mr Munyuki's right to privacy with public interest.

Decision and reasons on review of the substantive order

The panel decided to replace the current suspension order with a striking off order.

This order will come into effect at the end of 20 October 2024 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the eighth effective review of a substantive order. A conditions of practice order was originally imposed by a Fitness to Practise Committee panel on 26 April 2018 for a period of 12 months, by way of Consensual Panel Determination (CPD). The order was varied and extended for 12 months on 10 May 2019. On 20 April 2020, a further 12 month conditions of practice order was imposed. On 24 May 2021, the conditions of practice order was confirmed and extended by 8 weeks. The order was reviewed again on 2 July 2021 where it was varied and extended for 9 months. On 29 March 2022 the conditions of practice order was reviewed and the panel decided to vary the order and extend it for a period of 9 months. On 1 December 2022, the conditions of practice order was confirmed and extended for a period of 12 months. At the end of 20 January 2024 a suspension order was imposed for a period of 9 months.

The current order expires at the end of 20 October 2024.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved by way of admission which resulted in the imposition of the substantive order were as follows:

“That you:

- 1. on one or more occasions set out within Schedule 1 did not maintain records associated with Patient A to a clinically appropriate standard.*
- 2. on 07 December 2016:*

- a. *took Patient A to a public house in circumstances whereby such an intervention had not been agreed by Patient A's multidisciplinary team.*
 - b. *paid for Patient A's meal/beverage(s) in circumstances whereby such an intervention had not been agreed by Patient A's multidisciplinary team.*
3. *on one or more unknown occasions sent Patient A inappropriate text messages.*
 4. *on or around 19 January 2017 made a retrospective entry in Patient A's notes in respect of an appointment you had with her on 07 December 2016.*

AND, in light of the above your fitness to practise is impaired by reason of your misconduct.'

The seventh reviewing panel determined the following with regard to impairment:

'The panel has considered carefully whether your fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it including the NMC bundle and further documentation including an unsigned PDP dated as completed 25 June 2021, reflective statement, two identical references dated September 2022 and one reference dated May 2023, all of which you produced to the panel today. It has taken account of the submissions made by Mr Webb and you and your oral evidence. Mr Webb outlined the background of the case and took the panel through the decisions of the previous panels. He submitted you have not worked in a

nursing position since the imposition of substantive order and you are currently working in a support worker role.

Evidence

You gave evidence under affirmation.

You said that you have not been working as a registered nurse since your last review. The previous reviewing panel suggested to you that you could work as a support worker in a healthcare setting which would afford you the opportunity to demonstrate your compliance with the conditions of practice order and allow you to further strengthen your practice and develop your insight.

You told the panel that you had worked at the same nursing home over two extended periods between May to September 2022 and November 2022 to May 2023. You said that your role as a support worker in a care home involves responsibilities such as taking residents for walks and to buy groceries, handling their money, washing and bathing residents. You said that you take notes of the residents' day to day activities. You said that you do not administer medication to residents and told the panel that you 'have been unable to comply with that condition'. The panel noted that this is not a condition of your registration.

You referred the panel to the references you provided today from your temporary position as a healthcare worker. You said you considered this to be useful of evidence that you have been working well as a support worker. You accepted when questioned by the panel that the references contained sparse detail and did not address the areas of concern that the last panel considered a future panel may be assisted by i.e. maintaining professional boundaries.

You referred the panel to your reflective account. You said that you included details about how you would face the same circumstances in the future and what you would do differently. In relation to public protection, you said that you have been independently working with residents and there have been no concerns raised.

You explained to the panel that you struggled to comply with the conditions of practice [PRIVATE].

In response to questions from the panel, you said that you produced the reflective statement using the Gibbs model and you wrote it in 2022, immediately after the last review hearing. You did not forward it to the NMC and did not subsequently develop that reflective piece any further. It was only produced to this panel on the day of your attendance.

The panel acknowledged that you recognise the need for managing boundaries in professional relationships in your reflective statement however you did not provide any reasons about how you would do this. In response to this, you said that you will maintain professional boundaries by always following the care plan of the residents only.

The panel asked you about any training or courses you had completed to strengthen your practice. You said that you are due to complete a two-day MAPPA course. You also stated that you had completed one-day training on 30 November 2023 which covered moving and handling, safeguarding adults, safeguarding children and medication administration. You said that you paid for these courses yourself. You did not produce any independent evidence, such as emails, confirmation of attendance, receipt for payment of the course fee, joining instructions or certificates to support your evidence to the panel. You said you requested the certificates, but they have not come through yet and you intend on forwarding the certificates to the NMC.

In response to questions regarding your PDP, you said that your PDP was produced with your manager whilst you were working as a registered nurse in the Orchard Nursing Home. You explained that you worked at the Orchard Nursing Home for a three-month probationary period and had to leave due to a 'medication administration near miss'.

You said that your PDP has not been updated since June 2021 but you had not thought to continue it when working for two extended periods as a Healthcare

Assistant (HCA) at the Sycamore Care Home. You said you are hoping to update it when you get another registered nurse role. You said that you have been applying for nursing roles, you had an interview three months ago which you have not heard back from and you have another interview coming soon.

You accepted that you should have probably asked for help to complete your PDP and undertaken one to one reflections with the agency you are currently registered with.'

The seventh reviewing panel determined the following with regard to sanction:

'The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict your practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where 'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.' The panel considered that your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered the continuation of the current conditions of practice order. The panel noted that your engagement with the NMC has been sporadic, unpersuasive and lip service only. It determined that you have not sufficiently engaged with the NMC conditions imposed despite having many opportunities to do so. Today, you failed to provide any substantiated documentary evidence such as independent evidence to support any strengthened practice i.e. certificates.

[PRIVATE]. The panel was concerned that you had submitted an unsigned PDP dated 2021 (over two year and a half years ago) despite it being attainable for you

to comply with the conditions of practice order within your support worker role. The panel noted that recommendations were repeated to you from the last reviewing panels, and you have not shown efforts to comply with those.

On this basis, the panel concluded that a conditions of practice order is no longer the appropriate order in this case. The panel concluded that your lack of insight, limited evidence of strengthening your practice and sporadic engagement with the conditions of practice order means that you are unlikely to engage sufficiently with a further imposition of a conditions of practice order which would protect the public or satisfy the wider public interest.

The panel determined therefore that a suspension order is the appropriate sanction which would both protect the public and satisfy the wider public interest.

Accordingly, the panel determined to impose a suspension order for the period of nine months would provide you with an opportunity to appropriately engage with the NMC and provide updated evidence that you have strengthened your practice and demonstrated sufficient insight to be considered for a return to practice. It considered this to be the most appropriate and proportionate sanction available.

...

Any future panel reviewing this case would be assisted by:

- Your attendance at the next review hearing*
- An up-to-date reflective piece regarding professional boundaries, record keeping and your insight into your previous actions.*
- Testimonials from your employer, line manager, supervisor and/or colleagues specifically addressing your ability to maintain professional boundaries and your record keeping in a clinical or care setting.'*

Decision and reasons on current impairment

The panel has considered carefully whether Mr Munyi's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's ability to practise kindly, safely and professionally. In

considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it, including the NMC bundle, and the determination from the fourth review (omitted from the NMC bundle). It has taken account of the submissions made by Ms Donovan on behalf of the NMC. She submitted that there is a persuasive burden on Mr Munyuki to fully acknowledge why past professional performance was deficient and through insight, application of education, supervision or other achievement address past impairments.

Ms Donovan submitted that Mr Munyuki has not submitted any updated materials to suggest progress which might have included updated testimonials from his employers or colleagues, references, evidence of training including receipts and certificates and evidence of supportive materials relating to [PRIVATE]. Given the absence of this information Ms Donovan submitted that there was an absence of evidence of progressed insight and no demonstration of learning.

Ms Donovan submitted that there had been a lack of engagement from Mr Munyuki since the last review which she highlighted is of concern. She further submitted Mr Munyuki had failed to respond to a number of correspondence attempts made by the NMC including confirming his intentions to attend today's hearing.

Ms Donovan further submitted that Mr Munyuki had been issued a concurrent interim conditions of practice order relating to a separate matter currently under investigation, which also relates to record keeping errors and failure to hand over a patient's care. Ms Donovan submitted that the case had been progressed to a separate fitness to practise committee and is listed for a substantive hearing on 20 January 2025.

Ms Donovan submitted that given the lack of engagement, the absence of evidence of an updated reflective statement, no evidence of progressed insight, no evidence of relevant training, no references, no evidence of [PRIVATE] and no testimonials there is an indication there is risk of repetition. On these grounds, Ms Donovan submitted Mr Munyuki

continues to be impaired on both public protection and public interest grounds and there is no basis on which to find that his impairment has been remedied.

The panel heard and accepted the advice of the legal assessor.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance. The panel considered whether Mr Munyuki's fitness to practise remains impaired.

The panel noted that the last reviewing panel found that Mr Munyuki had insufficient insight. At this hearing the panel considered the previous reviewing panel's guidance to Mr Munyuki which included the following recommended steps for today's hearing:

- *Your attendance at the next review hearing*
- *An up-to-date reflective piece regarding professional boundaries, record keeping and your insight into your previous actions.*
- *Testimonials from your employer, line manager, supervisor and/or colleagues specifically addressing your ability to maintain professional boundaries and your record keeping in a clinical or care setting.*

In its consideration of whether Mr Munyuki has taken steps to strengthen his practice, the panel took into account Mr Munyuki's previous submissions and efforts as it relates to the historical conditions of practice orders and their variations spanning the past six years. The panel noted that Mr Munyuki had provided a reflective piece in March 2022 which demonstrated developing insight, and that his insight was described as "good" at that hearing, but no evidence has been provided at any subsequent hearing, or today, to show further development in his insight since that time.

The panel had regard to Mr Munyuki's absence from today's hearing and although drew no adverse inference from Mr Munyuki's absence, acknowledged that given his attendance at previous hearings, Mr Munyuki may have disengaged with the process.

The panel gave consideration to Mr Munyuki's previous difficulties in obtaining employment which prevented him from carrying out his previous conditions of practice orders, and acknowledged Mr Munyuki's efforts volunteering with the Red Cross and his subsequent employment at a care home as a care worker. However, the panel noted Mr Munyuki's failure to address the seriousness of the misconduct and the effects it could have had on the patient through a reflective piece. The panel noted the patient's vulnerabilities including [PRIVATE], and notes his responsibilities in relation to safeguarding and his subsequent failures to action what should have been firmly embedded safeguarding principles.

The panel was of the view that Mr Munyuki had multiple opportunities to demonstrate developing insight through the submission of updated reflective pieces but had not done so. The panel was therefore concerned that Mr Munyuki's limited approach to remediation appeared to be reflexive rather than reflective.

The panel bore in mind the [PRIVATE] but also noted the lack of supportive evidence from [PRIVATE] and how it may have impacted upon his ability to strengthen his practice.

The panel had regard to the judgment of Mrs Justice Cox in the case of CHRE v NMC and Grant in reaching its decision.

In paragraph 74, she said:

'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her/ fitness to practise is impaired in the sense that S/He:

a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or

c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or

d) ...

The panel finds that limbs a, b and c of Grant remain engaged.

The panel determined that there was risk of harm as a result of Mr Munyuki's misconduct in the past. Without full insight and remediation, Mr Munyuki is likely to put patients at risk of harm in the future.

Mr Munyuki's misconduct has breached fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. The panel was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to harm extremely serious.

The last reviewing panel determined that Mr Munyuki was liable to repeat matters of the kind found proved. Today's panel has considered the seven previous reviews and successive opportunities to address the misconduct. The panel was of the view that the absence of evidence from Mr Munyuki suggests no progress in his insight into the seriousness of his misconduct. In light of this, this panel determined that Mr Munyuki is liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is required.

For these reasons, the panel finds that Mr Munyuki's fitness to practise remains impaired.

Decision and reasons on sanction

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mr Munyuki's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mr Munyuki's misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether a conditions of practice order on Mr Munyuki's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel noted that conditions of practice were in place continuously from the time of the substantive hearing until December 2023, and proved to be unworkable. It had no information at this time to suggest that Mr Munyuki would be able or willing to comply with conditions even if they were imposed. It concluded that conditions of practice were inappropriate at this time.

The panel next considered imposing a further suspension order. It acknowledged that Mr Munyuki had initially made progress in providing evidence of developing insight

and retraining in an attempt to address and remedy his past failings. However that progress now appeared to have stalled and arguably to have deteriorated. At the last hearing in December 2023 Mr Munyuki produced testimonials and a reflective piece which were of some age and had not been updated to indicate any further development. The panel acknowledged the difficulties Mr Munyuki has reported experiencing in securing employment in a nursing role, [PRIVATE]. However, the panel considered that even while not working as a nurse, there were things he could have done to demonstrate progress in his levels of insight and professionalism. Those were spelled out to him again by the panel in December 2023, and Mr Munyuki has failed to engage with the opportunity to follow up those recommendations. He appears to have disengaged from the process and the panel considered that this suggested an attitudinal aspect to the continued absence of evidence of full remediation. In the circumstances, the panel determined that a further period of suspension would not serve any useful purpose. The panel determined that it was necessary to take action to prevent Mr Munyuki from practising in the future and concluded that the only sanction that would adequately protect the public and serve the public interest was a striking-off order.

This striking-off order will take effect upon the expiry of the current suspension order, namely the end of 20 October 2024 in accordance with Article 30(1).

This decision will be confirmed to Mr Munyuki in writing.

That concludes this determination.