

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO E925 OF 2023

DONALD ASIKU
OKUMU.....CLAIMANT

VERSUS

SIMBA PHARMACEUTICAL LTD.....
RESPONDENT

JUDGMENT

Background

1. The dispute between the parties stems from the Respondent's decision to terminate the Claimant's contract of service. The Claimant contests the propriety of the decision.
2. The Claimant avers that the Respondent engaged his services as an Area Business Manager through a letter dated 4th May 2023. He contends that he commenced work on 5th May 2023.
3. The Claimant contends that his role entailed supervising the sale of Carenova products across the country. He contends that he was in charge of six medical representatives who were tasked with distribution of the aforesaid products.
4. The Claimant avers that the contract between the parties had a probationary term of six months. He contends that the

contract was to either be confirmed or discharged in writing within the aforesaid period.

5. The Claimant contends that he worked diligently and improved the Respondent's sales between May and July 2023. He avers that the sales improved because of his effective supervisory and sales skills.
6. The Claimant contends that on 1st August 2023, the Respondent's management summoned him to a meeting during which they informed him that his contract had been terminated. He avers that on 2nd August 2023, the Respondent issued him with a letter of termination of his contract of even date which indicated that the decision was informed by the desire to scale down field activities and to stop distribution of Carenova products. He further avers that the Respondent also issued a redundancy notice to the labour office on the same day.
7. The Claimant contends that the Respondent's decision to terminate his services was unlawful as it did not adhere to the law on redundancy declaration. He asserts that the Respondent: did not consult him on the process; did not disclose the selection criteria it used to isolate him for release from service; purported to declare redundancy when the business was doing well; and conducted the redundancy in an opaque manner.
8. On its part, the Respondent asserts that it hired the Claimant's services as from 4th May 2023 to oversee the distribution and sale of Carenova products. It confirms that

- the Claimant was to supervise six members of staff who were engaged in the distribution of the aforesaid products.
9. The Respondent contends that the Claimant's contract provided for a probationary term of six months. It avers that during this period, either party could terminate the contract by giving the other notice of one month or paying an amount which is equivalent to salary for one month.
 10. The Respondent asserts that during the Claimant's interview, he assured it that his department was to start making profits immediately in order to sustain itself. It contends that although the department experienced some growth in the three months that the Claimant was in service, this was not sufficient to sustain it.
 11. The Respondent avers that owing to the poor performance of the department, a decision was made to phase it out. It contends that the Claimant and his team were notified of the decision in a meeting which was held on 1st August 2023.
 12. The Respondent avers that it offered to deploy the Claimant and his team to other departments if they wished. It contends that four of the team members accepted the offer and joined other departments. However, it contends that the Claimant declined the offer because he viewed his position as senior and was unwilling to take the position of medical representative.
 13. The Respondent avers that the Claimant became unruly during the meeting of 1st August 2023 prompting it to issue him with a letter terminating his services. It contends that

since he was still on probation, it was procedural to release him instantly as it did. The Respondent however asserts that it terminated the Claimant's services purely because of the inability of his department to sustain itself and not on account of his misconduct.

14. The Respondent avers that it paid the Claimant his terminal dues to wit: salary in lieu of notice; and other undisclosed benefits. As such, it contends that the separation of the parties was lawfully executed.

Analysis

15. The parties acknowledge that their contract had a probationary clause which envisaged the Claimant working for six months before the contract could either be confirmed or terminated. It is also common ground that the decision to terminate the Claimant's employment was taken before the probationary period of the contract had lapsed. Of concern is whether the Claimant was entitled to the protections that are available to employees who are not serving on probation under *the Employment Act* during the tenure of his probation.
16. Although section 42 (1) of *the Employment Act* purported to deprive employees who are on probation of the protection that is afforded to employees under section 41 of the Act, this court found the provision to be unconstitutional (see ***Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another [2021] eKLR***). The finding was subsequently affirmed by the Court of Appeal in the case of

Red Lands Roses Ltd v Mugo (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR) (24 January 2025) (Judgment).

As such, the provision has been rendered inoperative for want of compliance with *the Constitution*.

17. In the witness statement of the defense witness, he appeared to suggest that it was within the Respondent's mandate to terminate the Claimant's services without adherence to the protection alluded to above. That would of course be misguided in view of the prevailing case law on the matter. Luckily, counsel for the Respondent appears to have appreciated this fact whilst making their closing submissions in the cause.
18. From the evidence that was tendered in court, the reason why the Respondent terminated the Claimant's services was the alleged poor sales of the products which he was tasked to oversee. The Respondent's case was that because of the poor sales, the Claimant's department was not able to sustain itself forcing it (the Respondent) to take the decision to phase it out.
19. This evidence speaks to the fact that the Respondent made the impugned decision on account of its operational requirements. This brings the decision to terminate the Claimant's employment squarely within the purview of termination on account of redundancy (***Wazir v Redstar International Limited (Cause E477 of 2023) [2024] KEELRC 1971 (KLR) (26 July 2024) (Judgment)***).

20. The foregoing being the case, the Respondent was duty bound to ensure compliance with sections 40, 43 and 45 of *the Employment Act*. It had to demonstrate that there was a substantive reason to justify its decision. Further, it was bound to close the contract in strict compliance with the procedural strictures under section 40 of the Act (see ***Thomas De La Rue (K) Ltd v Omutelema [2013] KECA 492 (KLR) & Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 404 (KLR)***).
21. The Respondent alleged that the Claimant's department was recording poor sales which rendered it unsustainable. It (the Respondent) was therefore duty bound to present cogent data to back this claim. However, this was not done. No data was presented to the Claimant to justify the assertion that the sales in the department could not sustain it. On the contrary, the Claimant asserted and the Respondent's witness conceded that the department experienced growth after he was engaged.
22. Having regard to the foregoing, it is apparent that the Respondent did not tender evidence of the alleged dismal performance of the Claimant's department. As such, the court finds that it (the Respondent) did not demonstrate that it had a substantive justification to anchor its decision.
23. As regards the procedural requirements for a redundancy declaration, the Respondent was obligated to issue the Claimant with a notice of intention to declare a redundancy

at least one month before the redundancy declaration. A similar notice was to issue to the local labour officer.

24. The law requires that a redundancy notice speaks to two things: the reasons for and extent of the proposed redundancy (***Mohan v CCI Kenya Limited (Cause E588 of 2023) [2024] KEELRC 2347 (KLR) (30 September 2024) (Judgment)***).
25. The Respondent issued the Claimant with a letter dated 2nd August 2023 and the labour office with a notice of even date in alleged compliance with the aforesaid requirements of law. However, the two notices had material defects.
26. First, the notice which was issued to the Claimant was titled “termination of employment” denoting that it was a notice to terminate his services and not a notice of intended redundancy. Second, the two notices did not address the extent of the alleged redundancy. Third, the notices were for a period of less than one month.
27. Having regard to the foresaid, it is apparent that the impugned redundancy was not in compliance with the law. It thus resulted in the unlawful closure of the Claimant’s contract of service.
28. In the Respondent’s lawyers’ closing submissions, they seek to convince the court that their client dropped the redundancy process midstream and instead terminated the Claimant’s services on account of poor performance. However, this contention is not supported by the evidence on record. For instance, the Respondent’s letter to the

Claimant's lawyers dated 21st August 2023, affirms the fact that the Respondent terminated the Claimant's services on account of redundancy. In fact, the Respondent contends that its decision was guided by section 40 of *the Employment Act* which deals with redundancy. As such, counsel's contention that the Claimant's services were not terminated on account of redundancy is misguided.

29. However, even assuming that counsel was correct in this respect, there was no evidence to back their contention that the Claimant was dismissed from employment due to poor performance. Poor performance presupposes that an employee has failed to meet performance targets which had been agreed on by the parties (***National Bank of Kenya v Mutonya [2019] KECA 404 (KLR)***). In this case, no evidence was tendered to demonstrate that the parties had agreed on targets which the Claimant failed to meet. As a matter of fact, the Respondent's witness conceded in cross examination that the parties had no set targets which the Claimant was expected to meet.
30. There was no evidence to suggest that the Claimant's performance was subjected to any evaluation. There was no evidence of the Claimant having been placed on a performance improvement plan to assist him to improve without success. As such, the Respondent's attempts to invoke the ground of poor performance to justify the impugned decision fail.

31. The Respondent has further asserted that the Claimant's services were terminated after he refused to be deployed to another department after the closure of his department. However, no cogent evidence was presented to affirm this assertion. No evidence of the offer which was made to the Claimant was presented to court. No minutes of the meeting at which the alleged proposal to deploy the affected employees to other departments were tendered in evidence to assist the court to confirm what was discussed in the meeting.
32. As a matter of fact and contrary to the Respondent's assertions in this respect, the letter which was issued to the Claimant on 2nd August 2023 stated in no uncertain terms that the Respondent was not able to provide him with any other job function in the organization. The letter does not speak to the fact that the Claimant declined to be deployed, if at all. That being the case, the court is not convinced that the Claimant was offered a softer landing which he rejected.
33. Finally, the court noted during the trial that the Respondent's witness kept recanting portions of his evidence. This casts aspersions on the credibility of his evidence.
34. In the premises, the court finds that the decision to terminate the Claimant's services was irregular. That being the case, he is entitled to be compensated for the unfair termination of his contract of service.

Determination

35. After evaluating the pleadings, evidence and submissions on record against the applicable law, the court makes the following findings and attendant orders:-

- a) The court finds that the Respondent unlawfully terminated the Claimant's contract of service.
- b) The court awards the Claimant compensation for the unfair termination of his contract in the sum of Ksh. 405,360.00 being the equivalent of his gross salary for three months. In making this award, the court has taken into account (as is indeed required of it under section 49 of *the Employment Act*) the fact that the employment relationship between the parties was still at its infancy stage.
- c) The award is subject to the statutory deductions which were applicable at the time the contract between the parties was terminated.
- d) The court awards the Claimant interest on the above amount at court rates from the date of the decision.
- e) The court awards the Claimant costs of the case.

**Dated, signed and delivered on the 16th day of March,
2026**

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI