



**Omari v Euromax Pharmaceuticals Limited (Cause 324 of 2018)
[2024] KEELRC 686 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 686 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 324 OF 2018
J RIKA, J
MARCH 28, 2024**

BETWEEN

VINCENT ZACHARY OMARI CLAIMANT

AND

EUROMAX PHARMACEUTICALS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on 15th March 2018.
2. He states that he was employed by the Respondent, on 2nd March 2017, as a Medical Sales Representative.
3. He was placed on probation of 6 months. His salary was Kshs. 40,000 monthly.
4. Probation ended on 30th August 2017. The Respondent continued to engage the Claimant rendering the Claimant a permanent Employee of the Respondent.
5. On 2nd October 2017, the Respondent gave the Claimant 1-month notice of termination of contract, founded on allegations of gross misconduct and poor performance.
6. On 31st October 2017, the Managing Director, Sindani, sent the Claimant a letter of termination, dated 23rd October 2017. The Respondent alleged that the Claimant was found to be working for another Employer, during the notice period, and was therefore not entitled to any benefits from the Respondent.
7. He was not heard. He never went on annual leave. He was not paid any terminal benefits. He prays for: -
 - a. 12 months' salary in compensation for unfair termination at Kshs. 480,000.
 - b. Notice at Kshs. 40,000.



- c. Pro-rata annual leave at Kshs. 13,000.
Total ... Kshs. 533,000.
 - d. Certificate of Service to issue.
8. The Respondent filed its Statement of Response, on 9th May 2018. Its position is that the Claimant falsified a sales report, alleging that sales under his jurisdiction had decreased, while in fact, he was working for a rival, Simba Pharmaceuticals Limited. The Claimant misled the Respondent that he had sought for business from one Dr. Nyongesa at Kasarani Nairobi, while the said Dr. moved to Mombasa 3 years prior to 2017.
 9. The Claimant's contract was terminated fairly and lawfully. He breached his contract and trust. He worked for a business rival, undermining the Respondent. He worked for 8 months. He had not completed 1 year, by the time of termination. The Claim has no merit. The Respondent urges the Court to dismiss the Claim with costs.
 10. The Claimant gave evidence and closed his case, on 10th November 2023. The Respondent opted not to call Witnesses, and the hearing therefore closed on 10th November 2023. Parties confirmed filing and exchange of their Closing Submissions at the last appearance before the Court, on 8th December 2023.
 11. The Claimant relied on his Witness Statement and Documents [1-4] in his evidence-in-chief. He restated that his contract was terminated by the Respondent on allegations of falsification of sales reports. He was not heard and was denied terminal benefits.
 12. Cross-examined, he told the Court that he worked for 8 months. He was issued 1-month notice of termination dated 2nd October 2017. He did not agree that it would have lapsed around 2nd November 2017. He did not write to the Respondent, denying the allegations. He did not agree to the allegations. The Respondent alleged that the Claimant absconded, during the notice period. It was alleged that he left on 2nd October 2017 after he received notice, and returned on 16th October 2017. It is not true that he absconded. He was at work. He received the letter dated 23rd October 2017, which alleged that he had absconded and would be dismissed effective 23rd October 2017.
 13. He did not respond to the letter of 23rd October 2017. He was denied access by the Respondent to enable him respond. He left on 31st October 2017. His sales were okay. The Respondent ought to have exhibited sales records, to prove otherwise. The Claimant did not have his own records. The Statement of Response made serious allegations against the Claimant. He responded to these through his Advocates.
 14. Redirected, he told the Court that the allegations were not placed before him. He was not heard. There was no letter to show cause issued to the Claimant. Absconding was fresh accusation, levelled against the Claimant. Initially, the allegations were, that he falsified sales reports and that his sales were low. He was not allowed to serve his notice period in full.
 15. The issues are whether the Claimant's contract was terminated through a fair procedure; whether it was founded on valid reasons; and whether he is entitled to the prayers sought.

The Court Finds: -

16. The Claimant was employed by the Respondent as a Medical Sales Representative, through a letter of appointment dated, and effective, 2nd March 2017.
17. His salary was Kshs. 40,000 monthly.



18. He was to serve under probation of 6 months, which ended on 2nd September 2017.
19. On 2nd October 2017, the Respondent issued him a notice of termination. The notice states that the decision was based on gross misconduct and poor performance.
20. The notice was for 1 month, which logically, would have taken effect on 2nd November 2017.
21. On 23rd October 2017, the Respondent wrote to the Claimant a termination letter. It was alleged that the Claimant had absconded upon receiving the notice on 2nd October 2017. The Respondent states that it had been informed that the Claimant was working for a competitor, and it therefore had no option, but to terminate the contract with immediate effect. The effective date of termination [EDT] was therefore changed by the Respondent, from 2nd November 2017, to 23rd October 2023.
22. Procedure: The notice of 2nd October 2017 alleges that termination was on account of gross misconduct and poor performance. The Claimant was not asked to respond to these allegations, through a letter to show cause.
23. He was not called to any disciplinary hearing, and asked to defend himself, in accordance with Section 41 of the *Employment Act*.
24. While still serving the notice period, the Respondent added another allegation of absconding, to the previous allegations made against the Claimant.
25. Again he was not asked to explain or defend absconding. It was alleged that he was working for a competitor, Simba Pharmaceuticals. No letter to show cause issued based on this accusation and no disciplinary hearing was convened.
26. The notice of 1-month was short-circuited, and termination turned into a summary dismissal, on 23rd October 2017.
27. Procedure did not conform to the minimum standards fairness, under Sections 41 and 45 of the *Employment Act* 2007.
28. Reasons: As intimated on reviewing procedure, there were 3 substantive grounds, cited by the Respondent, to justify termination. It was initially alleged that the Claimant was engaged in gross misconduct and poor performance. Later, he was alleged to have absconded.
29. These substantive grounds were not established by the Respondent. There was no evidence that the Claimant falsified sales reports. No falsified sales reports were placed before the Court by the Respondent. There was no evidence of poor performance presented by the Respondent to the Court. It was alleged that the Claimant absconded, and went to work for a competitor, Simba Pharmaceuticals. This again was empty rhetoric made by the Respondent.
30. The Respondent did not give any evidence before this Court, or at the workplace, to establish valid reason or reasons, under Sections 43 and 45 of the *Employment Act*.
31. Termination was unfair, for want of fair procedure and valid reasons.
32. Remedies: The Claimant worked for a total of 8 months. He served a probationary period of 6 months, which ended in September 2017. He was on an open-ended contract at the time of termination. He did not cause or contribute to the circumstances leading to termination. He was issued notice of termination of 1 month without justification and was not even allowed to serve out the imposed notice period. Procedure was flawed, and termination was not founded on any valid ground. He is granted equivalent of 4 months' salary in compensation for unfair termination at Kshs. 160,000.



33. He is granted notice pay of 1 month at Kshs. 40,000, in accordance with clause 8 of the employment contract.
34. Clause 6 [b] of the contract, entitled the Claimant to 23 working days of annual leave per calendar year. It specifies that leave was calculable on pro-rata basis for the period worked. Having worked for 8 months, the Claimant is entitled to pro-rata annual leave calculated at Kshs. 13, 913.
35. Certificate of Service to issue.
36. There is no prayer for costs and interest, and none shall be granted.

It is Ordered: -

37.

- a. The Respondent shall pay to the Claimant compensation for unfair termination equivalent of 4 months' salary at Kshs. 160,000; notice at Kshs. 40,000; and pro-rata annual leave at Kshs. 13,913 – total Kshs. 213,913.
- b. Certificate of Service to issue.
- c. No order on the costs and interest.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 28TH DAY OF MARCH 2024.

JAMES RIKA

JUDGE

