



**Nyagah v Transchem Pharmaceuticals Limited (Cause E127 of 2021)
[2023] KEELRC 2089 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2089 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E127 OF 2021**

**K OCHARO, J
JULY 27, 2023**

BETWEEN

FRANCIS NDWIGAH NYAGAH CLAIMANT

AND

TRANSCHEM PHARMACEUTICALS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein filed a Statement of Claim dated 17th February 2021 seeking:-
 - a. A declaration that the Claimant's employment was unfairly terminated.
 - b. The Respondent be and is hereby ordered and directed to pay the Claimant compensation for the unfair termination of Kshs. 1,692,000/-.
 - c. The Respondent be and is hereby ordered and directed to pay the Claimant costs of this suit.
 - d. The Respondent be and is hereby ordered and directed to pay the Claimant interest on b and c above at court rates from the date of filing of this suit until payment in full.
 - e. The Respondent be and is hereby ordered and directed to furnish the Claimant with a Certificate of Service.
 - f. Any such other or further relief as this Honourable Court may deem appropriate.
2. The Statement of Claim dated 17th February 2021 was accompanied by the Claimant's Verifying Affidavit sworn on 16th February 2021; List of Witnesses dated 17th February 2021; Witness Statement dated 16th February 2021 and Claimant's List of Documents dated 17th February 2021.



3. In response to the said Statement of Claim, the Respondent filed a Statement of Response dated 1st July 2021; a List of Witnesses dated 1st July 2021; and a Witness Statement (undated).

Claimant's case

4. The Claimant averred that he was offered employment by the Respondent vide a contract dated 1st February 2007 as a Pharmaceutical Technologist as a permanent employee earning a monthly salary of Kshs. 60,000/-.
5. On or about March 2007, the Claimant was offered the position of Branch Manager by the Respondent's founding partner Mr. John Gituku, for the Respondent's new Development House branch on fresh terms on condition that the Claimant uses his license to register the business annually, and if business at the branch picked up, he would receive an annual salary increment. He accepted.
6. Business at the Respondent's Development Branch was very successful, hence the Respondent increased the Claimant's salary. At the time the Claimant's employment was terminated, the Claimant was earning Kshs. 141,000/-.
7. On 23rd December 2020, the Claimant's employment was terminated vide a letter dated 23rd December 2020 purportedly on the basis that the Claimant had filed a Constitutional Petition against the Respondent. The Respondent's Managing Director indicated that the Company was unable to meet the Claimant's demands per ELRC petition E081/2020 Francis Ndwigah Nyagah vs Transchem Pharmaceuticals Limited.
8. The Claimant's position was that his termination of employment was unfair as the reason for termination of employment was not valid and fair. Further that the process leading to the termination was not in accordance with the statutory procedure provided for in the [Employment Act](#).
9. The Claimant's claim is for:
 - a. Compensation for Unfair termination Months) - Kshs. 1,692,000
 - b. Costs of the suit
 - c. Interest on a and b above at Court Rates from the date of filing suit until payment in full.
 - d. A Certificate of Service.
10. The matter proceeded to an oral hearing on 27th October 2022. The Claimant adopted his Witness Statement dated 16th February 2021 as his evidence in chief and also produced the documents contained in his List of Documents dated 17th February 2021 as his documentary evidence.
11. Cross-examined by Counsel for the Respondent, the Claimant stated that at the start of his employment, his basic salary was KShs. 60,000/-. As at the time he was leaving the Respondent's employment his salary had more than doubled, he was earning KShs. 141,000/-. He had worked for the Respondent for 14 years.
12. He further testified that in the High Court Petition, he had complained of unjustified salary deductions and an increment of his salary at the rate of Kshs.20,000/- per year. Though he had made a cumulative claim of KShs. 6,000 000/-, the Court awarded him only KShs. 24,000/-.
13. The Claimant further stated that at the start his relationship with the Managing Director of the Respondent was cordial. However, the relationship deteriorated later on to the extent that whatever



decision he made at the branch level was often overturned. His branch was not getting any support from the management of the Respondent.

14. In his evidence under re-examination, the Claimant stated that it was clearly expressed in the termination letter that his employment was terminated because of the petition he had filed in the High Court against the Respondent.
15. He clarified that when he got employed by the Respondent company, its Managing Director was the late Mr. Gitua, husband of Respondent's witness No.1. She became the Managing Director after the demise of her husband.

Respondent's case

16. The Respondent presented one witness, Lydia Muthami Wahome to testify in support of its defence against the Claimant's claim. She presented herself to Court as the Managing Director of the Respondent Company.
17. In her testimony, she acknowledged that the Claimant was at all material times an employee of the Respondent. He was a supervisor. Due to his qualifications, the Respondent was trading under his license. He had registered one of its branches.
18. The witness stated that she became the Managing Director of the Respondent in the year 2012 after her husband who was then the Managing Director passed on. When she took over this position, the Claimant became insubordinate. He started undermining her on account that she was not a qualified professional. Many a time he would not take her instructions, or whenever he was given any he could resort to arguments.
19. She further stated that she terminated his employment because the relationship between him and her had become so bad. She was no longer able to work with him. Further, he was making unreasonable demands that the Respondent couldn't reasonably meet. On procedural fairness, she stated that she was fair as she gave him notice.
20. Cross-examined by Counsel for the Claimant, the witness stated that the reason[s] for the termination of his employment were put forth on the termination letter, thus, the demands he was making in the High Court Petition.
21. The witness stated that in paragraph 9 of the Statement of Claim, the Claimant pleaded that he was terminated through a termination letter, letter which embodied the specific reasons for termination. That the Respondent, in its pleadings admitted this averment of the Statement of Claim.
22. The witness stated that at the time she was joining the Respondent Company as its Managing Director, the Claimant was earning KShs. 156,000/-. At the time of separation, he was earning KShs. 152,000/-.
23. The witness stated that she had a very difficult relationship with the Claimant. His conduct amounted to insubordination. The Claimant dared her to dismiss him severally. She wrote him a show cause letter, though she cannot remember where she placed it.
24. In her evidence under re-examination, the witness asserted that she terminated the employment of the Claimant because of the bad relationship between them. Further, because of the demands he was making.



Claimant's Submissions

25. The Claimant filed submissions dated 17th November 2022. He submits that it is the obligation of the employer to justify the reasons for termination under Section 43 of the [Employment Act 2007](#) and that where the employer fails to do so, the termination shall be deemed unfair.
26. He also submits that per Section 46 (h) of the [Employment Act 2007](#), the institution of legal proceedings against an employer does not constitute a valid reason for terminating an employment contract. In support of this submission, he cites the cases of [Sammy Anyinga Madabana vs Kenya International Hotel Limited](#) [2020] eklr and [Richard Shitebi Isiabo vs Eastern Produce Kenya Limited](#) [2015] eklr.
27. The Claimant also submits that the Respondent did not comply with the mandatory procedure provided for under Section 41 of the [Employment Act 2007](#), before terminating his employment. Therefore, the termination lacked procedural fairness.
28. The Claimant prays for an award of 12 months' gross salary for unfair termination, and cites [Nasongo Wangila & 15 others vs Acme Containers Limited & Anor](#) [2017] eKLR; and [Angela Wokabi Muoki vs Tribe Hotel Limited](#) [2016] eKLR in support of this point.

Respondent's Submissions

29. The Respondent filed submissions dated 21st February 2023. It identifies three issues for determination, thus; whether the termination of the Claimant's employment was valid; whether the termination was in compliance with procedural imperatives; and whether the Claimant is entitled to the reliefs sought.
30. It was submitted that the Respondent's witness did demonstrate satisfactorily that through his conduct the Claimant had made his employment untenable. The Claimant had severally dared her to dismiss him. The Respondent's Managing Director, therefore, believed that there existed a sufficient reason to terminate his employment. The Respondent discharged the legal burden under Sections 43 and 45 of the [Employment Act](#).
31. Commenting on the Claimant's submissions on the provisions of Section 46 (h) of the [Employment Act 2007](#), stated that as much as the provision prohibits termination of an employee's employment for the reason that he or she has instituted legal proceedings against the employer, the said Section has a proviso, thus, "except where the complaint is shown to be irresponsible and without foundation".
32. The Respondent submits that the Claimant's claims in Petition E081/2018 were baseless, irresponsible, and without foundation, hence the dismissal of the same by the Court. It cited the case of [Sammy Anyinga Madabana vs Kenya International Hotel Limited](#) [2020] eKLR to drive home its point on the qualification to the provision.
33. Finally, the Respondent submits that if the Court should find that the Claimant was unfairly terminated, it should consider the extent to which he contributed to the termination. The Respondent states that the Claimant provoked the Respondent's Managing Director even daring her to terminate his employment, acts that bordered on insubordination.

Issues for Determination

34. I have reviewed the pleadings, the evidence placed before me, and the submissions filed by both parties and authorities. The issues for determination are as follows: -



- a. Whether the Respondent contravened Section 46 (h) of the *Employment Act* 2007, and unfairly terminated the Claimant's employment;
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the Respondent contravened Section 46 (h) of the *Employment Act* 2007, and unfairly terminated the Claimant's employment.

35. It is not in dispute that the Claimant was an employee of the Respondent since 1st February 2007. It is also not in dispute that the Respondent terminated the Claimant's employment vide a letter dated 23rd December 2020 which in part read:

“I regret to inform you that your employment contract has been terminated. The company is unable to bear/meet your demands as per employment and labour relations court petition E081/2020 Francis Ndwigah Nyagah vs Transchem Pharmaceuticals Limited.

You will be paid your December 2020 salary and a one-month pay in lieu of notice.”

36. I have carefully considered the evidence by the Respondent's witness, therein is an admission that the termination was on account of the existence of a matter that the Claimant had instituted against it, namely Petition E081/2020.
37. Section 46 (h) of the *Employment Act* 2007 provides in mandatory terms that the institution of legal proceedings against an employer by an employee does not constitute a fair reason for dismissal. Terminating an employee's employment because he has filed suit against his employer, in my view, is terminating on a statutorily prohibited ground, therefore an unfair ground. The termination becomes automatically unfair.
38. I hold a further view that any employer who terminates an employee's employment just because the latter has taken legal action against him or her breaches the Constitutional right of that employee against unfair labour practices.
39. By reason of the foregoing premises, I conclude that the termination of the Claimant's employment was substantively unjustified.
40. I now turn to the issue of procedural fairness.
41. Section 41 of the *Employment Act* 2007, provides a mandatory procedure that an employer contemplating termination of an employee's employment has to adhere to. The procedure contemplated in the stated provision of the law has three components, thus; the notification component, the employer must notify the employee of its intention and the grounds arousing the same; the hearing component, the employer must accord the employee adequate opportunity to prepare and make a representation on the grounds, and conjoined in this component is extending him an opportunity to be accompanied by a colleague or trade union representative[if he or she is a member of a union]; and consideration component, the employer must consider the representations made by the employee on the grounds before making a decision. for which the employer is considering termination, and shall subject the employee to a hearing where the employee shall be permitted to make representations.
42. Duty lay on the Respondent to prove that it indeed did adhere to the fair procedure provided for in the section mentioned above. I have carefully considered the evidence by the Respondent and come to an inescapable conclusion that it didn't place forth any evidence to demonstrate such. The legal



burden on it by reason of the provisions of Section 45[2], was not discharged. The termination was procedurally unfair therefore.

Whether the Claimant is entitled to the reliefs sought.

43. Having held that the Claimant was indeed unfairly terminated, I now consider the matter of his prayers.
44. In his submissions dated 17th November 2022, the Claimant submits that the Court should award 12 months' salary as compensation for unfair termination.
45. On its part, the Respondent submits that the Court should consider the extent to which the Claimant contributed to the termination by virtue of his insubordination.
46. I have taken note of the fact that the Claimant worked for the Respondent for about 14 years. I am also cognizant of the manner in which the Respondent terminated the Claimant's employment, without the benefit of a hearing or an opportunity to make his case against termination.
47. Further, it is unfortunate that the Claimant's battle for his Constitutional right to fair labour practices culminated in the dismissal of his employment in blatant disregard of Section 46 of the [Employment Act](#) 2007.
48. It is the Court's considered view that the makers of [the Constitution](#) of Kenya 2010 intended for all Kenyans to enjoy the protections contained in the Bill of Rights. The said Constitution is in terms that are meant to embolden any person to approach our Courts, whenever they perceive that their rights have been infringed on, without fear of persecution.
49. In the circumstances of this case, I find that the Claimant is entitled to the Compensatory relief contemplated under the provisions of Section 49[1][c] of the [Employment Act](#), I award him 10 [ten] months' gross salary as compensation for the unfair termination.
50. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
51. In the upshot, judgment is hereby entered for the Claimant in the following terms:
 - a. A declaration that the Claimant's termination was unfair and unlawful.
 - b. The Claimant be paid compensation for unfair termination equivalent to 10 months' salary, that is Kshs. 1,410,0000/- (Kshs. 141,000/- x 10).
 - c. Interest on (b) above at Court rates from the date of judgment until payment in full.
 - d. The Respondent bears the costs of this suit.
 - e. The Respondent is ordered to issue the Claimant with a Certificate of Service, within 30 days of this Judgment.

READ, DELIVERED AND SIGNED THIS 27TH DAY OF JULY, 2023.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Ongato for Claimant

Mr. Macharia for Respondent

