



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thuo v Samba Pharmaceuticals Limited (Cause 596 of 2016)  
[2023] KEELRC 2347 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2347 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 596 OF 2016  
M MBARÚ, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JAMES THUO ..... CLAIMANT**

**AND**

**SAMBA PHARMACEUTICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed his claim on 9 August 2016, Amended Claim on 4 July 2018 and a further amended claim on 24 October 2019.  
The respondent filed a response on 25 September 2017.
2. The matter proceeded for hearing in the absence of the respondent who was invited by the court to attend for taking hearing direction without attendance. The claimant issued various hearing notices without the respondent attending.
3. The claim is that on 2 February 2015 the respondent employed the claimant a medical representative earning Kshs. 37,602 per month and his employment was terminated on 18 May 2016 without notice or being given any reasons.
4. On 16 May 2016 the respondent summoned the claimant to the office in Nairobi for a meeting held on 16 May 2016 where he was informed that that sales had reduced and there was need to terminate his employment. there was no further communication until 12 June 2016 when the respondent served the claimant with a letter terminating his employment and the respondent made a deposit of Kshs. 42,788 as final dues being;
  - a. Salary for 8 days worked in May 2016 Kshs. 9,703;
  - b. Notice pay Kshs. 37,602; and



- c. Leave pay Kshs. 22,875.
5. The claim is that the decision to terminate employment was unlawful and unfair and devoid of any reasons and hence claim terminal dues;
    - a. Salary for pay 2016 (unpaid balance) Kshs. 15,912;
    - b. Severance pay for 1 year and 3 months Kshs. 69,375;
    - c. Compensation for unfair termination of employment Kshs. 451,224;
    - d. Leave pay Kshs. 15,602;
    - e. Entitlement difference in tabulation Kshs. 11,244;
    - f. Certificate of service; and
    - g. Costs.
  6. The claimant testified that upon employment by the respondent he worked as required until 12 June 2016 when he was issued with letter of summary dismissal through courier. Before this date, he had been verbally informed that his employment would be terminated due to reduced work. He had been provided with a price list of goods as part of his employment documents. His intention was to grow the business from where he found it with the respondent selling 14 products which he grew to 22 products but these were new in the market and not readily accepted since the public was used to other products. The respondent claimed that there was poor performance whereas the market was still to accept the new products which required time and education.
  7. In response, the respondent's case is that the claimant was dismissed from his employment on 18 May 2016 due to indolence in performance of his duties. His contract was express that the respondent would set targets and the implications in failing to meet them was termination of employment and to this extent, through notice dated 18 May 2016 the claimant was informed of the same.
  8. The claim for terminal dues is without merit since the respondent paid the same and the suit should be dismissed with costs.
  9. No witness was called and the respondent remained absent at the hearing.
  10. At the close of the hearing, the claimant filed written submissions which are analysed and the twin issues for determination are whether there was unfair termination of employment and whether the remedies sought should issue.
  11. The employment of the claimant by the respondent is not contested. This was through letter dated 3 February 2015.
  12. The respondent also filed the letter dated 8 May 2016, Job Dismissal of the claimant on the grounds that;

It has been established that;

3. You are deliberately ignoring work and not following express instructions to reverse the same.
4. You are not achieving your set targets despite numerous efforts made to reverse the trend.



As a result of the above reasons, the company has decided to terminate your contract with immediate effect. ...

13. The claimant testified that this notice was served on him on 18 May 2016. He had verbally been advised that his employment would be terminated due to reduced work.
14. However, the respondent's notice relates to alleged deliberate refusal to do allocated work and failure to meet set targets. This led to immediate termination of his employment. the respondent paid the claimant Kshs. 42,788 as final dues being;
  - a. Salary for 8 days worked in May 2016 Kshs. 9,703;
  - b. Notice pay Kshs. 37,602; and
  - c. Leave pay Kshs. 22,875.
15. The mandatory provisions of Section 41 of the *Employment Act*, 2007 are that, before an employer can terminate employment, notice to the employee must issue stating the misconduct or gross misconduct on matters of work performance, capabilities or other matters relating to the job. The employee must be given a fair chance to make his representations in the presence of a fellow employee of his choice. These provisions speak to what is natural justice, fair procedure and due process as held in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. The basic minimum is that the employee should be accorded a hearing at the shop floor before his employment is terminated for whatever reasons even where such relates to gross misconduct, which is not the case here.
16. Over the alleged refusal to do work as required or the alleged poor performance of his duties, the respondent should have taken the claimant through the due process of the law before terminating his employment.
17. The defence that there was a written contract allowing the respondent to terminate employment upon the claimant failing to meet his set targets looked at in view of the provisions of section 41, 43 and 44 of the *Employment Act*, 2007 which requires that the employee be given a hearing and reasons leading to termination of employment, such position by the respondent cannot find justification in law. the policy giving rise to termination of employment at will has since been regulated in law.
18. The court finds the respondent unlawfully and unfairly terminated the claimant in his employment. pursuant to section 45 and 49 of the *Employment Act*, 2007 the claimant is entitled to notice pay and compensation.
19. Notice terming employment took effect on 8 may 2016 even though the claimant only got the notice on 18 May 2016.
20. On the finding there was unfair termination of employment, the claimant having worked for the respondent for one year and three months, compensation at four months' gross salary is hereby found appropriate. The last wage was Kshs. 37,602 and compensation is assessed at Kshs. 150,408.
21. The terminal dues paid included pay for 8 days worked in May 2016 and any other days worked and not paid for are well addressed in the awarded compensation.  
Notice pay is already deposited in the claimant's account.
22. Severance pay relates to claims under redundancy which is not the case here.  
Leave pay has since been allocated and paid.



23. On the claim for difference pay, the logic of this claim is not addressed and in the written submissions, a multiplier of 8 years is made on the reasons that the claimant worked for 8 years for the respondent which is not the case. Without good basis, this claim is dismissed.

24. A certificate of service should issue at the end of employment in terms of section 51 of the [Employment Act](#), 2007.

The claim being successful, the claimant is hereby awarded costs.

25. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

- a. A declaration that employment terminated unfairly;
- b. Compensation awarded at Kshs. 150,408;
- c. A certificate of service shall issue in terms of section 51 of the [Employment Act](#), 2007; and
- d. Costs of the suit.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**M. MBARU**

**JUDGE**

