



**Anam v Yerth Phamaceuticals Limited (Cause E541 of 2020)
[2023] KEELRC 2628 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2628 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E541 OF 2020
MN NDUMA, J
OCTOBER 19, 2023**

BETWEEN

TERESA AKINYI ANAM CLAIMANT

AND

YERTH PHAMACEUTICALS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 17/9/2020 against the respondent seeking the following reliefs:-
 - a. Declaration that the claimant was constructively dismissed.
 - b. 12 months gross salary as compensation for the unfair termination being the sum of Kshs.1,140,000.00.
 - c. Payment for the 8 annual leave days unspent as at the termination date being a sum of Kshs.25,400.00
 - d. Payment of one month's salary at the sum of Kshs.95,000.00 on account of the requisite one month's pay in lieu of notice.
 - e. Unpaid House allowance at the sum of Kshs.30,000 per month or 30% of the claimant's basic payment making a total of Kshs.60,000.00.
 - f. Interest on (b) to (e) above at court rates from the date of the unfair termination;
 - g. Costs of the suit.
2. The Statement of claim and notice of summons were served on the respondent and received on 24th September, 2020. The notice of summons and Memorandum of claim were later reserved on the firm of Khayesi Njambi & Khayesi Advocates on 11/2/2022 who are on record for the respondent. An



affidavit of service was filed to that effect sworn to by Benson Muturi, a court Process Server dated 13th December 2022.

3. The respondent did not file a Memorandum of Response nor did they attend court for mention or hearing despite invitation to do so.
4. The claimant (C.W.1) testified in support of the claim that she was now resident of Botswana and adopted a witness statement dated 31/8/2020 as her evidence in Chief. The claimant also produced a bundle of documents dated 31/8/2020 as exhibits '1' to '6' in support of the claim.
5. C.W.1 stated that she was employed by the respondent by a letter of appointment dated 28/4/2020 as a Superintendent Pharmacist. That she served the respondent well from 27th April, 2020 to 22nd July, 2020, a period of about three months.
6. That her monthly salary was Kshs.95,000 and was poached from a different company by the respondent. That the respondent did not pay her monthly salary from the month of May, June and July, 2020 despite her excellent services.
7. That the claimant made demands and follow up but the respondent only paid her Kshs.40,000 and thus is left with a balance of Kshs.245,000.
8. That the claimant was eventually unable to go to work due to lack of funds, but the respondent's Chief Executive Officer instituted disciplinary proceedings against her for failing to report to work. That the respondent was commencing business when it employed the claimant and needed someone with Pharmaceutical skills to get the regulatory license to operate the business. That in May, and June, 2020, the Respondent's premises were being renovated and required the claimant to work from a different location. That due to the aforesaid reasons, the respondent told the claimant that she did no work full time and was not entitled to May and June salary. That the respondent did not pay her National Social Security Fund (NSSF) and NHIF dues during that period. That the respondent had promised to pay the balance of the salary but has failed and or neglected to do the same.
9. The letter of appointment specifically excluded probation period for the claimant.
10. The claimant states that she was constructively dismissed from employment of the respondent.
11. The claimant produced demand letter for payment of Kshs.145,000 dated 7/7/2020. The claimant also produced letter dated 8/7/2020 written to her by the respondent to show cause why she should not be disciplined for absconding work.
12. From the letter of employment, the claimant had been offered four (4) shares out of the seven 7 shares of the respondent making her the majority shareholder with 57% of total shares.
13. The claimant does not state whether these shares were transferred to her or not since no certificates of transfer have been placed before court.
14. Considering that this suit is undefended, the claimant bears the onus of proving that she was an employee of the respondent; that she was owed salary for the month of May, and June 2020 in the sum of Kshs.145,000 as stated in the letter of demand dated 7/7/2020.
15. That the failure by the respondent to pay her salary amounted to constructive dismissal.
16. In the memorandum of claim dated 31st August, 2020, the claimant did not pray for payment of arrear salary for the months of May, and June 2020 in the sum of Kshs.145,000 but only claims payment in lieu of unpaid eight (8) leave days in the sum of Kshs.25,400; one month salary in lieu of notice in the sum of Kshs.95,000 and unpaid house allowance in the sum of Kshs.30,000.



17. The aforesaid claims are not supported by the evidence adduced by the claimant in her witness statement dated 31/8/2020. In that statement, the claimant did not state that she was owed in lieu of any leave days. She did not also state that she was entitled to house allowance at 30% of her basic salary which was not paid.
18. The claimant only testified that she was owed arrear salary and failure to pay the salary amounted to constructive dismissal.
19. The court is bound by the pleadings filed by the claimant and cannot award her in respect of arrear salary which has not been prayed for in the Statement of claim. Furthermore, the claimant failed to prove that she was owed any house allowance and payment in lieu of leave days not taken.
20. The claimant was also not candid to the court in her testimony. She did not disclose and or explain that she was the majority shareholder of the respondent according to the letter of appointment in this suit.
21. It is clear that the respondent was a start up by the claimant and another person, whose name is not disclosed in the Statement of claim.
22. The claimant stated that this was a new business which did not even have a premises and so she did not report to a specific place of work during the three months period she served the respondent.
23. The court finds that this was a business venture by the claimant and another through the respondent company which failed from inception.
24. The claimant has failed to prove that she was constructively dismissed by the respondent. Rather, the start-up pharmaceutical business by the claimant and another failed.
25. The suit lacks merit in its entirety and is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 19ST DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

