



**Okumu v Ace Nothern Hopsital Ltd (Cause E025 of 2022)
[2023] KEELRC 2448 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2448 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E025 OF 2022**

**AK NZEI, J
OCTOBER 12, 2023**

BETWEEN

DAVID OKUMU CLAIMANT

AND

ACE NOTHERN HOPSITAL LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated April 14, 2022 and filed in Court on April 20, /2022, and pleaded that the Claimant was, from September 1,2021 to January 22, 2022, employed by the Respondent as a Medical Practitioner earning a basic pay of Ksh 120,000 per month without house allowance; and that the Claimant’s employment was on January 22, 2022 unlawfully terminated. That the Claimant had not executed an employment contract, and that his termination was verbal.
2. The Claimant further pleaded that the termination of his employment was unlawful and unfair because the same was not based on any valid reason, the Claimant was not given an opportunity to be heard, the termination was effected without notice, the Claimant was not paid his dues and was not issued with a certificate of service.
3. The Claimant sought the following reliefs against the Respondent:-
 - a. house allowance (5x15% basic pay).....Ksh 120,000
 - b. salary *in lieu of* noticeKsh 120,000
 - c. a declaration that the Claimant was duly employed by the Respondent.
 - d. a declaration that termination of the Claimant’s employment was unfair and unlawful
 - e. an order that the Respondent remits the statutory dues for the period of employment.



- f. costs of the suit and interest at Court rates.
4. Other documents filed by the Claimant included an affidavit in verification of the claim, the Claimant's written witness statement dated April 14, 2022 replicating all the averments made in the memorandum of claim, and a list of documents dated April 14, 2022 listing some documents. The listed and filed documents included the Claimant's bank statement, M-pesa statement, a copy of a demand letter dated February 28, 2022 and response to the demand letter dated March 9, 2022.
 5. The Respondent entered appearance on October 25, 2022 and filed Response to the Claimant's Memorandum of Claim March 3, 2023. The Respondent denied the Claimant's claim and pleaded that the Claimant was employed under an independent fixed term contract to stand in for an employee who was on sick leave, but admitted that the Claimant was earning a basic pay of Ksh 120,000 per month without house allowance. The Respondent made this admission by admitting paragraph 4 of the memorandum of claim.
 6. The Respondent further pleaded:-
 - a. that the Claimant was not entitled to house allowance as he was not a permanent employee.
 - b. that the Claimant was, at the onset, made aware that he was only working with the Respondent as a locum medical practitioner for a short period.
 7. the Respondent also filed a written witness statement of one Sylvester Makhokha Wesonga dated December 10, 2022.
 8. When trial opened before me on April 25, 2023, a date fixed in the presence of Counsel for both parties, the Respondent did not attend Court. The Claimant adopted his written witness statement dated April 14, 2022 as his testimony and produced the four documents referred to in paragraph 4 of this judgment. The Claimant further testified that he is a Clinical Officer holding a diploma in medicine and surgery, and that he was employed by the Respondent on September 1, 2021, earning Ksh 120,000 per month. That this salary was initially paid to him by M-pesa from the Respondent's KCB bank account to the Claimant's mobile phone, and subsequently into the Claimant's Equity bank account. That the Claimant worked for five months, his last working day being January 22, 2022.
 9. The Claimant further testified that on January 23, 2022 at around 9.00pm, he received a phone call from the Respondent's director, telling him not to go to work the following day. That the director promised to call the Claimant but never did; and never picked the Claimant's calls. The Claimant denied having executed any contract for locum services. He explained that locum is a situation where one is paid for hours worked. It was the Claimant's further testimony that his salary was not subjected to statutory deductions by the Respondent, that he was not subjected to disciplinary proceedings, and was not issued with a certificate of service.
 10. The Claimant closed his case, and the Court closed the Respondent's case and directed parties to file written submissions. The Claimant filed written submissions on May 11, 2023, while the Respondent did not file.
 11. It ought to be noted that the Respondent neither attended Court on the date fixed for hearing nor adduced any evidence. The evidence adduced by the Claimant was, therefore, neither controverted nor rebutted by the Respondent; and stands unchallenged. It was stated in Trust Bank Limited-vs-



Paramount Bank Limited & 2 Others, Nairobi [Milimani] HCCC No. 1243 of 2021, as follows; and I agree:-

“it is trite where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact. In so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”

12. The foregoing being the position in the present case, issues that emerge for determination, in my view, are as follows:-

- a. whether the Claimant is entitled to pleaded unfair termination and to seek compensation for unfair termination.
- b. whether the Claimant is entitled to the reliefs sought.

13. On the first issue, although the Claimant demonstrated, on a balance of probability, that he was employed by the Respondent as pleaded, he is disqualified by the stature from complaining that he was unfairly terminated. Section 45(3) of the Employment Act provides:-

“An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

14. The Claimant in the present case was employed by the Respondent for five (5) months only, and he pleaded and testified as much. He cannot complain that he was unfairly terminated, and he cannot claim compensation for alleged unfair termination. Consequently, the prayer that the Court declares that the Claimant was unfairly terminated is declined. Also declined is the prayer for 12 months’ salary as compensation for unfair termination of employment.

15. The prayer for one month salary in lieu of notice is allowed pursuant to Section 35(1)(c) of the Employment Act, and I award the Claimant Ksh 120,000 in that regard. I also award the Claimant Ksh 120,000 being unpaid house allowance as prayed. The prayer for remittance of statutory deductions is declined as the Claimant pleaded and testified that his salary was not subjected to statutory deductions. The prayer for issuance of a certificate of service is allowed.

16. In sum, and having considered the submissions filed, judgment is hereby entered for the Claimant against the Respondent as follows:-

- a. One month salary in lieu of notice.....Ksh 120,000
 - b. Unpaid house allowance.....Ksh 120,000
- Total Ksh 240,000

17. The Respondent shall issue the Claimant with a certificate of service pursuant to Section 51(1) of the Employment Act within thirty days from the date of this judgement.

18. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH OCTOBER 2023

AGNES KITIKU NZEI

JUDGE



Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

.....Respondent

