



REPUBLIC OF KENYA



**Kamende v Nila Pharmaceuticals Limited (Cause 364 of 2018)  
[2023] KEELRC 3131 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3131 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 364 OF 2018  
DKN MARETE, J  
NOVEMBER 22, 2023**

**BETWEEN**

**SAM EZBON MWAI KAMENDE ..... CLAIMANT**

**AND**

**NILA PHARMACEUTICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Memorandum of Claim dated 14th March, 2018. The issue in dispute is herein cited as;
  - i. Unfair termination contrary to the Employment Act of 2007.
  - ii. Infringement of the Claimant's right to fair labour practices enshrined in Article 41(1) of the Constitution.
  - iii. Breach of employment contract dated 1<sup>st</sup> November, 2005 ("the Contract").
2. The Respondent by a Response to Memorandum of Claim dated 25th April, 2018 denies the claim and prays that it be dismissed with costs.
3. The Claimant's case is that vide an employment letter dated 1st November, 2005, the Respondent engaged him as a Pharmaceutical Technologist on a permanent basis. He earned Kshs.56,805.00 and paid annual leave.
4. The Claimant's further case is that he performed his duties well and had a blemish free record. He used his registration certificate to run the Respondents pharmacy allocated to him but was not paid anything extra. He also did 12 hours work instead of the usual 8 daily hours of work.



5. It is the claimant's other case that on or about 4th January, 2018, the Respondent's Director, Finance and Administration instructed him to leave office over some altercation with a client. He was also alleged to be abusive and disrespectful. This amounted to an oral dismissal from work.
6. The Claimant further avers that the Respondent violated his statutory and Constitutional rights as well as trampled on his contractual obligations well entitled to him as particularised herein below:
  - i. Failure to offer remuneration for the use of his pharmaceutical practising license for over 12 years.
  - ii. Maliciously and without sufficient probable cause or none at all, dismissing the Claimant and contrary to the *Employment Act* of 2007.
  - iii. Breach of employment contract dated 1<sup>st</sup> November, 2005 as a result of the frustration that the Claimant was forced into by the Respondent.

He prays as follows;

- i. Two months' salary in lieu of notice Kshs.113,612/=
- ii. Severance pay Kshs.28,402/=
- iii. 12 months' salary compensation for wrongful dismissal Kshs.681,672/=
- iv. Overtime payment (12 years) Calculated at Kshs.79 per hour for every four extra working hours for 12 years Kshs.1,365,120/=
- v. Unpaid house allowance Kshs.8,520/= for 12 years) Kshs.1,226,880/=
- vi. Public holidays worked for 2005-2010 7 public holidays each@Kshs.1,893/= 2011-2017 6 public holidays each @1,893/= Kshs.68,148/=
- Total Kshs.3,550,089/=
- vii. General damages for breach of contract
- viii. Certificate of service.
- ix. Costs of suit.
- x. Interest on items i), to v) above at court rates.
- xi. Any other relief that the court may deem fit to award.

#### **The Respondent denies the Claim;**

7. It is her case that the claimant's registration certificate was a mandatory document before he could discharge duties of a pharmaceutical technologist and that informed the basis of the claimant securing employment with the respondent and earning a salary.
8. The Respondent in denial of contents of paragraph 7 of the statement of claim avers that on 4th January, 2018 the claimant was requested by the Finance and Administration Director to explain an incident that occurred at his work station where he was rude to a customer. Additionally, the claimant had previously been warned over similar incidents. He is put to strict proof of any other allegation to the contrary.



9. The Respondent's other case is that employees work for the recommended 8 hours per day and that the company is always closed for business during public holidays. The claimant is put to strict proof of any other allegation to the contrary.
10. The respondent further avers that on 4th January, 2018 the claimant was requested by the respondent's Finance and Administration Director to explain an incident that took place which entailed the claimant being rude to a customer. The explanation was sought at Lagos Hotel, Nairobi where the company was holding a meeting for all company pharmaceutical technologists and after the meeting, the claimant never went back to his work station and absconded duty. The claimant is put to strict proof of any other allegation to the contrary.
11. In finality the Respondent denies that it's Director of Finance and Administration was abusive and disrespectful to the claimant and maintains that the claimant absconded duty. He is being less than candid in his allegations. The claimant is put to strict proof of any other allegation to the contrary.
12. It her further case that there was indeed no termination of the employment of the Claimant but on the contrary, he absconded duty and refused to co-operate on a resolution of the issues ensuing out of his revulsion at the workplace.
13. The issues for determination therefore are;
  1. Whether the claimant was unlawfully terminated or he absconded work?
  2. Whether the Claimant is entitled to the reliefs sought?
  3. Whether the claimant is entitled to an award of costs?
14. The 1st issue for determination is whether the claimant was unlawfully terminated or he absconded work the claimant submits a case of unfair termination.
15. He seeks to buttress his case by relying on the authority of Denning MR in *British Leyland UK Limited -vs- Swift* [1981] 1RLR 91 at page 93 where the court observed as follows on the doctrine of reasonable employer test;

“Was it reasonable for the employer to dismiss [the employee]? If so reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.”
16. Again, the Claimant submits that the Respondent proceeded to unfairly terminate the Claimant without notice and any reasonable cause, but rather chose to unsubstantiate his claim by stating that he had absconded from work. The Respondent was unable to provide to court any document as proof that indeed the right channels were followed, including but not limited to the mandatory right to be heard as per our *Constitution* and further, the right to be accorded a fair hearing. The claimant was never invited to any disciplinary hearing contrary to the law, and that the information presented by the Respondent on 'meetings to discuss his absconding' were and remain unsubstantiated.
17. The Respondent opposes a case of termination of employment and submissions follows;

In the present case, we are left with two competing positions by the claimant and the respondent. The burden of proof was on the claimant to prove his allegations to the required standard. The claimant however failed to demonstrate with credible evidence that he did not abscond but was dismissed.



It is instructive to note that the Respondent was willing to accommodate the claimant back to his position upon him communicating as to whether he would resume work or resign. Therefore, this clearly illustrates that the Respondent did not terminate Claimant's services.

18. She further seeks to rely on the authority of *Boniventure Lubembe versus alba Petroleum Ltd* (2016) eKLR where the court observed as follows;

“in view of the foregoing finding that the dismissal of the claimant was justified, the court declines to make declaration that the dismissal was unfair and unlawful. Under section 44 of the Employment Act (EA), absenting from duty without permission or just cause is a misconduct which entitles an employer to terminate the employee summarily subject to procedural fairness provided under section 41 of the Employment Act.....”

19. A case of no termination of employment is therefore discernable from the evidence adduced in support of the case of the Respondent. The Claimant absconded duty and was nowhere to found. This is even in the situation that the Respondent was ready and willing to negotiate a return to work formula for the Claimant. This leaves the Claimant's case helpless and loose. I therefore find a case of no termination of employment and hold as such.
20. The 2nd issue for determination whether the claimant is entitled to the relief sought. He is not.
21. Having lost of a case of unlawful termination of employment, he becomes disentitled to the relief sought.
22. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**DELIVERED, DATED AND SIGNED THIS 22<sup>ND</sup> DAY OF NOVEMBER 2023.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

1. Mr. Thuo instructed by Shako & Company Advocate for the Claimant
2. Mr. Maina holding brief for Kabue instructed by Kabue Thumi & Company Advocate for the Respondent.

