



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1348 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

WILFRED JOMO ATIKA.....CLAIMANT

VERSUS

BATALO PHARMACEUTICALS LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Claimant has brought a claim against the Respondent by the memorandum of claim dated 12th July, 2016.

The Respondent put his response dated 22nd July, 2016.

THE CLAIMANT'S EVIDENCE

2. The Claimant states he was employed by the Respondent as a pharmacist at a monthly salary of Kshs.20,000/= a month.

He says he was not issued an appointment letter. He says he commenced employment on 4th August, 2014.

3. He says he served diligently until 8th May, 2016 when he was unlawfully and wrongfully terminated.

4. He says during employment he was not given leave. He also says he was not given notice to terminate his services.

He claims he was not paid salary for some months and that his NSSF and NHIF dues were not remitted to the necessary bodies.

5. He avers therefore his employment was terminated in contravention of Section 41 of the Employment Act.

6. He prays therefore for compensation for a total of Kshs.350,640/= as itemized in paragraph 5 of the claim.

7. Costs of the suit and interest.

He asks for any other relief the court may deem fit to grant.

RESPONDENT'S EVIDENCE

8. The Respondent in his response admits Claimant was employed by the Respondent but at a salary of Kshs.15,000/= a month not Kshs.20,000/=.

He says the Claimant deserted his duties.

9. He admits he owes Claimant Kshs.68,240/=.

10. NSSF arrears of Kshs.8400/=.

11. And annual leave 10,500/=.

He says he is willing to pay him the above dues.

12. He therefore prays the Claimant's suit be dismissed with costs.

DETERMINATION

13. The Claimant says he had no written contact and even his employment was terminated orally.

14. The Respondent on the other hand says the Claimant was employed as a support staff not a pharmacist. He says that they found in their company some funds were embezzled and they questioned the Claimant. He then deserted employment and never returned.

He admits they owe him salary of Kshs.78,740/= and Kshs.8400/= for NSSF.

15. The court has considered very deliberately the evidence adduced by both parties and the pleadings and submissions and have observed that the Claimant is claiming he was dismissed without any notice or following the right procedure.

The Respondent on the other hand is claiming the Claimant deserted employment after he was questioned about embezzlement of funds.

16. It is trite law that if an employer who alleges desertion by the employee the employer should establish the steps he took to contact the employee.

At the most the employer must show he gave notice to the employee that he was considering terminating his employment on the grounds of desertion.

In the case of **RONALD DAUDI VS TORNADO CARRIERS CASE NO.236 OF 2016** the court held that desertion of duty is a grave administrative offence which if proved would render an employee liable for summary dismissal. It is however not enough for an employer to simply state an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this grounds is under consideration.

17. In this case the Respondent admitted in his evidence in chief that he did not attempt to reach out to the employee. There was no notice given and Claimant was not given an opportunity to defend himself of any embezzlement of funds.

18. In the often quoted case of **WALTER ANURO VS TEACHERS SERVICE COMMISSION CASE NO.955 OF 2011** the court held that "in order the termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Further Section 43 of the Employment Act obligated an employer to prove the reasons for termination of employment and where the employer failed to do so the termination was deemed to have been unfair.

19. The procedure for termination of employment for poor performance, misconduct or physical incapacity is well provided in Section 41 of the Employment Act 2007. The Section provides that the employer who wishes to terminate the employment of the employee on the above grounds must explain to the employee in a language he understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representation of his choice present during his explanation.

20. The court finds the evidence given by the Respondent as to the reasons of separation with the Claimant is conflicting. If at all it was dismissal for embezzlement of funds the right procedure was not given as mandated in a clear mandatory language under Section 41 of the Employment Act.

21. As well if the Claimant deserted employment which is not proved the Respondent did not comply with the law related to desertion. In my considered findings the Claimant was unlawfully and wrongfully dismissed from his employment

and so I enter Judgment in his favour.

RELIEFS

22. In light of the foregoing findings I award the Claimant the following:-

(1) One month salary in lieu of notice..Kshs.15,000/= (there is no evidence that his salary was Kshs.20,000/= but even the documents he produced in court showed Kshs.15,000/=.

(2) Salary arrears.....Kshs.68,240/=

(3) NSSF arrears.....Kshs.8,400/=

(4) Annual leave for one year at Kshs.15,000/= per month Kshs.10,500/=.

(5) Claimant is also awarded 2 months equivalent

For unfair termination.....Kshs.30,000/=.

CONCLUSION

The effect of my award in total is therefore Kshs.132,140/= plus interest at court rates till full payment.

Costs are also awarded to the Claimant. It is so ordered.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 20TH DAY OF JANUARY 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE