



**Mayabilo v Goodlife Pharmacy Limited (Cause 580 of 2017)  
[2022] KEELRC 4115 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4115 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 580 OF 2017  
M MBARŪ, J  
JUNE 30, 2022**

**BETWEEN**

**ISAIAH SIMIYU MAYABILO ..... CLAIMANT**

**AND**

**GOODLIFE PHARMACY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. On December 10, 2014 the respondent employed the claimant while trading as Mimosa Pharmacy Limited at a wage of Ksh 30,000 as a pharmacist technologist and placed at Hurlingham branch
2. On October 24, 2016 the claimant and others were told to report to the head officer and was then sent on compulsory leave from November 1, 2016 and to report back on November 16, 2016 when he was told that he would be transferred to other branches of the company. There was no communication as to which exact branch the claimant had been moved to and despite calling the human resource office, nothing was forthcoming.
3. On November 23, 2017 the claimant called to report to the head office and was instead issued with a warning letter on undisclosed allegations. The claimant was then issued with a notice to show cause and required to respond within 48 hours with regard to why he had refused to accept the warning letter.
4. The claimant replied to the show cause notice but did not receive any response and his salary was stopped without communication as to whether he was on suspension or his employment terminated. He went without a salary for 5 months.
5. On February 27, 2015 the claimant was promoted and his salary increased to Ksh 50,000 which was never paid.
6. The claim is that during employment the claimant was not paid a house allowance or provided with housing.



7. This resulted in unfair termination of employment and his terminal dues should be paid.
8. The claimant testified in support of his case that upon employment he was based at the Hurlingham Branch at a wage of Ksh 30,000 per month. On March 9, 2015 he was promoted to shift supervisor and his salary reviewed to Ksh 50,000 per month. He was then transferred to Lunga Lunga branch and upon consultations the transfer was rescinded but the salary increment was not effected.
9. The claimant testified that on December 17, 2015 his salary was reviewed to Ksh 31,500 instead of the Ksh 50,000 previously allocated.
10. On March 4, 2016 the claimant was transferred to T-Mall branch and the wage reviewed to Ksh 55,000 but his was not paid. the deployment was rescinded. He had only worked at this branch for 3 months and then returned to Hurlingham branch. The claimant was issued with a first warning over alleged discrepancies in stock which he declined to sign as there were no specifics. On October 24, 2016 he was called to a meeting and sent on compulsory leave and when he was called back he was issued with a last warning on October 24, 2016 over alleged discrepancies in stocks and without undertaking any investigations the respondent terminated his employment without the due process of the law.
11. He has attached a witness statement and is claiming the following dues;
  - a) Notice pay Ksh 55,000;
  - b) Leave for 2 years Ksh 110,000;
  - c) Severance pay Ksh 55,000;
  - d) Arrears of salaries after adjustment from Ksh 30,000 to 50,000 at Ksh 240,000;
  - e) Salary for November 2016 to March, 2017 Ksh 220,000;
  - f) Compensation;
  - g) General damages; and
  - h) Costs.

## **Response**

12. The claimant was an employee and his salary agreed upon and which was inclusive of a house allowance. The claimant is not entitled to Ksh 50,000 in salary as claimed because he turned down the transfer and promotion offers due to unspecified personal reason and the various promotions and salary increments were revoked by the respondent.
13. During his employment, the claimant was issued with several warnings due to dismal work performance and misconduct leading to dismissal from his employment. the claimant refused to sign the warning letters leading to a notice to show cause why his employment should not be terminated and instead opted to change his work ethics leading to deteriorating performance. All issued warnings, the claimant refused to sign in acceptance.
14. The claimant never lodged any complaint with regard to allegation made in his claims and this led to huge discrepancies at the Hurlingham branch where the claimant and other employees were called to a meeting to give an explanation and when he was transferred to another branch, he cited personal reasons and failed to attend.
15. The claims made are without merit and should be dismissed with costs.



16. In evidence the respondent called Ruth Elwak head of human resource and who testified that the claimant's work ethics was poor and when this was brought to his attention through a warning letter he refused to sign leading to issuance of a notice to show cause.
17. The claimant was transferred from the Hurlingham branch to Lunga Lunga branch but he cited personal reasons and refused to go. He was then transferred to T-Mall branch as a promotion and increased wage but he declined. The wage reverted back to the earlier one since he never reported to the new branch as manager.
18. The claimant was paid all his salaries as due and the respondent has filed work records in evidence.
19. At the close of the hearing, both parties filed written submissions.

### **Determination**

20. The claimant amended his memorandum of claim and his claims relates to alleged unfair termination of employment, that he was locked out of work for 5 months without pay and eventually his employment terminated unfairly.
21. The claimant has admitted that he was issued with a warning letter after he reported back to work on November 23, 2017 and he refused to sign since the allegations made had no specifications. On November 24, 2017 a third warning was issued and the claimant failed to sign it in acceptance under the mistaken belief that by accepting it he would be effectively accepting the allegations made therein. This is outlined under paragraph 19 of the amended memorandum of claim.
22. An employee who fails, refuses and ignores the lawful instructions of an employer commits gross misconduct as defined under section 44(4) (e) of the *Employment Act*, 2007;
  - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
23. It was therefore gross misconduct on the part of the claimant to decline to accept the warning letters. The show cause notice which issued as a result was justified under the provisions of section 41(2) of the Act which directs that;
  - (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
24. The claimant failed to show good cause. Whatever cause that justified the claimant's conduct and failure to accept the warning letters issued by the employer, such was a matter addressed at the shop floor and cannot find justification before the court. the warning had issued by the employer on good basis and the claimant was bound to take lawful instructions of the employer. See *Kenya Plantation & Agricultural Workers Union (KPAWU) v Eastern Produce (K) Limited* [2022] eKLR.
25. In the case of *Anthony Korir v Imarisha Sacco Society Limited* [2020] eKLR the court held that the refusal to take lawful instructions by the employer amounts to gross misconduct under the provisions of section 44(4)(e) of the *Employment Act*, 2007 and such justify summary dismissal.
26. In this case, the court finds the conduct of the claimant justified termination of his employment by the respondent. Summary dismissal was justified.



27. On these findings, notice pay, compensation and damages are remedies not available to the claimant.
28. The employer is the custodian of work records pursuant to the provisions of section 10(6) and (7) of the *Employment Act*, 2007. The records filed by the respondent as the employer demonstrate that the claimant was transferred from Hurlingham Branch to Lunga Lunga branch and he declined the same for personal reasons. The transfer was with a wage increase and upon the decline, the due wage increase reverted back to the earlier wage.
29. The claimant was then promoted and transferred from Hurlingham branch to T-Mall branch and his wage increased. He was issued with letter dated March 4, 2016. In a letter dated March 10, 2016 it was noted that the claimant declined the transfer and he reverted back to his position.
30. The claimant for unpaid salary increments re lost with the decline for promotion and transfer. The claimant cannot justify his claim for a wage over a position that was rescinded on his own account and citing personal reasons.
31. The claimant is seeking payment of severance pay. This is a case of summary dismissal and not a redundancy to justify payment of severance pay.
32. Pursuant to the provisions of section 19(1)(c) of the *Employment Act*, 2007 the employer is not bound to pay an employee for days he is absent from work without good cause or where the employee has not rendered his services without good cause.
33. The claim for salary from November, 2016 to March, 2017 was over a period the claimant was out of work and the response has not addressed this lapse. Employment only terminated through summary dismissal on December 7, 2016 and for the duration of employment, the due wage is payable. The claimant has applied the due wage on an upper limit and beyond what he was entitled to after he declined a transfer and reverted back to his earlier wage.
34. The due wages for the period of November 2016 to March, 2017 shall be tableted and paid within 30 days after which date the same shall accrue with interests.
35. Accordingly, save for payment of due wages for the period of November, 2016 to march, 2017 within 30 days from the date hereof and after which time the same shall accrue interests, all other claims fail. Each party shall bear own costs.

**DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Peter Kigotho**

..... **and** .....

