



**Odhiambo v Pharma Specialities Limited (Cause 343 of 2018)  
[2022] KEELRC 1341 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1341 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 343 OF 2018**

**AK NZEI, J  
JUNE 23, 2022**

**BETWEEN**

**EVANS LENNOX ODHIAMBO ..... CLAIMANT**

**AND**

**PHARMA SPECIALITIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted by the Claimant vide a Memorandum of Claim dated 21<sup>st</sup> May 2018 and filed on 22<sup>nd</sup> May 2018, whereby the Claimant pleaded: -
  - a) that he was employed by the Respondent on 2<sup>nd</sup> February 2017 as a Medical Representative earning ksh.37,000 per month and worked continuously without any warning or suspension upto 21<sup>st</sup> February 2018.
  - b) that the Claimant took out a Practice Certificate for the year 2018 in the name of the Respondent.
  - c) that on 1<sup>st</sup> April 2018, the Respondent revised the Claimant's gross monthly salary to ksh.42,000.
  - d) that on 21<sup>st</sup> April 2018, the Respondent unprocedurally, unfairly and verbally terminated the Claimant's employment without any lawful cause or reason; and refused to pay the Claimant's outstanding dues.
  - e) that termination of the Claimant's employment contravened Section 45 of the [Employment Act](#).
  - f) that the Respondent did not respond to a demand letter dated 8<sup>th</sup> May 2018.
2. The Claimant sought the following reliefs: -



- a) three months' salary in lieu of notice ..... ksh.126,000
  - b) damages for unlawful termination @ 8 months .... ksh.336,000
  - c) twelve (12) leave days for 2017/2018..... ksh.21, 142  
Total ksh. 483,142
  - d) costs of the suit and interest.
3. Documents filed by the Claimant along with the memorandum of claim were the Claimant's written witnesses statement dated 21<sup>st</sup> May 2018 and a list of documents dated the same date, listing some 12 documents.
  4. The Respondent entered appearance on 6<sup>th</sup> July 2018 and filed Response to the Memorandum of Claim on 24<sup>th</sup> July 2018. The Respondent denied the Claimant's claim and pleaded: -
    - a) that the Claimant's verbal termination was revoked by an email send by the supervisor on 11<sup>th</sup> May 2018.
    - b) that upon formal revocation of the verbal dismissal, the Claimant without leave, lawful cause or plausible explanation absented himself from his work place.
    - c) that the Claimant was invited to attend the monthly sales meeting on 31<sup>st</sup> May 2018 vide an email dated 28<sup>th</sup> May 2018, which email and meeting the Claimant snubbed.
    - d) that by a notice to show cause dated 8<sup>th</sup> June 2018, send to the Claimant by registered post, the Claimant was summoned to explain his absence at the monthly sales meeting, but he did not turn up or disclose the existence of the suit.
    - e) that the Claimant was duly paid for the months of May and June despite his absenteesm, and the Respondent would seek refund by counter-claim.
    - f) that the Respondent summarily dismissed the Claimant on grounds of insubordination amounting to gross misconduct, and absenting himself from his work place.
    - g) that the Respondent received the demand letter on 15<sup>th</sup> May 2018, which was after the erroneous dismissal had been revoked.
    - h) that the suit is premature and an abuse of the Court's process.
    - i) that the Claimant is yet to clear with the Respondent company by returning company properties and refunding operational expenses advanced to him for the month of May and that the Respondent would claim the same from the Claimant.
    - j) that the cause of action arose in Nairobi where the Respondent is located and where the contract was negotiated.
  5. Along with the Response to the memorandum of claim, the Respondent filed a written witness statement by one Gerald Nderitu dated 20<sup>th</sup> July 2018 and a list of documents dated the same date, listing some elven items/documents.
  6. On 24<sup>th</sup> September, the Claimant filed a further list of documents dated 4<sup>th</sup> September 2018, listing four items/documents.
  7. On its part, the Respondent filed a supplementary list of documents on 11<sup>th</sup> November 2019 dated 6<sup>th</sup> November 2019, listing four documents/emails.



8. When trial opened on 30<sup>th</sup> November 2021, the Claimant adopted his filed witness statement as his testimony in chief, and produced in evidence the documents listed on his list of documents and further list of documents, which were marked as exhibit nos. 1-16. The documents produced by the Claimant included a letter of employment dated 2<sup>nd</sup> February 2017. The Claimant testified, inter-alia:
- a) that he was confirmed to his employment in July 2017, and that his initial salary was increased from ksh.37,000 to ksh.42,000 after appraisal.
  - b) that on 21<sup>st</sup> April 2018, the Respondent's Country Manager verbally terminated the Claimant's employment, telling the Claimant that he was not appreciative and had an attitude, and that he could not work with him.
  - c) that on 23<sup>rd</sup> April 2018, the Claimant's supervisor send an email to the Claimant confirming the termination and assigning reasons thereto, and that this was done without first calling the Claimant for a meeting.
  - d) that the Claimant sought intervention of the Respondent's CEO and was called for a meeting on 27<sup>th</sup> May 2018, which was after his termination, and that on 30/5/2018, the Claimant's supervisor send him an email telling him that his termination stood, and that he should clear with the company on 31<sup>st</sup> May 2018.
9. Cross-examined and re-examined, the Claimant testified that he did not attend a meeting scheduled by the Respondent for 28<sup>th</sup> May 2018 and a show cause meeting scheduled by the Respondent on 20<sup>th</sup> June 2018 because he had already cleared with the Respondent company, and that the matter had already been filed in Court after sending out a demand through his lawyer. That an advance copy of the demand letter dated 8<sup>th</sup> May 2018 had been send to the Respondent by email.
10. On its part, the Respondent called one witness, Gerald Nderitu (RW-1) who adopted his filed witness statement dated 20<sup>th</sup> July 2018 as his testimony in chief and produced the documents listed on the Respondent's list of documents and supplementary list of documents as exhibits. The documents were marked as the Respondent's exhibit nos 1-16. The witness admitted that the Claimant was employed by the Respondent.
11. Cross-examined and re-examined, RW1 testified: -
- a) that he served the Claimant with a termination notice on 23<sup>rd</sup> April 2018, and that although he wrote a letter of apology to the Claimant on 11th May 2018, the apology letter did not revoke the termination notice.
  - b) that after receiving demand notice from the Claimant's Advocates, the Respondent invited the Claimant for a meeting on 19<sup>th</sup> May 2018.
  - c) that the witness (RW-1) did not know whether the Claimant was working during the months of May and June 2018.
  - d) that the Claimant was on 28<sup>th</sup> May 2018 invited for another meeting on 31<sup>st</sup> May 2018, and that this was well past his termination date.
  - e) that the discussion at the meeting held on 27<sup>th</sup> May 2018 regarded the (Respondent's) business in Mombasa where the Claimant was based.
  - f) that the Claimant was dismissed for failing to avail himself for a meeting on 31<sup>st</sup> May 2018, which amounted to absconding the meeting and for failing to show cause on the same date.



12. Upon considering the pleadings filed and evidence adduced by both parties, issues which emerge for determination, in my view, are as follows: -
- a) whether this Court is seized of jurisdiction to hear and to determine the suit herein.
  - b) whether the Respondent terminated the Claimant's employment on 21<sup>st</sup> April 2018, 23<sup>rd</sup> April 2018 or on 26<sup>th</sup> June 2018
  - c) whether termination of the Claimant's employment was unfair.
  - d) whether the Claimant is entitled to reliefs sought.
13. On the first issue, the Respondent pleaded as follows at paragraph 15 of its statement of Response: -
- “15. The Respondent avers that the cause of action arose in Nairobi where the Respondent is located and the contract negotiated and therefore the Honourable Court does not have jurisdiction to hear and determine the same.”
14. It is worth noting that this Court's jurisdiction is territorial. The *Employment and Labour Relations Court Act* and the Rules made thereunder do not bar the filing of suits falling within the Court's jurisdiction at any station of the Court within the Republic of Kenya. For good order, however, and to avoid cases of forum shopping by parties to suits, cases ought to be filed in Court stations within whose local and/or geographical jurisdictions the causes of action arise.
15. In the present case, the Claimant's contract of employment dated 2<sup>nd</sup> February 2017 (Claimant's exhibit no. 1) states as follows at paragraph 3(a)
- ...your normal place of work shall be Nairobi but the company may request you to work anywhere within Kenya as required. Occasional travel outside Kenya may also be necessary.”
16. The Respondent's witness (RW-1) testified that the Claimant was based at Mombasa at the time of his termination. In particular, the witness told the Court that a meeting held on 27<sup>th</sup> April 2018 discussed the Respondent's business in Mombasa where the Claimant was based. Further, almost all the emails produced in evidence by the Respondent regarding the Claimant referred to the Claimant's operations in Mombasa and Malindi.
17. I find and hold that the cause of action herein arose in Mombasa where the Claimant was based at the time of termination of his employment, and that the suit herein is properly before this Court.
18. On the second issue, the Claimant pleaded that his employment was verbally terminated by the Respondent's Country Manager on 21<sup>st</sup> April 2018, and that the dismissal was confirmed by the Claimant's supervisor, Gerald Nderitu, vide an email dated 23<sup>rd</sup> April 2018. The said supervisor (RW-1), told the Court that his said email (dated 23<sup>rd</sup> April 2018) was never revoked.
19. The Respondent never denied having terminated the Claimant's employment on 21<sup>st</sup> April 2018. Vide his emails dated 21<sup>st</sup> April 2018 and 23<sup>rd</sup> April 2018, the Claimant complained about the verbal termination of his employment on 21<sup>st</sup> April 2018. The verbal dismissal by the Respondent's Country Manager was never revoked and/or withdrawn. The email by the Claimant's supervisor dated 23<sup>rd</sup> April 2018 purporting “to extend a one month notice to work” was, in my view, just but a side show. The Claimant's employment was verbally terminated by the Respondent's Country Manager on 21<sup>st</sup> April 2018. I so find and hold.



20. The Claimant pleaded and testified that the Respondent did not respond to the Claimant's demand letter dated 8<sup>th</sup> May 2018 (Claimant's exhibit no. 11). The Claimant testified that an advance copy of the letter was sent to the Respondent by email. The demand letter indicates and shows as much. The Respondent never denied having received a copy of the demand letter by email. All that the Respondent said and demonstrated was that it received the hard copy of the demand letter on 15<sup>th</sup> May 2018. In the demand letter, the Claimant gave the Respondent seven days' notice to pay his dues and compensation for unlawful termination of employment on 21<sup>st</sup> April 2018 or face suit. The suit herein was filed in Court on 22<sup>nd</sup> May 2018.
21. The purported summary dismissal letter written by the Respondent on 26<sup>th</sup> June 2018 (Respondent's exhibit no. 12), and any purported process leading up to it, were irregular and invalid attempts by the Respondent to sanitize the unprocedural termination of the Claimant's employment on 21<sup>st</sup> April 2018. Such an illegal exercise cannot be sanctioned by this Court.
22. On the third issue, for any termination of employment to pass the fairness test, it must be demonstrated that the employer complied with the mandatory procedural requirements of Section 41 of the [Employment Act](#), which provides:
- “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee 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 representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
23. In the case of CMC Aviation Limited -vs- Mohammed Noor [2015] eKLR, the Court of Appeal stated as follows:
- “In view of the foregoing, we find that the appellant's act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the [Employment Act](#). In Kenya Union of Commercial Food and Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the [Employment Act](#). That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui –vs- Kenya Pipeline Company Limited [2014] eKLR”
24. The Respondent was not shown to have complied with Section 41 of the [Employment Act](#) before verbally dismissing the Claimant on 21<sup>st</sup> April 2018. The termination was unprocedural and unlawful, and therefore unfair. I so find and hold.
25. The Respondent alleged that it paid the Claimant's salary for May and June 2018; and exhibited payslips in that regard. This was being done after the verbal termination of the Claimant's employment



on 21<sup>st</sup> April 2018, the issuance of a demand notice by the Claimant's Advocates on 8<sup>th</sup> May 2018 and institution of the suit herein on 22<sup>nd</sup> May 2018. It was another attempt by the Respondent to sanitize, in retrospect, the unprocedural and unfair termination of the Claimant's employment.

26. On the fourth issue, and having found that termination of the Claimant's employment was unfair, it follows that the Claimant is entitled to compensation for unfair termination of employment. The Claimant prayed for eight months' salary in this regard, although Section 49 of the Employment Act provides for a maximum of twelve months' salary in compensation for unfair termination of employment. I award the Claimant the eight months' salary prayed for in the Memorandum of Claim, and deduct therefrom two months' salary shown by the Respondent to have been paid to the Claimant as "salary for May and June 2018." The Claimant did not deny having received that payment. This leaves an award of the equivalent of six months' salary. That is ksh.42,000x6 = 252,000. I have taken into account the circumstances in which the Claimant's employment was terminated.
27. The prayer for three months' salary is declined, and the Claimant is awarded one month salary in lieu of notice, in line with Clause 9 of his contract of employment and Section 35 of the Employment Act.
28. The claim for twelve days leave payment was not specifically pleaded, and was not proved. The same is declined.
29. The Respondent did not raise any Counter-Claim against the Claimant.
30. Ultimately, judgment is hereby entered for the Claimant against the Respondent for:-
  - a) Six months' salary being compensation for unfair termination of employment .....ksh.252,000
  - b) One month salary in lieu of notice .....ksh.42,000Total ksh. 294,000
31. The sum awarded is subject to statutory deductions under Section 49(2) of the Employment Act.
32. The Claimant is also awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JUNE 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

Okumu for Claimant

Nyaga for Respondent

