



Ayioka v Accord Healthcare [Kenya] Limited (Employment and Labour Relations Cause E194 of 2021) [2022] KEELRC 13322 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13322 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E194 OF 2021**

J RIKA, J

NOVEMBER 30, 2022

BETWEEN

GILBERT MECHA AYIOKA CLAIMANT

AND

ACCORD HEALTHCARE [KENYA] LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on March 3, 2021. He states that he was employed by the Respondent, on or about August 28, 2007, as a Medical Representative. His starting salary was Kshs 35,129 monthly.
2. He was promoted through good performance, to the position of Line Manager, on or about September 2011. His salary as of September 30, 2020 was Kshs 100,176.
3. The Respondent continued to pay the Claimant the salary of a Medical Representative despite the promotion to a managerial position. The Claimant made futile effort to have a letter of appointment reflecting his new position. The Respondent refused to adjust his salary.
4. On September 30, 2020, the Respondent abruptly issued the Claimant a letter of termination of employment. It was alleged that the Claimant had performed poorly, consistently. He was not given a chance to be heard. There was no letter to show cause, warning letter, or complaint with regard to the allegation. Termination was unfair, unlawful and malicious.
5. He prays for Judgment against the Respondent for: -
 - I. Declaration that termination was unfair and unlawful.
 - II. Service pay of 13 years worked.
 - III. Damages for unfair and/or wrongful and unlawful termination.



- IV. Declaration that the Claimant was discriminated against by the Respondent.
 - V. Maximum compensation for unfair and wrongful termination.
 - VI. Underpayment from the date of promotion as Line Manager.
 - VII. Interest.
 - VIII. Damages for discrimination.
 - IX. Certificate of Service.
 - X. Costs.
 - XI. Interest.
 - XII. Any other relief the Court deems just to grant.
6. The Respondent filed a Statement of Response, dated April 20, 2021. Its position is that the Claimant was its Employee. He was always inciting other Employees against the Management, alleging there was salary disparity. His actions were in breach of his contract, leaving the Respondent with no other option but to terminate the contract. His performance declined. The Respondent attempted to motivate the Claimant by issuing him awards. The Respondent exercised its contractual right to terminate the contract. Termination was preceded by many verbal warnings. He received several incentives, including medical cover; company car; fuel allowance; and overseas training – all at the expense of the Respondent. Service was paid to the Claimant. The Respondent prays the Court to dismiss the Claim.
 7. The Claimant gave evidence and closed his case on March 25, 2022. The Respondent's Finance Manager, Rupesh Kumar Pradhan, gave evidence for the Respondent on July 21, 2022, when the hearing closed. The matter was last mentioned before the Court on September 23, 2022 when the Parties confirmed filing and exchange of their Submissions.
 8. The Claimant adopted his Witness Statement and Documents, exhibits 1-6, and Supplementary Documents, exhibit 7-8, in his evidence. He emphasized that Line Managers were paid Kshs 100,000 to Kshs 300,000 monthly salaries.
 9. Cross-examined, the Claimant restated that he was employed in 2007. He worked for 13 years. His pay was different over the years. It was increased annually. Each Party could terminate the contract by notice of 1 month. He was paid notice of 1 month. He was receiving other benefits such a company car; telephone allowance; and medical cover. He received training, financed by the Respondent. He did not have a document showing that termination was unfair. He was made Line Manager. He did not have a document showing promotion. He claims underpayment, based on this promotion. The Respondent is a pharmaceuticals company. The Claimant holds a degree in biomedical science. He is not a pharmacist. He was a sales agent, and trained on team management. He used to receive gratuity every December.
 10. Redirected, the Claimant stated that it is conceded by the Respondent at paragraph 5 of the Statement of Response, that the Claimant was promoted. Termination was not preceded by performance appraisal or letter to show cause. Salary increments were based on performance. Benefits conferred upon the Claimant were for the overall benefit of the Respondent. He requested for the letter of promotion severally; it was not given.



11. Pradhan adopted his Witness Statement and Documents filed by the Respondent, exhibits 1-26, in his evidence.
12. Cross-examined, he told the Court that he was the Finance Manager, and had worked for 6 months, at the time of his evidence. Managers were paid salary of about Kshs. 75,000 monthly. Appointment letters are issued. Letter dated September 7, 2011, issued to the Claimant by the Respondent, suggests he was promoted. Promotion was based on good performance. Termination took place in 2020, while warning letter, referred to in Pradhan's Witness Statement, issued in 2012. There was no concern about the Claimant's performance, in 2012 and 2014 when warning letters issued. Termination was based on poor performance, which was assessed against sales and individual performance. These were not documented. Employees who do not post good performance are not rewarded. Pradhan did not have evidence of incitement of other Employees by the Claimant. Salary increment was automatic, even when performance was poor. The Respondent did not promote the Claimant. It was indicated that he was a Manager, for purposes of obtaining visa to India, for his training. The car supplied to him was for official duties.
13. Redirected, Pradhan told the Court that the Claimant travelled to India for training, in September 2011. He did not improve after training. He was not promoted to Manager. Poor performers would receive incentives to improve performance.
14. The issues are whether the Claimant's contract was terminated fairly by the Respondent, under Section 41, 43 and 45 of the Employment Act; and whether he merits the prayers sought.

The Court Finds: -

15. There is agreement between the Parties, that the Claimant worked for the Respondent between 2007 and 2020, a period of 13 years.
16. He was employed as a Medical Representative on a monthly salary of Kshs 35,129. There is a letter dated September 7, 2011, addressed to the Indian High Commission, Nairobi, confirming that the Claimant was employed as a Medical Representative for the last 7 years; and had been promoted as of September 7, 2011, to a Manager.
17. Promotion can hardly be doubted, and the explanation by Pradhan that the statement on promotion was made to enable the Claimant obtain Indian visa, is unconvincing. Did he have to be a Manager to be issued a travel document? Are not Indian visas open to Medical Representatives? Are they out reach for the hoi polloi? The Court is satisfied that the Claimant was promoted to the position of Line Manager.
18. There is nothing on record to establish that having been promoted, the Claimant was denied the salary payable to a Manager. He did not avail to the Court the applicable salary scales. It was his word against that of Pradhan. He did not specify the amount claimed as underpayment. He mentioned that Managers were paid monthly salary of between Kshs 100,000 and Kshs 300,000. He was not specific. In any event, he was paid a monthly salary of Kshs 100,176 as of September 30, 2020, according to his Pleadings, which is with the bracket of the amount he states was due to Managers.
19. Upon promotion, it was for the Parties to agree on the new terms and conditions of service, if any. Promotion at employment does not invariably lead to change remuneration. If there was no pay rise, the Court cannot be called upon to enforce contemplated pay rise, which the Claimant characterizes as underpayment of salary.



20. He appears to mistake the concept of underpayment of wages, which is based on the Wage Orders specific to certain industries, and applicable to specified category of Employees. Management Employees are not covered under the Wage Orders, and are deemed to have sufficient bargaining muscle, to negotiate their terms and conditions of service with their Employers. If there is underpayment, it must be based on a known contract of employment, labour instrument, policy or law. The Claimant does not base his claim for underpayment on any of these. He just speculates that because he was made a Line Manager, he should have received a salary of between Kshs 100,000 and Kshs 300,000, as earned by other Line Managers at the Respondent.
21. The Court finds there is no merit on the prayer for underpayment [vi], and the prayers for discrimination [iv] and [viii] in the Statement of Claim.
22. The Claimant prays for service pay over a period of 13 years. His pay slips on record show that he was actively subscribed to the NSSF. He would not therefore be eligible for service pay under Section 35[6] of the Employment Act, 2007. Furthermore, his pay slips over the years show payment of an item which was described as service pay. The Claimant himself testified that he was paid gratuity each year. There is no support for his prayer [vi] for service pay.
23. The remaining prayers are on declaration that termination was unfair, and compensation as a remedy for unfair termination.
24. This calls for review of procedure [Section 41 and 45 of the Employment Act] and review of the reason or reasons advanced by the Employer, in justifying termination [Sections 43 and 45 of the Employment Act].
25. Procedure. The letter of termination is dated September 30, 2020. The Respondent informed the Claimant that due to his consistent non-performance and gaps in basic job responsibilities, ‘we hereby terminate your services with immediate effect.’
26. There were no other processes leading to the letter of termination. There was no letter written to the Claimant, asking him to show cause; there were no charges presented against the Claimant; and there was no hearing in any form or shape.
27. There were no warnings, relating to the reasons given on termination. There was no evidence that the Claimant was placed on any performance improvement plan. There was no performance appraisal, just empty accusation about poor performance.
28. The Claimant was paid notice, and told it was in full and final settlement, after 13 years of service. He had been promoted. He had been awarded as part of the Respondent’s culture on performance and meritocracy, and recognized for superior performance. The Respondent told him that he had put in extra effort, to meet the organizational requirement. His salary had gradually been raised, to incentivise him, to improve his good performance.
29. The assertion that termination was on account of consistent poor performance, appears inconsistent with the Claimant’s employment record. Without performance appraisal, and evidence of dip in performance, it cannot be concluded that the stated reason in justifying termination, was a valid reason.
30. The Court is satisfied that termination was unfair on account of flawed procedure, and lack of valid reason, or reasons. It did not meet the statutory standards of fairness, under Section 41, 43 and 45 of the Employment Act 2007.
31. The Claimant merits compensation for unfair termination. In assessing compensation, it has been considered that the Claimant worked for 13 uninterrupted years. His disciplinary record was, save



for 2 warnings which were not within the validity period by the time of termination, exemplar. He had been promoted and garlanded for good performance. He did not contribute to the circumstances leading to termination. His contract was term-indefinite. He merits equivalent of 12 months' salary in compensation for unfair termination.

Orders: -

- a. He is awarded equivalent of 12 months' salary in compensation for unfair termination, at Kshs 1,202,112.
- b. Certificate of Service to issue.
- c. Costs to the Claimant.
- d. Interest allowed at court rate, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 30TH DAY OF NOVEMBER 2022.

James Rika

Judge

