



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ita v Philips Pharmaceuticals Ltd (Cause 1191 of 2015)  
[2022] KEELRC 13479 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13479 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1191 OF 2015  
AN MWAURE, J  
NOVEMBER 24, 2022**

**BETWEEN**

**AUGUSTINE KINYUA ITA ..... CLAIMANT**

**AND**

**PHILIPS PHARMACEUTICALS LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a statement of claim dated July 8, 2015. The Respondent put up a response dated August 17, 2015.

**Claimant's case**

2. Claimant avers he was employed by the Respondent on June 2, 2011 as its medical representative. He was to receive the following remunerations.
  - (1) Basic salary Kshs 116,600/- per month
  - (2) Conveyance allowance Kshs 165,500/-
  - (3) Sale commission variable
  - (4) Pension Kshs 11,660 per month
3. He says he discharged his duties faithfully and in accordance with employment terms.
4. He says that sometime in April 2013 he disagreed with supervisor David Chamirmir over discriminatory treatment against the Claimant. The supervisor gave him a warning on April 8, 2013 over late submissions of weekly activity sheet report. He says the warning was discriminatory as was not applied to others who submitted their weekly report the same time as the Claimant. These were Albert



Okubasu, Godrick Odhiambo, Bernado Siamoto, Grace Muthoni Gabriel Siru, Helen Wainaina and Cathrine Waitherero.

5. The Claimant says he was not given a chance why he turned the report late.
6. He prays that a declaration be made that his termination was unlawful, unfair and wrongful. He prays for compensation equivalent to 12 months' salary and other prayers as on his claim inclusive costs and interest. Claimant says he was terminated on December 31, 2013.

#### **Respondent's case**

7. The Respondent says the Claimant was never serious with his work despite several counselling sessions. He says in 2013 the Respondent introduced weekly sales activity reports to be submitted by sales representatives. They were to be submitted every week and would be sent to South Africa.
8. He says Claimant approached those reporting systems casually and then gave him a warning letter.
9. He says Claimant was not discriminated but was his poor performance and attitude towards work made him be given a warning letter.
10. Respondent says the other sales representative did their best to send the reports the Claimant displayed a don't care attitude despite several verbal and written warnings.
11. The Respondent says David Chemirmir was personal friend of the Claimant and had encouraged him to apply for the job. He had no reason therefore to discriminate him.  
The email annexed hereto shows Chemirmir recommended the Claimant to be confirmed to the job.
12. The Respondent says Claimant did not improve in his performance and was given second warning. Indeed there are emails annexed as exhibits showing communication on Claimant's shortcomings.
13. It is the Respondents averments that Claimant was paid one month salary in lieu of notice as well as his November 2013 salary. He was terminated on December 31, 2013. Respondent further says Claimant had utilised his leave days. The Respondents further averment is that Claimant certificate of service is always ready for collection.
14. The Respondent therefore prays the Claimant's suit be dismissed with costs.

#### **Claimant's evidence**

15. The Claimant in his evidence in Court on January 23, 2020 said he was accused of giving his report late but he says he handed the report on Sunday but his supervisor handed it in late. He says he is of Seventh Day Adventist Faith and could not work on Saturday. He says he handed in the report on Sunday.
16. Claimant says he was also accused of errors in the report and handing in the reports late. Claimant says he was not given an opportunity to be heard.
17. Claimant says he had a personal grievance with his supervisor. He says he was also informed he did not follow the right format and yet he was not given the template of the right format to follow.

#### **Respondent's case**

18. The Respondent witness Winfred Karage says she is the company administrator. She says Claimant was employed by the Respondent. He did not perform his duties faithfully and so was given warning and was given opportunity to explain himself. She says Claimant was not discriminated against.



19. She also says she saw email between the Claimant and Mr Chermirmir and they were about performance.

### **Claimant submissions.**

20. The Claimant in his submissions says his performance target were agreed with Mr Chermirmir his supervisor and he was to be forwarding his report on Sundays as he used to worship on Saturdays. He says his relationship with supervisor was uneventful until April 8, 2013 when he gave him his first warning letter.
21. He says the Respondent did not provide any evidence to show there was a standard reporting format. He says he was not given an opportunity to explain himself before a fellow employee. They rely on the case of *CMC Aviation Limited v Mohammed Noor [2015] eKLR* where Court of Appeal held:-

“in view of the foregoing, we find that the appellant’s act of summarily dismissing the Respondent from its employment 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 v Meru North farmers Sacco Limited, [2013] eKLR* the industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employees, that employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case for termination as well as in a case that warrants summary dismissal.”

22. They also raised the handling of the allegation of poor performance by the Claimant. They relied in the case of *Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR* where Court held section 431 of the act, enjoins in conclusion the Claimant submit that the Claimant termination was therefore unfair.

### **Respondent’s submissions**

23. The Respondent in their submissions says the Claimant did not tender any evidence that he was unconstitutionally terminated. He says he was discriminated because other employees also forwarded their reports late but the Respondent says there is no evidence oral or written to prove his allegations about his fellow employees i.e that they also forwarded their report late.
24. Respondent says Claimant would refuse to tender his report on Friday as required and would submit them on Monday.
25. The Respondent says the Claimant’s mandate to forward the report weekly on Friday was clear and yet he failed to do so. The submissions by Respondent s that Claimant was warned twice in writing and the persisted to disobey lawful orders. He say Claimant was not terminated unlawfully or unfairly under section 45 of *Employment Act* as a valid reason was given. He failed to meet laid down deadlines.
26. As to whether fair procedure was followed he cites clause 8 of the *Employment Act* which provides for giving three warning letters before termination. He says Claimant was given three warning letters on April 8, 2013, second on November 25, 2013 and last one on December 31, 2013 which was also termination letter. He says the termination was equally in compliance with fair procedure.

### **Determination**

27. The issue for determination is whether the Claimant was unfairly terminated and also if Claimant is entitled to the reliefs sought.



28. The Claimant was terminated from employment by a letter of termination dated September 30, 2013. It was to take immediate effect. He was told that the reason for termination was in relation to warning letter dated November 25, 2015. The said warning letter referred to failure to adhere to deadlines. Secondly he was told about the standard of his reports and failure to follow agreed format. He was urged to take corrective action.
29. The employment laws and authorities make it mandatory for employer to give a valid reason for terminating the employment of an employee. Section 45 of Employment Act provides as follows:
- 45.
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.
  - (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
  - (4) A termination of employment shall be unfair for the purposes of this Part where - (a) the termination is for one of the reasons specified in section 46; or (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
  - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (f) the existence of any previous warning letters issued to the employee.
30. In this case there is a good number of communications between Claimant and his employer pertaining to his performance. In particular he is indicted of not adhering to the agreed deadlines and following he agreed format. So in the last warning letter which is combined with the termination letter (December 31, 2013) he is informed he failed to adhere to agreed deadlines and to agreed format of reporting the “weekly sales activity sheet”
31. It is evidence Claimant had an idea of what his employer was unhappy about. However the law provides that the employer must if termination is being considered on the ground of misconduct, poor performance or physical incapacity 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 shop floor union representative of his choice present during this explanation. Section 41 of the Employment Act 2007.



32. The Claimant may have been informed of the late report handover and the format of preparing the report but it is not crisp clear and there are no records to hold Claimant to account clearly as to his employer's expectations.
33. In the case of *Janet Nyandiko v Kenya commercial Bank Limited* supra the Court held:  
" Section 41 of the Act enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of conduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reason for which the employer is considering to terminate the employee's employment with them. The employer is also joined to ensure that the employee receives the said reason in the presence of a fellow employee or a shop floor union representative of on choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.
34. In *Maina Mwangi v Thika Coffee mills Limited [2021] eKLR* the Court held.  
Even if the Respondent was unhappy with the Claimant's performance and his attitude however the procedure mandated in the law of employment in termination of employment was not adhered to. So the Respondent must be found to have failed to prove his case for fair dismissal of the Claimant. In essence the Claimant has proved he was unfairly terminated she was not taken through the disciplinary hearing also in the presence of his witness as managed in section 41 of the *Employment Act* 2007. The Court therefore enters judgment in favour of the Claimant.
35. Having entered judgment in favour of the Claimant the Court will award him the following reliefs.
- (a) Two months gross compensation Kshs 116,600x2 = 23,200/-
  - (b) Loss of income till retirement not proved or specified
  - (c) Two month salary in lieu of notice. Contract provided one month and it was paid
  - (d) Two month conveyance allowance not specified
  - (e) Unpaid salary 30<sup>th</sup> December to January 8, 2014 he was paid December 2013 salary the 8 dyes salary not proved
  - (f) Accrue and unutilised leave Respondent has proved leave was taken.
  - (g) Mesne profits not specified
  - (h) Compensation for violating unconstitutional rights covered in the compensation
  - (i) Interest at Court rates from date of judgment till full payment
  - (j) Certificate of service to be released to the Claimant within 7 days.
  - (k) Each party to meet their costs as the Claimant contributed to his plight
36. The Court must raise issue with Claimant's advocate who did to list the claim specifically and left it to the Court to do the workout. This will not be acceptable and in future the Court will not work out the figures for the parties.
37. Total award to the Claimant is Kshs 233,200/-.
- Orders accordingly.



**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24<sup>TH</sup> NOVEMBER, 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 March 15, 2020 and subsequent directions of April 21, 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 had 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 Civil 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 a just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA NGIBUINI MWAURE**

**JUDGE**

