



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1994 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 16th January, 2020)

MAURICE SIKITU OKUMU.....CLAIMANT

VERSUS

DOVEYPHARMA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Statement of Claim dated 20th September 2016 and filed in Court on 27th September 2016, in which he seeks compensation for unfair and unlawful termination of his employment and failure by the Respondent to pay his terminal dues.
2. He states that he was employed by the Respondent on or about 24th September 2014 as a Business Development Manager earning a monthly salary of Kshs. 30,000/- which amount was subsequently increased to Kshs. 45,000/- exclusive of other benefits as provided in his employment contract.
3. The Claimant further contends that his employment with the Respondent was confirmed to permanent basis following his successful completion of the probationary period of 3 months as evidenced by the confirmation letter annexed to the Statement of Claim.
4. The Claimant avers that he worked diligently and to the Respondent's satisfaction until 9th June 2016 when his services were unfairly and unlawfully terminated without prior notice. He further averred that during the subsistence of his employment with the Respondent he was not subjected to any formal evaluation process to gauge his work performance.
5. The Claimant further avers that his termination was unfair and unlawful. He contended that the same was done contrary to the provisions of Article 41 of the Constitution of Kenya, 2010 and the mandatory provisions of Sections 29, 35, 36, 45 and 47 of the Employment Act, 2007.
6. In his Statement of Claim the Claimant prays for the following:-
 - a) *A declaration that the Claimant was terminated by the Respondent unfairly and/or unlawfully.*
 - b) *Compensation for unfair termination*
 - c) *Payment of dues/emoluments particularized under paragraphs 5 (e) totalling to Kshs. 1,167,857/-.*
 - d) *Costs for these proceedings.*
 - e) *Any other relief which the Honourable Court may deem fit to grant under the circumstances.*
7. The Respondent filed its Statement of Response dated 16th November 2016 and filed in Court on 21st November 2016 through the firm of Njuguna, Kahari & Kiai Advocates, in which it admits having employed the Claimant herein. It is further the Respondent's contention that the Claimant was earning an average gross monthly salary of Kshs. 40,000/- and not Kshs. 45,000/- as alleged by the Claimant.
8. The Respondent denied having unfairly terminated the Claimant's services as alleged. It is the Respondent's assertion that the Claimant absconded duties without notice and numerous efforts to communicate with him were rendered futile.

9. The Respondent contended that the Claimant having absconded from lawful duties is not entitled to the reliefs sought in his Statement of Claim. The Respondent therefore urged this Court to dismiss the Claim with costs to the Respondent.

10. The matter was thereafter fixed for hearing on 23rd September, 2019 with the Claimant testifying on his own behalf and the Respondent calling one witness to testify on its behalf.

Evidence

11. The Claimant adopted his witness statement dated 20th September, 2016 and filed in Court on 27th September 2016 adopted his evidence in chief, in which he reiterates the averments made in his statement of Claim. The Claimant further relied on the documents filed on 27th September 2016 together with the statement of Claim herein.

12. The Claimant further testified that he was verbally terminated by the Respondent herein without notice or payment of the dues owed to him. CW1 further urged this Court to allow his claim as drawn.

13. On cross-examination, CW1 averred that he signed a contract dated 24th September 2014 which provided for payment of a monthly salary as well as commission upon successful sale.

14. CW1 further confirmed that he was earning an average salary of Kshs. 45,000/- monthly. He however confirmed that the Respondent's letter dated 1st February 2016 annexed to the Respondent's bundle of documents indicated that his salary was reviewed to Kshs. 40,000/-

15. CW1 further testified that his services were verbally terminated by the Respondent herein without any explanation on the reason for his termination. He further contended that he was not in the habit of absenting himself from duty without permission as alleged by the Respondent.

16. On further cross-examination CW1 stated that he had no document in Court to confirm that he worked overtime.

17. On re-examination, CW1 stated that on overtime the signed register was kept by the Respondent Company and that the same was introduced 3 months prior to his termination.

Respondent's Case

18. RW1, **Harun Muiruri**, the Managing Director of the Respondent Company testified on behalf of the Respondent herein. He adopted his Witness statement dated 14th August 2018 as his evidence in chief.

19. He further relied on the documents attached to the List and Bundle of documents filed in Court on 15th August 2018. In brief RW1 in his statement reiterated the averments made in the Response filed in this matter.

20. He further contended that the Claimant in June 2016 absconded his official duty without any written reason (s) and without obtaining permission from the management.

21. RW1 further confirmed having made numerous efforts to contact the Claimant but all his efforts were futile. He further contended that he did personally contact the Claimant to collect his cheque of his terminal dues amounting to Kshs. 33,896.95/- also to no avail. RW1 further confirmed that the Claimant is in possession of a laptop belonging to the Respondent, which is yet to be returned to date.

22. RW1 contended that the Respondent did not terminate the Claimant's employment as alleged but rather that the Claimant absconded his duties. He therefore urged this Honourable Court to dismiss the Claim with costs to the Respondent.

23. On cross-examination, RW1 confirmed that the Claimant was not terminated but rather he absconded duties. He further confirmed that he (the Claimant) was not subjected to any disciplinary hearing as he failed to honour calls from him (RW1) to attend to the same.

24. On further cross-examination, RW1 confirmed that the Claimant was not paid his salary for June 2016. He further confirmed that the Claimant's May 2016 salary was also not paid to him.

25. RW1 stated that he had no document requesting the Claimant to clear with the Respondent herein. He further confirmed that the Claimant's salary during the subsistence of his employment was increased due to satisfactory performance.

26. RW1 denied having orally terminated the Claimant as alleged.

27. On re-examination, RW1 confirmed that the Claimant is yet to clear with the Company.

28. The Parties were thereafter directed to file and exchange their written submissions to the Claim.

Claimant's Submissions

29. The Claimant submitted that he has proved on a balance of probabilities that indeed he was verbally terminated by the Respondent herein,

the Respondent witness having failed to adduce any evidence of any form of communication between the Claimant and the Respondent.

30. The Claimant further submitted that his termination was therefore unfair and/or unlawful as he was not accorded any hearing prior to the termination of his services. It is on this basis that he urged this Honourable Court to find that his termination was unfair and/or unlawful.

31. The Claimant contended that he is entitled to the reliefs sought in his Statement of Claim and urged the Court to allow the same as drawn. To buttress this argument the Claimant relied on the following Authorities **Boniface Francis Mwangi Vs B.O.M. Iyego Secondary School (2019) eKLR**, **Joseph Nzioka Vs Smart Coatings Limited (2017) eKLR** and **Henry Mugita Lugadilu Vs Nairobi City County (2018) eKLR**.

32. In conclusion, the Claimant urged this Honourable Court to allow his claim in terms of the reliefs sought therein.

33. I have examined all evidence on record from both Parties and submissions filed herein.

34. The Claimant has alleged that he was verbally terminated by the Respondent, which the Respondent deny and insist that the Claimant absconded duty.

35. The Respondents do not have any evidence that they communicated to the Claimant asking him to show cause why he should not be terminated for absconding duty.

36. Infact in cross-examination, the RW1 told Court that the Claimant was not paid his May and June 2016 salary and this tallies with the fact that he had already been constructively terminated by the Respondent in May 2016 who withheld his salary and in June 2016 verbally sent him away.

37. There are no valid reasons advanced in my view to indicate the claimant absconded duty as there was no communication to him on this. No due process was also carried out after the Claimant absconded. The conclusion this Court draws is that the Claimant was unfairly and unjustly terminated and the Claimant's case succeeds.

38. In terms of remedies, I find for the Claimant and I award him accordingly as follows:-

1. 1 month salary in lieu of notice = 40,000/=

2. Unpaid salary for May 2016 = 40,000/= and

for June 2016 (9 days) salary of Kshs12,000/=

Total 52,000/=

3. Payment in lieu of untaken leave

for 1 year = 40,000/=

4. Service pay for 2 years

= $\frac{1}{2} \times 40,000 \times 2 = 40,000/=$

5. 10 months' salary as compensation

for unfair and unjustified termination

= $10 \times 40,000 = 400,000/=$

TOTAL = 522,111/=

less statutory deductions

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 16th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno holding brief Omari for Claimant

Miss Muriithi for Respondent – Present