



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 347 OF 2012

JECKONIAH ONYANGO.....CLAIMANT

VERSUS

CEDAR PHAMACARE LTD.....1st RESPONDENT

DR. RICHARD GATUIKU GITONGA.....2nd RESPONDENT

DR. JANE KAJUJU GATUIKU.....3rd RESPONDENT

JUDGMENT

1. Jeckoniah Onyango (Claimant) instituted legal proceedings against the Respondents and he stated the Issue as Dispute as

1. Wrongful termination.
2. Terminal dues.
3. General damages.
4. Statutory contributions.

2. The Respondents filed a *Response* on 5 April 2012 prompting the Claimant to file a *Reply to Response* on 27 April 2012.

3. The Cause was heard on 15 July 2015 and 6 October 2015 before Nzioki wa Makau J. The Claimant and the 2nd Respondent testified and the hearing was adjourned to enable the Respondents to call another witness.

4. Because Nzioki wa Makau J was transferred from Nairobi before he could conclude the Cause, the file was placed before me for further hearing on 2 December 2019.

5. The Respondents, however, opted to close their case without calling the further witness.

6. The parties did not file submissions within the agreed timelines.

7. The Court has considered the pleadings and evidence and identified the Issues for determination as examined hereunder.

Commencement of employment relationship

8. The Claimant asserted that the Respondents, operating under the name of Mellon Pharmaceuticals employed him in 1990 as a Pharmacy Assistant. He testified that the name was changed to Cedar Pharmacy in 1993, and eventually to Cedar Pharmacare Ltd. The Claimant even disclosed the locations where the Respondents operated from.

9. The 2nd Respondent testified that he could not recall the exact dates that he engaged the Claimant but stated that he could not have employed the Claimant before 1993 when he was licensed and opened his own pharmacy and that prior to the licensing he was working at Kenyatta National Hospital up to 1992 and at KAM Pharmacy.

10. Considering that the 2nd Respondent only got licensed in 1993, and registered the business in that year and without any records such as payslips, the Court finds that the employment relationship started in 1993.

Unfair termination of employment

11. In a dispute relating to unfair termination of employment, the employee has the initial burden of showing an unfair termination of employment occurred.

12. In order to discharge the burden, the Claimant stated that around 7 February 2012, the 2nd Respondent sent him a text message accusing him of theft of drugs and that the said Respondent refused to accept his explanations and instructed him to leave because there was no trust and that as a result he left and went to seek legal advice.

13. The Claimant contended that the decision by the Respondents was unfair because he was not given notice.

14. The 2nd Respondent testified that a friend of the Claimant alerted him on 6 February 2012 that the Claimant used to pilfer drugs and take to another shop and that he established that indeed the Claimant had pilfered medicines worth about Kshs 80,000/-.

15. According to the 2nd Respondent, when he confronted the Claimant to explain the alleged theft, he stormed out and that on the same day he received a demand letter alleging unlawful dismissal.

16. The Court has two inconsistent accounts as to what exactly happened.

17. The Court will, therefore, look at the surrounding actions of the parties to establish the probable truthful version.

18. The Claimant sought legal advice within hours of the confrontation with the 2nd Respondent. The demand letter indicated that the 2nd Respondent had directed the Claimant to leave.

19. On the other side, the 2nd Respondent alleged the Claimant stormed out and therefore absconded duty. If indeed the Claimant absconded, the Respondents should have issued a show-cause, requiring him to explain the failure to report to work.

20. The narration by the Claimant, in the view of the Court, appear more probable because he caused a demand letter alleging unfair termination of employment to be sent immediately.

21. The Court further finds that the 2nd Respondent, upon finding out what he thought was theft ordered the Claimant in the heat of the moment to leave after finding his explanation unsatisfactory.

22. There was some semblance of hearing, and the Court in consideration of the above and that the Respondents operated an extremely lean structure finds that the Respondents were in substantial compliance with the statutory procedural fairness dictates of section 41 of the Employment Act, 2007.

Substantive fairness

23. The Respondents contended that the separation with the Claimant was on account of his absconding from work.

24. The Respondents did not prove to the required standard that the Claimant had an intention not to report to work to fulfil his contractual obligations or that he was asked to show cause after failing to report for work if indeed he absconded. It is also telling that there was no response to the demand letter to controvert the termination narration.

25. Consequently, the Court concludes this was a case of unfair termination of employment as the Respondents did not discharge the burden placed upon them in terms of sections 43 and 45 of the Employment Act, 2007.

Compensation and salary in lieu of notice

26. The Claimant was not given notice of termination of employment and the Court will award the equivalent of 1-month salary in lieu of notice.

27. Compensation is a discretionary remedy.

28. The Court declines to award compensation considering the circumstances of the case and the award of other benefits as will become clear shortly.

Breach of contract

Salary for January/February 2012

29. The Claimant testified that he was not paid his salary for January 2012. The 2nd Respondent asserted that he was paid through M-Pesa and he produced an mpesa statement.

30. The Court finds the salary was paid.

Leave

31. The Claimant claimed Kshs 330,000/- being accumulated leave for 22 years of service. The Claimant did not prove that he sought annual leave and was declined.

32. Further, section 28(4) of the Employment Act, 2007 circumscribes the number of leave days which can be carried forward.

33. The Claimant did not lay a sufficient evidential foundation for this head of the claim.

Service pay

34. There was no evidence that the Claimant was a member of a pension scheme or the National Social Security Fund and by virtue of section 35(5) & (6) of the Employment Act, 2007, the Court will allow the claim for *service pay* as pleaded.

House allowance

35. The Claimant did not prove that he was a Pharmacy Assistant. The evidence before the Court shows that he was only carrying menial jobs which fall under the categorisation of a general labourer but in a pharmacy.

36. The argument that if house allowance was added to his wage, it would have fallen below the prescribed minimum wage cannot hold.

37. The wage the Claimant was getting was much higher than the prescribed minimum wage for general labourers, and the Court declines to find the wage did not include house allowance.

Defamation/Slander

38. The Claimant did not prove that he was defamed/slandered.

Conclusion and Orders

39. The Court finds and declares that the Respondents did not prove that the Claimant absconded and that his employment was unfairly terminated and awards him

(a) Salary in lieu of notice	Kshs 15,000/-
(b) Service pay	Kshs 164,423/-
TOTAL	Kshs 179,423/-

40. Claimant did not file submissions within agreed timelines and is denied costs.

Delivered, dated and signed in Nairobi on this 24th day of February 2020.

Radido Stephen

Judge

Appearance

For Claimant Mr. Okwaro instructed by Tim Okwaro & Co. Advocates

For Respondent Mr. Njuguna instructed by Kahari & Kiai Advocates

Court Assistants Sikulu/Judy Maina