



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 495 OF 2018

JACKSON KIPROTICH KURUI.....CLAIMANT

VERSUS

PHILLIPS PHARMACEUTICALS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Jackson Kiprotich Kurui, the Claimant in this case, worked for the Respondent, Phillips Pharmaceuticals Limited in the position of Medical Representative. Kurui brought this claim after termination of his employment on 11th June 2018.

2. The Claimant's claim is contained in a Memorandum of Claim dated 23rd October 2018 and filed in court on 25th October 2018. The Respondent filed a Statement of Defence on 14th December 2018.

3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called Hezbone Ayimba, who at the material time, worked as Country Lead-MSD. The parties also filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 30th July 2012 as a Medical Representative within the MSD HIV Department. The Claimant further states that at the time of termination of his employment, he earned a monthly salary of Kshs. 302,460.

5. The Claimant's case is that his employment was unlawfully and unfairly terminated on 11th June 2018 in that there was no valid reason for the termination and he was not allowed an opportunity to be heard. He adds that he was not paid his terminal dues.

6. The Claimant now claims the following from the Respondent:

- a) Compensation for unlawful termination.....Kshs. 3,629,520
- b) Service pay.....872,475
- c) Unpaid annual leave days (3.5) days.....22,266
- d) Certificate of service
- e) Costs plus interest

The Respondent's Case

7. In its Statement of Defence dated 10th December 2018 and filed in court on 14th December 2018, the Respondent admits having employed the Claimant but denies that his monthly salary was Kshs. 302,460.

8. The Respondent states that the Claimant's employment was marred by issues of underperformance and/or poor performance, which were raised with the Claimant from time to time, but he failed to improve despite being afforded an opportunity to do so.

9. The Respondent denies that the Claimant's employment was unlawfully terminated and states that the Claimant failed to meet set targets which he was well aware of.

10. The Respondent further states that the Claimant was informed that his Key Performance Indicators (KPIs) were not met as agreed thus leading to poor performance. The Respondent avers that the Claimant had monthly one on one meetings with the Sales Manager with aim of guiding the Claimant's performance.

11. The Respondent adds that despite the monthly review meetings, the Claimant's performance did not improve much; he achieved 51% of the first quarter (Q1) 2018 budget against a threshold of 80%.

12. The Claimant was placed on a Performance Improvement Plan (PIP) on 10th April 2018, with a coaching plan through his first line manager, Felister Mwangangi under close supervision for two months, April and May.

13. By the end of April 2018, the Claimant's performance was at 59% despite the fact that 80% of his products were already in the tender awards of his key institution; Kenya Ports Authority. Based on the foregoing, the Claimant was given one month to improve.

14. Having failed to improve, the Claimant was issued with a notice to show cause on 31st May 2018. By the same notice, the Claimant was invited to a hearing on 6th June 2018.

15. The Claimant responded to the show cause notice on 6th June 2018 and on the same date he attended a meeting at which he was given an opportunity to defend himself. The Respondent states that it considered the Claimant's representation and arrived at the decision to terminate his employment.

16. On 11th June 2018, the Claimant was issued with a termination letter containing the reason for termination.

17. The Respondent states that upon termination, the Claimant was paid all his dues, including one month's salary in lieu of notice, salary for days worked in June 2018 and accrued leave days.

Findings and Determination

18. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

19. The termination of the Claimant's employment was communicated by letter dated 11th June 2018 stating:

"Dear Jackson,

RE: LETTER OF TERMINATION

We refer to your Performance Improvement Plan signed by you on 10th April 2018 and Felister Mwangangi's email dated 10th May 2018 wherein you were advised of your low performance.

Furthermore, we refer to the show cause letter dated 31st May 2018 and subsequent meeting held on 6th June 2018 at Phillips Business Park, Mombasa Road, wherein you did not provide any satisfactory explanation for your low performance.

Accordingly, we are now left with no choice but to notify you of our decision to terminate your services with effect from 11th June 2018.

As per our records, your leave entitlement for the year 2018 is 8 ½ leave days and you will be compensated for the same less statutory deductions along with your above mentioned dues.

Please arrange to hand over all Company property in your possession and the Company ID card to Ms. Felister Mwangangi.

We wish to remind you to maintain confidentiality as per the Confidentiality Agreement signed by you on 11th January 2016 after leaving employment of this Company.

Please sign and return copy of this letter confirming receipt of this letter with terms stated therein and that you have received all your dues in full and final settlement and nothing whatsoever remains outstanding thereafter.

Yours sincerely,

PHILLIPS PHARMACEUTICALS LIMITED

(signed)

N.K. SIELE

CHIEF EXECUTIVE OFFICER”

20. According to this letter, the Claimant’s employment was terminated on account of poor performance. This is one of the grounds allowed under Section 45 of the Employment Act.

21. The Claimant relied on the decision in *Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR* where **Mbaru J** held the following:

“...where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof.....to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”

22. On its part, the Respondent relied on *Alois Makau Maluvu v Cititrust Kenya Limited & another [2018] eKLR* where **Onyango J** stated the following:

“In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvement as was stated in the case of FREDRICK OWEGI V CIC LIFE ASSURANCE AND

JANE WAIRIMU MACHIRA (supra).”

23. I fully associate myself with the position advanced in *Jane Samba Mukala* and *Alois Makau Maluvu* (supra). The Claimant confirmed that he was aware of his targets for the first quarter of the year 2018, which he admittedly failed to achieve within the period. The Court did not see any document to prove that the Claimant had taken issue with these targets either prior to or within the performance period.

24. The Claimant further confirmed that the Respondent had raised concerns on his performance even going as far as putting him on a Performance Improvement Plan, after which he was subjected to a capability hearing within the dictates of Section 41 of the Employment Act.

25. It seems to me therefore that the Claimant was made aware of his shortfalls and allowed a reasonable opportunity to improve. I consequently find and hold that the termination of the Claimant’s employment on account of poor performance was lawful and fair.

26. The claim for compensation for unlawful termination is therefore without basis and is dismissed.

27. Having been a member of a Pension Scheme in addition to the National Social Security Fund, the Claimant is not entitled to service pay.

28. From the evidence on record, the Claimant was paid in lieu of his pending leave days. The claim thereon is therefore also without basis and is dismissed.

29. On the whole, the Claimant’s entire claim fails and is dismissed with costs to the Respondent.

30. It is so ordered.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

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 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO JUDGE

Appearance:

Mr. Ndere for the Claimant

Mr. Mwangi for the Respondent