



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 44 OF 2017

[Formerly Kisumu 312 of 2016]

(Before Hon. Justice Mathews N. Nduma)

DANIEL RUGAMBWA MUKIBII1ST CLAIMANT

SYMPLECIUS NAMATSI OPONDO.....2ND CLAIMANT

CELLINE AYIEKO OLANDO.....3RD CLAIMANT

WINFRED NAFULA SIMIYU.....4TH CLAIMANT

VERSUS

LUMBOKA MEDICAL SERVICES.....RESPONDENT

JUDGMENT

1. The four claimants filed suit on 24th October 2016 at Kisumu E&LRC. The matter was later transferred to Bungoma. All the four claimants filed witness statements dated 18th October 2016 which were adopted as their evidence in chief by each one of them in court.
2. The claimants were employees of the respondent. The 1st claimant was employed as the only resident doctor on 10th December 2012 earning a salary of Kshs. 130,000 per month. The 1st claimant was promoted to the Head of clinical services on 1st September 2016 and his salary increased to Kshs. 180,000 per month. CW1 was allowed to raise a fee note for some surgeries he performed within the hospital which on average earned him Kshs. 300,000 per month. The respondent also paid house rent at the rate of Kshs. 16,600 per month.
3. On or about February 2016, a new management team took over the respondent and were not happy with the salaries the old employees earned including the four claimants. They wanted the claimants to accept lesser salaries.
4. On 13th October, 2016, the 1st claimant was summarily dismissed without notice, notice to show cause and or any disciplinary hearing. The hospital operated using the medical practicing certificate of the 1st claimant and continues to do so even after the dismissal of the claimant.
5. The 1st claimant prays for payment of terminal benefits and compensation for the unlawful and unfair dismissal in the event the court does not reinstate him to his employment.
6. The 2nd claimant was employed on 11th July 2013 as a pharmacist at a gross monthly salary of Kshs. 35,000. The 2nd claimant testified that he worked diligently and met all set targets. That the hospital used the practicing licence of the 2nd claimant and so it paid him Kshs.

25,000 monthly top up on his salary.

7. That the new management did not wish to pay the remuneration earned by the 2nd claimant and they wanted the 2nd claimant to accept a lesser salary.

8. On 14th October 2016 the 2nd claimant was summarily dismissed without notice, notice to show cause or any hearing. The 2nd claimant states that the dismissal was unlawful and unfair and prays for reinstatement to his job and in the alternative he be paid his terminal benefits and compensation for the unlawful and unfair dismissal.

9. The 3rd claimant was employed by the respondent on 6th October 2012 as a laboratory administrative manager at a monthly salary of Kshs. 65,000. The 3rd claimant testified that he worked diligently and was commended for his good work. The respondent used the 3rd claimant's professional licence to operate the laboratory and so paid the claimant an extra Kshs. 25,000 per month.

10. The new management was not happy with the remuneration the 3rd claimant earned and wanted the 3rd claimant to accept a lesser salary.

11. On 13th October 2016, the 3rd claimant was summarily dismissed without notice, notice to show cause or any hearing. The claimant states that the dismissal was unlawful and unfair. The 3rd claimant was not paid any terminal benefits just like the 1st and 2nd claimant. The claimant prays that the dismissal be declared unlawful and unfair and the court to reinstate the 3rd claimant to his job and in the alternative the respondent to pay the 3rd claimant terminal benefits and compensation for the unlawful and unfair dismissal.

12. The 4th claimant was employed by the respondent on 1st December 2012 as a finance officer at a net salary of Kshs. 40,000. In October 2013, the 4th claimant was promoted to the position of Hospital Administrator and was paid a net salary of Kshs. 70,000 which was later increased to a gross salary of Kshs. 91,889.

13. The new management was unhappy with the remuneration of the 4th claimant and wanted him to take a cut. On 14th October 2016, the 4th claimant was summarily dismissed without notice, notice to show cause or hearing and without payment of terminal benefits.

14. The 4th claimant testified that the dismissal was unlawful and unfair and that he be reinstated to his job and in the alternative he be paid terminal benefits and compensation for the unlawful and unfair dismissal.

15. Despite service of summons to enter appearance and statement of claim on the defendant, the Advocate for the defendant on record did not file a statement of defence to the statement of claim. The Advocates for the respondent had only filed grounds of opposition to a notice of motion dated 25th October 2016 filed by the claimants seeking interim orders to stop the respondent from replacing the claimants before the hearing and determination of the suit. The interim orders were not granted.

16. Hon. Maureen Onyango J. made a ruling on 30th March 2017 in which she awarded the claimants throw away costs in the sum of Kshs. 26,000 and payment of court adjournment fee and also gave directions directing the respondent to file statement of defence within 30 days from 30th March 2017. The judge set the hearing date of the suit on merits on 6th November 2017.

17. The matter came for hearing before me on 29th May 2018 when Advocate Anwar for the respondent sought adjournment stating that he had just received instructions to replace the advocates on record. Mr. Anwar also told the court that he intended to settle the matter out of court and requested for time to do that. Matter was set for mention to record consent on 24th July 2018 and the claimants were awarded Kshs. 4,000 wasted costs and court adjournment fee.

18. On 24th July 2018, the court was informed by Mr. Anwar for the respondent and Mr. Milimo for the claimants that the matter was not yet settled and they sought a hearing date. The matter was set for hearing on 22nd January 2019.

19. On 29th January 2019, Mr. Milimo appeared for the claimant and the respondent did not appear without any explanation. Counsel for the claimant informed court that a new advocate had come on record on 22nd January 2019. The court granted the last adjournment and hearing was set for 26th March 2019.

20. On 26th March 2019, Mr. Milimo appeared for the claimant and the respondent did not appear nor did Midikira and Company Advocates who were now on record for the respondents. The claimants demonstrated that they had duly served the respondents with a hearing notice of the 26th March 2019 and the court directed the matter to proceed exparte.

21. The suit is therefore not defended at all and the testimony by the four (4) claimants remain uncontroverted.

22. Upon a careful analysis of the testimony by the claimants, the pleadings and list of documents filed the court finds that the claimants have proved on a balance of probabilities all the particulars of claim. That they were employed by the respondent on diverse dates in various capacities and they earned the stated salaries until the 13th and 14th October 2016 when the claimants were respectively summarily dismissed from employment by the new management of the respondent who had taken over the operations of the hospital in February 2016. That the new team was unhappy with the remuneration the claimants earned and opted to summarily dismiss them without notice, notice to show

cause or any hearing in violation of *Sections 36, 41, 43 and 45 of the Employment Act, 2007*. The respondents did not pay the claimants any terminal benefits upon the summary dismissal.

23. The claimants have proved on a balance of probabilities that their employment was unlawfully and unfairly terminated by way of summary dismissal. The claimants are entitled to the remedies provided under *Section 49(1) (c) and (4) of the Employment Act, 2007*.

24. It is now over three (3) years since the claimants were summarily dismissed. There is no evidence before court to demonstrate that reinstatement of the claimants would be a viable remedy in the circumstances of this case especially this being a small establishment where the owners of the business are in daily control of the operations of the medical clinic. It would be in the court's view impractical to maintain a workable employment relationship if the court were to reinstate the claimants.

25. The court deems compensation and payment of terminal benefits as the suitable remedy in the case. The claimants did not contribute to the summary dismissal. They were unlawfully and unfairly dismissed without warning or notice to absorb the shock of a job loss and loss of income to sustain themselves. The claimants are all professionals capable of moving on with their lives. The claimants were not paid any terminal benefits upon dismissal. The claimants were not compensated for the job loss. The claimants were humiliated in the manner of the abrupt dismissal and they suffered loss and damage as professionals.

26. The claimants had served the respondent for about four (4) years with a clean record. The respondent relied on the professional certificate of the 1st, 2nd and 3rd claimants to conduct its business and showed no gratitude in the manner it summarily dismissed them. The claimants were not paid any severance pay nor has there been any mitigation of the costs the claimants have incurred as a result of the job loss.

27. Accordingly, the court grants each of the claimants as against the respondent:

- (a) One month salary in lieu of notice.
- (b) Six (6) months salary in compensation for the unlawful and unfair dismissal upon considering all above factors and past decisions of E&LRC court in similar cases.

28. In the final analysis judgment is entered in favour of each claimant against the respondent as follows:

- (a) Daniel Rugambwa Mukiibi
 - (i) (Kshs. 180,000x16,600x6) Kshs. 1,179,600 in compensation and
 - (ii) Kshs. 196,600 notice pay.
- (b) Symplicius Nanatsi Opondo.
 - (i) (Kshs. 60,000x6) Kshs. 360,000.
 - (ii) Kshs. 60,000 in lieu of notice.
- (c) Celine Ayieko Olandu.
 - (i) (109,846x6) Kshs. 659,076
 - (ii) Kshs. 109,846 in lieu of one month notice.
- (d) Winfred Nafula Simiyu
 - (i) (91,889 x6) 551,334
 - (ii) Kshs. 91,889 in lieu of one month notice.
- (e) Interest at court rates from date of filing suit till payment in full.
- (f) Costs of the suit

Judgment Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due 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 online with their consent. 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 has 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 18 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 just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Olando Udoto and Okello Advocates for the claimants

Midikira and Company Advocates for the respondent

Chrispo – Court Clerk