



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 662 OF 2017

EUNICE WUGANGA MWANYALO.....CLAIMANT

VS

SPHINX PHARMACEUTICALS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is documented by a Memorandum of Claim filed by the Claimant on 16th August 2017. The Respondent filed a Statement of Defence on 11th September 2017.
2. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Isabella Osoro. Both parties subsequently filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Medical Representative from 16th August 2010 until 5th June 2017 when she was dismissed. The reason given for the dismissal was her refusal to obey a lawful command, issued by her Manager. At the time of dismissal, the Claimant earned a monthly salary of Kshs. 35,500.
4. The Claimant avers that her dismissal was wrongful and now claims the following

- a) Leave pay on prorata basis.....Kshs. 24,850.00
- b) Salary for 5 days in June 2017.....5,916.70
- c) 1 month's salary in lieu of notice.....35,500.00
- d) 12 months' salary in compensation.....426,000.00
- e) Certificate of service
- f) Costs

The Respondent's Case

5. In its Statement of Defence dated 5th September 2017 and filed in court on 11th September 2017, the Respondent admits having employed the Claimant as a Medical Representative from 16th August 2010. At the time of her dismissal, the Claimant earned a monthly gross salary of Kshs. 40,500.
6. The Claimant was dismissed by letter dated 5th June 2017, on account of wilful failure to comply with lawful directions issued by the Respondent. The Respondent states that the Claimant had exhausted her leave days.

Findings and Determination

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

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

The Dismissal

8. The Claimant was dismissed by letter dated 5th June 2017, stating the following:

“Dear Eunice

RE: SUMMARY DISMISSAL

This letter is to inform you that you have been summarily dismissed.

In reference to appraisals conducted in December 2016, it was recommended that you transfer from Mombasa to Nairobi, however, you wrote to the company requesting to be given three (3) months, up to end of March 2017, to show improvement on your performance which was granted. In the bid to also support you, the company has been organizing a series of trainings one such training you attended on 6th April 2017 and internal meetings held between 6th and 8th April 2017, to try and understand what other support the company could extend to you for your performance to improve further.

On 29th May 2017, a communication was sent to all the Sales and Marketing team both in Nairobi and in the Counties to attend the end of month meeting and training that was to be held on 2nd and 3rd of June 2017 in the office, which you did not attend.

Without leave or other lawful cause, you knowingly failed and refused to obey a lawful and proper command, which was within the scope of your duty to obey, issued by your Manager. We consider that your actions constitute gross misconduct warranting summary dismissal and we are left with no choice but to terminate your employment contract with us effective immediately.

Contact the undersigned in case of any clarifications.

urs,

(Signed)

R. BERNARD ONKUNDI OTUNDO

Director”

9. As documented by this letter, the Claimant's dismissal was triggered by her failure to attend a training session convened by her employer on 2nd and 3rd June 2017, in Nairobi. While conceding that she had indeed missed the said session, the Claimant told the Court that she was unable to travel from Mombasa to Nairobi because she did not have transport.

10. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. It is now well settled that the burden placed on the employer in this regard is to show a reason that would cause a reasonable employer to terminate employment.

11. In ***International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR*** the Court of Appeal reiterated that the reason for termination of an employment contract is that which the employer genuinely believes to exist as at the time of termination. It follows therefore that in confirming compliance with Section 43 of the Employment Act, the Court does not ask itself what it would have done had it been in the shoes of the employer; all the Court asks is whether in the circumstances of the case, the employer acted reasonably. Fairness in this context is not based on value judgment but on clear requirements set out in law.

12. The Claimant admitted that prior to the training session of 2nd and 3rd June 2017, there were concerns on her performance, raised by her employer. She went further to admit that she had failed to meet her targets in some respects.

13. Indeed, the training session in question was part of a performance improvement programme initiated by the Respondent. To miss such a session was a grave matter and in the absence of any evidence of prior official communication by the Claimant on her inability to travel, the Court finds and holds that the Respondent had a valid reason to dismiss her.

14. The Respondent however failed to observe due procedure in effecting the Claimant's dismissal and the Human Resource Manager, Isabella Osoro admitted as such before the Court. The result is that the dismissal was procedurally unfair and the Claimant is entitled to some compensation.

Remedies

15. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service tempered with the finding that the Respondent had a valid reason for the dismissal. I further award the Claimant one (1) month's salary in lieu of notice.

16. As held by the Court of Appeal in *Nation Media Group Limited v Onesmus Kilonzo [2017] eKLR* even in cases of summary dismissal, an employee is entitled to all accrued dues as at the date of dismissal. At any rate, the claims for prorata leave and salary for days worked in June 2017 are admitted and are payable.

17. I therefore enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....	Kshs. 129,000
b) 1 month's salary in lieu of notice.....	43,000
c) 6 days leave balance for 2016 (43,000/30x6).....	8,600
d) Prorata leave for 2017 (43,000/30x1.75x5).....	<u>12,542</u>
Total.....	193,142

18. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant is also entitled to a certificate of service plus costs of the case.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2019

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JUDGE

Appearance:

Miss Zamza for the Claimant

Mr. Masese for the Respondent