



**REPUBLIC OF KENYA**  
**IN THE EMPLOYEMENT AND LABOUR**  
**RELATIONS COURT AT MALINDI**  
**CAUSE NUMBER 16 OF 2018**  
**[Formerly Cause Number 333 of 2017 at E&LRC at Mombasa]**

**BETWEEN**

**FURAHA MENZA NZAI .....CLAIMANT**

**VERSUS**

**CARLOS ANGORE t/a BOMBOLULU MEDICAL CENTRE.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Nyange Sharia & Company Advocates for the Claimant*

*Ogoti & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed her Statement of Claim on 26<sup>th</sup> April 2017. She states that she was employed by the Respondent as a Laboratory Technician in the year 2005. Her contract was terminated by the Respondent on 9<sup>th</sup> April 2017, in circumstances she holds, were unfair and unlawful. Her last salary was Kshs. 21,000 monthly. Termination was without notice. She was not given reason for the decision. She was denied her terminal benefits. She prays the Court to find termination was unfair, and enter Judgment in her favour, against the Respondent, in the following terms:-

- a) Declaration that termination was unfair and unlawful.
- b) Declaration that the Claimant was entitled to 1 month annual leave.
- c) Salary arrears for April 2017 at Kshs. 6,300.
- d) Salary arrears for the period of maternity leave in 2007, 2010 and 2013 at Kshs. 189,000.
- e) Notice at Kshs. 21,000.
- f) 12 years' leave at Kshs. 252,000.
- g) 12 months' salary in compensation for unfair termination at Kshs. 252,000.
- h) Gratuity at Kshs. 126,000.

Total...Kshs. 846,300.

- i) Certificate of Service to issue.
- j) Any other suitable order.
- k) Costs.

2. The Respondent filed his Statement of Response on 20<sup>th</sup> July 2017. He states that he employed the Claimant as Casual Labourer. She deserted after the Respondent asked her to supply him with her Practicing Licence issued by Kenya Medical Laboratory and Technologies Board. This was a requirement from a team of Inspectors from Health Regulatory Bodies. The Claimant kept promising she would avail her Licence, but did not. She was released to process her Licence, but did not comply. For the time she worked, she was paid Kshs. 700 daily. The Respondent did not terminate her contract; she deserted. He asks the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and rested her case on 18<sup>th</sup> October 2017. The Respondent gave evidence on 18<sup>th</sup> July 2018. His Witness, Laboratory Technician and Researcher Mary Chebet Kitiyo, gave evidence on 26<sup>th</sup> February 2019, bringing the hearing to an end.

4. Furaha told the Court she was employed by the Respondent at his Diagnostic Centre in Kaloleni, Kilifi County. She used to run medical tests, earning a monthly salary of Kshs. 21,000. She was the lone Laboratory Technician. On 9<sup>th</sup> April 2017, the Respondent asked her to hand over to a Trainee who had just arrived.

5. There was a joint Health Inspection at the Centre by Ministry of Health Officials. The Claimant was found not to have a Licence. She was given 3 months to obtain one. This was in March 2017. The Respondent told her to leave and look for work elsewhere. Her Colleagues who did not have Licences are still working. She was denied her salary for the period of her maternity leave. She was not paid for days worked in April 2017. She worked without annual leave. The only time she rested was on 24<sup>th</sup> and 25<sup>th</sup> of December. She suffered after termination. The Respondent did not issue a letter of termination.

6. There was no letter of appointment either, the Claimant told the Court on cross-examination. The Respondent was her Family Doctor and Friend. He knew her before employing her. Health Inspection was carried out annually. She was registered as a Laboratory Technician, but did not have a Licence. There were 3 Employees at the Centre- the Claimant; a Nurse; and a Clinical Officer. Inspection was in March 2017. The Claimant expected to have a Licence in June 2017. She was dismissed on 9<sup>th</sup> April 2017. The Respondent knew from the date he employed the Claimant, that she did not have a Licence. She was asked to hand over to a Trainee called Mary. The Claimant trained Mary for 2 hours. The Claimant seeks maternity leave pay, notice of 3 months, and annual leave over a period of 12 years. She was not in casual employment. For a short period after employment, she was paid Kshs. 500 daily. From November 2005, she was paid a monthly salary. It is not true that she worked inconsistently. Redirected, the Claimant told the Court that she was not issued pay slips. Inspection was annual. She could not have been a Casual Employee from the year 2005 to 2017.

7. The Respondent told the Court he is a registered Medical Clinical Officer. He started his practice in 1999. He has 7 Employees. He offers maternity, laboratory, nursing and medical services.

8. The Claimant worked for the Respondent from 2005. She would come and go. She was in temporary laboratory technical engagements [Locum]. She had been trained at Mombasa Technical and had her Certificates. Eventually, the Rules for Practitioners changed, requiring Nurses and Laboratory Technicians to have Licences. Certificates from Training Institutions were not sufficient.

9. The Claimant was found to have no Licence by Health Inspectors on 23<sup>rd</sup> March 2017. Just like a Driver without a Licence, she could not be allowed to continue discharging her role. The Respondent has a Licence and could work on locum basis at other Institutions. The Claimant was given 3 months, to obtain her Licence. The Respondent sat down with the Claimant and discussed how she could obtain her Licence. He had known her for long, and was ready to assist her. She confided in the Respondent that she had failed 2 papers and would rectify this to enable her obtain Licence. The Parties agreed to find a Reliever who was compliant. They settled on Mary Chebet. The Claimant took Mary around and orientated her.

10. To the Respondent's dismay, the Claimant later served him with a letter from KITUO CHA SHERIA, alleging he had terminated her contract unfairly. He replied, explaining he did not terminate her contract, but only required her to obtain Licence. He expected her to return to work. He paid her a daily rate of Kshs. 500 initially and Kshs. 700 later. She was not paid a monthly salary of Kshs. 21,000. She worked 9 days in April 2017 and is entitled to salary of Kshs. 6,300.

11. Cross-examined, the Respondent conceded that his Witness Statement on record, did not identify the Claimant as a Locum Laboratory Technician. Employees reported at 8.00 a.m. and left at 5.00 p.m. There were 4 Laboratory Employees. The Claimant Worked on Locum basis. The Respondent however alleged that she deserted, and notified the Labour Office about her desertion. The Respondent allowed the Claimant to go for her Licence on 9<sup>th</sup> April 2017. She made her demand 2 days later on 11<sup>th</sup> April 2017. She worked on and off from 2005. The Respondent did not have the attendance register to support this. Redirected, the Respondent told the Court that the Claimant did not work in continuity.

12. Mary testified she worked for the Respondent in 2017, on Locum basis. She was paid daily. She was to relieve the Claimant. The Claimant was going to look for Board Licence. The Parties told this to Mary. Mary arrived on 7<sup>th</sup> April 2017, and was shown around by the Claimant before she handed over. She started working on 9<sup>th</sup> April 2017. She did not know what the Claimant agreed with the Respondent. Mary worked until March 2018. The Claimant did not return. Cross-examined, the Witness told the Court she did not know the exact terms of employment between the Parties herein. She did not work in continuity. She did not work daily.

**The Court Finds:-**

13. The Claimant was employed by the Respondent as a Laboratory Technician in 2005. She worked until 9<sup>th</sup> April 2017, when she left employment in disputed circumstances.

14. The Court does not think that having worked for 12 years, the Claimant could be said to be in casual employment at the time she left. She had served for an aggregate number of years, placing her beyond the characterization of casual employment. The nature of her work, as laboratory technician, was central to Respondent's practice. It could not be discharged through temporary labour. It is not possible that the Claimant worked as Locum, for 12 years. The Court is satisfied that by the time she left, the Claimant worked as a regular Employee for the Respondent, earning Kshs. 21,000 monthly.

15. She was required to have a Licence, after Health Inspectors found her practicing without one. She agrees that she did not have a Licence, and that Health Inspectors who visited the Respondent's facility on 23<sup>rd</sup> March 2017, required she obtain a Licence. The Rules had changed, making it mandatory for medical assistants and practitioners to have such Licences.

16. There is satisfactory evidence to show that the Parties agreed, to give time off to the Claimant, to enable her obtain the Licence. Mary was brought in to relieve the Claimant. The Claimant left on 9<sup>th</sup> April 2017, after she showed Mary around, and handed over her Office to Mary, without complaining that the Respondent had terminated her contract. 2 days later, she wrote demand letter alleging unfair termination.

17. It was not possible for the Claimant to continue working without a mandatory Licence. She did not at any time after 9<sup>th</sup> April 2017, return to the Respondent with a Licence in hand. She did not fulfill a mandatory requirement of the law, to enable the Respondent continue employing her. Every profession has its own regulations. An Employee who fails to meet such regulations cannot blame her Employer, where she is compelled to cease working. The Respondent would have been complicit in violation of the law, if he had continued to employ the Claimant without the Claimant obtaining her Licence.

18. The Court does not therefore agree with the Claimant that her contract was terminated by the Respondent, or indeed that her contract was terminated unfairly. She was merely asked to obtain a Licence. She left her role in the hands of Mary. She went away, but instead of pursuing her Licence and returning to work, she went to KITUO CHA SHERIA 2 days later, and instigated this Claim. Her prayers for compensation and notice pay have no foundation and are rejected.

19. **Salary for 9 days worked in April 2017 is undisputed and allowed at Kshs. 6,300.**

20. The Respondent did not provide any evidence showing he had placed the Claimant in any Social Security Plan, for the 12 years she served him. He was content to treat her as a Casual Employee with no access to the social security benefits created under the Employment Act 2007. She merits service pay under Section 35 [5] as read with Section 35 [6] of the Employment Act 2007. **She is granted service pay, at 15 days' salary for 12 complete years of service at Kshs. 145,384.**

21. The Respondent similarly did not provide the Court with Claimant's annual leave records. She says she did not go on annual leave, and was not paid in lieu of leave. The Respondent ought to have discounted this with employment records, showing when the Claimant went on annual leave, or what she was paid in lieu of such leave. Again the Respondent was content to treat the Claimant as a Casual Employee, or Locum Employee, without the right of paid annual leave. She prays for 30 days of annual leave over a period of 12 years. **The Court allows her the minimum statutory 21 days of annual leave, over a period of 12 years, amounting to 252 days- at Kshs. 203,538 in annual leave pay.**

22. The Claimant states she was on maternity leave in 2007, 2010 and 2013, and was not paid her salary while on this leave. She has not provided medical proof that she was pregnant and gave birth during these years. She did not show that she complied with Section 29[4] of the Employment Act, to become entitled to maternity rights mentioned in other Subsections of Section 29. Her prayer for salary in arrears, for the period of alleged maternity, is declined.

23. The Court does not see what the prayer for a declaratory order about 30 days of annual leave, is premised on. There is no contract, legal provision, wage instrument or policy document, showing the Claimant to have been entitled to 30 days of annual leave. The Court cannot declare terms and conditions of employment not contemplated by the law or by the Parties in their contracts.

24. **Certificate of Service to issue.**

25. No order on the costs and interest.

IN SUM, IT IS ORDERED: -

**a) The Respondent shall pay to the Claimant salary for April 2017 at Kshs. 6,300; service at Kshs. 145,384; and annual leave at Kshs. 203,538 – total Kshs. 355,222.**

**b) Certificate of Service to issue.**

**c) No order on the costs and interest.**

**Dated and delivered at Malindi, this 28<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**