



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 42 OF 2015**

**ALEX MUSEMBI MULILI.....CLAIMANT**

**-VERSUS-**

**PATHCARE KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 16.1.2015 alleging that he was employed by the Respondent on 2.9.2013 as a Laboratory Technician earning Kshs.30,000 per month and worked continuous, until 23.10.2014 when the respondent's CEO informed verbally that his service had been terminated. He averred that the termination was unfair and prayed for:-

(a) One month's salary in lieu notice Kshs.34,500/=;

(b) Salary for the month of October inclusive of House Allowance Kshs. 34,500/=;

(c) Unpaid house allowance for the period September 2013 and September 2014, that is  $(15/100 \times 30,000 \times 12 \text{ months}) =$  Kshs.54,000;

(d) Refund of monies unlawfully deducted for the claimant's salary for the period January 2014 to September 2014, that is  $3,910 \times 9$  months = 35,190/=;

(e) Accrued annual leave = Kshs.30,000/=;

(f) Overtime of Ksh.54,337.50;

(g) Damages for wrongful dismissal and unfair termination of employment contract, as per Section 49 of the Employment Act = Kshs.414,000/=;

(h) Costs of the cause;

(i) Interest for a, b, c, d, e, f, g, and h above;

(j) Declaration that the termination of the claimant was unfair and unlawful;

(k) Any other relief the Honourable Court may deem fit to grant; and

(l) Certificate of service.

2. The respondent filed her defence on 7.2.2018 admitting the employment relationship between her and the claimant but denied the alleged unfair termination. She further averred that the termination of the contract was done by the claimant when he absconded duty from 23.10.2014 after refusing to receive a show cause letter from the CEO dated the same date. She therefore prayed for the suit to be dismissed with costs because it is the claimant who breached the contract.

3. The main issues for determination arising from the pleadings are whether the claimant absconded employment or was he unfairly dismissed by the respondent. To answer the said questions both parties tendered evidence and filed written submissions.

## Claimant's Case

4. The claimant testified that he was employed as a Medical Laboratory Technologist by the respondent effective 2.9.2013 for a basic salary of Kshs.30,000 per month. That he was not paid house allowance until February 2014 when his basic pay was reduced by Kshs.3,910 which henceforth was treated as house allowance in his payslips. He further testified that under the contract he was supposed to work 8 hours every month and not paid all his pay for the number of hours of overtime worked. That the issue of overtime affected a group of workers in the Kisumu office where he was stationed and that prompted them to write a memo to the management in January and February 2014.

5. The claimant further testified that he worked well until 12.10.2014 when the Marketing Manager informed him that the CEO wanted to meet him in Nairobi. That on 13.10.2014, he travelled to Nairobi but the CEO was not available to meet him and as such, he was made to work at Nairobi until 23.10.2014 when the CEO called for him. That when he went to the CEO'S office, he found him in a hurry to catch a flight and as such, he just told him that his service had been terminated and he should collect his termination letter from the Operations Manager the following day.

6. The claimant also testified that the CEO never cited any reason for the said termination and he was not taken through any disciplinary hearing. He therefore believed that he was terminated for raising the issue of overtime. On 24.10.2014, he went to collect his letter and he was surprised to find the letter for termination was dated 17.10.2014 even before he met the CEO. He contended that he was never served with any warning letter during the whole period of his service.

7. In cross examination, the claimant admitted that his contract of service provided that his salary was a gross pay of Kshs.30,000 and that his payslips indicated that his gross pay as Kshs.30,000. He further admitted that he used to be paid for the overtime worked but maintained that the pay was not for all the extra hours worked. He contended that no overtime was paid to the employees who worked less than 52 hours per week during the day or 60 hours per week during the night. He relied on the Lab Rotta prepared by the Lab Manager to prove that he was working 208 hours per month instead of the 180 hours provided under the contract. He therefore prayed for Kshs.54,337 for overtime.

8. He further admitted that on 9.8.2014 he took a blood sample from a patient for testing and thereafter the patient wrote a complaint against him. He further admitted that on 23.10.2014, he met the CEO who was in a hurry to take a flight, and he just told him that his service were terminated and should collect a letter from the Operations Manager the following day. That on 24.10.2014, he collected the termination letter dated 17.10.2014 but declined to sign for it because it bound him to discharge the respondent from any further claim apart from the Kshs.90,828 offered in the letter as final dues.

9. He however denied ever being served with the show cause letter dated 23.10.2014 or being called to collect the cheque for Kshs.90,828.

## Defence Case

10. Mr. Benjamin Matheka, the respondent's Manager in charge of Outreach sites testified as Rw1. He also adopted his written statement filed in court on 15.3.2018. He stated that his scope of work was to oversee all counties outside Nairobi and handle HR issues if called upon to do so. He confirmed that the claimant was employed by the respondent for a gross salary of Kshs.30,000 per month as per the contract of employment executed by him. He denied the claim for house allowance and maintained that the gross pay included house allowance. He further denied the claim for overtime and stated that the claimant was paid all his overtime. He denied the authenticity of the Duty Rotta produced by the claimant contending that it was not on the respondent's letterhead and it lacked any signature.

11. He admitted that in January and February 2014, the employees in Kisumu raised issue of overtime. He further stated that in August and September 2014, two patients raised complaints against the claimant about blood tests and even filed statements. Thereafter, the claimant was called to Nairobi to meet the CEO but Rw1 did not know why claimant was wanted in Nairobi. He however testified that the claimant was served with a termination letter offering him salary for October 2014. He therefore prayed for the suit to be dismissed with costs.

12. On cross examination Rw1 admitted that the respondent has a HR Manager. He further stated that his role was overseeing labs outside Nairobi including HR matters. He maintained that paragraph 4 of the contract of employment provided for Kshs.30,000 gross salary. He admitted that paragraph 7 of his written statement stated that the claimant had failed to do his work. He further admitted that there was an Attendance Register for workers in Kisumu office clocking in and out. He did not have any other Duty Rotta for Kisumu to counter the one produced by the claimant.

13. Rw1 admitted that he did not know the reason why the claimant's services were terminated and whether he was accorded any disciplinary hearing. He also did not know whether there were any minutes for disciplinary hearing. He however contended that the contract of employment was never confirmed in writing after the probation.

## Claimant's Submissions

14. The claimant submitted that he was an employee of the respondent until October 2014 when he received a termination letter. It is his case that in that month, all his colleagues at Kisumu received confirmation and when he enquired about his confirmation letter, his supervisor told him that he was a criminal. That after a week he was summoned by the CEO to Nairobi and kept waiting until 23.10.2014 when the CEO meet him and told him that his services were no longer required and he stood dismissed. No reason was cited and no hearing was given to him either orally or via a show cause letter. He further submitted that no warning letters were served upon him before the termination.

15. He relied on *Peter C. Kamau v Grain Bulk Handler Ltd [2014]eKLR*, *Mary Chemwemo Kiptui Vs Kenya Pipeline Co. Ltd [2014]eKLR* and *Kenfrieght (E.A) Ltd V Benson K. Nguti [2016]eKLR* to fortify his submission that termination of employment of an employee for a cause is unfair if the employee is not accorded a hearing. That in all the cited precedents the courts were unanimous that the employee should be told his transgression and given an opportunity to defend himself as required under section 41 and 45 of the Employment Act

16. In addition, he submitted that he is entitled to the reliefs sought in his claim including compensation of 12 months salary for unfair termination, salary in lieu of notice, salary for October 2014, unpaid house allowance, overtime, accrued annual leave, unlawful deductions, certificate of service and costs of the suit.

### **Respondent's submissions**

17. The respondent submitted that the claimant was at all material time to this suit on a probationary contract since he was never confirmed due to some incidences that happened at the workplace. She therefore argued that the claim herein should be governed by section 42 of the Employment Act, which disapplies section 41 of the Act of employees serving under a probation contract. In the alternative, she urged the court to find that if section 41 of the Act was applicable then a hearing was done through statements by the patients and claimant invited to respond. She relied on *Amatsi Water Service co. Ltd V Francis Shire Chachi [2018]eKLR*.

18. In addition to the foregoing, she submitted that the claimant was confronted with complaints by his colleagues and patient on how he executed his duties. That complaints were in written form and the claimant responded to the same also in writing. She urged the court to find that the claimant carried out his duties carelessly necessitating the said complaints from patients in line with section 44(4)(c) of Employment Act.

19. As regards the reliefs sought, the respondent submitted that, she was willing to pay the claimant salary for October 2014, one month salary in lieu of notice, accrued leave and overtime as per the termination letter. She further submitted that she is willing to issue the claimant with a certificate of service. She however denied the claim for compensation for unfair termination contending that no justification for the same was given by the claimant. She further denied the claim for house allowance and contended that the gross salary agreed in the written contract of service included House Allowance.

### **Analysis and determination**

20. There is no dispute from the evidence adduced that the claimant was employed by the respondent from 2.9.2013 to 23.10.2014 when termination of his services was communicated verbally by the respondent's CEO. It is also common knowledge that on 24.10.2014 he received a letter of termination dated 17.10.2014 in which he was offered one month salary in lieu of notice among other dues. The issues for determination are:-

- (a) Whether the termination of the contract of service occurred during probation contract or not.
- (b) Whether the termination was unfair.
- (c) Whether the relief sought should be granted.

### **Probation or Confirmed Contract**

21. Clause 6 & 7 of the contract of service dated 27.8.2013 provided that

***“6. You will be required to serve a three (3) months probationary period with effect from your commencement date.***

***7. you will be confirmed in your substantive post upon satisfactory completion of your probation period.”***

22. It is common knowledge that the claimant served through the 3 months' probation period without any issue after which he was transferred to Kisumu. Although he was never given any confirmation letter, the court is of the view that the claimant was confirmed to his substantive post through the conduct of the parties. The said conduct was in consonance with the contract of service in so far as it implemented the terms of contract, which were duly applicable after confirmation. The said term included implementation of the provident fund clause and the termination clause.

23. The said clauses provided as follows:-

***“5. The company has introduced a contributory provident fund scheme which every staff contributes to after successful completion of 3 months probation period. It is mandatory for all staff to join.***

***8. During the above probation period, employment may be terminated by giving two (2) week's written notice by either party.***

***Upon confirmation, employment thereafter may be terminated by either party giving one(1) month's written notice or payment of one(1) month's salary in lieu thereof.”***

24. It is clear from the claimant's payslip that from March 2014 when his probation period ended, he was enrolled into the provident fund scheme and contributions deducted from his salary by the employer. It is also clear that by the termination letter dated 17.10.2014, the respondent offered to pay to the claimant one month salary in lieu of notice. Such conduct is a clear indication that the respondent had treated the claimant as having successfully concluded his probationary contract and confirmed to his substantive post. Consequently, I find and hold that the termination occurred after confirmation to the substantive post.

### **Unfair termination**

25. The burden of proving unfair termination lies with the employee under section 47(5) of the Act. The burden is discharged if he proves on a balance of probability that the reason for the termination was not valid and fair, and that a fair procedure was not followed. Valid and fair is one that relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to explaining to the employee his transgression and according him an opportunity to defend himself.

26. Once the employee makes a prima facie case in the foregoing terms, the burden shifts to the employer to prove and justify the reason for the termination as required by section 43, 45 and 47(5) of the Act, and to prove that fair procedure was followed as required by section 41 and 45 of the Act. In the present case, Rw1 admitted that he did not know the reason why the claimant's services were terminated and whether he was taken through any hearing. Consequently, I find and hold that the respondent did not discharge her burden of proving the reason for the termination of the claimant's services, and that a fair procedure was followed, and as such the termination was unfair within the meaning of section 45 of the Employment Act. That view is fortified by the decisions cited by the claimant in his written submission summarized herein above.

### Reliefs

27. The claim for salary for October 2014, salary in lieu of notice and certificate of service were admitted and I therefore grant them.

28. The claim for compensation for unfair termination is granted to the tune of 3 months' salary considering the short period of service but also because no misconduct for the termination was cited as having contributed to the termination.

29. The claim for accrued house allowance is dismissed because clause 4 of the contract of service provided that his salary of Kshs.30,000 per month was gross pay. For the same reason the claim for refund of unlawful salary deductions is dismissed.

30. The respondent offered to pay Kshs.10,100 as outstanding overtime pay but the claimant prayed for Kshs.54,337.50. According to the claimant, he was working for 208 hours per month instead of 180 hours from February to September 2014. He relied on the contract of service, Duty Rotta and email correspondences between respondent and employees to support his claim. The respondent disputed the authenticity of the Duty Rotta but did not produce any other. He also did not produce the staff Attendance Register for Kisumu office to disprove the claim for overtime.

31. I have carefully considered the Duty Rotta, which showed that the claimant like some of his colleagues were working 257 hours per month. I have also considered the emails exchanged between management and the employees in which it was confirmed that the normal working hours per week were 45 translating to 180 hours per month. He has however assessed his normal weeks working hours as 52 which translates to 208 hours per month and claimed overtime of 28 hours per month going by the hours indicated in the Duty Rotta.

32. The assessment of the overtime is however not clear whether the claimant factored the overtime already paid as per the payslips produced as exhibits. Consequently I decline the sum of Kshs.54,337.50 for lack of particulars and grant the Kshs.10,100 offered by the respondent.

33. I have found that the termination of the claimant's contract of service herein was unfair. I therefore enter judgment for him against the respondent in the following terms:-

(a)	October	2014	salary	Kshs.30,000	x	23/26.....	Ksh.26,538.50
(b)	Salary	in	lieu	of	Notice.....		30,000.00
(c)			Compensation.....				90,000.00
(d)	Leave	22	day/26	x	30,000.....		25,384.60
(e)	Overtime.....					<u>10,100.00</u>	
							<b><u>182,023.10</u></b>

The said sum will be subject to statutory deductions but in addition to costs and interest at court rates from the date hereof. In addition, the claimant will be issued with certificate of service forthwith.

**Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019**

**ONESMUS N. MAKAU**

**JUDGE**