



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1395 OF 2015**

**STEPHEN MKALE MULINDI.....CLAIMANT**

**v**

**PROVIDE INTERNATIONAL.....RESPONDENT**

**JUDGMENT**

1. Stephen Male Mulindi (Claimant) was employed by Provide International (Respondent) as a clinical officer in February 2013.
2. On 1 October 2014, the Respondent issued to the Claimant a 1 month notice of termination of employment.
3. The Claimant was aggrieved and he instituted legal proceedings stating the Issues in Dispute as Unlawful and unfair termination of the Claimant's employment contract.
4. The parties filed a List of Agreed Issues on 11 July 2018 and the Cause was heard on 5 July 2019 and on 10 July 2019.
5. The Claimant testified on his own behalf while the Respondent's Human Resources Manager, and another witness testified. The witnesses also adopted their filed witness statements.
6. The Claimant filed his submissions on 2 August 2019 while the Respondent filed its submissions on 6 September 2019.
7. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

**Procedural fairness**

8. The Claimant testified that he was not issued with a *show cause* notice or afforded an opportunity to be heard.
9. Under cross-examination, the Respondent's witness stated that a *show cause* notice dated 14 August 2014 was issued to the Claimant and that he was heard on the same day. He admitted that a copy was not filed in Court. Minutes, if any of the hearing were not filed in Court.
10. However, the Respondent issued a *written notice of termination of employment* to the Claimant on 1 October 2014.
11. The notice did not set out any reasons for the decision and the Claimant sought for a meeting with the Respondent.
12. On 14 November 2014, the Respondent wrote to the Claimant to set out the reasons for the termination of employment.
13. Section 35(1)(c) of the Employment Act, 2007 contemplates the giving of *written notice of termination of employment*.
14. The Respondent gave the notice.
15. Despite the notice, section 41 of the Act requires the employer to afford an employee an opportunity to make representations before taking the decision to terminate employment, if the termination is grounded on *misconduct, poor performance or physical incapacity*.
16. The reasons which were given by the Respondent in its letter dated 14 November 2014 though issued *post-facto*, referred to *performance*.

17. In so far as the Respondent did not inform the Claimant of the *poor performance* before giving the notice of termination or afford him an opportunity to make representations, the Court can only conclude that the termination of the Claimant's employment was tainted with procedural impropriety.

### **Substantive fairness**

18. With the conclusion on procedural fairness, it is not necessary for the Court to examine whether the Respondent discharged the burden expected of it by sections 43 and 45 of the Employment Act, 2007.

19. However, in the circumstances of this case, it is the opinion of the Court that an examination of the validity of the reasons would be necessary.

20. The Respondent's second witness testified without the testimony being rebutted or interrogated in any meaningful way that the Claimant asked a patient to make direct mpesa payment directly to his mpesa account after attending to the patient.

21. The Court, therefore, finds that the Respondent had and proved that it had valid and fair reasons to terminate the Claimant's employment.

### *Compensation*

22. The Claimant's employment was terminated for what essentially amounted to fraud/dishonesty, and it is the view of the Court that compensation, a discretionary remedy is not appropriate.

### **Breach of contract**

23. The Claimant contended that he was not paid his salary for August, September and October 2014 totalling Kshs 59,334/-.

24. The Respondent did not rebut the assertion or produce pay records, and the Court will find that the Claimant was entitled to the wages as of right, up to effective date of termination.

### **Service pay**

25. The contract provided that the Claimant's remuneration would be subject to statutory deductions.

26. The Respondent's Human Resources Manager admitted in cross-examination that the statutory deductions were not deducted or remitted.

27. Without evidence that section 35(5) & (6) of the Employment Act, 2007 applied to the Claimant, the Court will find that the Claimant is entitled to Kshs 11,410/38 as *service pay*.

28. In the circumstances, the Court finds no merit in the submission by the Respondent that the contract did not provide for service pay or that the law has not yet fixed the formula for computing service pay. There are numerous authorities where the Courts have taken judicial notice for computation of service pay at the rate of 15 days' pay for each completed year of service.

### **Certificate of Service**

29. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

### **Conclusion and Orders**

30. The Court finds and holds that the termination of the Claimant's employment was procedurally unfair but declines to award compensation.

31. For breach of contract, the Court finds for the Claimant and awards him

(a) Unpaid salaries Kshs 59,334/-

(b) Service pay Kshs 11,410/38

**TOTAL Kshs 70,744/38**

32. Each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 8<sup>th</sup> day of October 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mrs Khayesi instructed by Khayesi Njambi & Khayesi Advocates

For Respondent Mr Adere instructed by Adere & Co. Advocates

Court Assistant Lindsey