



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 98 OF 2015
HILLARY ODHIAMBO NYONJE.....CLAIMANT
VS
GLENMARK PHARMACEUTICALS KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by Statement of Claim dated 23rd January 2015 and filed in court on 29th January 2015 is for unlawful termination of employment. The Respondent filed a Statement of Reply and Counterclaim on 20th February 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Field Manager, Susan Makena Mwithiga a police officer by the name Mutuku Makenzi and the Auctioneer, Lloyd Muthoka. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 1st April 2014 in the position of Medical Representative. His monthly emoluments were as follows:

- a) Salary.....Kshs. 55,000
- b) Mileage allowance.....69,000
- c) Lunch allowance.....3,600
- d) Airtime allowance.....2,000

4. The Claimant states that the Respondent refused to pay him house allowance. He adds that his employment was terminated on 8th September 2014 by email.

5. It is the Claimant's case that the termination of his employment was actuated by malice and was in clear breach of the Respondent's statutory duty. In particular, the Claimant avers that no reason was given for the termination and he was not given an opportunity to defend himself.

6. The Claimant further states that after the termination of his employment, the Respondent orchestrated an illegal campaign of intimidation to force him to return a car he had purchased via a car loan. The

Claimant avers that despite servicing the car loan, the Respondent used the police and auctioneers to harass and force him to return the car.

7. The Claimant's claim is as follows:

- a) 12 months' salary in compensation.....Kshs. 1,548,000
- b) 1 month's salary in lieu of notice.....129,000
- c) House allowance from April 2014 to September 2014..... 49,500
- d) Certificate of service
- e) Costs plus interest

The Respondent's Case

8. In its Statement of Reply and Counterclaim dated 19th February 2015 and filed in court on 20th February 2015, the Respondent admits having employed the Claimant as a Medical Representative at a monthly salary of Kshs. 55,000 effective 1st April 2014. The Respondent however states that this salary was all inclusive save for the following additional benefits, which were payable upon production of receipts:

- a) Daily car allowance of Kshs. 2,800 (Kshs. 400 in the absence of a car)
- b) Monthly airtime of Kshs. 2,000
- c) Food allowance per day of Kshs. 120 while in the field

9. The Claimant was also entitled to a car loan which was granted by the Respondent in accordance with company policy.

10. The Respondent accuses the Claimant of poor performance and failure to obey lawful instructions, issued by his superiors. The Respondent cites the following particulars of misconduct on the part of the Claimant:

- a) Constantly absenting himself from work without permissions;
- b) Unlawfully neglecting to perform his work and carelessly handling the Respondent's property;
- c) Habitually failing and/or refusing to obey lawful orders from his superiors;
- d) Taking off with the Respondent's motor vehicle, forcing the Respondent to report it as stolen.

11. The Respondent states that it was forced to make a report to the police after the Claimant took off with company property. While denying the Claimant's claim of intimidation, the Respondent states that the motor vehicle in issue was registered in its name, by virtue of the loan facility extended to the Claimant. The Claimant had declined to service the loan or return the car in spite of many requests made to him.

12. By way of counterclaim, the Respondent claims the sum of Kshs. 1,032,623 on account of debts owed by the Claimant to the Respondent, as well as company property illegally taken by him made up as follows:

- a) Kshs. 812,290.67 car loan;

- b) Kshs. 60,000 for I-pad;
- c) Kshs. 2,000 for CUG SIM card;
- d) Kshs. 90,397 sample medicines;
- e) Kshs. 5,000 promotional items;
- f) Kshs. 62,935.33 staff travel advance.

13. The Respondent also claims general and punitive damages plus costs and interest.

Findings and Determination

14. There are four (4) issues for determination in this case:

- a) The Claimant's monthly salary;
- b) Whether the termination of the Claimant's employment was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought;
- d) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Claimant's Salary

15. The Claimant pleads that his monthly salary was Kshs. 129,600 made up of the following:

- a) Salary.....Kshs. 55,000
- b) Mileage allowance..... 69,000
- c) Lunch allowance.....3,600
- d) Airtime allowance.....2,000

16. The Respondent on the other hand, maintains that the Claimant's actual monthly salary was Kshs. 55,000 and that the allowances were to facilitate the Claimant's work and were therefore not part of his monthly salary. The Claimant admitted in cross examination that these allowances were for operations and he was expected to account for them. This was in line with the evidence of the Respondent's 1st witness, Susan Makena Mwithiga to the effect that these allowances were based on a tour plan submitted by the Claimant and were accounted for by production of receipts.

17. In the final submissions filed on behalf of the Respondent, reference was made to the holding by this Court in ***Stella Muhoro v Bamburi Cement Limited [2017] eKLR*** that facilitative payments, intended to support the employee while actively engaged in the employer's business, are not part of the employee's monthly salary.

18. I have no reason to change my mind on this issue and applying the test in the ***Stella Muhoro Case*** (supra), I find that the allowances paid to the Claimant were facilitative rather than remunerative and were not therefore part of his monthly salary. The result is that the Claimant's monthly salary for purposes of this claim is settled at Kshs. 55, 0000.

The Termination

19. The Claimant's employment was terminated by letter dated 8th September 2014, stating as follows:

*“Dear **Hillary Odhiambo Nyonje***

Pursuant to Clause 9(b)(2) of your employment contract, Glenmark Pharmaceuticals (Kenya) Ltd., hereby terminates your employment with effect from 8th Sep 2014. Kindly hand over all the company’s properties (which are in your possession) to your Line Manager SUSAN MAKENA MWITHIGA immediately. Please also ensure to submit your expense statement including your expenses till 08th Sep 2014 with actual bills/supporting (sic) immediately.

As you have taken a car loan from Bank of India and from Glenmark Pharmaceuticals (K) Limited, you may either choose to clear the Car Loan taken from Bank of India and Loan taken from Glenmark Pharmaceuticals (K) Limited or hand over the car to the Company immediately. Your full and final settlement will be done after 7 days from the date of receiving clearance from your seniors or from the date of clearance of your car loan/handing over the car to co. whichever is later.

We take this opportunity to thank you for your service and wish you all the best in your future endeavors.

Best Regards

Shivaprasad Chemudupati

(Signed)

Country Manager

Glenmark Pharmaceuticals (K) Limited

20. This letter makes reference to Clause 9(b)(2) which provides for termination of the Claimant’s employment by payment of one month’s salary in lieu of notice. In this regard, the Respondent seems to suggest that termination could be effected without justifiable cause as long as adequate notice or pay in lieu thereof was issued. This was the law before enactment of the Employment Act, 2007. The situation has however since changed and as held by **Rika J** in **GMV v Bank of Africa Limited [2013] eKLR** the requirements of Sections 41,43 and 45 of the Employment Act are minimum employment standards which must be read into all employment contracts.

21. A reading of the Claimant’s termination letter does not disclose any reason for the termination. The Respondent’s 1st witness, Susan Makena Mwithiga told the Court that the Claimant was a poor performer and that before the termination of his employment, he had been asked to resign.

22. There was however no evidence of any charges being put to the Claimant at the shop floor. It seems to me therefore that by the time the Claimant left the Respondent’s employment, the reason for his exit was not clear. This was in violation of the requirement for substantive justification for termination set out under Section 43 of the Employment Act as well as the procedural fairness parameters in Section 41 of the Act.

Remedies Available to the Claimant

23. Pursuant to the forgoing, the Court finds that the termination of the Claimant’s employment was substantively and procedurally unfair and awards him three (3) months’ salary in compensation. In making this award, I have taken into account the Claimant’s length of service and the Respondent’s conduct prior to the termination. I further award the Claimant one (1) month’s salary in lieu of notice.

24. The Claimant also claims house allowance. However, his letter of appointment and his pays lips provided for gross salary. The Court therefore reached the conclusion that it was the intention of the parties that the Claimant be paid a consolidated salary, inclusive of house allowance. Consequently, the

claim in this regard fails and is dismissed.

The Respondent's Counterclaim

25. In its counterclaim, the Respondent claims Kshs. 812,290.67 being car loan balance. However, by the time the matter came up for hearing, the subject car had been repossessed. The Respondent therefore attempted to convert this part of the counterclaim to cover repair, towing and auctioneer's charges. The only thing to say is that these claims were neither pleaded nor supported by evidence. The rest of the counterclaim was not proved and is dismissed.

Final Orders

26. Finally, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....Kshs. 165,000

b) 1 month's salary in lieu of notice.....55,000

Total.....220 000

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

28. The Claimant is also entitled to a certificate of service and costs of the case.

29. Orders accordingly.

DATED AND SIGNED AT MALINDI THIS 29TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Gomba for the Claimant

Miss Githii for the Respondent