



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1007 OF 2014

MATHEWS OTIENO OMOLO..... CLAIMANT

VERSUS

TEMPLE STORES PHARMACEUTICAL LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Mathews Otieno Omolo against his former employer, Temple Stores Pharmaceutical Limited. The claim is contained in a Statement of Claim dated 18th June 2014 and filed in court on even date. The Respondent filed a Statement of Defence on 13th August 2014.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called a partner, Joseph Ngera Kiama. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard, at a basic monthly salary of Kshs. 8,000, effective 11th July 2010. On 21st September 2013, the Claimant was instructed by the Respondent's Managing Director to proceed on 7 days' leave and on reporting back to work, the Claimant was informed that his services were no longer required.

4. It is the Claimant's case that the termination of his employment was unjustifiable and unprocedural. Further, upon termination, the Claimant was not paid his terminal dues. He now claims the following:

a) One month's salary in lieu of notice.....	Kshs. 12,548.00
b) Salary for 21 days in September 2013.....	10,143.00
c) Leave pay for 3 years.....	32,735.00
d) Public holidays (10 days each year).....	28,980.00
e) House allowance @ 15% of 12,548.....	67,759.20
f) Service gratuity for 3 years.....	18,822.00
g) Overtime worked (3 hours per day).....	155,520.00

h) 12 months' salary in compensation..... 150,576.00

i) Certificate of service

j) Costs plus interest

The Respondent's Case

5. In its Statement of Defence dated 7th August 2014 and filed in court on 13th August 2014, the Respondent states that the Claimant has never been its employee and that the documents annexed to the Statement of Claim are a forgery.

6. The Respondent further states that the Claimant was an employee of a security firm and was assigned to guard the Respondent's premises at night. However, most of the nights the Claimant would leave his place of assignment as soon as the Respondent's staff left for the day. One time, the Respondent's Managing Director, Joseph Ngera Kiama is said to have found the premises unattended at around 11.0 pm. Kiama made a report to the Claimant's employer and thereafter did not hear about the Claimant.

7. The Respondent avers that it has never employed an individual as a security guard but has been sourcing security guards from established security firms.

Findings and Determination

8. There are three (3) issues for determination in this case:

a) Whether the Claimant was an employee of the Respondent;

b) Whether the Claimant has made out a case for unlawful termination of employment;

c) Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

9. The Respondent denies ever having employed the Claimant but gives conflicting accounts on its engagement with him. In its Statement of Defence filed in court the Respondent states that the Claimant was employed by a security firm and assigned to guard the Respondent's premises.

10. The Respondent's witness, Joseph Ngera Kiama on the other hand testified that the Claimant worked for the Respondent as a reliever guard paid a daily rate of Kshs. 400. Kiama's testimony also contradicted crucial documents produced by the Respondent being, sample letters of appointment, payslips and employment cards. He told the Court that the Claimant worked for 2-3 weeks but could not tell the exact period of employment.

11. In sum, the Court found the Respondent's evidence contradictory and of no probative value. In the absence of any proof of the Respondent's averments on its relationship with the Claimant, the Court invokes Section 10(7) of the Employment Act, 2007, dopts the Claimant's testimony and finds that there was indeed an employment relationship between the parties capable to enforcement by the Court. In similar vein, I adopt the Claimant's testimony regarding the effective and termination dates as well as obtaining terms of employment.

The Termination

12. The Respondent's witness, Joseph Ngera Kiama testified that he had received information that the Claimant was not reporting to work as required. Upon inquiry, the Claimant stated that he had a domestic problem and Kiama told him to go and sort it out. He was not given a return date.

13. In light of this the Court has arrived at the conclusion that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure.

Remedies

14. Flowing from the foregoing findings, I award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process. I also award the Claimant one (1) month's salary in lieu of notice.

15. The Claimant further claims house allowance. Section 31(1)and(2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

16. There was no evidence that the salary paid to the Claimant was inclusive of house allowance. I therefore allow house allowance at 15% of the basic salary of Kshs. 8,000 and adopt the resultant gross figure of Kshs. 9,200 as the Claimant's monthly salary for purposes of this claim. On the same ground, the claims for salary for 21 days in September 2013, leave pay and service pay also succeed and are allowed.

17. The claims for public holidays and overtime worked were however not proved and are dismissed.

18. In the end, I enter judgment in favour of the Claimant as follows:

a) 5 months' salary in compensation.....	Kshs. 46,000
b) 1 month's salary in lieu of notice.....	9,200
c) House allowance for 38 months (1,200x38).....	45,600
d) Salary for 21 days in September 2013 (9,200/30x21).....	6,440
e) Leave pay for 3 years (9,200/30x21x3).....	19,320
f) Service pay for 3 years (9,200/30x15x3).....	13,800
Total.....	140,360

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

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

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Mr. Kaingu for the Respondent