



**REPUBLIC OF KENYA**

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

**CAUSE NO.2370 OF 2017**

**RICHARD OTIENO OMBOKO ..... CLAIMANT**

**- VERSUS -**

**MADINA HOSPITAL LIMITED ..... RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> October, 2018)**

**JUDGMENT**

The claimant filed the statement of claim on 29.11.2017 through MMA Advocates, LLP. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant without benefits by the 3<sup>rd</sup> respondent is null and void.
- b) A declaration that the claimant is entitled to terminal benefits.
- c) A declaration that the claimant was unfairly terminated.
- d) The claimant be paid terminal dues amounting to Kshs.1, 327, 500.00 as follows:
  - i. Gratuity  $15/30 \times 31/2 \times$  Kshs.50, 000.00 Kshs.87, 500.00.
  - ii. 12 months' salary for unfair termination Kshs.600, 000.00.
  - iii. One month's pay in lieu of notice Kshs.50, 000.00.
  - iv. Unpaid salary for July 2017 Kshs.50, 000.00.
  - v. Unpaid increment in salary since August 2014 to July 2017 Kshs.15, 000.00 x36 months Kshs.540, 000.00.
- e) General damages for breach of contract based on lost expected earnings for the remaining years to retirement.
- f) Any other relief that the Honourable Court may deem fit to grant.
- g) Costs of the claim.

The respondent's memorandum in reply was filed on 19.12.2017 through Abdulrahman, Saad & Associates. The respondent prayed that the claimant's suit against the respondent be dismissed with costs.

It is not in dispute that the respondent employed the claimant as a clinical officer by the letter of appointment dated 17.12.2013 and signed by the claimant in acceptance on the same 17.12.2013. The letter stated in paragraph 1 thus, "**You will be on probation for three months. On successful completion of the probation period, you will enter into contract of two years of which this appointment may be renewed or terminated by either party serving thirty days notice or by paying thirty days salary in lieu of notice to the other party subject to the hospital right of summary dismissal provided.**" The letter did not state the effective date and the Court considers that the 3 months probationary service commenced on the date of the letter 17.12.2013 so that the probationary service lapsed on or about 17.03.2013. It is not in dispute that the claimant continued in the respondent's employment until July 2014 when the respondent's managing director one Ashkir Abdirizak decided to terminate the employment of 6 persons including the Claimant. The claimant's evidence is that the contract of service

was abruptly terminated by the respondent on 08.07.2017 without pay and without reason. The respondent's evidence is that on 01.05.2017 or thereabouts, the respondent issued one month's notice to all its employees on the intended closure of the medical centre and thereafter, remitted all salaries due to the employees including the claimant. The claimant denied that such notice was ever issued or put on staff notice board.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant's employment was unfair. The evidence is that the claimant's employment was terminated on 08.07.2017 on account of redundancy because the medical centre the claimant had been employed to serve at was unsustainable. The Court finds that section 40 of the Employment Act, 2007 on redundancy applied. The respondent failed to serve the one month notice upon the claimant and upon the area labour officer as provided in section 40 of the Act. Accordingly the termination was unfair. The Court has considered the unbroken period of clean service of over 3 years, the desire by the claimant to continue in service, and the claimant did not contribute to his termination. To balance justice in the case, the Court awards the claimant 6 months' gross salaries under section 49 of the Act at Kshs. 50, 000.00 per month making **Kshs.300, 000**.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other payments as prayed for. The Court makes findings as follows:

i. The claimant prays for gratuity  $15/30 \times 31/2 \times \text{Kshs.}50, 000.00$   $\text{Kshs.}87, 500.00$ . The Court finds that the prayer is in the nature of severance pay under section 40 of the Act limited to 15 days' pay for each completed year of service at 35,000.00 per month making  $\text{Kshs. } 17, 500.00 \times 3$  being **Kshs. 52, 000.00** which is awarded accordingly. While making that finding the Court returns that the evidence was that the claimant's monthly pay was Kshs. 35, 000.00.

ii. The claimant is entitled to one month's pay in lieu of notice **Kshs.35, 000.00** as provided for under section 40 of the Act and is awarded accordingly.

iii. The claimant was terminated on 08.07.2017 and the Court awards pay for 8 days worked and not paid being **Kshs.9, 333.30**.

iv. The claimant prayed for unpaid increment in salary since August 2014 to July 2017  $\text{Kshs.}15, 000.00 \times 36$  months  $\text{Kshs.}540, 000.00$ . The claimant's case was that he was promised salary increment of Kshs.15, 000.00 in view of the extra work assigned being working for long hours, seeing patients outside normal working hours and the increment in salary would take care of the overtime. Thus the claimant testified that his monthly salary was Kshs. 35, 000.00 plus Kshs 15,000.00 making Kshs.50, 000.00 as pleaded in the claim. The parties were in a written agreement and the respondent has denied an oral agreement to increase the claimant's salary. The Court returns that the claimant's monthly salary was Kshs. 35, 000.00 and the increment has not been established and it will fail.

v. The Court returns that the claimant has not justified the prayer for general damages till retirement age as there was no agreement on a retirement age. The claimant is a clinical officer and there is no established justification that after the termination he could not secure alternative gainful engagement. The prayer will therefore fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination of the claimant's employment was unfair.
- 2) The respondent to pay the claimant **Kshs.396, 333.30** by 15.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 26<sup>th</sup> October, 2018.**

**BYRAM ONGAYA**

**JUDGE**