



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1958 OF 2013

GEORGE OTIENO OMOLLO.....CLAIMANT

VS

MEDIMART HEALTHCARE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant, George Otieno Omollo filed a Memorandum of Claim on 6th December 2013 seeking relief for wrongful and unfair termination of employment.
2. The Respondent filed a Response on 10th January 2014 but did not attend the hearing in spite of due notification. The Claimant testified before the Court on 17th April 2014 and thereafter filed written submissions on 2nd May 2018.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 19th July 2013 in the position of Pharmacy Technologist. He earned a monthly salary of Kshs. 28,000 which was to be increased to Kshs. 30,000 in the third month of employment.
4. On 12th November 2013, the Respondent accused the Claimant of misusing the office phone to make personal calls. The Claimant acknowledged using the said phone to make two urgent calls to his father and sibling. He explains that on 8th November 2013, he had inadvertently carried the office phone home while leaving his personal one in the office.
5. The Claimant avers that the Respondent made it difficult for him to coherently explain and defend himself as he was ambushed while at work and was not given an opportunity to explain himself. He was thereafter issued with a letter of summary dismissal.
6. It is the Claimant’s case that there was no justifiable cause for his dismissal and he was not given an opportunity to be heard. He now claims the following:

- a) 1 month’s salary in lieu of notice.....Kshs. 30,000
- b) Unpaid leave allowance.....30,000
- c) 12 months’ salary in compensation.....360,000
- d) Costs plus interest

The Respondent’s Case

7. In its Response dated 10th January 2014 and filed in court on even date, the Respondent admits having offered the Claimant the position of Pharmacy Technologist under a probationary contract dated 19th July 2013.
8. The Respondent states that the Claimant’s probation was to end on 19th January 2014 and was therefore subsisting on 17th November 2013

when his employment was terminated. The Respondent therefore maintains that the Claimant is not entitled to bring a claim for unlawful termination of employment.

9. On the issue of personal calls made on the office phone, the Respondent states that following unsustainable escalation of telephone bills due to unauthorized calls, the Respondent issued a warning to its employees. The other employees complied with the warning but the Claimant did not.

10. The Respondent gives a list of unauthorized calls made by the Claimant on 8th November 2013. Additionally, the Respondent claims that the Claimant had carried the office phone home prior to 8th November 2013 that is on 22nd October 2013.

11. The Respondent contends that the Claimant was accorded ample time to explain himself. Further, the Respondent states that the Claimant had been issued with prior verbal and written warnings.

Findings and Determination

12. The first issue for determination in this case is whether the Claimant is entitled to bring a claim for unlawful and unfair termination of employment. The Respondent states that because the Claimant was still on probation as at the time of termination then his claim is not properly before the Court.

13. In advancing this argument, the Respondent relies on Section 42(1) of the Employment Act, 2007 which provides as follows:

42.(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

14. Section 2 of the Act defines a probationary contract as:

“a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.”

14. The Claimant’s letter of appointment dated 19th July 2013 clearly states that he was to be on probation for a period of six (6) months, running from the date of the letter. Indeed, the Claimant himself admits that at the time of leaving the Respondent’s employment, he was still on probation. The question remains whether, despite this uncontested fact, the Claimant’s claim is properly before the Court.

15. In *Carole Nyambura Thiga v Oxfam [2013] eKLR* my brother **Rika J** stated the following:

“Under Section 42(1) of the Employment Act, 2007 an employee who is on probation is not entitled to the minimum statutory procedural guarantees created under Section 41, upon termination of the contract of employment. Employment during probation is at-will. The protection afforded to regular employees under unfair dismissal laws are not available to employees whose contracts are terminated while on probation.”

16. In the final submissions filed on behalf of the Claimant on 2nd May 2018, an attempt was made to draw a distinction between unfair termination and wrongful dismissal. This part of the Claimant’s submissions preponderates towards the argument that since the Claimant’s claim is one of wrongful dismissal as opposed to unfair termination, then the limitation imposed by Section 42(1) of the Employment Act does not apply.

17. I must admit that Counsel for the Claimant captured the attention of the Court in this regard and his argument could well be the basis of further study on the various terms used to describe separation in employment.

However, looking at the Employment Act as currently crafted, the Court did not find any intention in the mind of the legislators to create limitations for certain categories of separation while exempting others. This is more so because the remedies created under the Act apply across the board. It seems to me therefore that the limitation created by Section 41(2) of the Act applies to the Claimant’s case no matter the term used to describe the mode of his exit from the Respondent’s employment.

18. That said, the Court finds and holds that the Claimant’s claim for unlawful termination of employment has no basis in law and is dismissed. Regarding the claim for notice pay I have this to say; the Claimant, having been on probation at the time of termination was only entitled to seven (7) days’ notice as provided under Section 42(4) of the Employment Act. Similarly, the Claimant is only entitled to prorata leave for the four (4) completed months of service.

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

a) 7 days’ pay in lieu of notice (30,000/30x7).....Kshs. 7,000

b) Prorata leave pay for 4 months(30,000/30x1.75x4).....7,000

Total.....14,000

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

21. As the Claimant's main claim did not succeed, I direct that each party will bear their own costs.

22. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 2ND DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Sagini for the Claimant

No appearance for the Respondent