



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO 1603 OF 2014**

**BETTY MWENDA NGONDU.....CLAIMANT**

**VERSUS**

**MADAWA PHARMACEUTICALS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that she was employed by the respondent as a medical representation at all material time to the claim. On or about the month of August, 2014 the respondent withheld her salary for the month of July on flimsy grounds that the claimant offered credit to an entity known as Alphamed Limited yet all her actions were within the scope of her job description.
2. The claimant further alleged that in the month of August, the respondent summoned the claimant to its business premises cunningly and maliciously in a bid to implore her to resign which she resisted. After the scheme failed the respondent allegedly engineered the claimant's arrest and incarceration at Spring Valley Police Station on 13<sup>th</sup> August, 2014 and thereafter released on police bond. The respondent subsequently withdrew the complaint due to lack of evidence. According to the claimant, the respondent's conduct amounted to constructive dismissal from employment in a manner that was unlawful and unfair.
3. The respondent on its part pleaded that the claimant was in breach of her letter of appointment by offering over the counter drugs to a non-existing company. The respondent further averred that the claimant was arrested on 13<sup>th</sup> August, 2014 during the course of investigations in which she was a suspect. The respondent further claimed the claimant deserted and never reported to her new work station and deployment.
4. In her oral evidence, the claimant stated that she was employed by the respondent on 1<sup>st</sup> September, 2010 and her starting salary was Kshs 34,800 per month which was later increased to Kshs 51,000 by the time she left employment. It was her evidence that she used to conduct medical sales to doctors and pharmacies. She never had any disciplinary issues in the course of her employment. In July 2014 she did not receive her salary and upon enquiry she was asked to see the Director. When she saw the Director she was informed that her immediate manager did not want her around hence she should resign.
5. According to her, she was asked to resign first before she could be paid her July salary. The claimant testified that a customer bought drugs on credit in her territory and she was asked by the Director to collect the payment. It was her evidence that most customers were credit customers. The client in this case was Alphamed. She left with Director to collect payment from Aphamed but she was instead taken to Spring Valley Police Station and locked up. She was later released on Kshs 10,000 bond. She returned to her workplace to follow up the matter but got no response. In cross-examination she stated that Alphamed was already in the respondent's database.
6. The respondent's witness Ms Elizabeth Kailema stated that the claimant was in charge of sales and marketing. According to her good customers could be given medicine on credit but credit was to be given after verification. It was further her evidence that there was a customer known as Alphamed whose debt was over 6 months old hence they went to check its physical address but found the address did not exist. The claimant gave a phone number of a person called Cessy who informed her Alphamed had closed because it was not doing well. Cessy paid Kshs 15,000/= via Mpesa but when she asked for a meeting to discuss payment of the balance Cesy said it was not possible since she was in Marsabit.
7. It was her evidence that she later learnt Cessy was Christine Mukiri who was working for George a former respondent's accountant who was terminated for fraud. She stated that the police arrested the claimant because they thought she was an accomplice. It was further her evidence that George who was her brother is the one who bailed the claimant out and that the police tried to arbitrate the matter and urged Christine and the claimant to pay the outstanding amount.
8. It was further her evidence that before the incident the claimant was to be transferred to a different sale territory and that she was paid mileage but her salary was yet to be paid. It her evidence that the claimant's services were never terminated and that the claimant never reported to the respondent's office upon her release from custody.

9. In cross-examination she stated that Alphamed was in the respondent's database and that she wanted the claimant to take her to the person she was selling medicine to. She denied asking for the claimant's arrest and that the police arrested the claimant because she was un-cooperative.

10. In termination of employment cases the reason or reasons for termination of a contract of employment are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. Further the burden of proof of reasons for termination of employment rests on the employee.

11. It is not in dispute that the claimant was a Medrep for the respondent and in the course of her duties could give credit to good customers but approval had to be sought first. The claimant apparently sold drugs to Alphamed which turned out to be a bad debtor. The respondent sought to know from the claimant the physical location of Alphamed. They could not trace Alphamed and were informed by one Cessy on phone that Alphamed closed down. Cessy however sent the respondent Kshs 15,000/= as part payment of the debt but could not meet the respondent's director to discuss how the balance would be paid because she said she was then in Marsabit.

12. It turned out that Alphamed was related to another company called Melden being run by one George who was not only the brother to the respondent's director Elizabeth Kailema but also former respondent's accountant who was allegedly dismissed on account of fraud. Mrs Kailema informed the court that she called in the police who attempted to arbitrate the matter and urged the claimant and one Christine to settle the outstanding debt. According to her, the claimant was arrested because she was not co-operative.

13. The respondent was owed money by Alphamed or Meldan whichever the case. This is normal in business. Debtors may default in paying for goods or services for one reason or another. Do they become fraudsters as a result for the police to be called? And how did the claimant's innocent act of selling goods on credit become a matter for which she had to be arrested and locked in a police cell only to be bailed out by the respondent's director's brother?

14. This is a clear case of abuse of police powers to coerce payment of a debt. In any event the claimant merely sold the drugs in issue on credit which was within her mandate. She did not by doing so become liable for the debt. As observed earlier in the judgement, the burden of proof of reasons for termination of employment contract rests on the employer. Further the test of what constitutes a reason for which an employer can dismiss is measured from the perspective of a reasonable employer. That is to say if a reasonable employer faced with similar facts would dismiss then the dismissal will be upheld.

15. In the courts view, there existed no valid reason for which the claimant's service could be terminated. The claimant did no wrong to sell goods on credit. The default by a debtor to settle the debt for goods supplied is a normal business risk which could not cause the claimant's incarceration let alone dismissal.

16. The respondent has argued that it never dismissed the claimant from work and that the claimant did not report to work after release from police custody. But who would have the burning urge to report to work after being arrested on the complaint of an employer and for such flimsy reasons? The respondent's conduct were unreasonable and made it impossible for the claimant to continue working. It was as the claimant rightly observed a constructive dismissal.

17. The court therefore enters judgement in favour of the claimant against the respondent as follows;

a. One month salary in lieu of notice	51,000
b. Salary for July 2014	51,000
c. Twelve months salary as compensation for unfair termination of service	<u>612,000</u>

**714,000**

d. Costs of the suit

18. Items (a) (b) and (c) shall be subject to taxes and statutory deductions.

19. It is so ordered.

**Dated at Nairobi this 30<sup>th</sup> day of November, 2018**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 30<sup>th</sup> day of November, 2018**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.