



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1998 OF 2013

OBADIAH MARAO OANGE.....CLAIMANT

- VERSUS -

VOSTRUM (K) T/A VOSTRUM CLINIC....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim of claim on 16.12.2013 through Ochwo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) One month salary in lieu of notice Kshs.40, 000.00.
- b) Unpaid salary for June 2013 and 2 days for July 2013.
- c) Unpaid overtime for three months worked (273 hours for the 91 days worked) Kshs.78, 750.00.
- d) Payment in lieu of leave not taken 5.25 days Kshs.8, 077.00.
- e) 12 months' salaries for compensation under section 49 of the Employment Act, 2007 Kshs.480,00.00.

The respondent's response to the memorandum of claim was filed on 05.02.2014 through J.K. Mwangi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The respondent employed the claimant as a pharmaceutical technologist on 21.03.2013 at the time the claimant had the current practicing certificate. The contract of service was oral but the evidence is that the claimant was employed subject to possession of a current practicing certificate. The certificate would be displayed in the respondent's clinic signifying the claimant was the pharmacy technologist in charge. The claimant failed to provide the certificate for the purpose. Thus the respondent's advocates wrote to the claimant in their capacity as the respondent's company secretary the letter dated 25.06.2013 stating that the claimant had refused to provide the practicing certificate for display as was agreed at the time of employment. The letter demanded that the claimant provides the certificate by 27.06.2013 and if he failed to provide the certificate he would not be confirmed in appointment upon lapsing of the probationary period. Further, the claimant would be deducted Kshs.10, 000.00 backdated to the date of employment for failure to bring the certificate as was agreed.

In the letter applying for employment dated 22.03.2013 the claimant confirmed that he was qualified and licensed as a pharmaceutical technologist.

The claimant testified that on 02.07.2013 the respondent asked him not to report at work on 02.07.2013. The claimant further testified that he had his practicing certificate and not premises certificate prescribed by the Pharmaceutical Board for such displays. The claimant stated that he had not been asked about the premises display certificate. The claimant further testified that on 03.07.2013 he met the respondent's advocates and company secretary and he was told he had been terminated. The respondent's evidence was that the claimant walked away from the board when he failed to provide the practising certificate.

The Court has considered the material on record and makes the flowing findings on the issues in dispute.

- a) The Court finds that by his own pleading, the claimant has confirmed that it was a condition of the appointment that he would furnish the respondent with a copy of his current practicing certificate. The letter dated 25.06.2013 was specific that the claimant provides the practicing certificate. In his letter dated 25.06.2013 the claimant purported to deny that at the time of employment, there had been discussion about the practicing certificate. The Court finds that the claimant has offered contradictory pleading and

evidence. The Court finds that the claimant was terminated from employment when he failed to avail the practicing certificate as was a condition of the appointment. The probationary appointment was ending and due for confirmation and the Court returns that the respondent was entitled to terminate the probationary service and decline the confirmation. Section 42 (1) of the Employment Act, 2007 is clear that section 41 of the Act on notice and hearing prior to termination on account of misconduct or poor performance or ill health did not apply during the probationary period. Further the claimant's probationary service was potentially liable to extension, with his consent, within provisions of section 42(2) of the Act. In view of the ensuing grievance against the claimant, the Court returns that the respondent was entitled not to confirm the claimant and there was no contemplation of extension of probationary service. The termination was not unfair or unlawful. The claimant is not therefore entitled to pay in lieu of termination notice as prayed for.

b) The claimant is entitled to salary for June 2013 and 2 days worked in July 2013 and is awarded **Kshs. 43, 077.00** as prayed for. The Court finds that the respondent failed to establish that the claimant had been paid for the days worked and as prayed for.

c) The parties agreed to Kshs.40, 000.00 per month payable to the claimant for the work done over the agreed working hours. The Court returns that the claimant has failed to justify the prayer for overtime pay.

d) Under section 28 of the Act leave is earned after 12 months of service and the Court returns that the claimant had served only for around 3 months and leave had not accrued. The prayer will therefore fail.

In conclusion judgment is hereby entered for the parties for:

a) The respondent to pay the claimant **Kshs. 43, 077.00** by 15.12.2018 failing interest to be payable thereon at Court rates from the date termination 02.07.2013 till full payment.

b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 2nd November, 2018.

BYRAM ONGAYA

JUDGE