



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1189 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

MACHUKI ANYONA JULIUS.....1ST CLAIMANT

DUNCAN MUTUKU KING'OO.....2ND CLAIMANT

JEREMIAH KAMAU MURAGURI.....3RD CLAIMANT

GRIPHEN JUMBA CHANZU.....4TH CLAIMANT

BERNARD GITAU WAIREGI.....5TH CLAIMANT

JACQUELINE MUTETHYA JOHN.....6TH CLAIMANT

-VERSUS-

OMAERA PHARMACEUTICALS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants' herein filed a Statement of Claim dated 13th July, 2012 through the firm of Kilonzo & Company Advocates.
2. The 1st Claimant avers that he was employed by the Respondent on or about February 2003 as a Medical Representative with a gross salary of Kshs. 15,000 and was later promoted to Assistant Marketing Manager with a gross salary of Kshs. 90,000/-. The 1st Claimant further avers that his services were terminated on or about April 2011 having worked for the Respondent for a total of 8 years.
3. The 2nd Claimant's Claim was struck out vide the Ruling Delivered on 18th December, 2013 by the Honourable Lady Justice Monica Mbaru for being time barred.
4. The 3rd Claimant avers that he was employed by the Respondent in 1st August, 2003 as a computer operator. No contract of employment was issued to the 3rd Claimant. That his services were terminated by the Respondent in January 2008 without notice and that he had worked for a total of 5 years.
5. At the time of termination the 3rd Claimant was earning a gross salary of Kshs. 21,600/-.
6. The 4th Claimant avers that he was employed by the Respondent in June 2001 as a store keeper for a period of 10 years and that no written contract was issued to that effect. He further avers that his services were terminated in July 2010 without notice. At the time of dismissal the 4th Claimant averred that he worked as a dispatch officer earning a salary of Kshs. 31,000/- and an allowance of Kshs. 1,000/-.
7. The 5th Claimant avers that he was employed by the Respondent on or about July 1986 as a delivery man for a period of 15 years and that no contract was issued to that effect. He further avers that his services were terminated on 18th August, 2010. He states that at the time of dismissal he was working as a storekeeper earning a salary of Kshs. 31,000/- and receiving an allowance of Kshs. 3000/-.
8. The 6th Claimant avers that she was employed by the Respondent in June 2002 as a medical representative and worked for a period of 8

years. She further avers that she was not issued with a written contract of employment.

9. The 6th Claimant further avers that her services were terminated in February 2010 without any written notice to that effect and with no reasons for her dismissal. She further avers that at time of dismissal she was earning a gross salary of Kshs. 45,000/- and receiving an allowance of Kshs. 39,400/-.

10. All Claimants aver that they served the Respondent diligently and with loyalty until their services were terminated. They further aver that the Respondent acted in contravention to the provisions of the Employment Act by:-

i. Failing to issue the Claimants with written contracts of employment contrary to Section 9 (1) (a) of the Employment Act

ii. Dismissing the Claimants without Notice contrary to Section 44(2) of the Employment Act

iii. Failing to issue the Claimants with Certificates of Service contrary to Section 51(1) of the Employment Act and

iv. Dismissing the Claimants wrongfully or unfairly contrary to Section 45(1) of the Employment Act.

11. The Claimants pray for their Statement of Claim to be allowed as prayed.

12. The Respondent filed its Memorandum of Response wherein they admit the existence of employment relationship with the Claimants but deny that the Claimants were wrongfully and unfairly dismissed and that they are not entitled to the reliefs sought.

13. The Respondent further urged the Court to allow its counter claim as prayed and itemised in paragraphs 105 to 113 of the Memorandum of Response.

Evidence

14. The 1st Claimant (CW1, **Machuki Anyona Julius**) gave his evidence on 2nd November, 2015. He reiterated the averments as contained in the Memorandum of Claim.

15. CW1 stated that he was employed by the Respondent in 2003 with a gross salary of Kshs. 15,000 at the position a medical representative and was issued with ID Card Number 13818299.

16. CW1 further stated that sometime in April 2011 he was called to the Company boardroom where he was informed that his services were no longer needed at the Respondent Company.

17. CW1 stated that at the time of dismissal he had been promoted to Institutional Manager earning a gross salary of Kshs. 90,000/=.

18. On cross-examination, CW1 stated that at the point of appointment the Respondent did not issue him with a written Contract of employment as required by law.

19. On further cross examination CW1 stated that he seeks transport allowance and that he was similarly provided with lunch, fuel and credit allowances all of which amounted to Kshs. 40,000/=.

20. CW1 stated that he was terminated without notice or reason.

21. CW2 (**Bernard Gitau Wairegi, 5th Claimant**) gave evidence on 24th September, 2018. He reiterated the averments in the Memorandum of Claim.

22. CW2 stated that he was employed by the Respondent on 1st July, 1996 and not 1986 as indicated in the Memorandum of Claim. He further stated that he was dismissed on 18th August 2010 and that he was informed of his dismissal verbally by Dr. Otundo (one of the Directors at the Respondent Company) and was not given any notice.

23. CW 2 further stated that the alleged minutes annexed to the Respondent's documents do not bear his signature and that he was never invited for any such meeting prior to his termination.

24. CW2 stated that it was alleged that he was operating a chemist while under the employment of the Respondent which is not true and that he did not at any time steal any medications from the Respondent Company as alleged.

25. CW2 further stated that he has never been arrested and charged for any act of theft at the Respondent Company and no warning letter ever issue to reflect any acts of theft of medication at the Respondent Company.

26. On cross-examination, CW2 stated that he was called to a meeting by the Respondent and informed that he was operating a chemist and as such, his services were terminated on that basis.

27. On further cross-examination CW2 stated that while at the Respondent Company his duties as a storekeeper involved removing and

packing of drugs for customers and was not at any time in charge of any store keys where the drugs were store.

28. He stated that he engages in the business of running a beauty shop and has never at any time run a chemist.

29. He further stated that he worked overtime at no pay and that bank statements can attest to the Kshs. 3,000/- allowances the Respondent used to give him.

30. He stated that he left employment over 8 years ago and as such is not claiming reinstatement any more.

31. CW3 (**Jeremiah Kamau Muraguri, 3rd Claimant**) in evidence stated that he was employed by the Respondent on 31st July 2003 and worked until 30th December, 2007.

32. CW3 stated that on 30th December, 2007 he made an enquiry on pay increment and was informed by Dr. Njoroge verbally that his services were no longer needed. He further stated that he was not invited for any meeting prior to his dismissal and was never given any reason for his dismissal.

33. CW3 further stated that the minutes of the meeting of 8th January, 2008 are not known to him as he was never invited for any such meeting and did not append his signature thereto. Further, that at the time of dismissal he was not issued with a certificate of service and that the one filed by the respondent was not issued to him then.

34. CW3 averred that he earned a monthly salary of Kshs. 21,000/- and urged the Court to allow his Claim as prayed in the Memorandum of Claim.

35. On cross-examination CW3 stated that he did not report to work on January 2008 as his services were terminated on 30th December 2007 by Dr. Njoroge. He further stated that he no longer wishes to pursue the prayer for reinstatement.

36. On further cross-examination, CW3 stated that he was not given any notice before his dismissal.

37. CW4 (**Griphen Jumba Chanzu, 4th Claimant**) stated that he was employed by the Respondent till July, 2010 when he tendered his resignation letter.

38. CW4 further stated that he was not issued with a certificate of service and that what was filed by the Respondent was never issued to him.

39. CW4 urged the Court to allow his Claim as prayed.

40. On cross-examination, CW4 stated that he was employed by the Respondent in June 2001 and was never issued with a written contract of employment.

41. On further cross-examination, CW4 stated that he issued his letter for resignation on 27/7/2010 to the director on the same date.

42. On re-examination, CW4 stated that when he issued his letter of resignation the director asked him to leave immediately and not serve the notice period. He further stated that he prays his claim to be allowed as prayed.

43. CW5 (**Jacqueline Mutethya John, 6th Claimant**) stated that she was employed by the Respondent in June 2002 and was never issued with a letter of appointment.

44. CW5 further testified that she was invited for a meeting where she was informed that Dr. Otundo had directed that she be informed to vacate my office immediately and hand over the Company car keys.

45. CW5 averred that she was not given notice or the opportunity to explain herself before termination of her employment. Further, that at the time of termination she was earning a salary of 49,800/-.

46. It was CW5's evidence that she was not issued with a certificate of service at the time of termination and that she was not informed of any meeting and did not sign the minutes attached thereto.

47. She urged the Court to allow her claim as drawn.

48. On cross-examination, CW5 testified that she had no evidence that she worked overtime and that she went on leave.

49. On further cross-examination, she indicated that she does not wish to pursue the prayer for reinstatement.

50. The Respondent Witness (Dr. John Njoroge, RW1) testified on 24th October 2018. It was his evidence that he owns the Respondent Company.

51. He further testified that the 1st Claimant was not dismissed from employment but rather he absconded duty further that he was earning a

monthly salary of Kshs. 92,000/- but not the allowance of Kshs. 48,000/-.

52. Similarly, the 3rd Claimant was not dismissed but rather he deserted duty when the Respondent closed for Christmas holiday.

53. He further testified that the 4th Claimant gave in his resignation letter and left employment immediately.

54. It was his evidence that the 5th Claimant was dismissed from employment following investigations that unravelled that he was running a pharmacy called stable pharmacy. He further testified having called the 5th Claimant for a verbal meeting but didn't attend.

55. RW1 testified that the 6th Claimant was not dismissed but rather deserted duty on enquiry she informed the office that she had resigned.

56. It was RW1's evidence that none of the Claimants were paid at the point they left employment.

Submissions

57. It is submitted on behalf of the 1st, 3rd, 4th, 5th and 6th Claimants that their termination from employment was wrongful and unlawful as provisions of Section 41 of the Employment Act were not adhered to and that they were not accorded fair hearing. The Claimants relied on the authorities of **Kenya Union of Commercial Food and Allied Workers Versus Meru North Farmers Sacco Limited (2014) eKLR**, **Samsung Electronics East Africa Limited Versus K. M (2017) eKLR** and **CMC Aviation Limited Versus Mohammed Noor (2015) eKLR** for emphasis.

58. Counsel for the Claimants also submitted that there was no valid reason for the termination of the Claimants'. It is further submitted that no procedure was followed and therefore the dismissal was unfair. That as a result of the flawed process of dismissal the 1st, 3rd, 4th, 5th and 6th Claimants are entitled to the prayers set out in the Memorandum of Claim. For emphasis, Counsel on record for the Claimants relied on the provisions of Section 49, 50 and 51 of the Employment Act, 2007 and the case of **Evans Katiezo Aligulah Versus Eldomatt Wholesale and Supermarket Limited (2006) eKLR**.

Respondent's submissions

59. On behalf of the Respondent it is submitted that there were valid reasons for the termination of the 1st, 3rd, 4th, 5th and 6th Claimants and that the Respondent complied with the provisions of Section 41(2) and 43 of the Employment Act, 2007. The Respondent for emphasis relied on the cases of **Kenya Revenue Authority Versus Menginya Salim Murgani (2010) eKLR** and **Charles Oyata Versus Norfolk Hotel (2017) eKLR**.

60. The Respondent further submitted that the Claimants were issued with certificates of service as evidenced by the bundle of documents.

61. That the Claimants are not entitled to the reliefs sought for the reason that the termination for each Claimant was warranted and regular.

62. On payment in lieu of Notice, it is submitted that the 1st and 3rd Claimants absconded from work and without any lawful reason failed to attend work leaving the Respondent with no other alternative but to summarily dismiss them as per the provisions of Section 44(1) of the Employment Act.

63. The 5th Claimant admitted to pilfering goods and opening a competing clinic which was a ground for summary dismissal and the 4th and 6th Claimants left employment voluntarily and are therefore not entitled to payment in lieu of notice.

64. For emphasis, the Respondent relied on the cases of **D.K Njagi Marete Versus Teachers Service Commission- Industrial Cause Number 379 of 2009**, **Industrial Cause Number 611(N) of 2009 Maria Kagai Ligaga Versus Coca Cola East and Central Africa Limited** and **Charles Oyata Versus Norfolk Hotel (2017) eKLR**.

65. I have examined all evidence and submissions of the parties. I note that the Claimants save for the 4th Claimant have indicated that they were dismissed from employment for various reasons. The 5th and 6th Claimants told the Court that they were informed that their services were no longer required.

66. The 4th Claimant resigned voluntarily whereas the 5th Claimant is said to have been dismissed for running a parallel chemist under the name of Stable Chemist.

67. In deciding this case, the issues to determine are as follows:-

1. Whether the 1st, 3rd and 6th Claimants were dismissed or absconded duty.

2. Whether the 5th Claimant was dismissed for valid reasons.

3. Whether the Claimants are entitled to remedies sought.

68. Concerning 1st, 3rd and 6th Claimants, they told the Court that they were summoned by the Respondent and told to leave as their services were no longer required.

69. The Respondent on their part indicate that these claimants absconded duty. There is however, no indication that the abscondee were even served with a (NTSC) Notice to show cause as to why their services should be terminated for absconding duty.

70. The Respondent prays that the Claim be dismissed with costs.

71. In absence of any such communication, I take the 1st, 3rd, and 6th Claimants' contention that they were told to leave on the correct position.

72. As to 5th Claimant, it is indicated that he was dismissed for running a parallel chemist which he denied. That notwithstanding, there is no evidence of the existence of such alternative business being run by 5th Claimant which the Respondent have proved.

73. In any case, there is no indication that the 5th Claimant was taken through any disciplinary process and found culpable. There is no letter inviting 5th Claimant to any disciplinary hearing. It is apparent that the 5th Claimant was condemned unheard and this offends the provisions of Section 41 of Employment Act 2007 which states as follows:-

“(1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

74. In terms of remedies, all Claimants seek payment of their terminal benefits. I find for the Claimants as follows:-

1st Claimant

1. 8 months' salary as compensation for unlawful termination = $92,000 \times 8 = 736,000/=$

2. 1 months' salary in lieu of notice = 92,000/=

3. Issuance of Certificate of Service

TOTAL = 828,000/=

3rd Claimant

1. 8 months' salary as compensation for unlawful termination = $21,000 \times 8 = 168,000/=$

2. 1 months' salary in lieu of notice = 21,000/=

3. Issuance of Certificate of Service

TOTAL = 189,000/=

4th Claimant

1. 1 months' salary in lieu of notice = 37,000/=

2. Issuance of Certificate of Service

TOTAL = 37,000/=

5th Claimant

1. 1 months' salary in lieu of notice = 34,000/=

2. 8 months' salary as compensation for unlawful dismissal = $34,000 \times 8 = 272,000/=$

3. 18 days salary for days worked in August 2010 = 20,400/=

4. Issuance of Certificate of Service

TOTAL = 326,400/=

6th Claimant

1. 1 months' salary in lieu of notice = 45,000/=

2. 8 months' salary as compensation for unlawful dismissal = 8 x 45,000 = 360,000/=

TOTAL = 405,000/=

3. Issuance of Certificate of Service

75. The Claimants are also entitled to costs and interest payable by Respondent with effect from the date of this judgement.

Dated and delivered in open Court this **20th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutai holding brief Ndolo for Claimants – Present

Gathua holding brief Miss Muriranja for Respondent