



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1401 OF 2011

EVANS OCHIENG OLUOCH.....CLAIMANT

VS

NJIMIA PHARMACEUTICALS LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Memorandum of Claim dated 12th August and filed in Court on 17th August 2011 seeks relief for unlawful termination of employment and failure to pay accrued dues. The Respondent filed a Statement of Response on 8th September 2011 and the matter opened for hearing on 10th November 2012 before my brother **Marete J.**

2. By the time the matter came before me on 19th January 2016, the Claimant had closed his case. I therefore heard the defence case and thereafter directed the parties to file written submissions. The Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Beatrice Waiganjo.

The Claimant's Case

3. The Claimant was employed by the Respondent on 17th November 2008 in the position of Medical Representative. At the time of leaving the Respondent's employment on 15th December 2010, the Claimant's salary stood at Kshs. 34,503. On 15th October 2010, the Claimant notified the Respondent that he wished to proceed on annual leave. The Claimant states that upon receiving his leave request, the Respondent terminated his employment verbally.

4. The Claimant's claim is as follows:

- a) A declaration that the termination of his employment was unlawful
- b) Unpaid salary for the month of December 2010.....Kshs.34,503
- c) Service charge for 2 years.....34,503
- d) Pay in lieu of notice.....34,503
- e) 30 days' leave pay.....34,503

12 months' salary in compensation for unlawful termination.....414,036

- a. Certificate of service
- b. Costs plus interest

The Respondent's Case

5. In its Statement of Response filed in Court on 8th September 2011, the Respondent admits having employed the Claimant but denies the claim for unlawful termination. The Respondent states that the Claimant deserted duty on 17th December 2010 after being summoned to a meeting to discuss under performance of his duties. Having deserted duty, the Claimant rendered himself liable to summary dismissal.

6. The Respondent states that the Claimant has declined to hand over and counter claims from him one month's salary in lieu of notice.

Findings and Determination

7. The issues for determination in this case are as follows:

- a. Whether the Claimant deserted duty or was unlawfully terminated;
- b. Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

8. The Claimant states that he was verbally terminated on 17th December 2010 after making a request to go on leave. The Respondent on the other hand states that the Claimant deserted duty after being summoned to a meeting to discuss under performance of his duties. Desertion amounts to gross misconduct and renders an employee liable to summary dismissal. However, like all cases of misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty.

9. On 18th January 2011, the Respondent wrote to the Labour Office in Nairobi as follows:

“Dear Sir/Madam

RE: DESERTATION (SIC) FROM WORK-EVANS OCHIENG I.D NO 13681728

The above refers:-

We wish to inform your good office that the above person has been our employee since Nov. 2008. He absconded duty from 17th Dec 2010 to date.

Attempt to reach him through the cell phone and word of mouth from his manager hasn't yielded much.

We therefore wish to inform your office that he's no longer in our payroll.

Yours faithfully,

For Njimia Pharmaceuticals

(signed)

BEATRICE WAIGANJOH

HUMAN RESOURCE MANAGER”

10. According to this letter, some effort was made to reach the Claimant. However, the Claimant's Manager who is said to have made these efforts was not called as a witness and the Court was therefore unable to assess the efficacy of these efforts. An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserting employee. At the very least, the employer must issue reasonable notice to the employee that termination of employment is being considered.

11. The Respondent's Human Resource Manager, Beatrice Waiganjoh testified that the Respondent had the Claimant's forwarding address. There was therefore no reason why the Respondent failed to issue such a notice to the Claimant. The letter to the Labour Office cannot serve as notice as it was merely reporting the Claimant's separation from the Respondent's employment.

12. Testifying on the events leading to the Claimant's desertion, Waiganjoh told the Court that on 17th December 2010, she had a discussion with the Claimant regarding his poor performance for the preceding six months. A further meeting was to be held the following day because the Claimant's Manager was away.

13. The Court was unable to understand why the Human Resource Manager would initiate such a discussion in the absence of the Claimant's Manager. In the normal scheme of things, it would be the immediate supervisor to initiate a discussion on the performance of an employee under their supervision. The role of the Human Resource Manager is to offer technical and professional advice and guidance.

14. In this case, the hand of the Human Resource Manager was too prominent and the Court formed the opinion that the agenda for the meeting of 17th December 2010 was not to discuss the Claimant's performance but to communicate the termination of his employment. The Court therefore adopts the Claimant's testimony that he was terminated and thereby rejects the Respondent's defence that he deserted duty. From the record, there was no reason advanced for the termination and due procedure was not followed in effecting the termination. The termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation. By this finding the Respondent's Counterclaim fails and is dismissed.

Remedies

15. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one month's salary in lieu of notice. Additionally, I award him salary for days worked in December 2010. The Respondent did not produce leave records to counter the Claimant's claim for leave pay which therefore succeeds and is allowed.

16. The Claimant was a contributing member of the National Social Security Fund(NSSF) and is therefore not entitled to service pay.

17. Cumulatively, I make an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation for unfair termination.....Kshs.207,018
- b) 1 month's salary in lieu of notice.....34,503
- c) Salary for 17 days worked in December 2010 (34,503/30x17).....19,552
- d) Leave pay (34,503/30x21).....24,152

Total.....285,225

18. I further direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

19. The award amount will attract interest at court rates from the date of the award until payment in full.

20. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF MARCH 2016

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JUDGE

Appearance:

Mr. Wachira for the Claimant

Mr. Maina for the Respondent