



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO. 1913 OF 2011

ALEX MUSEMBI MULILI..... CLAIMANT

VERSUS

JACOB NZIOKI KWESI

SIMON IRUNGU KARIUKI

EZEKIEL KIRIMA MUNYAGIA

STEPHEN NDAMBUKI NGUGU

JOINTLY T/A CLINIC LAB AND

PHARMACY/AL-RAHAMED.....RESPONDENT

JUDGEMENT

1. The Claimant's case is set out in the amended memorandum of claim filed on 8th November 2012. The Claimant states that at all material times thereto he was registered as a medical laboratory technician with the Kenya Medical Laboratory Technicians and Technologists Board as Number B00985. A copy of the certificate of registration was produced as exhibit 'AMM1'. From the face of the certificate same was issued on 13th May 2009.

2. The Claimant states that on the 1st July 2008 he was employed by the Respondent in their clinic as a Laboratory Technician to work during the night and subject to probationary period of three (3) months.

3. The Claimant was not issued with a letter of appointment upon completion of probation period but was issued a staff identity card produced as exhibit 'AMM2' inspite of request to be given one.

4. The Claimant states that he agreed orally with the Respondent that he would be paid a monthly salary of Kshs 15,000 and was paid the same from 1st July 2008 until 30th June 2011 before his dismissal. The Claimant was not given a payslip. In addition the Claimant states that the salary was paid less the following statutory deductions;

i. PAYE Kshs 1200

ii. NSSF Kshs 200

iii. NHIF Kshs 300

5. The Claimant signed a voucher for the salary and was not issued with a payslip. That sometimes in June 2011, the Claimant sought a loan from Select Management Services and was asked to provide a payslip for the purpose. The Claimant requested for a payslip and or the voucher he was signing from the Respondent but the Respondent opted to give him a letter of confirmation produced as exhibit 'AMM3'.

6. The letter dated 13th June 2011 confirm that the Claimant was an employee of the Respondent in the position of Medical Laboratory Technician since 1st July 2008 to date and earned a monthly salary of Kshs 18,000. The Respondent requested Select Management Services to accept the letter as a replacement for the payslip.

7. On 1st July 2011, the Claimant was dismissed from employment without notice and without payment in lieu of notice. The dismissal was verbal and no reasons were provided.

8. The Claimant states that the dismissal was unlawful, unfair and malicious and he seeks compensation in respect thereof. The Claimant had served for 3 years and claims;

- i. Refund of NHIF deductions not remitted in the sum of Kshs 10,800
- ii. Refund of NSSF deductions and not remitted in the sum of Kshs 7,200
- iii. One month's salary in lieu of notice in the sum of Kshs 18,000
- iv. Payment in lieu of annual leave (21 days) not taken for 3 years in the sum of Kshs 54,000
- v. Unpaid house allowance calculated at 15% of his salary for 3 years in the sum of Kshs 97,200
- vi. Damages for unlawful and unfair termination.

9. The Claimant relies on the memorandum of claim and all the attachments thereto, oral testimony under oath and written submissions.

Response

10. The Respondent filed a statement of response on 13th December 2011 in which they deny the claim in its entirety and put the Claimant to strict proof. The Respondent called two witness named Jacob Nzioka Kwesi the proprietor of the respondent and Stephen Ndambuki a cashier employed by the Respondent.

11. The Respondent's case is that the Claimant visited the Respondent in July 2008 and introduced himself as a laboratory technician student studying at the Kenya Medical Training Institute. That the Claimant applied for attachment to the clinic on locum basis for the purposes of studying and gaining practical experience.

12. The Claimant was duly attached and it was orally agreed that he would be coming to work at his convenience after classes and was to be paid an allowance calculated on work done. The Respondent deny agreeing to pay a monthly salary and exhibited copies of their cashbook showing entries of amounts paid to the Claimant which amounts varied from time to time.

13. The Respondent further states that the Claimant was not qualified to be employed as a laboratory technician when he requested for attachment since he was a student and was not registered as a laboratory technician by the medical laboratory technicians and technologist's board. The Respondent further states that the Claimant did not at any time prove he was qualified for employment and they considered him to be a student all along.

14. The Respondent added that in the month of February 2009, they realized the Claimant was stealing from the business and warned him but he did not heed the warning and he was asked to stop the attachment in June 2009.

Determination

- i. Was the Claimant an employee of the Respondent or on attachment?
- ii. How was the Claimant remunerated and when was the relationship with the respondent severed?
- iii. Is the Claimant entitled to the reliefs sought?

Issue i & ii

15. Upon a careful consideration of the evidence by the parties, the court has come to the following conclusion of fact;-

16. The Respondent provided a letter dated 13th June 2011 to the Manager, Select Management Services for the purposes of helping the Claimant access a loan. In the letter, the Respondent confirms that the Claimant was its employee in the position of Medical Laboratory Technician since 1st July 2008.

17. The Respondent added that the Claimant earned Kshs 18,000 per month. Clearly the evidence by the Respondent that the Claimant was on locum attachment for the entire period he was with the respondent is patently false. It is also not true that the Claimant separated with the Respondent in July 2009 since the letter was written in June 2011.

18. Furthermore, this letter demonstrates that, contrary to the assertions by the Respondent that the Claimant never received any salary he was indeed paid a monthly salary of Kshs 18,000. Furthermore, it is clear that though the Claimant may have been initially attached as a student and paid allowance in 2008, the Claimant acquired a certificate of registration on 13th May 2009. It is therefore without a doubt that the Claimant had acquired a legal capacity to be employed by the Respondent as a Medical Laboratory Technician.

19. The Claimant has therefore proved on a balance of probabilities that he was qualified to serve in the position he was employed to by the respondent though initially he awaited receipt of the professional certificate from the Ministry of Health. The Claimant was subjected to intense cross examination by counsel for the Respondent and he was candid and consistent in his testimony. The court finds him a credible witness and believes his testimony.

20. This cannot be said of RW1 and RW2 whose testimony was clearly contradictory to the documentary evidence authored by RW1 on 13th June 2011.

21. The Claimant has equally proved on a balance of probability that he was on 1st July 2011 dismissed from employment by the respondent without notice, notice to show cause, disciplinary hearing and without any reason assigned to the summary dismissal. As a result the summary dismissal was unlawful and unfair and the Claimant is entitled to compensation in terms of section 49(1) (c) as read with section 49 (4) of the Employment Act 2007.

22. The Claimant lost career prospects at an early age unfairly. He was not paid any terminal benefits upon dismissal and he did not receive a certificate of service to ease his moving to another job. The Claimant was treated maliciously by not getting any letters of employment nor any payslip and was actually demonized by the Respondent as its employee.

23. The Claimant had served 3 years continuously and no adverse record of employment was produced by the Respondent. To the contrary, the Respondent recommended that he be facilitated by getting a loan

and immediately thereof summarily dismissed him. The Claimant has suffered loss and damage and the court awards him eight (8) months' salary as compensation for the unlawful and unfair dismissal from employment contrary to section 45 of the Employment Act 2007 in the sum of Kshs 144,000.

Terminal Benefits

Notice pay

i. The Claimant has proved that he was summarily dismissed without notice and without payment in lieu of notice. The court having found that the summary dismissal was unlawful and unfair awards the Claimant one month salary in lieu of notice in the sum of Kshs 18,000.

Refund of NHIF and NSSF deductions

ii. The Claimant has also proved on a balance of probability in the absence of any documentary evidence to the contrary that the Respondent deducted NHIF and NSSF from his monthly salary and he did not remit the same in the sum of Kshs 18,000 (10,800 & 7,200 respectively). The court awards the amount to the Claimant accordingly.

Leave not taken

iii. The Claimant has also proved on a balance of probability that he worked for 3 years continuously and was not granted leave. The employment Act 2007 guarantees every permanent employee at least 21 days leave for every completed year of service. The court awards the Claimant Kshs 54,000 in lieu of 63 leave days not taken.

iv. There being no written contract between the parties the Claimant has failed to prove that he was entitled to housing allowance in addition to the monthly salary he received from the respondent. Since the monthly salary paid to the Claimant was above the general minimum wage for the cadre served by the Claimant the claim has not been proved and same is dismissed.

24. In the final analysis, the total award to the Claimant as against the Respondent is as follows;

- i. Kshs 144,000 Compensation
- ii. Kshs 10,800 NHIF refund
- iii. Kshs 7,200 NSSF refund
- iv. Kshs 18,000 in lieu of notice
- v. Kshs 54,000 in lieu of leave

Total award Kshs 234,000.

The award is payable with interest at court rates from date of filing suit till payment in full.

The Respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 18th day of March 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE