



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 856 OF 2015**

**BETWEEN**

**ELIZABETH NDUKU ..... CLAIMANT**

**VERSUS**

**THE MOTHER SUPERIOR MARY IMMACULATE SISTERS ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Nyange Sharia Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant*

*No appearance by the Respondent*

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**JUDGMENT**

1. The Claimant was employed by the Respondent as a Clinical Officer, in a 1 year renewable contract, beginning 10<sup>th</sup> September 2013. She worked up to 1<sup>st</sup> July 2015, when the Respondent terminated her contract, on the ground that her position had become redundant. She earned a salary of Kshs. 26,000 per month. She was not paid her terminal dues. She states she was not paid redundancy dues. She claims termination was unfair, and prays for compensation. She prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 26,000
- b) Annual leave pay for 2014 at Kshs. 26,000.
- c) 14 pro-rata leave days for the year 2015 at Kshs. 12,133.
- d) 5 months' salary for breach of contract at Kshs. 130,000
- e) Severance pay at 12 months' salary at Kshs. 312,000
- f) Compensation for unfair termination at Kshs. 312,000

Total Kshs. 818,133

g) Certificate of Service to issue.

h) Costs

2. There are Affidavits of Service filed by the Claimant, showing the Respondent was served with the Summons, Mention and Hearing Notices. There is no Statement of Response filed, and Respondent did not attend Court at any time. Hearing on 2<sup>nd</sup> December 2016 went ahead in the absence of the Respondent.

3. Elizabeth told the Court she is presently unemployed. She used to treat patients and make referrals at Respondent's Hospital within Majengo, Mombasa. She was not given a written contract. She was not issued with pay slips. Her salary was deposited at Equity Bank, as borne out in the Bank Statements attached to her Claim.

4. She worked for 2 years without going on annual leave. She was issued a letter of termination, dated 1<sup>st</sup> July 2015. She was advised the Respondent did not have funds to continue employing her. She was offered 1 month salary in lieu of notice. The Hospital did not close down. Another Clinical Officer was recruited in her place. The Claimant was not paid her redundancy dues.

5. She explained that there were 5 months left in her contract, at the time it was terminated. She therefore asks to be paid salaries for the remainder of the contract period, among other prayers.

***The Court Finds:-***

6. Although it is suggested by the Claimant that she was not given by the Respondent a reason for termination, it is clearly stated in the letter of termination that the decision was based on lack of funds. The Respondent states it was straining to meet the Claimant's salary. Termination was based on redundancy. The question is whether this was a valid ground; and whether it was fairly executed in accordance with Section 40 of the Employment Act.

7. There is no evidence that the Claimant was issued with a notice of redundancy, in accordance with Section 40 of the Employment Act 2007. The Labour Office was not notified. Section 40 [1] [b] was not observed. There is no indication why the Claimant and not others was selected. She testified another Clinical Officer was employed in her place. Redundancy was not shown to be genuine. The Claimant was not paid severance pay, in accordance with Section 40[1].

8. In the view of the Court termination was unfair. It was not in accordance with Section 40. It was not shown to be grounded on a genuine redundancy, and was not carried out fairly. ***The Claimant merits and is granted the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 312,000. She is allowed the prayer for 1 month salary in lieu of notice, at Kshs. 26,000.***

9. The Claimant was offered pay for unspecified leave days, and notice pay. The termination letter alludes to deposit made with the Ministry of Labour. The actual amount is not stated.

10. There was no offer for severance pay. The Respondent explains correctly, in her letter dated 25<sup>th</sup> September 2015, that severance pay is based on a minimum of 15 days' salary for every completed year of service. The Claimant's prayer for severance pay based on the equivalent of 12 months' salary has no foundation in law.

11. ***The prayer for severance pay is granted at 15 days' salary for 1 complete year of service at Kshs. 15,000.***

12. ***She is granted annual leave pay for the year 2014, based on a minimum of 21 days given under Section 28 of the Employment Act, computed at Kshs. 21,000.***

13. She worked for 6 months, in the year 2015. She was entitled to 10.5 pro-rata annual leave days for 2015. ***She is granted Kshs. 10,500 as pro-rata annual leave pay.***

14. The claim for 5 months' salary, covering the period left in her contract has no merit. She did not offer any services after 1<sup>st</sup> July 2015. She has been compensated for the economic injury, through the award of the equivalent of 12 months' salary in compensation for unfair termination. In allowing the prayer for compensation, the Court has considered the reasonable expectation of the Claimant, as to the length of time for which her employment with the Respondent might have continued, but for the termination, under section 49[4] [f], read together with Section 50 of the Employment Act. The 5 years she expected to continue working have been considered. To allow her the anticipatory salary, would amount to double compensation. The prayer for anticipatory salary or damages for breach of contract, by whichever name called, amounting to Kshs. 130,000 is declined.

***14. The Respondent shall release to the Claimant her Certificate of Service forthwith, as required under Section 51 of the Employment Act.***

***15. As the Respondent has shown little interest in responding to the Claim, it is only fair the Respondent pays the costs of the Claim.*** In sum, it is ORDERED:-

***a) Termination was unfair.***

***b) The Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 312,000; notice pay at Kshs. 26,000; severance pay at Kshs. 15,000; annual leave pay at Kshs. 21,000; and pro-rata annual leave pay at Kshs. 10,500- total Kshs. 384,500.***

***c) Certificate of Service to issue.***

***d) Costs to the Claimant.***

Dated and delivered at Mombasa this 13<sup>th</sup> day of December, 2016.

**James Rika**

**Judge**