



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 256 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> September, 2014)

DR. WILSON MAKONGO MARWA ..... CLAIMANT

**-VERSUS-**

HEMA HOSPITAL ..... RESPONDENT

**JUDGMENT**

The claimant herein Dr. Wilson Makongo Marwa filed his memo of claim on 12.9.2013 through the firm of Oguttu – Mboya & Co. Advocates. The claimant's case is that on 6.1.2006, the respondent herein employed him as a Doctor at the respondent's medical institution at an agreed monthly salary of Kshs 110,000/= only subject to annual increment between 6-10%. The claimant worked for the respondent until 7th May 2013 when the respondent dismissed the claimant from employment. It is the claimant's case that the respondent acted irregularly, illegally and without notice because he dismissed the claimant verbally and without notice thus subjecting him to harsh and inhumane treatment. Further the claimant avers that the respondent subjected him to unfair labour practices and failed to give him a hearing thus abusing and/or ignoring due process.

The claimant therefore prays to this court to order respondent to compensate him as follows:-

**1. 3 months salary in lieu of notice = 155,000 X 3**

**= Ksh 465,000/=**

**2. Severance pay at the rate of 1 months salary for each year worked (7 years) =**  
**155,000 X 7 = Ksh 1,085,000/=**

**3. Compensation for unlawful termination equivalent to 12 months salary = 12 X**  
**155,000 = Ksh 1,860,000/=**

**4. Salary for 7 days in the month of May = Ksh 36,767/=**

**5. A declaration that the dismissal was unlawful and irregular.**

**TOTALS claimed = KSH 3,581,167/=**

**Plus costs and interest.**

The claimant has exhibited his appointment letter dated 6.1.2006, duty roster for the month of December 2010, February & April 2011, October 2012, March, April & May 2013. He also exhibited copies of application for annual leave for the years 2010, 2012 & 2013, a bundle of 37 payslips, treatment/discharge summary from Karen Hospital dated 9.2.2013 and the demand notices in respect of the claim.

The respondents filed their statement of response on 27.9.2013 through the firm of M/s Ombachi & Co. Advocates. It is the respondent's defence that they provided claimant a 3 bedroomed house and paid all his bills. That they further paid him all earned salary and leave earned. They contend that they even granted him leave to travel to South Africa for specialized treatment. They deny they summarily dismissed the claimant but contend that he deserted duty. In respect of leave for 2009, they contend that he proceeded for leave from 16.2.2010 to 29.3.2010.

After hearing the evidence of the parties, the issues for determination are two-fold:-

- 1. Whether respondents unlawfully dismissed the claimant.**
- 2. Whether the claimant is entitled to prayers sought.**

The claimant informed court that he was employed by the respondent on 6.1.2006 and claimant's **App 11** is proof of the same. The claimant worked for claimant from that period to 5.5.2013 when he seems to have been dismissed as per page 18 of claimant's list of documents which is a duty roster and under Dr. Marwa, it is indicated on 5.5.2013, ("dismissed at 2.30 pm"). This is a document authored by the respondent which the respondent could not explain. RW1 told court that he knew that the claimant was on sick leave at this time and they never looked for him.

The respondent had indicated that claimant was on sick leave during this period and they paid him Ksh 190,000/= salary advance to go for treatment. However the claimant told court that they never paid him Ksh 190,000/= for treatment but this was salary arrears which had remained unpaid for some time as indicated in one of his payslips e.g for January 2013 when he was paid Ksh 80,000/= only. Despite the fact that the respondent contends that claimant was on sick leave from May 2013, there is no indication of the same. The duty roster indicates that he was dismissed on 5th May 2013. Despite the contention by respondent that the claimant absconded duty, there is no effort to look for claimant by respondent yet they allege that he was unwell. It is the finding of this court that the respondent verbally dismissed the claimant. The manner of dismissal being verbal was unlawful and unfair and this breaches the provision of law and fair labour practices.

Is the claimant then entitled to prayers sought? Given that the claimant was not given any notice before dismissal, he is entitled to one month's salary in lieu of notice = Ksh155,000/=. The claimant is also entitled to payment of service pay equivalent to 1 month salary for each year worked = 7 X 155,000 = Kshs 1,085,000. On leave payments, the claimant told court that he didn't proceed for leave in 2009. The respondent contend that he proceeded on leave from 16.2.2010 to 29.3.2010 as per their **App 7**. However claimant contends that this was leave for 2010. The claimant's pg 12 of list of documents shows that claimant was on leave from 1st December 2010 to 31st December 2010. So the leave taken in February 2010 to March 2010 could not have been for the same year of 2010. This prayer for leave for 2009 fails on that account.

I find claimant is entitled to 12 months salary as compensation for unlawfully termination = 12 X 155,000 = Ksh 1,860,000/=:, plus salary for days worked in May 2013 = Ksh 36,167/=:.

**TOTALS = KSH 3,136,167/=**

**Plus costs and interest.**

The claimant should also be issued with a certificate of service.

**HELLEN S. WASILWA**

**JUDGE**

**18/9/2014**

**Appearances:-**

Ondego h/b Oguttu for claimant present

Ombachi for respondent absent

CC. Wamache