



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1124 of 2011**

**SETH NAMUNYANYI MAHIGA ..... CLAIMANT**

**-VERSUS-**

**HEALTHY U 2000 LIMITED ..... RESPONDENT**

**JUDGEMENT**

The Claimant filed suit against the Respondent by a Memorandum of Claim dated 8<sup>th</sup> July 2011 in which he alleges wrongful and unlawful termination of his services. He seeks the following orders:-

- a) Pay in lieu of notice Kshs.16,265.00.
- b) Salary for the month of March and April 2011 Kshs.16,265.
- c) 15 days worked every year for 2 years Kshs.32,530
- d) 3 months leave Kshs.48,795.
- e) Overtime from August 2008 to April 2011 at Kshs.447,287.
- f) House Allowance Kshs.78,072.
- g) Damages for unlawful dismissal Kshs.195,490.
- h) Overtime on holidays and Sunday from August 2008 to March 2011 Kshs.146,384.00.
- i) NSSF omittance Kshs.4000.

The Respondent filed its Memorandum of Response on 13<sup>th</sup> December 2011 in which it denies the Claim by the Claimant and avers that the Respondent entered into a contract of employment with the Claimant in October 2008 as a Shelf Attendant at a gross salary of 14,000/=. The Contract was reduced into writing and signed by both parties on 2<sup>nd</sup> November 2009. The contract was terminable by either pay giving notice of 1 month or equivalent pay in lieu.

That the Claimant's employment was terminated on 4<sup>th</sup> April 2011 by letter dated the same day. That the reasons for termination were gross misconduct, poor disciplinary record with numerous warnings and absenteeism and deliberate refusal to perform duties assigned to him.

The Respondent further alleges that the Claimant was notified of the reasons for termination and his representations were considered before final decision to terminate his employment was made.

The case was heard before me on 4<sup>th</sup> December 2012. The Claimant testified on his behalf while the Respondent called as a witness, **MR. STEPHEN AMADALO AMUNYANYI**, the Respondents Human Resources Manager.

The Claimant testified that he was employed on 2<sup>nd</sup> August 2008 as a Health Advisor at a salary of Shs.16,265 and worked until 30<sup>th</sup> April 2011. That on 31<sup>st</sup> March 2011 he fell sick while at work in Nakumatt Karen Branch. He called his immediate Manager who gave him permission to seek treatment and asked him to inform the Manager of Nakumatt. He testified that he submitted the sick sheet to the HR Manager and did not retain copies. He reported back to work on 2<sup>nd</sup> April and continued with his work until 30<sup>th</sup> April when he was called by the Human Resources Officer who asked him to report to her office on Mombasa road. When he reported he was informed by the Human Resources Manager that the company was undergoing restructuring and that the Claimant was one of the people to be affected. The Human Resources Manager then gave him a letter dated 4<sup>th</sup> April 2011. Refer to Claimants Appendix (ii). When he asked her to explain why the letter was backdated she asked him to sign then he was chased away. He seeks payment of notice, severance pay, unpaid leave, salary for March and April, overtime and holiday pay.

The Respondents Witness **STEPHEN M. AMADALOAMUNYA** the Human Resources Manager testified that he was employed by the Respondent in July 2012 and was a consultant for the Respondent from May 2009 until July 2012. He testified that according to records the Claimant was employed in October 2008 at a salary of Shs.14,000. On 31<sup>st</sup> March 2011 the Claimant left work on the grounds that he was unwell. When he reported back he did not submit any sick sheet. When he came back he was summarily dismissed. He testified that the Claimants letter of termination attached as Claimants Appendix (11) is not genuine, that there was no restructuring, the letterhead was wrong, the language was not of the immediate former Human Resources Officer and was not signed.

He testified that the Claimant went on leave in 2010 as per leave application form (Respondent's Appendix 2), that the Claimant was not entitled to severance pay since he was summarily dismissed. He also testified that the Claimant's salary was inclusive of house allowance and he is therefore not entitled to payment of house allowance.

I have considered the pleadings, the oral evidence and the submissions by the parties. In my opinion the issues in dispute are the following:-

- 1) Whether the Claimant was employed on 2<sup>nd</sup> August or October 2012.
- 2) Whether the Claimant's salary was gross or basic.
- 3) Whether the Claimant was dismissed summarily or was terminated on grounds of restructuring.
4. Whether the Claimant is entitled to the reliefs sought.

**(1) Claimants date of Employment.**

The Claimant testified that he was employed on 2<sup>nd</sup> August 2008 as health advisor while the respondent's position is that the Claimant was employed from October 2008 as Shelf Attendant.

While testifying in Court the RW1 stated that the position of health advisor was introduced in August 2010. However, in payslips for the Claimant annexed as Respondent's Appendix 3, the Claimant is referred to as health advisor in payslips for June, July and August 2010.

The witness did not state if and when the Claimant's position was changed from Shelf Attendant

to Health advisor. Again in the letter of appointment attached to Respondent's reply to Memorandum of Claim, the date of appointment is entered as 'Oct' '08' meaning October 2008. It is inconceivable that a letter of appointment would refer to a month without referring to the actual date of employment.

For these reasons I believe the Claimants letter is genuine while it is the Respondent's letter that is not genuine.

I therefore find that the Claimant was employed on 2<sup>nd</sup> August 2008 as a Health Advisor.

## **2. Whether the Claimants salary was gross or basic.**

The payslips attached to Respondent's Memorandum of Response clearly separate the basic salary from the house allowance. I therefore find that the Claimant's salary was inclusive of house allowance.

I must point out here that the parties seem to be using the word "gross salary" loosely to mean basic salary, and "Gross salary" means total payments in a payslip which would include payments other than basic salary and house allowance (which is consolidated salary), that is basic salary consolidated with house allowance.

As in the case of the letter of appointment, the Claimant's letter of termination (**Claimants Appendix II**) is different from the Respondents.

### **(Respondents Appendix 12)**

It is not possible from the evidence on record to tell which of the 2 letters is genuine. More importantly however is that both letters would constitute unfair termination for the reason that both Claimant's and Respondent's versions of termination letters do not comply with the requirements of the Employment Act.

The Claimants version would amount to redundancy and does not comply with the requirements of Section 40 of the Employment Act.

The Respondents letter which is a summary dismissal also does not comply with Section 41 of the Employment Act which requires that the employee be heard before a decision is made to summarily dismiss him.

I will say no more about the conflicting letters.

## **4. Whether the Claimant is entitled to the reliefs sought.**

The Claimant has prayed for the following:-

### **a) Pay in lieu of notice**

Having found that the Claimant's termination was unfair, he is entitled to 1 months salary in lieu of notice as provided in Section 49(1)(a) of the Employment Act.

I therefore award him Shs.16,265 being 1 months' salary in lieu of notice.

### **b) Salary for the month of March and April 2011.**

The Respondent's Appendix 8, 10 and 12 show that the Claimant was not paid his final dues. The Respondent's have not produced any proof of payment of March and April salary to the Claimant.

I therefore find that the Claimant is entitled to salary for March and April 2011 and award him the

sum of Shs.32,530 accordingly.

**c) 15 days worked every year.**

Claimant did not submit any evidence or explain why he is entitled to 15 days every year.

I find that the Claim has not been proved and dismiss the same.

**d) 3 months leave**

The Claimant was in employment from August 2008 to April 2011. This is confirmed by my finding on issue No.1 above and the Respondents Appendix 10 which is a letter to the Labour Officer confirming that the Claimant was in employment up-to 30<sup>th</sup> April 2011. At 21 days per year or 1.75 days per month as provided in Section 28 of the Employment Act and in the Claimant's letter of Appointment, the claimant was entitled to a total of 57.75 days leave. Having taken 21 days as confirmed by himself and the Respondent in their testimonies, he is entitled to the balance of 36.75 days leave which translates to Kshs.19,924.63 which I accordingly award him.

**e) Overtime**

The Claimant has prayed for overtime of Shs.447,287. The Respondent denied that the Claimant worked overtime.

According to the Regulation of Wages and Conditions of Employment (General) Order, the maximum working hours per week is 52. The Respondent confirmed that the Claimant worked from 6.30 a.m. to 6.30 p.m. with 1 hours lunch break. That translates to 11 hours per day. Assuming that he was taking 1 day off as provided by law, he worked for 66 hours per week which translates to overtime of 14 hours every week. Having worked for 33 months which translates to 2.75 years at 52 weeks per year, he worked for 143 weeks. At 14 hours per week, this translates to 2002 hours. Overtime is paid for at the rate of 1.5 times the normal rate. His daily rate of pay based on the formular provided at Order 6 of the Regulation of Wages and Conditions of Employment (General) Order would be salary divided by two-hundred-and-twenty-fifth that is,  $72.29 \times 2002 \times 1.5 = 217,083.53$ .

I award him Kshs.217,083.53 on account of overtime.

**f) House Allowance**

I have already found herein above that the Claimant was paid a consolidated salary that is, the salary was inclusive of house allowance.

He is therefore not entitled to house allowance and the claim is dismissed.

**g) Damages for unlawful dismissal**

I have already found above that the Claimant was unfairly terminated. He is therefore entitled to compensation for unfair termination.

Having worked for 33 months, it would be excessive to grant him maximum compensation of 12 months' salary. In my opinion, 3 months' salary would be adequate compensation.

I therefore award him Shs.48,795 as compensation being 3 months' salary.

**h) Overtime on holidays and Sundays from August 2008 to March 2011.**

The Claimant has prayed for Shs.146, 384 being overtime for rest days and public holidays for the period he was in employment. The Claimant claims 137 days.

The respondent did not deny that the Claimant worked on rest days and public holidays. I however note that the duty roster shows that the Claimant took 1 off day every week.

He however did not take public holidays. The total public holidays for the period he worked are as follows:-

From August – December 2008	-	4 days
2009	-	11 days
2010	-	11 days
Up-to March 2011	-	1 day
<b>TOTAL:-</b>		<b>27 days</b>

At the rate of 12 hours per day, this translates to 324 hours. At double rate, this works out at 72.29x324x246843.92.

I award him Kshs.46,843.92 as overtime on public holidays.

**(1) NSSF Remittance**

NSSF underpayments can by law only be claimed by NSSF itself. The Claimant is advised to pursue the Claim through NSSF.

The claim is therefore dismissed.

In summary the Claimant is awarded the following:-

- a) ***Pay in lieu of notice Shs.16,265.***
- b) ***Salary for March/April 2011 Shs.32,530.***
- c) ***15 days worked every year - dismissed.***
- d) ***Annual leave shs.19,924.63.***
- e) ***Normal Overtime Shs.217,083.53.***
- f) ***House allowance – dismissed.***
- g) ***Damages for unlawful dismissal – Shs.48,795.***
- h) ***Overtime on public holidays – Shs.46,843.92 holidays.***
- i) ***NSSF – dismissed.***

**TOTAL :- Kshs.381,442.08**

The Respondent will also pay Claimants costs.

Orders accordingly.

Read in open Court and signed on this 25<sup>th</sup> day of April 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**

**Seth Namunyanyi Mahiga**

In the presence of:- \_\_\_\_\_ Claimant

**Njoroge**

\_\_\_\_\_ for the Respondent