



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1064 OF 2012

PETER OKUMU OLOO..... CLAIMANT

VERSUS

SIMBA PHARMACEUTICALS LTD..... RESPONDENT

JUDGMENT

The Claim herein commenced by Claimant's Statement of Claim dated 3rd May 2012 and filed in court on 21st June 2012. The Claimant alleges that the Respondent terminated his employment without adhering to laid down legal procedures, that the termination was unlawful, wrongful, utterly unfair and inhumane. He prays for the following orders;

- a. An order compelling the Respondent to issue the Claimant with a clearance certificate;
- b. 1 month salary in lieu of notice;
- c. Salary for 18 days worked;
- d. Service pay;
- e. Damages for unlawful termination;
- f. Costs of the claim.

The Respondent filed its defence on 30th July 2012. The Respondent denies the allegations in the Statement of claim and prays that the Claim be dismissed with costs.

The parties were heard on 30th October 2012 and 19th March 2013. The Claimant testified on his behalf and the Respondent called JOHN ONYANGO AWUOR, its Country Manager who testified on its behalf.

The Claimant testified that he is currently working with Mc Loyds Pharmaceuticals. He was employed by the Respondent Simba Pharmaceuticals Limited on 3rd January 2011. He signed an employment contract. He was a medical representative. His job entailed generating prescriptions from doctors by promoting various products of the company. This involved talking to doctors about the company's brands. He was also to do prescription audits to find out which doctors were prescribing the Company's products, booking orders and carrying out continuous medical education on behalf of the Company to increase volume of sales. He was posted to Eldoret where he worked for 6 months from 3rd January to 11th July 2011. He was thereafter relocated to Headquarters in Nairobi where he worked until he was dismissed on 18th February 2012. He did not know the reasons why he was dismissed. The letter of dismissal was given to him on 20th February 2012 and refers to his work performance. His work performance in Eldoret was good. He worked with new products and was able to penetrate the market. His work performance in Nairobi was also good as evidenced by the sales summary for Claimant and other sales representatives attached to the Statement of Claim from page 13 to 17 of his bundle of

documents. His performance was better than other sales representatives. The Claimant also referred to summary of client's products and feed back up to 17th February 2012, and summary of his weekly planner at pages 11,44,45 and 46 of his bundle of documents.

His claim is for salary up to 20th February 2012 which was not paid. He was told by the accountant that he would not be paid until customers he had introduced who owed the company had paid up. That it was the duty of the accountant and credit control to collect outstanding debts. He has also not been issued a certificate of service.

In the week before his dismissal he had a problem. His wife needed medical attention. He was granted permission to travel to Kisii but while in Kisii was called to travel back to Nairobi. He returned to Nairobi and went to field work. He asked for paternity leave which was refused. In his opinion this was the reason for his dismissal as the Country Manager was not happy about him asking for paternity leave.

The Claimant testified that on 16th February at 4.30 pm the Manager called the Claimant and asked him about an order from Siani. He was in Eastleigh. He asked the manager to allow him to call later when at a place where he could read what he had booked. Instead the manager ordered him to go back to the office in Westlands which he did.

He met with the Manager at around 5.30 pm. The Manager told him he was not performing. That the Manager had called the doctor in Sinai and made more booking. The Manager told the Claimant he was not going to entertain such performance in future.

The office used to have meetings on Saturdays from 7 am to noon. On 18th February the Claimant's group was the first to be evaluated. After discussing with the Manager and making his contributions the Manager asked the Claimant for his planner for that week and the following week. The Manager asked the Claimant why he did not write anything on the weekly summary. The Claimant replied that for most of the week they had discussed one on one and he did not see the need of writing the market report. The Manager then told the Claimant "***I will sack you***", took the weekly planner and threw it in the dustbin.

The Claimant testified that he was claiming payment for 18 days worked, 1 months salary in lieu of notice and damages for unlawful termination. He also seeks costs of the suit.

Under cross-examination the Claimant stated that his performance was assessed in December 2012 and the Manager was satisfied with his performance that he has never been warned or dismissed before, and that on 17th February 2012 his summary was incomplete, that Appendix SPL1 of Defence is a statement for Naivasha and he never worked in Naivasha.

RW1 for the Respondent testified that he was the Respondent's Country Manager and his job included recruitment, training, orientation in the field, supervision and doing sales analysis for the company. He also gave projections for overall growth of the Company and did product launches. He recruited the Claimant whose job was to promote pharmaceutical products to doctors and pharmacies to chose the Company's products and to market to companies which buy pharmaceutical products. The Claimant was a sales representative and was supposed to have an advance planner for the week indicating doctors and pharmacies to visit and the sales. At the end of the week the sales representative was supposed to write a report. The Claimant's performance was average. He had a target every month and there is no month when he achieved his target. Sales reviews were done on Saturdays.

A day or 2 before the Claimant was dismissed he had sent the Claimant to pick an order in Ongata Rongai. The Claimant informed him that there was no order from the client. When he called the doctor, the doctor said the Claimant had not been to see him. The doctor gave him an order on phone. There were other instances of forgery by the Claimant.

On Saturday 18th February 2012 he told the Claimant he was going to dismiss him. He had given the Claimant verbal warning. That the Claimant forged documents, had an unwarranted attitude and

numerous warnings.

Under cross examination RW1 stated as follows; that the Claimant was recruited in January 2011, was on probation for 3 months, was appraised in December 2011, that Claimant had a target of Shs.700,000/= a month, that the Claimant was never warned in writing and the verbal warnings are not documented.

That the dismissal letter does not mention forgery, that there is a department that deals with debt collection and Claimant was not in that department, that part of the reason for dismissal of Claimant is that he collected a cheque from one of the clients which bounced. He stated he was not aware Claimant applied for paternity leave and that Claimant was not dismissed because of paternity leave.

I have considered the pleadings, the evidence on record, the testimonies of the witnesses and the written submissions by counsel for both parties. The issues for consideration are whether the Claimant was unfairly terminated by the Respondent and whether he is entitled to the prayers sought.

On the first issue, whether or not the dismissal of the Claimant was unfair, the letter of dismissal reads as follows;

Peter Oloo

RE: SUMMARY DISMISSAL

After evaluating your work performance, attitude and other key results, you are hereby dismissed with immediate effect.

You are hence asked to submit any material you may be owing the company in order to facilitate your clearance.

I wish you best of luck in your future endeavors.

Yours faithfully

Simba Pharmaceuticals Ltd

(signed)

John Awuor

Country Manager.

Signed

Peter Oloo

The letter does not give the reasons for dismissal. It does not state that the Claimant was found guilty of any wrong doing. It does not state the result of the evaluation. The dismissal does not comply with sections 41,43 and 45 of the Employment Act 2007. The Claimant was never informed of the reasons for his termination nor was he given a hearing. The procedure used by the Respondent would not qualify for fair procedure.

The Claimant in his testimony stated that the reason for his dismissal was his request to go on paternity leave. I agree with the Respondent's submission that the Claimant failed to tender any evidence in support of the allegation in the form of a letter requesting for paternity leave or documentation to support the fact that his wife had given birth.

I also find the allegations of forgery against the Claimant not proved by the Respondent and not capable of being a basis for dismissal of the Claimant. I find the allegations of collecting a bounced cheque as a reason for dismissal to be ridiculous. The Claimant cannot be held responsible for a 3rd party's bounced

cheque and cannot be penalized for that. The alleged cheque is dated July 2011 and could not be a basis of dismissal in July 2012.

The Respondent further alleges non performance as one of the grounds of summary dismissal of the Claimant. Non performance can never be a ground for summary dismissal. It can only be a ground for termination. The grounds for summary dismissal are those provided for under section 44(4) and which amount to gross misconduct. In any event the Respondent did not produce any evidence to prove poor performance by the Claimant or any warning on poor performance.

I find that the dismissal was unfair in both substance and procedure.

I now look at the remedies sought by the Claimant.

a. An order compelling the Respondent to issue the Claimant with a clearance certificate.

There is no provision in law that requires an employer to issue a clearance certificate. I believe that the Claimant intended to pray for Certificate of Service which is provided for under section 51 of the Employment Act and is a mandatory requirement for any employee who has served for a minimum of 4 weeks.

I direct that the Respondent issues a Certificate of Service to the Claimant as provided by Law.

b. 1 months Salary in lieu of Notice.

Having found the Claimant's termination of employment to be unfair, he is entitled to 1 months salary in lieu of notice in terms of section 49 (1) (a) of the Employment Act. His contract of service provides for notice of 1 month.

I therefore award the Claimant Kshs.28,000/= being 1 month's salary in lieu of notice.

c. Salary for 18 days worked

The Respondent has admitted that it has not paid the Claimant for 18 days worked before his dismissal.

The condition that the Claimant collects outstanding debts is unreasonable as he cannot collect debts for the company when he is no longer an employee, nor was it his responsibility to collect debts. According to the evidence of RW1, there is a department that deals with debt collection.

I award the Claimant the sum of Kshs.16,800 being 18 days salary for days worked in February 2012.

d. Service Pay

The Claimant prayed for service pay. The Respondent has not specifically denied owing the same but has demanded that the Claimant should collect outstanding debts generated by him before being paid.

Service pay is provided for in section 35(5) as read together with section 35(6) of the Employment Act and has been set by precedent at 15 days salary per year worked. Having worked for only 1 year the Claimant is entitled to service pay of shs.14,000/= which I accordingly award him.

e. Damages for unlawful termination.

Having found that the Claimant was unfairly terminated, he is entitled to compensation as provided in section 49(1) (c) of the Employment Act.

Taking into account the Claimants length of service and the manner in which he was dismissed I award

him 2 months salary as compensation in the sum of Kshs.56,000/=.

f. **Costs**

Having been successful in his Claim I award the Claimant costs of the case.

In summary therefore, I enter Judgment for the Claimant against the Respondent as follows;

1. Certificate of service
2. Kshs.89,600/=
3. Costs.

Orders accordingly.

Read in open Court this 18th day of September 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ibrahim Onyatta _____ for Claimants

Musyoka _____ for Respondent