



**Muthoni & 2 others v Ngalawa Kenya Limited (Employment and Labour Relations Cause 164 of 2016) [2023] KEELRC 2077 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2077 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 164 OF 2016**

**MN NDUMA, J  
AUGUST 24, 2023**

**BETWEEN**

**EMILY MBITHE MUTHONI ..... 1<sup>ST</sup> CLAIMANT  
DANIEL KYUMBO WAMBUA ..... 2<sup>ND</sup> CLAIMANT  
MARY NDANU ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**NGALAWA KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The three claimants filed suit on February 8, 2016. They were former employees of the respondent. The claimants were engaged in sale of Airtel, Airtime vouchers. They all alleged that they were not given a written contract and that they were also verbally terminated from employment by their employer without any notice, notice to show cause or any valid reason given. C W 1, Emily Mbithe Muthoni and C W 2 Daniel Kyumbo Wambua testified in the matter. C W 1 stated that she was employed on June 16, 2011 and her work was to account for stock and banking. That she was paid Kshs 15,000 per month and was not paid house allowance. C W 1 said she was not given any reason for the termination but the termination followed a Court attendance where her statement differed with that of the Director Catherine. That she was sacked verbally without a chance to explain herself. That the termination took place on March 6, 2015. That she reported to work from 7 a.m up to 7 p.m. except Saturdays when they reported to work at 7 am upto 1 p.m. That they were not registered with National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) and were not granted leave. That they did not abscond work but were verbally terminated from employment by Patrick, Koki Wambua and were not given Certificate of Service.
2. C.W.2 Daniel Wambua stated that he was employed on October 1, 2013 and worked in sales and marketing. That he was paid Kshs.8,500. That he had no written contract. That his employment was



- verbally terminated on March 5, 2015. That his work with Mary Ndanu was to sell Air time at Athi River, collect money and return to the shop. That at the time they were sacked they had requested for a salary increment and to be registered with NSSF and NHIF. That they had reported the employer to NHIF office for failure to register them. That he was not given any reason for the termination. That they were sent home on the same day, not given any reason for it and were not recalled back. That they were not paid house allowance and did not go on annual leave for the entire period they worked for the respondent. That they worked from Monday to Saturday from 6.30 a.m. to 6 p.m in the evening. That they worked overtime on Sundays but were not paid for it. That they only got leave during Christmas holiday in December.
3. Under cross-examination, C.W.1 and C.W.2 denied that they absconded work. C.W.2 denied that he left to open his Airtime shop which he admitted was now running. C.W.1 and C.W.2 said they had no payslip and were in paid cash. C.W.1 and C.W.2 denied that their pay included house allowance. C.W.2 said that Koki sent them home and did not give them letter of termination.
  4. The claimants prays for payment of:-
    - a. Gratuity
    - b. Salary in lieu of three months' notice.
    - c. Compensation for unlawful termination and
    - d. To be issued with Certificate of Service.
    - e. Costs of the suit.
  5. R W 1 Catherine Koki Wambua testified that she was a director of the respondent situated at Athi River. That her business was to sell Airtel Airtime vouchers. That the shop opened at 8.00 a.m. and closed at 1 p.m. upon conciliation of daily sales of Airtime. That C.W.2 was a Sales person in the field and would report at 7am and return at 12 a.m. That the 3<sup>rd</sup> claimant Mary Ndanu worked in the same role as C.W.2. That upon return to the office, they would reconcile the sales, remit the money and go home. She denied that the claimants worked from 7 a.m. to 6 p.m. as alleged. That they were four (4) employees in total. That C.W.1 was paid Kshs.15,000 and others were paid Kshs.8,500 per month which included house allowance. That the claimants went on annual leave. That she had enrolled them with NSSF though she did not have the records before Court. That claimants were not terminated from employment but they all absconded from work on the same date, in February, 2015. That they were all paid cash on the 5<sup>th</sup> day of every month. That they did not sign any voucher and had no payslip. That R.W.1 did not give them Certificate of Service because they all absconded and only met them in Court. That the suit has no merit and it be dismissed.

## **Determination**

6. The parties filed written submissions which the Court has carefully considered together with the testimony by C.W.1 and C.W.2 adduced on behalf of the three claimants and by R.W.1, the employer. The claimants say that their employment was terminated verbally on May 05, 2015 without notice, notice to show cause, any reason or chance to explain themselves. That the employment was verbal and the termination was verbal. That they were not registered with NSSF and NHIF and were never granted annual leave. That they were not paid in lieu of notice and did not receive Certificate of Service. C.W.2 said that the claimants had demanded salary raise and to be registered with NSSF and NHIF and he suspected that to be the reason for the sudden termination.



7. C.W.1 on the other had suspected that her giving testimony before Court a day prior to the termination which contradicted that of R.W.1 led to her termination. R.W.1 simply denied that she terminated the employment of the claimants stating that they all did not turn up to work one morning and she did not see them again until they met in Court.
8. In terms of Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, read with Section 47(5) of the Employment Act, 2007, the employee has an obligation to demonstrate that their employment was terminated and that it was wrongly terminated. The employer on the other hand is obligated under Section 43(1) and (2) read with 47(5) of the Employment Act, to not only demonstrate that it had a valid reason to terminate the employment of the employee or that it did not terminate their employment at all.
9. The nature and terms and conditions of service of the claimants are not in dispute except whether they went on leave; were registered with NSSF and NHIF and the time of knocking out from work from Monday to Saturday. The evidence given by C.W.1 and C.W.2 vis a vis that by that given by R.W.1 is mutually destructive. The truth of the matter is solely hinged on credibility of the witness and whether there is corroboration of the versions told.
10. In employment matters, the employer has a statutory obligation to grant employee, a written contract, keep records of their payment; leave days taken and records of statutory deductions. R.W.1 did not produce any of the records and the claimants testified that they had no written contract of employment; were not given any payslips nor did they sign any payment vouchers. That they did not clock in and out nor were records of their reporting and leaving times kept by the employer. Furthermore, no letters of termination were provided to the claimants in terms of Section 74(1) of the Employment Act, the Court is entitled to make a presumption where an employer does not produce records that if the same were available they would not be supportive of the narrative told by the employer.
11. In the present case, the testimony by C.W.1 and that by C.W.2 is more credible than that told by R.W.1 with regard to the manner and reason of separation. The Court believes and finds that R.W.1 verbally terminated the employment of the three claimants without notice, notice to show cause, any reason given or opportunity to be heard. The Court also believes that the termination was verbal and that is why no certificate of service or any letter of termination was availed before Court by either party. The mode of operation of R.W.1 was not to keep any records at all including payment records and this renders more credibility to the testimony by C.W.1 and C.W.2.
12. Accordingly, the Court finds that the respondent terminated the employment of the claimants without notice and or any reason given in violation of Sections 36, 41, 43, and 45 of the Employment Act, 2007.
13. The Court also finds that the claimants were not granted annual leave; were not paid in lieu of one month notice and were not given Certificate of Service and the Court grants them this relief as sought in the Statement of Claim.
14. C.W.1 was paid Kshs.15,000 per month and is granted one-month salary lieu of notice in the sum of Kshs.15,000. The 2<sup>nd</sup> and 3<sup>rd</sup> claimants are granted Kshs.8,500 each in lieu of notice.
15. The Court finds that the claimants were not registered with NSSF and are entitled to gratuity in terms of Section 35(5) of the Employment Act, calculated at 15 days salary for each completed year of service. In this respect, C.W.1 worked from June 16, 2011 to March 6, 2015 a period of three (3) years and 9 months and is entitled to payment of gratuity for three years as follows  $(15,000 \times \frac{1}{2} \times 3) = 22,500$ .



16. C.W.2 worked from October 1, 2013 to March 6, 2015, a period of one year and 7 months and is to be paid gratuity for one year completed service in the sum of Kshs.4,250. He is entitled to Kshs.8,500 in lieu of notice.
17. The Court is satisfied that the claimants were paid consolidated salary as per the testimony of R.W.1 and were not entitled to payment of house allowance over and above what they received. This claim is dismissed.
18. The 3<sup>rd</sup> claimant Mary Ndanu was paid Kshs.8,500 per month and had served for a period of 4 years. She is entitled to payment of Kshs.8,500 in lieu of notice.
19. Furthermore, Mary is entitled to Gratuity calculated as follows (8,500 X  $\frac{1}{2}$  x 4) Kshs.15,000.
20. The claims for overtime have not been proved to the extent C.W.1 and C.W.2 gave contradictory testimony in this respect. The Court is satisfied that the respondent's shop closed at 1 p.m. upon conciliation of daily collection and so the claimants did not work any overtime. The claim for transport allowance was also not proved.

### Compensation

21. The claimants had their employment terminated on the same day and for similar reasons not given. The three were not given any notice, notice to show cause and no hearing at all. The claimants suffered loss and damage and did not contribute to the sudden termination. The claimants were not given Certificate of Service to help them get alternative employment quickly. The claimants were not compensated for their loss. The three had served the respondent for about two (2) one (1) and four (4) years respectively. The Court has considered the case of *Joseph Nzioka -vs- Smart Coating Limited* [2017] eKLR where the Court granted equivalent of six (6) months compensation and the case of *Simon Mbiti Mbane -vs- Inter Security Services Limited* [2018] eKLR where the Court granted seven (7) months compensation and the circumstances of this case above and has awarded compensation as follows:-
  - a. 1<sup>st</sup> claimant the equivalent of 4 months salary in compensation in the sum of Kshs 60,000.
  - b. 2<sup>nd</sup> claimant the equivalent of two (2) months salary in compensation in the sum of Kshs 15,000 and
  - c. 3<sup>rd</sup> claimant the equivalent of five (5) months salary in compensation in the sum of Kshs 45,000.
22. In the final analysis judgment is entered in favour of the claimants against the respondent as follows:-
  - A. Emily Muthoni
    - (i) Kshs 15,000 in lieu of notice.
    - (ii) Kshs 22,500 gratuity.
    - (iii) Kshs 45,000 in lieu of untaken leave and
    - (iv) Kshs 60,000 in compensation.Total: Kshs 142,500.
  - B. Daniel Wambua
    - i) Kshs 8,500 in lieu of notice.



- (ii) Kshs 8,500 in lieu of leave.
- (iii) Kshs 4,250 gratuity and
- (iv) Kshs 15,000 in compensation.

Total: Kshs 36,250.00.

C. Mary Ndanu

- (i) Kshs 8,500 in lieu of notice.
- (ii) Kshs 34,000 in lieu of leave days not taken.
- (iii) Kshs 17,000 gratuity and
- (iv) Kshs 42,500 in compensation

Total: Kshs 102,000

D. Interest at Court rates from date of judgment till payment in full.

E. Costs of the suit.

**Dated and delivered at Nairobi (virtually) this 24<sup>th</sup> day of August, 2023.**

**Mathews N. Nduma**

**Judge**

