Mukoko & another v Mwenda (Cause 1619 of 2018)
[2023] KEELRC 2900 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2900 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1619 OF 2018

NZIOKI WA MAKAU, J

NOVEMBER 15, 2023

BETWEEN

PIUS MUKOKO .... 1ST CLAIMANT

MIRIAM MUDEIZI .... 2ND CLAIMANT

AND

AGNES KARWITHA MWENDA .... RESPONDENT

JUDGMENT

1. The Claimants instituted this suit against the Respondent for wrongful underpayment and seeking payment of their lawful terminal dues, maximum compensation, exemplary damages for wrongful dismissal, and costs of the suit with interest thereon. They averred that the Respondent offered them employment in different capacities on various dates between 1997 and 2010 and that they served her with diligence and honesty throughout their employment. That however on or about the year 2016, the Respondent, without notice, terminated their employment under unclear circumstances and thereafter maliciously and without justification failed to pay their lawful dues and benefits. It was the Claimants' averment that they demanded for their lawful dues through the Union and the Respondent only effected partial payment to them. They particularised the Respondent's malicious acts to include the failure to issue them with their Certificates of Service, give them any hearing before the termination and give them any reason, valid or otherwise, for the termination. They further averred that as a result of the aforementioned matters, they had suffered great financial loss and damages and thus sought service pay for years worked, one month's notice pay, annual leave, public holidays, and off duties as particularised for each of them in the Statement of Claim.

2. In response, the Respondent filed a Reply to Statement of Claim averring that only the 1st Claimant was her employee, serving as a Watchman. That she never engaged as an employee the 2nd Claimant, who claimed to be the 1st Claimant's wife but that she would engage her as a casual labourer on a need basis. In this regard, the 2nd Claimant would be engaged to clean staircases and other common

areas in the block of Apartments the Respondent managed and that the 2nd Claimant would promptly be paid upon completion of any tasks assigned. The Respondent further averred that on numerous occasions she received an array of complaints against the 1st Claimant, including that he was rude and disrespectful to the tenants of the Apartments she managed. Moreover, that the 1st Claimant was allowing non-residents to park in the said apartments' parking for a fee, thereby causing the Apartments' tenants to park their cars on the road and that together with the 2nd Claimant, sold and misused water meant for use by the tenants. It was the Respondent's averment that tenants also reported several theft cases that happened when the 1st Claimant should have been on duty keeping watch. According to her, the 1st Claimant was therefore lawfully terminated as she had also verbally warned both Claimants to rectify their conduct but they neglected the said warnings and continued to act in gross misconduct.

3. The Respondent denied that she only effected partial payment to the Claimants, averring that she settled the full amount of Kshs. 40,000/- to the 1st Claimant and Kshs. 10,000/- to the 2nd Claimant as negotiated by the Union. That the said negotiated payment was ex gratia as no dues were owed to the Claimants at the point of termination of employment. She further denied that the Claimants suffered any loss and damage as alleged and particularised. It was the Respondent's case that the Claimants' claim was in bad faith, incompetent, vexatious, an abuse of court process, without any basis and should be struck out. She asserted that she was not served with demand and notice of intention to sue and prayed for the suit to be dismissed with costs.

4. In her Witness Statement dated 6th August 2019, the Respondent stated that she employed the 1st Claimant in or about the year 1997 as a Watchman in the Apartments located in Jamhuri Phase II Estate in Nairobi. That in addition to his monthly salary, the 1st Claimant enjoyed free housing provided at the Apartments as well as payment of utility bills such as water and electricity and that he resided with the 2nd Claimant in the said provided housing. She asserted that after the Claimants' gross misconduct, she issued the 1st Claimant a three-months verbal notice of termination of employment as well as a notice to vacate the premises. That on her own volition, she extended the said notices by a further two months following pleas from the 1st Claimant and even continued to pay him his full salary during the period of the notices. However, the Claimants refused to vacate the premises upon lapse of the extended notices and she had to evict them with the intervention of the police.

5. The Respondent asserted that the Claimants reported the matter to KUDHEIHA (the Union) alleging unfair termination and she was summoned to their offices to discuss the same. That subsequently on or about 27th July 2017, she met the Claimants at KUDHEIHA Workers Offices and a settlement amount was reached for each Claimant and paid in full. That the Claimants also signed an acknowledgement of the payment and a confirmation that no dues were owed to them. The Respondent argued that despite the Claimants having been in contact with the owner of the Apartments, Mr. John Mwenda Rutere, during the term of their employment, they had not raised with him the issue of unfair dismissal or any related claim since termination of the 1st Claimant's employment.

Evidence

6. The 1st Claimant (CW1) confirmed in his testimony before Court that the 2nd Claimant is his wife. He testified that they both worked for the Respondent as a Guard/Caretaker and as a Cleaner respectively and that his wife joined in 2010. He asserted that the Respondent never paid them NSSF dues, that he earned Kshs. 12,000/- per month and that they neither went for leave nor were given Public Holidays or off days. His further testimony was that there was no notice or reason for their dismissal from employment. Under cross-examination, CW1 asserted that he knew Mr. John Rutere as the Respondent's father after the Claimant had engaged them and that the said Mr. Rutere was not their

employer. That Mr. Rutere lived in Isiolo and would visit intermittently over time. He notified the Court that the 2nd Claimant also earned Kshs. 12,000/- per month. Whilst acknowledging that he was given a "small room upstairs", CW1 stated that he would descend to open the gate when cars came. He reiterated that he asked for leave and was denied but confirmed to the Court that he had not produced any documents on the issue of leave and Public Holidays. CW1 stated in re-examination that no letter was issued on employment and that it was the 2nd Respondent who paid their salary.

7. The Respondent (RW1), testified that she was representing her brother, Mr. John Rutere who owned the said property. According to her, they brought the 1st Claimant to work as a Watchman in 2001 while the 2nd Claimant was given casual jobs and paid on a daily basis for the engagements. RW1 confirmed in cross-examination having not given the 1st Claimant a letter of engagement and there having been no records of the monthly salary that was paid to him either through Mpesa or in cash. Further, that leave was requested on verbal basis and she would then let the 1st Claimant go on leave and that he also had at least one (1) day for rest on a mutual agreement. She asserted that the evidence of having paid the Claimants the settlement amount after the meeting at their Union's offices was with her lawyers.

Claimants' Submissions

8. According to the Claimants, the following emerge as issues for determination by this Court:

   a. Whether the Claimants' termination was unfair and unlawful;

   b. Whether the 2nd Claimant was an employee of the Respondent; and

   c. What remedies are available to the Claimants.

9. The Claimants invited the Court to note that the 1st Claimant was never issued with a Show Cause Letter prior to termination of his employment contrary to the provisions of section 43(1) and (2) of the *Employment Act* 2007. That failure to issue any notice of termination prior to terminating their employment was a violation of the provisions of section 44(2) of the *Employment Act* that categorically states:

   > Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

10. It was their submission that they were equally never issued with any letters of employment or termination letters. That from the foregoing, they were therefore unlawfully dismissed from their employment. In addition, that the Respondent's legal obligation to produce before Court records relating to their employment including their terms of engagement covering pay, leave and statutory deductions was not discharged in the instant suit. Regarding the 2nd Claimant's employment status, the Claimants cited section 37(3) and (4) of the *Employment Act* that provides for conversion of casual employment to term contract as follows:

   (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this *Act* had he not initially been employed as a casual employee.

   (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power

to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this *Act*.

11. It was the Claimants' submission that the Respondent having engaged the 2nd Claimant for six (6) years from 2010 to 2016, she was not a casual as alleged as no records of such casual employment was produced before the Court. Subsequently, the termination of the 2nd Claimant's employment was unprocedural and unfair. The Claimants submitted that they were entitled to service pay for years worked having worked for the Respondent for over 20 years and 10 years respectively and with no statutory deductions having been made towards the NSSF. They further urged this Court ought to find and hold that their termination was both substantively and procedurally unfair and without any basis whatsoever. The Claimants relied on the case of *Waweru v Mua Insurance (Kenya) Limited* (Cause 397 of 2019) [2023] KEELRC 1961 (KLR) (27 July 2023) (Judgment) in which the Court found that the claimant had suffered wrongful and unlawful termination and awarded her 12 months' salary as compensation for unfair and unlawful dismissal of employment. They also cited the case of *Oire v The County Government of Machakos & another* (Cause 379 of 2020) [2022] KEELRC 47 (KLR) (26 April 2022) (Judgment) where this Honourable Court awarded maximum compensation for wrongful termination of employment services.

Respondent's Submissions

12. The Respondent based their submissions under the issues of the discharge voucher and burden of proof, the claims for partial payments and for overtime, and whether the Claimants were entitled to the remedies sought. It was the Respondent's submission that both Claimants voluntarily signed the Discharge Voucher dated 27th February 2017 that was produced in the respective List of Documents of the parties herein. That the 1st and 2nd Claimants thus waived any further claims against the Respondent and that in the presence of a Union official, had full knowledge of all the material information and the import of the said Discharge Voucher. That for the Claimants to thus turn around and institute a claim against her is a breach of their Settlement and should be frowned upon by this Court. On this submission, the Respondent relied on the decision of the Court of Appeal in *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR that since it was clear that parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any other claims under the contract of employment and even in relation to the respondent's termination, the ELRC was simply required to give effect to the intention of the parties as discerned from the settlement agreement. As regards burden of proof, the Respondent submitted that it is trite law in civil cases that he who alleges must prove, as stipulated in sections 107 and 109 of the *Evidence Act*. She further submitted that the Claimants' allegations that she only paid them partially following the intervention of the Union are unsubstantiated. That the Claimants had not particularised the amount that was partially paid vis-à-vis the total amount that was to be paid. The Respondent relied on the case of *Patrick Muiru Kamunguna v Kaylift Services Ltd & another* [2021] eKLR where the Court held that any evidence that does not support or is at variance with the averments in the pleadings, goes to no issue and must be disregarded. It was the Respondent's submission that similarly, both Claimants had neither provided any evidence on the claims for public holidays and off duties worked nor had they given an itemized breakdown of the same. She asserted that the claim for overtime was thus misconceived and unsubstantiated and should consequently fail. In this regard, the Respondent relied on the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* [2016] eKLR in which the Court held that the burden of establishing hours or days served in excess of the legal maximum, rests with the employee. Further, that the Court of

Appeal in the case of *Ngunda v Ready Consultancy Limited* (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR) (4 February 2022) (Judgment) observed as follows:

> " …There were no details or particulars given of the public holidays or Sundays worked. Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible. As correctly submitted by the respondent, he who alleges must prove."

13. Regarding the remedies sought, the Respondent submitted that the Claimants had failed to establish a firm basis for their claim that she had only effected partial payment of their dues and their case should thus be dismissed with costs. Further, since no vitiating factors had been alleged and or proved as to when both Claimants signed the Discharge Voucher dated 27th February 2017, the same constituted a binding instrument. She relied on the case of *Ronald Kipngeno Bii v Unilever Tea Kenya Limited* [2022] eKLR. The Respondent thus urged the dismissal of the suit with costs.

14. The Claimants claimed their employment by the Respondent was terminated unfairly. They sought various relief from the Respondent who on her part asserts there was no basis for the claim as the Claimants had received payment and given a discharge. The Claimants did seek the intervention of KUDHEIHA and on 27th February 2017 received final dues payment which they acknowledged. They appended their signatures and indicated that there were no further demands whatsoever against the Respondent. This suit therefore was tenuous at best and is accordingly dismissed albeit with the order that each party bears their own cost.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE