



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO.235 OF 2015**

**MIRIAM ATIENO ONGANGO.....CLAIMANT**

**VERSUS**

**GILANIS SUPERMARKET LIMITED..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim dated 13<sup>th</sup> August, 2015, on the 19<sup>th</sup> August, 2015 through its union Kenya Union of Commercial Food and Allied Workers claiming to have been unfairly dismissal from employment.
2. The summary of the claimant's case is that she was employed by the Respondent verbally in August, 1990 as a general worker earning a salary of Kshs. 700 per month. On 9<sup>th</sup> May, 2012 the Respondent reduced her employment to writing and issued her with a contract retaining her position of general worker but her salary was now Kshs. 9,754. Before this contract was confirmed the claimant was placed on a six months' probation period regardless of the fact that she had worked for the Respondent prior for 22 years.
3. The claimant avers that she was named Miriam Atieno Ongango when she was born and upon being baptized in the year 1976 she was given a baptismal name and called Neli Atieno Ongango. She was then married to one George Adera in the year 1979 and her name became Neli Atieno Adera which names appear in her National Identity Card number 012169 which she applied for in 1979. Later in the same year, the areas Assistant Chief gave instruction in a 'Baraza' that the Identify card numbers issued to all persons in the areas for the year 1979 were erroneous and directed all persons to surrender their Identify card for rectification. The claimant leant of the said communique later on in the year 1982 and surrendered her Identity card which was retained by the registrar of persons in Siaya and issued with a new one with a different number being 8210906 bearing the name Miriam Atieno Ongango.
4. Sometimes in the year 2013 the claimant lost her National Identity card and made an application for replacement on the 9<sup>th</sup> May, 2013. She had not obtained police abstract neither did she have a copy of the said Identity card however that she remembered her National Identity card off head.
5. While she was waiting for the replaced Identity card, her salary for June, 2013 hit the bracket where she was supposed to remit Pay as Your Earn tax to Kenya Revenue Authority therefore her employer required her to obtain a copy of KRA Pin. She informed her employer that she had not applied for one, she was send away and informed to report back to work with the said KRA Pin.
6. The claimant then started following up on her lost Identity card in order to apply for the KRA pin. A few days later she received her National identity card which number was her previous one which she had surrendered to Registrar of Person in the year 1982 and not the current Identify card she had been using.
7. Efforts to have the new National Identity card was in vain and the only Identity card reflecting on the Registrars of person data base was her earlier Identity card number 0121699 bearing the name Neli Atieno Adera. The claimant did not have any option but to take the said identity card and obtained the KRA Pin on 12<sup>th</sup> July, 2013 together with NHIF and NSSF.
8. Based on the variation in the new Identity card number, the Respondent dismissed the claimant. The claimant through her Union sought for the issue to be addressed however the Respondent was adamant and the issue escalated to the Labour office however the same was not resolved to date and the Claimant remained unemployed.
9. The claimant avers that at the time of termination she was not paid her terminal dues. She therefore urged this Court to make the following Orders; -

**(A) (i) Reinstate her services on her previous position as a general worker without loss of service**

(ii) Pay her all wages and allowances she would have earned If this unfair dismissal was not meted on her.

(iii) Pay her twelve (12) months gross wages being compensation for wrongful dismissal

(iv) Any other relief the Hon. Court may find fit and just to grant to meet the ends of justice.

(v) Costs of the cause be granted

**ALTERNATIVE:**

**(B) In the alternative and where reinstatement is not considered, the Claimant prays for judgment in her for the payment of the following benefits as follows: -**

**(i) One month's pay in lieu of notice of Kshs. 12,000.00**

**(ii) 12 days pending leave (or 6 months' pro-rata leave) =5,538.50**

**(iii) Service for 23 years 12,000 x 15 x 23=159,231.00**

**(iv) 7 years' salary pending before retirement at the rate of Kshs.12,000 per months = 12,000 x12x7 = 1,008,000.00**

**(V) 12 months' gross wages being compensation for wrongful dismissal 44,000.00**

**TOTAL 1,328,769.50**

10. The Respondent entered appearance on the 31<sup>st</sup> August, 2015 and filed a response to claim on the 14<sup>th</sup> September, 2015.

11. The Respondent admitted employing the claimant as pleaded but denied dismissing the claimant from employment. The Respondent avers that during the substance of employment with the claimant, it asked the claimant to furnish it with its KRA pin as a statutory requirement to enable the Respondent make statutory deduction such as PAYE, NSSF and NHIF as required by law and instead the claimant gave it a KRA Pin bearing the name of Neli Atieno Adera a different name from the claimant without explanation.

12. That the Claimant's KRA pin, National identity card, Employment application form, waiting card all had different names bringing a lot of confusion and raising question as to the legality of the said documents. The Respondent then instructed the claimant to follow up with the Registrar of Person and acquire the proper Identity card and KRA pin. The respondent avers that instead of seeking for the said documents the claimant absconded duty and never reported to work.

13. The Respondent admitted to attending a meeting with the union on the 20<sup>th</sup> September, 2013 and insisting on being furnished with NHIF, NSSF, National identity card bearing similar names for the claimant to enable it reinstate the claimant however the union referred the matter for conciliation which Respondent maintained its position.

14. The Respondent avers that it paid the claimant her salary till June 2015 and that the reason the claimant did not have pay slip for May and June is because her salary was given through cash vouchers for the reason that they were unable to pay PAYE when the law required them to.

15. The Respondent then stated that it did not dismiss the claimant from employment rather that the claimant absconded duty after being asked to furnish the Respondent with proper identification records.

16. Before the matter was heard, the claimant died on the 9<sup>th</sup> April, 2016 and an application for substitution was made on the 28<sup>th</sup> July, 2017 which application was allowed on the 8<sup>th</sup> December, 2017 by Justice Radido and the Amended claim filed on 22<sup>nd</sup> December, 2017.

**Hearing**

17. During hearing, Philip Otieno, the administrator of the estate of the claimant, testified as CW-1 and told this Court that he is the son of the late Miriam Atieno Ongango. He stated that his mother worked for Gilanis supermarket and he then adopted the claimant witness statement which basically reiterated the contents of the claim.

18. Upon cross examination, RW-1 admitted that the claimant's other documents such as KRA Pin, National Identity card, NSSF and NHIF Card all bears the name of Neli Atieno Adera while her application letter bears the name Miriam Atieno Ongango, however that Miriam Atieno Ongango and Neli Atieno Adera are one and the same person and the variation had been duly explained in the claim and in a sworn Affidavit.

19. The Respondent called one witness one Wycliffe Ndunde as RW-1 , the Human Resource manager at Gilanis Supermarket who adopted his witness statement dated 18.10.2021 together with list of documents dated 12.11.2015.

20. RW-1 testified that Miriam Atieno Ongango identity card number was 8210906 while the Identity card for Neli Atieno Adera was

0121699. That they had employed the claimant knowing her as Miriam Atieno Ongango and the subsequent documentation and change of National Identity card reflected a different person therefore that they suspected fraud and requested the claimant to get proper documents. That the claimant instead of procuring the proper document absconded duty and never reported back to employment. The Respondent was apprehensive of recalling the claimant for fear of penalties attached to employing an individual under the salary bracket without remitting taxes as required by law.

21. Upon cross examination, RW-1 admitted receiving an affidavit informing it that the Miriam Atieno Ongango and Neli Atieno Adera were one and the same person however that they were apprehensive when the National Identity card number changed as well. He then contended that the claimant was not fired therefore there was no need for Notice or disciplinary hearing.

22. On re-examination, RW-1 testified that until her demise the claimant was on unpaid leave for the purposes of procuring her proper identity documents.

#### **Claimant's Submissions.**

23. It was submitted for the claimant that, the termination of the claimant's service was without reason or procedure as required under the law. It was argued that the claimant was sent home on leave to look for identification documents that showed her name and despite her explanation and furnishing the Respondent with an Affidavit giving an explanation for the name and Identity Card variation, the respondent was adamant to reinstate her. Accordingly, it was submitted that the claimant's termination was unfair in the circumstances and they urged this Court to allow the claim as prayed. In support of their case the claimant cited the case of **Antony Mkala Chitavi V Malindi Water and Sewage Co. Limited** and the case of **Paul Mumo Kitavi and ACME containers Ltd (Paul Mumo Kitavi V s ACME Containers Limited [2019] eKLR**.

#### **Respondent's Submissions**

24. The Respondent maintained that the claimant was not terminated from employment as alleged rather that she was given leave to regularize her documents. That the variation in Identity Card and subsequent documents raised concern with the management of the Respondent and instead of the claimant procuring the proper documents, she absconded duty and never reported back to work till her demise. According to the Respondent, the claimant's documents were fraudulently acquired in the bid to conceal her identity contrary to section 75 of the Employment Act.

25. It was then submitted that the inconsistencies in the documentation of the claimant ought to be construed against her as was held in **Standard Chartered Bank Ltd V Intercom Services Ltd & 4 Others [2004] 2KLR 183**.

26. The Respondent submitted that the claimant absconded duty when requested to furnish the Respondent with the proper documentation therefore that the termination was proper in the circumstances and they prayed for the claim to be dismissed with costs.

27. I have examined all evidence and submissions of the parties herein. The issues for this court's determination are as follows;

**1. Whether the claimant had been dismissed by the respondent.**

**2. If dismissed, if the dismissal was fair and justified.**

**3. Whether the claimant is entitled to the remedies sought.**

#### **ISSUE NO. 1**

28. On this issue, the claimants union wrote to the respondent vide a letter dated 19/8/2013 complaining about the claimant's dismissal. They suggested that they should have a meeting with the respondent to discuss the complaint that the claimants had been dismissed.

29. The respondents replied vide a letter dated 3/10/2013 indicating that they had no objection retaining the claimant in employment but had no alternative because they needed her to obtain her NSSF, NHIF and ID in the names of Neli Atieno Adera.

30. The insistence by the respondent in my view was very unreasonable given that the discrepancies in claimant's names had already been explained to them vide an affidavit dated 17/7/2013.

31. This is something the respondent should have investigated but they instead chose to insist on what was an impossibility.

32. The respondent admitted that they could not allow the claimant to serve them without producing the documents they demanded for.

33. It is therefore my finding that the respondent dismissed the claimant's services as admitted.

#### **ISSUE NO. 2**

34. Having found that the respondent dismissed the claimant, the next issue is whether the dismissal was fair and justified.

35. The respondent never subjected the claimant to a fair disciplinary process. There is no indication that the claimant was ever formerly

served with a dismissal letter spelling out the reason for the dismissal.

36. The dismissal went against the provision of Section 45 (2) of the Employment Act 2007 which states as follows;-

**“45. (1).....**

**(2) A termination of employment is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason-**

**(i) related to the employee’s conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure”.**

37. It is therefore my finding that the dismissal of the claimant was unfair and unjustified.

**ISSUE NO. 3: REMEDIES**

38. Having found as above I find for claimant and award her as follows;-

**1. 1 month’s salary in lieu of notice = 12,000/=**

**2. Pending leave of 6 months as prayed = 5,538.50/=**

**3. 10 months’ salary as compensation for the unlawful and unfair termination**

**= 10 x 12,000 = 120,000/=**

**TOTAL = 137,539/=**

**Less statutory deductions**

**4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF MARCH, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Munyiri holding brief for Respondent – present

Claimant – absent

Court Assistant - Fred