



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 324 OF 2017 CONSOLIDATED WITH CAUSE NO. 325 OF 2017

ALFRED YAA MANGI.....3RD CLAIMANT

SARAH KANINI NYAGA.....2ND CLAIMANT

- VERSUS -

NAIL SOMJI DAS GUPTA.....1ST RESPONDENT

MARC DAS GUPTA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th April, 2021)

JUDGMENT

The claimants filed on 21.04.2017 their respective statements of claims against the respondents through M/s H.N Njiru & Company Advocates. The suits were consolidated and the claimants prayed for judgment against the respondents for orders as follows:

- a. A declaration that the termination process as carried out by the respondents was unlawful and that the same amounted to an unfair termination.
- b. The respondent to issue each claimant a certificate of service.
- c. Costs of the suits and interest at 14 % per annum from the date of dismissal till payment in full.

The 1st claimant prayed for compensation and payments as follows:

- a. Unremitted NSSF for one year at Kshs. 200.00 per month Kshs.1, 200.00.
- b. Unremitted NHIF dues or a period of one year at Kshs.950.00 Kshs. 11, 400.00.
- c. Damages for wrongful and unfair termination per section 49 and 50 of the Employment Act, 2007 (32, 000.00 x 12) Kshs. 384, 000.00.
- d. Severance pay at the rate of 15 days for every completed year of service being 1 year Kshs. 16, 000.00.
- e. Overtime at Kshs.3, 000.00 per month for 1 year Kshs.36, 000.00.
- f. Leave allowance at Kshs.32, 000.00 for one year.
- g. Three months' salary in lieu of notice Kshs. 32, 000.00 x 3 Kshs.96, 000.00.
- h. Total Kshs. 576, 600.00.

The 2nd claimant prayed for compensation and payments as follows:

- a. Unremitted NSSF for one year 6 months at Kshs. 200.00 per month Kshs.3, 600.00.
- b. Unremitted NHIF dues or a period of one year 6 months at Kshs.850.00 Kshs. 15, 300.00.
- c. Damages for wrongful and unfair termination per section 49 and 50 of the Employment Act, 2007 (25, 000.00 x 12) Kshs. 300, 000.00.
- d. Severance pay at the rate of 15 days for every completed year of service being 1 year (Kshs. 25, 000.00/2) Kshs. 12, 500.00.
- e. Overtime at Kshs.3, 000.00 per month for 1 year Kshs.36, 000.00.
- f. Leave allowance at Kshs.25, 000.00 for one year.
- g. Three months' salary in lieu of notice Kshs. 25, 000.00 x 3 Kshs.75, 000.00.
- h. Salary balance for November 2016 at Kshs. 5, 600.00.
- j. Total Kshs. 473, 000.00.

The 1st claimant's case is that the respondents employed him as a cook or chef by oral agreement effective 23.11.2015 until 29.11.2016 when the respondents unlawfully terminated his services with immediate effect upon accusing him of stealing money belonging to 1st respondent. His monthly pay was Kshs. 32,000.00 per month. The termination was without carrying out any investigation or giving him an opportunity to be heard. The allegations of theft against the 1st claimant were reported to the police but the 1st claimant was found not culpable. Upon release by the police the claimant alleges he reported back on duty but he was locked out. It is his case that he had a clean record of service. The claimant states that he worked late into the night without pay. He claims and prays as per his statement of claim.

The 2nd claimant's case is that she was employed by the respondents as a house-help or caretaker on 18.04.2015 at their residence in Nyali, Mombasa. She states that she worked diligently and honestly until 29.11.2016 when she was wrongfully and illegally terminated by the respondents. Like for 1st claimant, her further case was that the respondents alleged that she had stolen their money, she was reported to the police and arrested. Further, the police investigations found her not culpable and she was set free. Like the 1st claimant she reported on duty after the release by the police but she was locked out. She further states that her dismissal was without notice and without justifiable reason or cause.

The respondents appointed Gikera & Vadgama Advocates to act in both suits. Against the 1st claimant the respondents filed a statement of response and counterclaim on 14.06.2017. The respondents stated that they employed the 1st claimant from January 2016 to 30.11.2016 when the claimant without lawful excuse absconded and deserted duty. The respondents admit that they employed the claimant as a chef to work for 6 days a week. Further, he was paid Kshs. 30, 000.00 plus discretionary Kshs. 2, 000.00 per month. He was given one day of paid off per week and paid leave when the respondents and their children travelled out of their Nyali residence. Further, the respondents advanced the claimant Kshs. 45, 110.00 as a loan to pay school fees. Further, the respondents agreed to the loan to be progressively set off against the monthly payment effective January 2017 until payment in full. The claimant was equally provided medical care per section 34 of Employment Act, 2007 and the Employment (Medical Treatment) Rules, 1977. On 29.11.2016 the respondents discovered USD 1000 which the 2nd respondent had locked in the respondents' dressing room of the master bedroom of the respondents' Nyali home was missing. The discovery of missing cash was made after the claimants had left from duty that day. The 1st claimant was informed about the incident by telephone and he reported on duty on 11.00am and denied stealing the cash. The 2nd claimant was equally informed on phone and denied involvement. The respondents reported the matter to the police and claimants were arrested. The respondent counterclaimed for school fees loan Kshs.45, 110.00 and Kshs.30, 000.00 pay in lieu of notice.

The 1st claimant filed a reply to response and defence to counterclaim. The 1st claimant stated that the counterclaim was meant to unfairly derail his claims. He denied that he had been loaned as alleged by the respondents.

The respondents filed a statement of response and counterclaim on 14.06.2017 with respect to the 2nd claimant's suit. It is admitted that the respondents employed the 2nd claimant as a domestic worker effective April 2015 and by oral agreement. The respondents denied causing arrest of the 2nd claimant on 29.11.2016 or any other date. The claimant was informed about the alleged loss of the cash on phone on the evening of 29.11.2016 and required to report on duty on 30.11.2016. Further, she was arrested and subsequently released but failed to report on duty. She filed a complaint at the area labour office alleging unfair termination and subsequently withdrew it. Like in the case of the 1st claimant the respondent counterclaimed for Kshs. 30, 350.00 being school fees loan to be recovered effective January 2017 until full payment. Further, the counterclaim is for Kshs.23, 000.00 being payment in lieu of notice because the claimant deserted work after the incident of 29.11.2016. The 2nd claimant filed a reply to response and defence to counterclaim on 30.06.2017. It was stated that the counterclaim was meant to divert from the claimant's suit and the same be dismissed with costs.

Parties testified to support their respective cases. Final submissions were filed. The Court has considered the submissions, pleadings, evidence and all material on record. The Court makes findings as follows.

First the Court returns that there is no dispute that parties were in contracts of service. The respondents employed the 1st claimant as a chef at a gross monthly pay of Kshs. 32, 000.00 and the 2nd respondent as a domestic worker at Kshs. 25, 000.00. The Court finds that the Kshs. 2, 000.00 paid by the respondents to the claimants said to have been discretionary was paid consistently and was therefore part of the gross monthly salary.

Second the Court finds that the claimants' employment came to an end in the circumstances that, following the alleged loss of the money, the claimants were arrested. The respondents' case is that despite the allegations and the arrest, the claimants should have reported back to work and instead deserted duty. It is clear to the Court, as per the correspondence from the police, that the claimants were found not culpable after the relevant police investigations. The Court therefore returns that the respondents have failed to show that the allegations were valid so that the termination was unfair for want of a valid reason as envisaged in sections 43 as read with sections 45 and 47(5) of the Employment Act, 2007. The respondents were entitled to give a notice and a hearing per section 41 of the Employment Act in view of the allegations but the same was not done. Instead the respondents made a report to the police without exhausting the internal procedures per section 41 of the Act to establish culpability, if any, against the claimants. The 1st respondent being the respondents' first witness (RW1) testified that the lost cash had been in the dressing room which was within the master bedroom. RW1 further testified that the claimants never accessed the dressing room which was always locked under key, and, only the respondents had the access key. The Court therefore finds that there was no basis to link the claimants to the alleged loss of the USD 1000. In that regard, and to answer the **third issue**, the Court returns that the termination was unfair both in procedure and in substance.

While making the finding, the Court has considered the evidence by the claimants that they were told by the 2nd respondent on phone on the early night on 29.11.2016 not to report on duty unless they produced the money that was allegedly missing. The Court has no basis to doubt the claimants' evidence because the 2nd respondent never testified to deny that position. Further, the Court considers that whether that was the position or not, in view of the allegations and the subsequent arrest and release as not culpable, the claimants were entitled to consider that they undertook very personal duties at the respondents' residence and the trust between them and the respondents (as necessarily implied in their contract of service) had thereby irretrievably been breached at the instance of the respondents. Thus the Court finds that such fundamental breach of trust and confidence amounted to constructive dismissal which the Court has found was unfair for want of valid or reasonable cause and due procedure. Even if the respondents expected the claimants to be at work on 30.11.2016 or thereafter release by police and they failed to show up, the Court considers that the claimants were entitled, in the circumstances, to consider themselves dismissed on account of lost trust and confidence at the instance of the respondents.

The Court has considered the evidence and the factors in section 49 of the Act on award of damages. The claimants had clean records of service. They appear to have wanted to continue in employment but for events of 29.11.2016 leading to the termination of their employment. The Court has considered the period they had each served the respondents of about a year and about 1.5 years respectively. The Court has considered the mitigating factor that the respondent gave the claimants a benefit of paying school fees for some of the claimants' children. The Court has also considered the unfair arrest in the circumstances of the case. The Court awards each claimant 4 months' compensation for the unfair termination plus one month pay in lieu of notice making **Kshs. 160, 000.00** for 1st claimant and **Kshs.125, 000.00** for 2nd claimant. The Court finds that the claim for 3 months' notice pay was not justified and only one month under section 35 of the Act was due. The Court further finds that the evidence was that the claimants had not been accorded annual leave as per section 28 of the Act and they are awarded **Kshs.32, 000.00** and **Kshs. 25, 000.00** respectively as prayed for. The Court finds that while testifying that the claimants did not report on duty whenever the respondents went on holiday, the days of such holidays were not computed and on a balance of probability the Court considers that the claimants were entitled to the pay in lieu of annual leave. The Court further finds that the 2nd claimant is entitled to **Kshs. 5, 600.00** unpaid salary for November 2016.

Fourth, the Court makes findings on the claimants' other claims and prayers as follows:

- a. The overtime was not agreed upon and on a balance of probability the claimants failed to establish overtime as alleged. For example, on the material date, 29.11.2016, they had left duty long before the alleged hours of overtime duty. The claim and prayers for overtime pay will fail.
- b. The claimants pray for NHIF and NSSF dues. The Court considers that NHIF and NSSF are statutory and grievances in that regard should be pursued in accordance with relevant statutory provisions. In any event the Employment Act in section 35 provides for service pay where there is no alternative gratuity or pension arrangements but in this case there were no claims for service pay. The evidence was that the NSSF was remitted for some months and not others and the Court considers that the statutory provisions should be available to remedy the grievance. The further evidence was that the respondents provided medical services for the benefit of the claimants. The claims and prayers will fail.
- c. The Court finds that as urged for the respondent, the claimants have not justified the prayer for severance and the matter did not relate redundancy where severance pay is due per section 40 of the Employment Act which provides for severance pay in event of termination on account of redundancy. The prayer will therefore fail.
- d. The court finds that the claimants are entitled to a certificate of service per section 51 of the Act.

Fifth, the Court has found that the termination was unfair. The Court has also found that the respondents conferred upon the claimants a benefit being payment of school fees for the claimants' children. The Court has found that the benefit was not a loan and the 1st respondent's evidence was that she did not know the details of the terms of the alleged loan. In any event, the Court has taken the benefit into account in awarding compensation under section 49 of the Act. Thus the Counterclaim will fail.

In conclusion, judgment is hereby entered for the claimants against the respondents for orders:

- a. The declaration that the termination of the claimants' contracts of service was unfair and unlawful.
- b. The respondents to pay the 1st claimant **Kshs. 192, 000.00** and the 2nd claimant **Kshs. 155, 600.00** by 01.07.2021 failing interest at Court rates to be payable thereon from the date of this judgment till the date of full payment.
- c. The respondents to deliver a certificate of service to each claimant within 30 days from the date of this judgment.

d. The respondents to pay costs of the claimants' case and the counterclaim.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH APRIL, 2021

BYRAM ONGAYA

JUDGE