

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1290 OF 2015

JACINTA MWENGA NYAMAI.....CLAIMANT

VERSUS

TRACEWOOD LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Memorandum of Claim dated 28th July 2015 against Trancewood Limited for the unfair termination of her employment. She avers that she was employed by the Respondent as a Casual Labourer from April 2004 to June 2015 and was earning a salary of Kshs. 15,000/- per month. She avers that her services were terminated on or about 2nd June 2015 without notice, justifiable reasons and payment of her terminal dues and that she was in the circumstances constructively terminated from work. She further avers that the actions of the Respondent subjected her to loss and harm warranting compensation and that the Respondent did not follow the laid down procedure in terminating her employment. She thus demands for damages equal to 12 months wages for the unfair termination, salary for the month of May 2015, service pay, salary in lieu of notice and leave. The Claimant prays for judgment against the Respondent for the said claims; for costs of the suit together with interest thereon at such rate and for such period as may be ordered by this Court; and for any other just and equitable relief this Court may deem appropriate. The Claimant states in her Witness Statement that apart from working for the Respondent as a Casual Labourer, she at times used to work at the Defendant's house as a house help. That she sustained injuries on or about 14th March 2013 while working for the Defendant and went back to work albeit with much strain. That on or about 26th May 2015, her backache deteriorated and her employer advised her to go to hospital where she was treated and given 3 days' sick off and upon reporting back to work on 29th May 2015, her employer gave her three more sick-off days for her to report back on 2nd June 2015. That she returned to work and while attending to her usual duties, was called to the office and instructed to write a resignation letter indicating she was unable to continue with the work, but she declined. That she also refused to sign a form which had indicated her salary and all her benefits. That she returned to the said office on 4th June 2015 to request for her salary for the month of May 2015 but was told she would not be paid unless she signs the form. That her employer also told her not to claim for the injuries she had sustained as it was an accident and that when she refused to sign the said form, she was consequently dismissed from work.

2. The Respondent filed a Response to Memorandum of Claim dated 22nd September 2015 denying that the Claimant was its employee at any given time and averring that there was no contractual relationship between the Claimant and the Respondent. The Respondent avers that the Claimant is therefore not entitled to the claims sought in her Memorandum of Claim and it denies being issued with any demand or notice of intention to institute the instant proceedings, which in any case it was under no obligation to respond to. The Respondent further avers that the Memorandum of Claim is frivolous and baseless and prays that the same be dismissed with costs to the Respondent. Peter Kilonzo wrote a Witness Statement on 14th February 2020 for the Respondent, stating that he was the Administrator of the Respondent between 2005 and 2018 and that his duties included hiring/employing casual workers, allocating duties to the said casuals and effecting payment of wages upon the said casual employees. He states that they never employed women as casuals due to the nature of business of the Respondent which deals with timber products and that they only employed men. That all the casuals they employed were given agreements to sign and if it is true the Claimant had been employed by the Respondent as a casual, she should exhibit the agreement. He further queries how the Claimant made NSSF returns by herself while purporting the Respondent to be her employer. Mr. Kennedy Juma who is the Accountant/Administrator of the Respondent also made a Witness Statement on 14th February 2020 for the Respondent stating that his duties include preparing payrolls for the company staff, posting their salaries to their accounts and making necessary returns including NSSF returns. He states that as per the Respondent's policy and in line with the law, all statutory deductions including NSSF are deducted and remitted to the relevant state departments before the net salary is paid to the employees. He further states that the Claimant has never been an employee of the Respondent by as she is not in the list of employees upon which he has been preparing payrolls and that he further knows all Respondent's employees by name and face, including employees who left the company.

3. In a rejoinder, the Claimant filed a Reply to Respondent's Statement of Defence dated 9th October 2015 averring that she reiterates the contents of her Memorandum of Claim. She further avers that she received her salary at the end of every month and asserts that notice and intention to sue were issued. The Claimant avers that she has a reasonable cause of action and that the Respondent's Defence is a mere negation and sham. The Claimant prays that the Respondent's Defence be struck out with costs and judgment be entered as prayed for in the Memorandum of Claim.

4. In her testimony before court, the Claimant stated that she was employed on 15th April 2004 and dismissed on 4th March 2015. She adopted her Witness Statement as part of her evidence and further produced her documents as exhibits in Court and which included the Demand Notice sent to the Respondent dated 16th June 2015. She stated that she worked for Mangula Vikana who was a Director of the Respondent and that she would also do household chores for her. That she was paid her NSSF contributions from 2010 but was not registered with NSSF and that she never went on leave and would work Monday to Sunday. The Claimant stated under cross-examination that she used to be paid twice a month and was not issued with a contract and that she has no records to show she was earning Kshs. 15,000/-. She stated that she has records from NSSF showing the Respondent was her employer and admitted that the statement does not have the NSSF stamp. She further stated that she continuously served the Respondent for 11 years and denies she was a casual employee. In re-examination, she states that she worked under an oral agreement and that Kennedy would bring her dues in cash and she would sign for the same and that

Kennedy would then go back to the office.

5. The first witness for the Respondent was Mr. Kenneth Juma who adopted his filed statement together with the Respondent's Bundle of 1st April 2019 as evidence in Court. He stated that having worked with the Respondent from 2008, the Claimant was not among the staff and he does not know the Claimant. The second witness for the defence was MR. Richard Kilonzo who relied on his filed statement as evidence before Court and stated that there was no lady at the workshop during the period he worked for the Respondent and that he never saw the Claimant there. He further stated that those who were there were permanent and were not casuals. He stated under cross-examination that there was no document before Court showing the employees are permanent. He stated that they were permanent as their NSSF and NHIF were paid. He reiterated that there were no ladies at the workshop who were casual and that the ones on the list were professionals and permanent.

6. The parties were to file written submissions and the Claimant submits that because the Respondent completely denies the Claimant having been its employee, there is no justification for the termination capable of being interrogated herein. She submitted that she was terminated on the grounds that she could no longer discharge her duties due to an injury sustained at the work place and submits that the Respondent did not ensure she received any medical treatment after the accident. It is the Claimant's submission that terminating her employment under the circumstances was unfair, malicious and a classic example of unfair labour practice. The Claimant further submits that having worked for the Respondent for close to 9 years, her engagement had changed to that of an employee by virtue of Section 37 of the Employment Act and was therefore entitled to 28 days' Notice of termination. She relies on the case of **Humphrey Omondi v Vishnu Builders Ltd [2016] eKLR** where the court found that the claimant was not a casual labourer as he had worked with the defendant company for around eight years and was furthermore paid on a weekly basis. That the said Court went on to find in favour of the claimant and ruled that his employment had been unfairly terminated without notice. She further cites the authority of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**. She submits that as per Section 47(5) of the Employment Act, the statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal rests on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer. That the obligation of an employee is not as onerous as the obligations on an employer and that she was unfairly terminated because no notice was given to her as required under Section 35(1) and was further not afforded a hearing as required under Section 41 of the Act. That Section 43 further demand that the employer proves the reasons for the termination while Section 45(2) (a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons. She urges the Honourable Court to thus find in favour of her Claim with costs to the Claimant.

7. The Respondent submits that the Claimant has not proved she was an employee of the Respondent whether by producing a duly signed contract of service or by oral evidence in the absence of a written contract or a payslip showing she was being paid a salary by the Employer. That on the other hand the Respondent's two witnesses testified in Court that the Claimant was not an employee of the Respondent and their evidence was not shaken during cross examination. Further, that it is trite law that where the Respondent denies employment relationship it is incumbent upon the Claimant to prove otherwise. The Respondent submits that Section 2 of the Employment Act defines an 'employee' as a person employed for wages or a salary and includes an apprentice and indentured learner. That in the case of **Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR**, this Honourable Court while dealing with the issue of Employer-Employee relationship rightly stated in part as follows:

".....in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process) proof of payment of wages, the power of dismissal and finally, the power to control the employee's conduct (this is what gives the test the nom de guerre - control test). In my considered view, there is insufficient indication for the assumption of the relationship the Claimant asserts and having failed to discharge the evidentiary burden the Claimant's case is only fit for dismissal."

8. The Respondent submits that the issue of calling a witness to corroborate the evidence of the existence of an oral agreement is inferred from the case of **Joseph Munene Murage v Salome Ndung'u [2019] eKLR** where the Court held that it was thus the burden of the claimant to prove the existence of an employment relationship and the unfair termination thereof. The Court further held that the claimant having failed to prove the existence of an employment relationship, the claim had no leg to stand and must thus fail. The Respondent submits that the foregoing position was also echoed by the Court in the case of **Zarika Adoyo Obondo v Tai Shunjun & Another [2020] eKLR** while citing several authorities. The Respondent submits that it further produced two certified documents from NSSF to support the Respondent's position and cast doubt on the authenticity of the NSSF statement produced by the Claimant. That the NSSF statement produced by the Claimant is doubtful because it does not bear the authentication stamp of the NSSF and further indicates the Claimant was registered as a voluntary contributor, meaning she was voluntarily remitting the dues by herself. The Respondent further submits that as under Sections 19 and 20 of the NSSF Act one cannot be employed and registered by NSSF as a voluntary contributor. That without prejudice to its submission on the authenticity of the NSSF statement produced by the Claimant, the Respondent referred the Court to the case of **John Matete Abayo v Digital Imaging Systems Limited [2018] eKLR** where the claimant sought to prove employment relationship by solely relying on an NSSF statement and a MEMO from the Respondent and the Court found the two documents as having not been sufficient to establish an employer-employee relationship between the parties. The Respondent submits that the issue of unfair termination cannot arise as it has established that the Claimant was not employed by the Respondent while the Claimant has failed to prove existence of an employer-employee relationship. That the Claimant is also consequently not entitled to the compensation sought in the claim. It further submits that in the unlikely event the Court finds that there was an employer employee relationship hence the claimant's services were unfairly terminated, determining the amount of compensation for unfair termination is untenable as the Claimant's monthly salary is an issue for determination by the Court. That since he who alleges must prove, the claim for compensation must as well fail as there would be no basis for making any finding in favour of the Claimant and the Respondent prays for costs because costs follow the event.

9. The Claimant asserted employment by the Respondent. She indicated that she worked for the Director of the Respondent one Mangula Vikana. She averred that she did some household chores and that is how she sustained an injury leading to her alleged constructive dismissal. The Respondent averred that the Claimant was not its employee and availed employment records as well as NSSF and NHIF statements that showed the Claimant was not its employee. The Claimant's NSSF statement was though unstamped indicative of the Claimant being a voluntary contributor. This means she was not an employee of the Respondent according to her own documents submitted in evidence. She perhaps may have had a claim against Mangula Vikana the Director of the Respondent but because she did not show any nexus between her and the Respondent the suit is only fit for dismissal. There is no evidence of employment of the Claimant by the Respondent which further bolsters the inevitability of dismissal of the suit. I however dismiss the suit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE