



Mwangi v Mbugua (Cause 312 of 2016) [2021] KEELRC 2313 (KLR) (7 July 2021) (Judgment)

Neutral citation: [2021] KEELRC 2313 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

CAUSE 312 OF 2016

HS WASILWA, J

JULY 7, 2021

BETWEEN

WINFRIDA MUTHONI MWANGI CLAIMANT

AND

ANN WANGARI MBUGUA RESPONDENT

JUDGMENT

1. By an amended memorandum of claim dated November 9, 2017 and filed on the November 13, 2017, the claimant sued the respondent for alleged unfair termination and to be paid her terminal dues.
2. The claimant avers that she was employed by the respondent as a house keeper sometime on the March 15, 2007 and placed on probation for a period of three (3) months earning a salary of Kshs 3,000 and upon confirmation her salary was increased to Kshs 5,000 with an annual increase of Kshs 500. Later on, she was also promoted to the position of receptionist and supervisor of the respondent's business.
3. The claimant avers that she worked in a guest house called Haki Yako Guest house which establishment was owned by both the respondent and her husband Joseph Mbugua Mwiberi (deceased).
4. Upon the demise of the respondent's husband on or about May 15, 2015, the respondent approached the claimant and demanded all the books of accounts in her possession and set them ablaze. Immediately thereafter the claimant was fired and paid Kshs 8500 being her May, 2015 salary and Kshs 25,000 being pay in lieu of notice.
5. She avers that throughout her employment, the respondent made her work on all off days, public holidays and was never granted leave for the 8 years worked for the respondent. She also stated that she was never paid house allowance as dictated by the law.
6. She therefore prays for the following reliefs; -
 - a. A declaration that the claimant's dismissal was unlawful, unjust and discriminatory and the same amounts to unfair termination.



- b. Compensation for unfair termination.
 - c. An order compelling the respondent to settle the outstanding benefits as tabulated at paragraph 23 of the claim.
 - d. General damages.
 - e. Costs of the suit and interest thereof at court rates.
7. The respondent entered appearance and filed a response to claim denying the claim as pleaded in the amended claim and in addition stated that she does not know the claimant neither has she ever employed her. She avers that the business known as Haki Yako Guest house was solely owned by her husband Joseph Mbugua Mwiberi, who passed away on the May 14, 2015.
 8. She maintained that she has never co-owned the said business and therefore could not have employed the claimant as alleged. She affirmed that there is no employer-employee relationship between her and the claimant to give rise to the claim herein.
 9. She prays for the claim against her to be dismissed with costs to her.

Hearing.

10. This suit was heard on the March 17, 2022 and on the May 23, 2022. During hearing the claimant testified as CW-1 and adopted her witness statement dated August 26, 2016 and produced the documents as appearing in the list of August 24, 2017 and supplementary list dated November 9, 2017 as her exhibits. In addition, the claimant testified that she was employed by the respondent in the year 2007 as room attendant and cleaner and promoted to be the position of receptionist sometimes in 2010. She avers that she never took her leave days. She testified that she was sacked without any reason and on reporting the issue to the labour officer, the said officer calculated her dues but the respondent refused to pay her leading to the institution of this suit.
11. Upon cross examination by Kamau Advocate, the witness testified that she knew the respondent before she was even employed by her. She avers that the respondent was the manager of the Hotel while her husband was the director. She however maintained that she dealt with the respondent most of the time and upon termination the respondent paid her three months' salary in lieu of notice and her may salary only.
12. The respondent testified in person as RW-1 and adopted her witness statement dated August 18, 2018 and produced the document appearing in the list of documents dated August 18, 2018 as her exhibits. She added that she is a retired nurse and currently lives at Langa Langa areas in Nakuru County.
13. Upon cross-examination by Daye Advocate, the respondent testified that she never employed the claimant neither was she her supervisor. She avers that Haki Yako Guest house was a business that was run by her late husband. On being shown the letter from the labour officer she admitted being invited to the labour office where she attended and directed to pay the claimant however she was not in a position to pay the claimant as she did not have any authority to pay her. She maintained that she never employed the claimant and therefore the claimant was not her employee.

Claimant's Submissions

14. The claimant submitted from the onset that she was an employee of the respondent and the handwritten letter for payment of her terminal dues is evidence of the said employment. It was argued that having agreed on mode of payment of her terminal dues the respondent ought to be estopped



from alleging that she was not the claimant employer. To support her case, the claimant relied on the case of *Emo Investment Limited v Stephanus Petrus Kruger* [2010] eKLR.

15. It was submitted further that the respondent who has denied employing the claimant is now the manager and the one in control of Haki Yako Guest house business as such she is as good as the employer and should shoulder the responsibility of paying the claimant her terminal dues. To support her argument the claimant relied on the case of *Lucy Nyandia Mwangi v Mathenge and Muchemi Advocates* [2013] eKLR where the court held that:-

“The *Employment Act, 2007*, the *Labour Relations Act, 2007* and the Industrial Court Act, 2011 define an employer to include,

“any person, public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual and includes the agent, the foreman, manager or factor of such person, public body, firm of corporation.”

This makes it possible for other persons acting for the principal employer to be held to be employers themselves. Managers, agents and factors in businesses can be employers. An associate or manager in a law firm can be an employer. An associate or manager who exercises decisional control; defines the work to be done by the employees; controls the tools of trade of the business; and who perhaps even pays the employees their salaries, can be deemed to be an employer... The Labour Institutions Act, 2007 adopts a slightly different definition of the term employer, closer to the impugned *Work Injury Benefits Act, 2007*. It defines the term to mean,

“a person, including the government, who employs or has employed an employee and where appropriate includes:

- [a] an heir, successor or transferor of an employer; or
- [b] the agent, director, or any person authorized to represent the employer...

Under this definition Waweru and Njoroge could be deemed to have employed Nyandia. Waweru was a beneficiary under the Estate of GK Mathenge. He and Nyandia transferred, or inherited the business from GK Mathenge”

16. It was argued that the claimant having been employed in 2007 was unceremoniously terminated in 2015 without giving reason for termination or subjecting the claimant to disciplinary process as such the claimant’s termination was unfair. The claimant relied on the case of *Lucy Nyandia Mwangi v Mathenge and Muchemi Advocates* (*supra*) where the court held that:-

“If the respondent was convinced after the death of GK Mathenge that it did not wish to proceed with the old employees, then it ought to have come out openly and advised the employees it considered the contracts terminated by reason of death or restructuring, and proceed to offer redundancy benefits under section 40 of the *Employment Act*. It was not sufficient to tell the employee that her contract had automatically lapsed by reason of death. It ought to have declared redundancy and offered redundancy package. If a business owner dies, and the business stops trading because he or she has died, redundancy law comes into play, because redundancy is the “loss of employment, occupation, job or career, by involuntary means, through no fault of the employee... The deceased’s personal representative, or the successor employers where the business continues, would



be responsible for payment of redundancy dues. Where the employer has died and the employee is not re-employed, the employee is taken as having left employment by reason of redundancy. An employer in the circumstances would include any person, who as a consequence of the death of the original employer has inherited the power to run the business”

17. The claimant in conclusion submitted that the totality of the case before this court shows that the claimant was unfairly terminated as such deserving of the reliefs sought and urged this court to allow the same as prayed.

Respondent’s Submissions

18. The respondent submitted from the onset that there is no employment relationship between her and the claimant and the fact that she is the widow of the owner of the Haki Yako guest house does not make her an automatic employer of the claimant. She argued that since there is not employer-employee relationship between the parties herein this court is deprived of jurisdiction to hear and determine this case.
19. It was submitted without prejudice that the claimant having been employee by Haki Yako Guest House was not terminated rather that she consented to her termination as by the handwritten agreement signed therein as such the termination was fair in the circumstances and the claim was filed as an afterthought which ought to be dismissed.
20. I have examined the evidence and submissions of the parties herein.
21. The claimant has indicated that the respondent was the manager of the business called Haki Yako which business was run by the respondent’s late husband.
22. The respondent indicated that the business was run by her husband and she has no employer employee relationship with the claimant.
23. The claimant has not produced before court any letters of administration to indicate that the respondent was the one who took over her husband’s business or take responsibility for any liabilities in relationship to employees of the business. Without proof that the respondent is responsible for the business ran by her late husband, I find that the claim cannot stand.
24. I dismiss this claim accordingly with no orders of costs.

DATED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF JULY, 2021.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Daye for claimant – present

Frank Mwangi & Co for respondent – present

Court Assistant - Fred

