



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2009 OF 2015

KAVAYI C. WYCLIFFE.....1ST CLAIMANT

STEPHEN NZIOKI.....2ND CLAIMANT

GEOFFREY KAGONI KEYA.....3RD CLAIMANT

THOMAS MALOMBE ILELI.....4TH CLAIMANT

-VERSUS-

AZIZI MOHAMMED T/A MCFRYS RESTAURANT.....1ST RESPONDENT

MC FRYS LIMITED.....2ND RESPONDENT

JUDGMENT

1. The Claimants' suit is contained in the Amended Memorandum of Claim filed on 10.12.2019 in which they averred that they were employed by the 1st respondent until they were unfairly dismissed from employment by him on diverse dates between 22.3.2015 and 29.3.2015. The suit seeks the following reliefs:

- a) **Declaration that the termination of the claimants' employment was unfair and unlawful.**
- b) **Terminal benefits totalling Kshs. 2,681,367.**
- c) **Certificate of service.**
- d) **Costs and interest at court rates**

2. The 1st Respondent filed his defence on 2.2.2016 denying any employment relationship with the claimants and averred that they were employed by the second respondent. He further denied the alleged unfair termination. The 2nd respondent filed defence on 16.3.2020 contending that no reasonable cause of action has been made against it by the claimants and prayed for the suit against it to be dismissed with costs.

3. The matter proceeded to full hearing when both sides gave evidence and thereafter they filed written submissions.

Claimants' case

4. Mr. wycliffe Kavayi, 1st claimant testified on behalf of all the claimants as Cw1 and basically adopted his Witness Statement dated 8.3.2018 as his evidence-in-chief. The statement reiterates the facts set out in the Amended Statement of Claim. In brief, he told Court that together with the other claimants they were employed by the 1st respondent in his restaurant called Auntie and thereafter took them to Highridge. He stated that he worked as a cook, together with Stephen Nzuki and Geoffrey Kagoni Keya while Thomas Malombe was a waiter.

5. He denied any employment relationship between the claimants and the 2nd respondent and maintained that they were employee of the 1st respondent. He further stated that they were never issued with any appointment letters or Payslips to show that they were employed by the 2nd respondent

6. He further testified that they were all dismissed from work by the 1st respondent without any prior notice, any reason at all and without being accorded any hearing. He contended that the termination of their employment was unfair and prayed for judgement as prayed in the amended Claim.

7. He denied that they were dismissed for refusal to sign a Policy document and averred that they were never given any termination letter stating that they were dismissed for refusal to sign the alleged policy document.

8. On cross examination, he clarified that the claim for leave is for the year 2013, 2014 and 2015 but admitted that he was paid for his leave. He further clarified that his claim for overtime is in respect of every day he worked for the 1st respondent.

9. He reiterated that he was employed by the 1st respondent to work at his Restaurant. He confirmed that all the other claimants are alive and in court, but they had given him authority to testify on their behalf.

10. He reiterated that the 1st respondent dismissed them without explaining the reason to them and hoped that he would explain the same to the court.

11. He admitted that the employer paid NSSF contribution for him.

Respondent's case

12. Mr. Azziz Mohamed testified as Rw1 and stated that he is the director of Mcfrys Limited, a fast food restaurant. He adopted as part of his evidence his written statements dated 18.2.2019 and 16.3.2020 and produced two sets of documents dated 18.2.2019 and 16.3.2020 respectfully.

13. He denied that the claimants were his personal employee and stated that they were employed by the 2nd respondent. He contended that each claimant was employed individually and not as a group.

14. He contended that a complaint was filed against his staff for passing comments to a lady customers and he warned all the employees and they all signed except the 1st claimant who left without collecting his salary for February and March 2015.

15. He admitted the 1st claimant's claim for said salary but denied the claim for salary in lieu of notice contending that he had served him with notice. He further denied the claim for House Allowance contending that the salary he was paying him was inclusive of house allowance.

16. He admitted that he never accorded the 1st claimant any hearing because he disappeared after being served with the notice and he never returned to clear until his lawyer served a demand letter.

17. He denied the claim by the 2nd, 3rd, and 4th claimants contending that he did not know them and they did not have any genuine claim against him.

18. On cross examination, Rw1 admitted that the 4 claimants were his employees. He further admitted that he never gave them appointment letters showing that they were employees of the 2nd respondent but only engaged them verbally. He further admitted that he had no written authority to engage them on behalf of the company and he never told them that he was engaging them on behalf of the company and not for himself. He also admitted that he never gave them any payslips but they signed only Petty Cash Vouchers which he kept. However he contended that their NSSF, NHIF and PAYE were paid under the company and not under his name.

19. He admitted that he never provided housing to the claimants but maintained that their salary was inclusive of housing. He admitted that he never gave any written evidence that the salary was inclusive of housing. He also did not produce documents to prove that the leave was cashed. He stated that the claimants were reporting at 9.30 am and leave at 10.30 pm for 6 days a week but there was no attendance register. He did not have documents to prove that he paid them for the overtime worked.

20. He contended that he gave the 1st claimant one months' notice dated 28.2.2015 but he left immediately. He contended that he did the same to all the other claimants but they all left. He clarified that the notice was that they either sign sexual harassment policy or they quit the job. They all refused to sign and quit the job and later served a demand notice through their lawyer. He confirmed that the notice was not in the company letterhead and it was not signed by him or any other officer of the company.

21. He admitted salary for 1st claimant but denied claims for all the other claimants because they did not give evidence in court to establish their claims. He also admitted that he never issued the claimants with certificate of service contending that they never went to clear with him.

22. He contended that he served the termination notice after the claimants refused to sign the said policy document. He concluded by stating that the claim for overtime and leave lack particulars.

Claimant's submissions

23. The claimants submitted that they were dismissed from employment by the respondent without a valid and fair reason. They contended that under section 43 of the Employment Act the burden is upon the employer to prove a valid reason to justify termination and if he fails to

do so the termination is unfair. According to them the respondent never explained to them, the reason for the termination and it never served them with any termination letter. They contended that the allegation that they refused to sign sexual harassment policy was false and the same has not been proved before this court.

24. The claimants further submitted that they were dismissed without being accorded a fair hearing as required by section 41 and 45 of the Employment Act. They contended that the respondents have failed to tender any written evidence of any meeting held between it the claimant to discuss the alleged sexual harassment policy. Therefore they maintained that the termination was unfair and they are entitled to the reliefs sought in the Amended Statement Claim.

Respondent's submissions

25. The respondents submitted that the claim by the 2nd, 3rd, and 4th claimants has not been proved because they never tendered any evidence. According to the respondents, the claimants had separate contracts and as such they have distinct causes, and therefore each of them ought to have tendered evidence to establish their respective cases. They contended that the said claimants have not discharged the burden of proving their cases as required under section 47(5) of the Employment.

26. For emphasis they relied on **Peter Wambani v Bethuel Ndung'u t/a Maji Pump Ventures [2020] eKLR** and **Kenya Plantation & Agricultural Workers Union v James Finlays Kenya Limited [2017] eKLR**. They also relied on **Justo Ngoka & 225 others v Rai Ply Wood (K) Ltd** (unreported) which was cited with approval in **Ndungu Mugoya & 473 others v Stephen Wangombe & 9 others [2005] eKLR** where the court held that each of the 226 plaintiffs should be treated individually.

27. In view of the foregoing precedent, the respondents submitted that the claims for the said three claimants should be dismissed because they are not covered by Rule 9 of the ELRC Procedure Rules of 2016.

28. In addition the respondents submitted that the claimants have no cause action against the 1st respondent because they were not his employees. The respondents contended that the claimants did not adduce any evidence to prove that they were employed by the 1st respondent. They further contended that claimants have admitted in their pleadings, evidence and submissions that they were employed by the 2nd respondent and not the 1st respondent. They further contended that the respondents are two distinct and separate persons despite the fact that the 1st respondent is a director of the company and as such he cannot be held liable for the employment claims made against the company.

29. For emphasis, they relied on **Multichoice Kenya Limited v Mainkam Limited & another [2013] eKLR** where it was held that directors are generally not liable on contracts by their companies.

30. As regards the status of the claimants' employment, the respondents contended that they were casual employees and not permanent employees. They contended that the 2nd respondent deals with fast foods and they do not employ permanent staff but only temporary ones on daily basis to meet specific needs of the day. Therefore they contended that the claimants never worked continuously so as to convert to permanent employees under section 37 of the Employment Act.

31. For emphasis, they relied on **Krystaline Salt Limited v Kwekwe Mwakele & 67 others [2017] e KLR** and **Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] e KLR** where the court held that the burden of proving employment lies with the employee.

32. On the other hand the respondents submitted that the claimants were fairly dismissed because there was a valid reason and a fair procedure was followed. They contended that the reason for the termination was the outright refusal by the claimants to adhere to sexual harassment policy which was necessitated by a complaint by a lady customer. They referred to the copy of the policy documents (exhibit 3) and contended that the import of signing the same was explained to the 1st, 2nd and 4th claimants but they refused to sign it and they were dismissed because the refusal threatened the conducive work environment.

33. With regard to the 3rd claimant, the respondents submitted that he slapped a colleague and absconded work before disciplinary proceedings could begin against him and the effort to reach him did not bear any fruit until he filed this suit. Consequently, the respondent contended that they have discharged the burden of proving valid and fair reason as required under section 43 and 45 of the Employment Act.

34. They further submitted that they followed the correct under procedure section 41 of the Act before the termination. They contended that the 1st, 2nd, and 4th claimants where at all material times aware of the reason for the termination as the refusal to sign the said policy document and still refused to sign the same after explanation by the management in the presence of the fellow employees.

35. They also contended that the said three claimants were served with one month notice despite being casual employee but they absconded work immediately. As regards the 3rd claimants, the respondents reiterated that he absconded work after assaulting a colleague and as such disciplinary hearing was not possible despite the effort to trace him.

36. Finally, the respondents submitted the claimants are not entitled to any relief because the termination was fair and lawful and also because the claimants have not adduced evidence to discharge the burden of proof as required by section 47(5) of the Employment Act and section 107 of the Evidence Act. In addition they contended that the claims as pleaded are vague and lack particulars and as such they ought to be declined and the suit be dismissed with costs.

Issues for determination and analysis

37. Having carefully considered the pleadings, evidence and submissions presented by the parties, the main dispute herein concerns the employment relationship between the parties and the fairness of the termination of the employment contract by the respondents. Section 45 of the Employment Act provides that:

“(1). No employer shall terminate the employment of an employee unfairly.

(2). A termination of employment by an employer 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.”

38. Consequently, the issues for determination are:

- a. Whether the claimants were employed by the 1st or the 2nd respondent.***
- b. Whether the failure by the 2nd, 3rd, and 4th claimants to testify during the hearing was fatal to their respective claims.***
- c. Whether the termination of Claimants’ employment contracts was grounded on a valid and fair reason.***
- d. Whether termination was done in accordance with a fair procedure.***
- e. Whether the Claimants are entitled to the reliefs sought.***

Who was the claimants’ employer?

39. The claimants have insisted that they were employed by the 1st respondent and not the 2nd respondent. The 1st respondent maintained that the claimants were employed by the 2nd respondent and not him. However, he admitted during cross examination that he is the one who recruited the claimants, that he neither issued them with letters of appointment nor did he inform them that he was recruiting them on behalf of the 2nd respondent. Further, he never issued them with any payslips or other relevant documents to show that they were employed by the 2nd respondent.

40. Having considered the evidence, submissions and the circumstances of this case, I find that the claimants have proved on a balance of probability were employed by the 1st respondent. If indeed he recruited the on behalf of the 2nd respondent nothing was easier than telling them as much or giving them documentary proof that they were employees of the company.

Whether the failure by the 2nd, 3rd, and 4th claimants to testify during the hearing was fatal to their respective claims.

41. The respondents contended that the claim by the 2nd, 3rd, and 4th claimants must fail because they did not testify in during the hearing. However, I have noted that they signed an authority allowing the 1st claimant to plead and testify on their behalf. The said claimants were all in court and they were satisfied with the evidence as tendered by the person they had given authority to represent them.

42. Rule 9 of the ELRC Procedure Rules provides that:

“(1) A suit may be instituted by one party on behalf of other parties with similar cause of action;

(2) Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:

Provided that in appropriate circumstances, the court may dispense with this requirement.”

43. On the basis of the above rule the said three claimants’ claims have not been rendered fatal by their failure to testify during the hearing because they gave authority to the CW1 to plead and testify in court on their behalf. Therefore I proceed to consider the evidence tendered by the Cw1 to determine whether claims have been proved to the required standard.

Whether the reason for termination was valid and fair.

44. The reason cited for the termination of the 1st, 2nd, and 4th claimants' is that they refused to sign Sexual Harassment policy and disappeared. Rw1 did not produce any evidence to show that he served the claimants with the said policy document like a delivery book to rebut the claimants' denial of the same. I perused the letters written by the defence lawyer in response to the demand letters by the claimants and none mentions the alleged refusal to sign sexual harassment policy. It follows that the alleged policy document is an afterthought, and there is no evidence that the claimants were served with the same. Consequently, I find and hold that the respondents have failed to prove the reason for dismissing the 1st, 2nd, and 4th claimants.

45. As regards the 3rd claimants, the reason for termination according to Rw1 was slapping his colleague and absconded before disciplinary hearing could be done. The 3rd respondent did not adduce evidence to rebut the testimony by Rw1. Consequently, I find that the respondents have proved a valid and fair reason for dismissing the 3rd claimant.

The procedure followed.

46. Section 41 of the Employment Act provides:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

47. In this case, Rw1 contended that the 1st, 2nd, and 4th claimants were explained the importance of signing the policy document but they refused. The claimants denied that allegation and maintained that they were never served with the said policy document. According to the claimants, if there was any such meeting, the employer ought to have produced written evidence in the form of minutes.

48. I have already made a finding of fact that the respondents have not proved that he served the said policy document on the claimants. Therefore the alleged explanation cannot have taken place. If the same took place, Rw1 could have produced a written evidence or called eye witnesses.

49. As regards the 3rd claimant, Rw1 admitted in evidence that the claimant was not given hearing before the termination and contended that he absconded work and efforts to reach him failed to bear any fruit. However, no evidence has been tendered to show how the employer tried to reach the said claimant.

50. In concluding this part, I find and hold that the termination of the claimants' employment was through some untidy process which did not accord with fair procedure set out under section 41 of the Employment Act.

Whether the Claimants are entitled to the reliefs sought

51. In view of the findings made herein above I make declaration that the termination of claimants' employment contract was unfair and unlawful.

52. Flowing from the foregoing I find that the claimants are entitled to salary in lieu of notice plus compensation for the unfair termination. I award each claimant one month salary in lieu of notice plus 3 months' salary as compensation for the unfair termination. In awarding the said compensation, I have considered that the claimants had worked for about 4 years and except for the 3rd claimant, the rest did not contribute to the termination through misconduct.

53. The claim for salary for February and March 2015 is allowed because Rw1 admitted the same when he stated 1st Claimant was not paid the same and denied the claim for the others just because they did not testify during the hearing.

54. The claim for house allowance is declined because it appears to be afterthought coming after the termination.

55. The claim for leave is only allowed for one year because under the Regulations for Hotel and caterers trade, leave cannot be accumulated without the employer's agreement. The claimants did not prove that they applied for leave and it was denied or all that they employer agreed to accumulation of the same. Under the said regulations, the annual leave is a minimum of 24 days and that is what I award each claimant.

56. The claimants admitted that the employer contributed NSSF for them and as such, the claim for service pay is declined.

57. The claim for overtime lacks material particulars and it is declined.

58. However the prayer for certificate of service is granted as prayed.

59. In the end, I enter judgment for the claimants in the follows:

1ST CLAIMANT (KAVAYI C. WYCLIFF)

Notice Kshs.12, 000

Compensation Kshs.36, 000

Unpaid salary Kshs. 24,000

Leave Kshs. 9600

Total Kshs. 81,600

2ND CLAIMANT (STEPHEN NZIOKA)

Notice Kshs.20, 000

Compensation Kshs.60, 000

Unpaid salary Kshs. 40,000

Leave Kshs. 16,000

Total Kshs. 136,000

3RD CLAIMANT (THOMAS MALOMBE)

Notice Kshs.12, 000

Compensation Kshs.36, 000

Unpaid salary Kshs. 24,000

Leave Kshs. 9600

Total Kshs. 81,600

4th CLAIMANT (GEOFREY KAGONI KEYA)

Notice Kshs.12, 000

Compensation Kshs.36, 000

Unpaid salary Kshs. 24,000

Leave Kshs. 9600

Total Kshs. 81,600

60. The above awards are subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof. The claimants will also be issued with Certificate of Service.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE