



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 10 OF 2020

SHIRLEY GATHONI KAMAU.....CLAIMANT

VERSUS

SEBS HOTEL LIMITED.....1ST RESPONDENT

NJOROGE KAHUGI Alias ROKA.....2ND RESPONDENT

RULING

1. The Claimant herein filed this suit against the Respondents for alleged unfair termination which arose as a result of an assault incident by the 2nd Respondent at work place and sought to be compensated for the unfair termination and for the 2nd Respondent to be punished for the treatment she received while working for the Respondents.

2. The Respondents in response filed a Defence together with a preliminary objection both dated 8th October, 2019 and filed on even date. The preliminary objection is based on the following grounds;

- 1) That this Court has no jurisdiction to adjudicate upon the matter**
- 2) The entire suit is bad in law, fatally incompetent, unsustainable, does not lie and is an abuse of Court Process.**
- 3) The statement of claim herein does not disclose any cause of action triable by this Court as against the 2nd Respondent.**

3. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Claim as it touched on its jurisdiction.

4. The preliminary objection was canvassed by way of written submissions with the Claimant filing on 22nd June, 2021 and the Respondents filed on the 9th June, 2021.

Respondent's submissions

5. The Respondents submitted from the onset that this Court lack the requisite jurisdiction to hear and determine the claim herein on the premise that the claim arose out of a personal injury suffered by the claimant at her workplace which she seeks compensation. He argued that such claims are at the purview of the Work Injuries and Benefits Act(WIBA) and cited the case of **Law Society of Kenya –v- Attorney General and another[2019] eKLR**. Accordingly, that since the claimant case was filed after the supreme Court decision on WIBA matters the same ought to have been filed in the right forum.

6. The Respondent reinforced his case by citing the case of **West Kenya Sugar Co. Limited –v- Tito Lucheli Tangale [2021] eKLR** where Justice Radido faced with a similar scenario held that;

“In the Court respectful view that all claims which were lodged with the courts from 22nd May, 2008 to 3rd December 2019 being claims underpinned by the judge made or judge declared law, were validly within jurisdiction of the Courts..... in view of this Court, these litigants who filed their disputes with the Courts from 22nd May 2008 to 3rd December, 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the Court where they had been lodges.”

7. He argued that the Claimant cannot take umbrage under the doctrine of legitimate expectation as the matter was not filed within the duration stated by Justice Radido neither was it filed before the WIBA came to force.

8. The Respondent also cited this Court decision in **Katherine wairimu Ndungu (Suing as administrator of the Estate of Francis Ndungu Githinji) V Kirinyaga Construction Company Limited [2018] eKLR** where this Court held that:-

“This matter having arisen in July 2007, the correct court to hear this case would have been the magistrates Court. When WIBA was passed however, the industrial Court acquired appellate jurisdiction in such work injury cases as provided for under section 51 of Work Injury Benefits Act.”

9. The Respondent argued that the claim in Katherine case above was on personal injury similar to the claims herein therefore this Court lacks jurisdiction to hear this case and prayed that it be struck out with costs to the Respondents.

10. It was also submitted that the claimants claim discloses no reasonable cause of action triable by this Court as against the Respondents. Therefore submitted that the preliminary objection is merit and prayed at it be allowed as prayed.

Claimant's submissions

11. The claimant on the other hand submitted that the preliminary objection is not on pure points of law as envisaged in *Mukisa Biscuits* case and argued that the 3rd Ground on whether there is any cause of action raised against the Respondent is a matter of fact that will require this Court to call for evidence from the parties to ascertain whether there is any cause of action against the Respondent. Also that ground 2 is a matter of fact and not law which will require this Court to interrogate the facts of the case to ascertain whether the case herein is bad in law and an abuse of Court process. He therefore submitted that the two grounds do not meet the threshold set out in *Mukisa Biscuit* case as to what constitute a Preliminary Objection.

12. On whether this Court lacks jurisdiction to hear and determine this claim, it was submitted that the claimant sued the Respondent for unfair termination that arose following discrimination at work place based on her gender and for compensation for the violation of the claimant right to equal treatment and freedom from degrading and humiliating treatment. It was submitted that her dismissal emerged from employment relationship which is contemplated under the preamble of the Employment and Labour relations Court Act and section 12 of the Employment and Labour relations Court Act and cited the case of **Celina Atieno Ogut –v- Undugu Society of Kenya [2019] eKLR** which the Court held that:-

“The claimant does not only seek compensation for wrongful and unfair termination of services from the 1st Respondent but damages fro defamation and malicious prosecution against the 4 Respondents jointly and severally as jint tortfeasors. This means the jurisdiction of the Court is attracted by the Reason of the fact that the factual background of the claim presented by the claimant arose out of his contract of employment with the 1st Respondent and once the Court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of it accrued or consequential jurisdiction.”

13. The Claimant submitted that under WIBA director of Occupational safety and health services is vested with jurisdiction to hear injury claims that arise as a result of an accident at the workplace, which is not the case in this claim. He argued that the claim before Court is not a personal injury that arose as a result of an accident at work place as alleged by the Respondent rather a claim for compensation following breach of claimant's constitutional right to equal treatment and freedom from degrading and humiliating treatment as contemplated under Article 27(3) and 29(f) of the Constitution, the assault being an underlying factor.

14. He submitted further that the claimant was hired by the Respondent as a chef only to be discriminated and humiliated by the Respondent causing her to lose her job having been constructively dismissed. Therefore, the compensation sought by the claimant was as a result of the said actions by the 2nd Respondent which came about as a result of her employment relationship with the Respondents.

15. The Claimant also submitted that under section 87(c) of the Employment Act, this Court has been empowered to hear all matter arising from interalia ill treatment of either party or injury to the person or property of either party under the contract of service. Further that section 87(2) of the Employment Act vests exclusive jurisdiction upon this Court to hear such complaints referred in section 1.

16. Accordingly, it was argued that the slapping of the claimant by the 2nd Respondent is a misconduct and ill treatment contemplated under section 87 of the Employment Act therefore clothing this Court with the requisite jurisdiction to hear and determine the claim.

17. The claimant submitted that the cause of action in her claim arose out of employment relationship with the Respondents which was cut short due to the actions of the Respondents and argued that they have a cause of action against the Respondents and prayed that the Preliminary objection be dismissed and the Claim be allowed to run its course till it just conclusion.

18. I have considered the averments of the parties in respect of the Preliminary Objection herein.

19. The respondent applicant has argued that this court lacks requisite jurisdiction to handle this claim as it is an issue of injury at work for which the requisite jurisdiction vests in hands of the direction of WIBA.

20. I have looked at the statement of the claimant, the main complaint is that she was assaulted by her boss while at work. She reported the matter to the police and the boss was even arrested and charged before a criminal court.

21. He pleaded guilty and was sentenced to a fine of 10,000/= or 6 months imprisonment.
22. The statement indicates that she was then terminated and suffered discrimination on account of gender.
23. The claimant has sued the 1st respondent her employer and the assailant Njoroge Kahugi – the 2nd respondent.
24. In respect of being assaulted by Njoroge, the claimant should have filed her claim for damages in a civil court.
25. The claimant has indicated she seeks damages for unfair termination from the 1st respondent. She has not in her claim explained whether she was actually terminated or the circumstances under which she was terminated.
26. This would have been an issue to be determined by this court but which the claimant has not sought to explore.
27. I therefore find the Preliminary Objection has merit. I allow it and strike out this claim accordingly.
28. Each party will bear its own costs.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Waiganjo for respondent – present

Wachira for claimant – present

Court Assistant - Fred