



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 835 OF 2015

WAITHIRA MUTHAKA.....1st CLAIMANT

ANN WANJA MUSILI.....2nd CLAIMANT

CONSOLATA NDUTA.....3rd CLAIMANT

AGNES DAVID.....4th CLAIMANT

v

FOREST COFFEE ESTATE.....1st RESPONDENT

NJERI GAKUNJU (sued as an Administrator of the estate of

MARY W. GAKUNJU.....2nd RESPONDENT

JUDGMENT

1. The 4 Claimants jointly sued the Respondents on 19 May 2015 and they stated the Issue in Dispute as Unlawful termination and failure by the Respondents to pay termination benefits.
2. The Respondents filed a *Memorandum of Reply* on 13 August 2015, and the Cause was heard on 18 February 2019 and 16 December 2019. All the Claimants and the 2nd Respondent testified (the witnesses adopted their witness statements and produced some exhibits).
3. The Claimants filed their submissions on 15 January 2020 while the Respondents filed their submissions on 3 March 2020 (should have been filed before 26 February 2020. The delay will impact the order on costs).
4. Although the Court had directed the parties on 17 January 2019 to file Agreed Issues, the parties opted to adopt the Issues as proposed by the Respondents and filed in Court on 28 February 2018.
5. The Court has considered the pleadings, evidence and the submissions and will examine the dispute in light of the Issues as adopted by the parties.

Whether there was a contract of employment between the Claimants and the 1st Respondent

6. An employer is defined in section 2 of the Employment Act, 2007 as means 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, foreman, manager or factor of such person, public body, firm, corporation or company.
7. There is evidence on record that the Respondents communicated with the Claimants on the letterhead of the 1st Respondent.
8. The Respondents also produced leave records which suggest that the Claimants were employed by an entity known as *Evergreen Agencies Ltd*.
9. The Claimants are illiterate old women who were working in a coffee farm by the name of *Forest Coffee Estate*. The Respondents

acknowledged in the *Memorandum of Reply* that they were employees of Mary Gakunju (deceased) but did not make any reference in the *Reply* to the relationship between Evergreen Agencies Ltd and Mary Gakunju (deceased).

10. In the circumstances, the Court would not fault the Claimants for suing and/or considering as their employer, the business name.

11. In any case, one of the Administrators of the estate of the deceased who run the coffee farm was joined as a party.

Unfair termination of employment

12. The evidence before Court was that the Claimant's contracts were brought to an end upon the death of one Mary Gakunju.

13. The said Mary Gakunju run a farm under the name and style of *Forest Coffee Estate* (1st Respondent).

14. With no evidence presented before the Court that the 1st Respondent was a juristic person separate and distinct from Mary Gakunju (deceased), the Court is unable to find or conclude that there was unfair termination of employment within the contemplation of sections 35(1), 36, 40, 41, 43, 44, 45 and/or 47 of the Employment Act, 2007.

15. In other words, there was no termination upon notice, summary dismissal, redundancy or unfair termination of employment.

16. The Claimants contracts became frustrated by the death of the employer. The notices of 2 January 2015 were therefore legally superfluous.

17. Compensation, a discretionary remedy where there is a finding of unfair termination of employment, is therefore not available to the Claimants.

Underpayments

18. The largest portion of the Claimants cause of action related to underpayment of wages.

19. Underpayment of wages may occur where an employer pays below the contractually agreed wages, or where the employer pays wages below the prescribed minimum wages.

20. From the witness statements, the Claimants appear to have anchored the heads of claim for underpayments on the prescribed minimum wages.

21. Minimum wages are set out in *Regulation of Wages Orders* which and are usually prescribed annually.

22. The Orders set daily rates of pay, hourly rates of pay and monthly rates of pay. The rates also depend on the sector and area of operation.

23. The Claimants did not disclose whether they were on hourly, daily or monthly rate of pay. All that was outlined was a monthly wage but no indication whether it was cumulative from hourly or daily rates.

24. The Claimant also outlined a uniform minimum monthly wage of Kshs 9,000/- throughout their tenure of employment.

25. It is in the public knowledge that prescribed minimum wages were not static and were and are adjusted periodically.

26. Considering that these heads of claims were in the nature of special damages, the Court is unable, on the state of evidence on record to find that the Claimants were underpaid.

Annual leave

27. Annual leave of at least 21 days with full pay is an entitlement of an employee. Section 28(4) of the Employment Act, 2007 circumscribes how much of the annual leave may be carried forward.

28. The 1st and 2nd Claimants sought for Kshs 35,700/- said to be accrued annual leave over 7 years of employment.

29. The 3rd and 4th Claimants sought Kshs 5,200/- on account of leave for 1 year.

30. The Respondents produced leave records and which records indicate that the Claimants would apply for and would be granted annual leave. The Respondents also produced final dues schedules.

31. The final dues schedules show that as of 2014 the 1st and 2nd Claimants had no outstanding leave, and further that *pro-rata* leave was part of final dues paid to all of the Claimants.

32. On the state of evidence, the Court finds that the Claimants did not provide an evidential foundation for an award of any relief on account

of accrued leave.

Overtime

33. The Claimants did not provide any evidence that they worked overtime without compensation for the overtime work.

Severance pay

34. In some jurisdictions such as the United Kingdom under the Employment Rights Act, 1996, the death of an employer counts as a redundancy situation.

35. In our jurisdiction, section 67(a)(ii) of the Employment Act, 2007 provides that in the case of death of an employer, the employer becomes insolvent.

36. In such a case, the employee or his/her personal representative should make an application to the Cabinet Secretary for Labour under section 66 of the Employment Act, 2007 for payment out of the National Social Security Fund of any monies or debts which may be due to the employee.

37. The option, in the present case, is for the Claimants to invoke the aforesaid provisions of law.

Conclusion and Orders

38. From the foregoing, the Court regrettably finds no merit in the Cause herein, and orders the *Memorandum of Claim* dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 6th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimants Mr. Ng'ang'a instructed by Ng'ang'a Kimani & Associates Advocates

For Respondents Ms. Gatari instructed by Ndungu Njoroge & Kwach Advocates

Court Assistant Lindsey/Judy Maina