



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 487 OF 2017

BETWEEN

1. EBINATE JAJI

2. ANSENTOS OKOTH.....CLAIMANTS

VERSUS

HABO GROUP OF COMPANIES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Thabit, Wampy & Kitonga Advocates for the Claimant

Bosire & Partners, Advocates for the Respondent

JUDGMENT

1. The 2 Claimants filed their Statement of Claim, on 21st June 2017. They state, they were employed by the Respondent. Jaji was employed on 11th August 2013 through a written contract. The letter states ‘ ‘ you will be employed as Procurement.’ ’ Okoth was employed as Workshop Foreman. His letter is dated 11th March 2003

2. Jaji states, her contract was terminated by the Respondent arbitrarily and without notice, in March 2016. Her last salary was Kshs. 22,000. She prays the Court for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 22,000.
- b. Severance pay at Kshs. 33,000.
- c. SACCO at Kshs. 9,300.
- d. In-house saving at Kshs. 9,300.
- e. Unpaid leave at Kshs. 38,133.
- f. Damages for unfair termination at Kshs. 264,000.

Total.....Kshs. 375,733.

3. Okoth states, his contract was terminated similarly, arbitrarily and without notice, in March 2016. His last salary was Kshs. 50,000. His prayers are:-

- a. 1 month salary in lieu of notice at Kshs. 50,000.
- b. Severance pay at Kshs. 350,000.
- c. SACCO at Kshs. 47,000.
- d. In-house saving at Kshs. 59,000.
- e. Unpaid leave at Kshs. 130,000.
- f. Damages for unlawful termination at Kshs. 600,000.

Total.....Kshs. 1,236,000.

4. The prayers are summed up as follows:-

- a. An order to issue compelling the Respondent to pay the Claimants all their dues as stated above.
- b. A conditional order to issue directing the Respondent to pay the Claimants all their statutory dues pending.
- c. An order to issue for damages for wrongful and or unfair dismissal as prayed.
- d. Costs of the Claim.

5. The Court must from the outset take issue with the prayers sought. Order [b], on conditional order is steeped in ambiguity. What is the condition for grant of the order? What statutory dues, outside what is specifically pleaded under paragraph 14 [C] and [1] of the Reliefs, in the Statement of Claim? And is not the prayer for damages, included in paragraph 14 [C] and 1 of the Statement of Claim? What is the prayer for SACCO? Parties particularly those with the benefit of Counsel, must be clear in their Pleadings and not waste judicial time repeating and/or making ambiguous and unnecessary prayers. To ease the burden placed on the shoulders of the Court, paragraphs 2 and 3 of the Reliefs sought are struck out. The Court shall deal with Claim as pleaded at Paragraph 14[C], 1 and 4 of the Statement of Claim.

6. The Respondent filed its Statement of Response on 8th March 2018. It states, it never employed the Claimants. It is pointed out that the 1st Claimant variously gives her date of employment as June 2013 and August 2013. The letters of appointment show they were employed by Habo Agencies, a different entity from the Respondent. The Respondent did not terminate Claimants' contracts. They are not entitled to the prayers sought. The Respondent prays the Court to dismiss the Claim with costs.

7. Both Claimants gave evidence and rested their Claim, on 16th July 2019. Administrator, Anderson Kenneth Muturi Mugambi, gave evidence for the Respondent on 8th October 2019, closing the hearing. The matter was last mentioned on 12th March 2020 when Parties confirmed filing of their Submissions.

8. Jaji told the Court she was employed as a Procurement Officer in June 2013, earning a monthly salary of Kshs. 22,000. She worked until March 2016. She reported in the morning. She was called by the CEO's Secretary, and told there was no more work. The Human Resource Officer told Jaji he was not aware about there being no more work. The following day, the Human Resource Officer told her he had received e-mail communication from the Manager, saying that she was involved in overpricing of spare parts. She was to be issued letter to show cause, why disciplinary process should not ensue. She was asked to leave, and was not recalled. She approached the CEO, who was non-committal on her fate.

9. Cross-examined, Jaji told the Court her letter of employment issued in the name of Habo Agencies. She was asked orally to go home. There were allegations against her. She responded to the letter to show cause. Her response is not exhibited. She did not foreclose the disciplinary process. She never went on annual leave. Redirected, she told the Court that Habo Agencies changed into Habo Group of Companies. Her pay slip issued in the name of the latter. Records remained in the custody of the Respondent.

10. Okoth confirmed he was employed by the Respondent as a Workshop Foreman. He was employed in 2000 but appointed officially in 2003. He was told by Jaji that their contracts were terminated because they overpriced spares. He was advised by the Human Resource Manager, that he had been suspended. He found a new Human Resource Manager, who was unhelpful, every time he visited the Respondent on follow-up.

11. Cross-examined, he told the Court that his letter of appointment issued in the name of Awanad Enterprises Limited. He was unwell at the time of termination. Jaji called him, and informed him about termination. He did not have evidence showing he was suspended, or that he was unwell at the time. He did not try to contact the CEO. He found a different Human Resource Manager. He did not have a letter of termination. Redirected, he told the Court that his contract described him as an Employee of Habo Group of Companies.

12. The issues may be stated to comprise: whether the Claimants were Employees of the Respondent; whether their contracts were terminated unfairly, or at all, by the Respondent; and, whether they merit the prayers sought.

The Court Finds:-

13. *Employees of the Respondent?* Jaji's contract was issued in the name of Habo Agencies Limited, on 11th August 2013. She told the Court that Habo Agencies Limited became Habo Group of Companies in subsequent years. Okoth's contract was issued in the name of Awanad Enterprises Limited on 11th March 2003. At paragraph 3 of Okoth's contract, it is indicated that his workstation was Awanad, but that as an Employee of Habo Group of Companies, he could be required to work in any of the subsidiary Company within the Group.

14. It is clear that the entities which issued Claimants letters of appointment, were part of Habo Group of Companies. Jaji was mistaken in her assertion that Habo Agencies became Habo Group of Companies later. Habo Group was there at the time she was employed, as confirmed in the letter issued to Okoth, way back in 2003. The pay slips issued to Okoth were in the name of Habo Agencies Limited, said to have been Jaji's Employer, and are stamped in the name of Habo Group of Companies.

15. The Court is satisfied that the Claimants were Employees of Habo Group of Companies Limited, named as the Respondent herein.

16. Contracts terminated by the Respondent unfairly or at all? The Respondent pleaded that it did not employ the Claimants and it follows therefore, that it did not terminate their contracts. The Court has concluded that the Respondent did employ the Claimants, so this standpoint is flawed.

17. Alternatively, it was alleged by the Respondent, that Okoth disappeared from the workplace, and calls to trace him made by the Respondent, bore no fruit. This is in the evidence of Mugambi. In the case of Jaji, Mugambi was content with the explanation that she was not an Employee of the Respondent. The Respondent also states it did not issue letters of suspension and/ or termination.

18. The more likely and believable version, in the respectful view of the Court, is what the Claimants told the Court. They were suspected for involvement in overpricing of certain spare parts at the Respondent. They were asked to step aside by word of mouth, and advised after some time, that there was no more work for them.

19. In doing this, the Respondent did not establish valid reason or reasons justifying termination, in accordance with Section 43 and 45 of the Employment Act 2007. The Respondent did not take the Claimants through a fair procedure under Section 41 and 45 of the Act. Termination was unfair.

20. Jaji is allowed the prayer for notice, equivalent of 1 month salary, at Kshs. 22,000 and Okoth allowed notice at Kshs. 50,000.

21. Jaji worked for approximately 3 years, from 2013 to 2016. She is not shown to have had disciplinary issues in her personnel record. Okoth worked from 2003 to 2016, a period of approximately 13 years. He is not shown to have disciplinary blemishes in his record. Both Employees did not contribute in any way to the circumstances leading to termination. They were paid nothing on termination. ***The Respondent shall pay equivalent of 6 months' salary to Jaji, in compensation for unfair termination at Kshs. 132,000, and equivalent of 12 months' salary to Okoth at Kshs. 600,000 in compensation for unfair termination.***

22. Jaji's contract had a clause on in-house savings. Okoth's did not. Jaji would be entitled to 2 times of her contributions, in-house savings, on termination. On resignation or dismissal, the contract states she would only receive her contributions. She did not give evidence on what her contributions were. She has not established her prayer for in-house savings.

23. The Claimants similarly, failed to explain to the Court their prayer for SACCO. The prayer for SACCO is bare. What is an order for SACCO? The prayer is rejected.

24. On severance pay, this is ordinarily considered in a redundancy situation. Okoth's contract did not mention severance. His prayer for severance is declined. Jaji's contract, had a clause on severance pay. It states that she would be paid 15 days' salary for every completed year of service. On resignation she would lose all the severance pay. The Parties perhaps intended that Jaji would receive service, rather severance pay. The Court has an obligation to enforce what is intended by the Parties. ***Jaji is allowed the prayer for severance pay at the rate of Kshs. 11,000 for each of the 2 complete years of service, amounting to Kshs. 22,000.***

25. The Claimants state they did not go on annual leave, or receive pay in lieu of leave. The Respondent's position is that it did not employ the Claimants and so could not be liable for their annual leave entitlement. There was no effort on the part of the Respondent, to offer documents showing leave taken or bought from the Claimants. The Claimants seek Kshs. 38,133 and Kshs. 130,000 respectively, in annual leave pay. Jaji was entitled under her contract to 21 days of annual leave. She worked for about 2 ½ years, and her claim for Kshs. 38,133 looks mathematically plausible. Okoth was entitled to 26 days of annual leave under his contract. He worked for 13 years. He claims is for Kshs. 130,000 in annual leave pay, which appears understated, if it is true he did not go on leave throughout. He is allowed what he pleads, which the Court thinks is below what he would merit, if he never went on annual leave. ***The Court shall allow the prayers for annual leave for both Claimants, as pleaded.***

26. **No order on the costs.**

27. Lastly the Court must record here, that owing to the covid-19 pandemic, it has been compelled to sign, and release this Judgment from the Trial Judge's home at Chaka, Nyeri County. It is not possible to deliver the Judgment in Open Court, or even in Chambers without exposing the participants in these proceedings, to the pandemic. Online platforms are not risk-free, as Staff of the Judiciary have to commute to Court to set up the necessary infrastructure. And even when the set-up is complete, communication is prone to constant breakage. The City of Mombasa, where the Trial Court is stationed, is at the time of preparing this Judgment, a hotbed of covid-19 and on the verge of a total lockdown. The health and safety of the participants must come first. The wheels of justice must move on nonetheless. Relying on Rule 38 of the E&LRC [Procedure] Rules 2016, the Court shall therefore release this Judgment for dispersal to the Parties, from outside the Trial Court Station. Ordinarily, Judgments are delivered in Open Court under Rule 28, but these are not ordinary times. It is noted on the record also,

that the Hon. the Chief Justice has directed all pending Judgments be released to the Parties, on or before 30th of May 2020. A copy of the Judgment shall be accessible through the Kenya Law Reports web portal, as soon as practicable. ***The Respondent is granted a stay of execution of 45 days.***

IT IS ORDERED:-

a. It is declared that the Claimants were Employees of the Respondent, and termination of their contracts by the Respondent was unfair.

b. The Respondent shall pay to the 1st Claimant: notice at Kshs. 22,000; equivalent of 6 months' salary in compensation for unfair termination at Kshs. 132,000; severance at Kshs. 22,000; and annual leave pay at Kshs. 38,133 –total Kshs. 214,133.

c. To the 2nd Claimant: notice at Kshs. 50,000; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 600,000; and annual leave pay at Kshs. 130,000 – total Kshs. 780,000.

d. Total Claim to be settled by the Respondent at a grand total of Kshs. 972,133.

e. No order on the costs.

f. The Respondent is granted an order of stay of execution for 45 days.

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge