



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 887 OF 2016

KASYOKA WAMBUA.....1<sup>ST</sup> CLAIMANT

ROSE NDULULU KINGOO.....2<sup>ND</sup> CLAIMANT

LUCY MUTIO MAKAU.....3<sup>RD</sup> CLAIMANT

VS

HARISH SHAH.....RESPONDENT

JUDGMENT

Introduction

- 1. The Claimants, Kasyoka Wambua, Rose Ndululu Kingoo and Lucy Mutio Makau have sued the Respondent, Harish Shah for unlawful termination of employment. The claim is by way of Statement of Claim dated 18<sup>th</sup> November 2016 and filed in court on the same date.
2. The Respondent filed a Reply on 15<sup>th</sup> December 2016 to which the Claimants responded on 9<sup>th</sup> January 2017.
3. When the matter came up for trial, the parties testified on their own behalf.

The Claimants' Case

- 4. The Claimants state that they were employed by the Respondent as house helps on diverse dates between 6<sup>th</sup> May 2013 and 6<sup>th</sup> September 2015. The Claimants, who earned graduated monthly salaries ranging from Kshs. 9,000 to 12,500 were charged with the responsibility of taking personal care of the Respondent's mother, the late Mrs. Sumati L. Shah.
5. The Claimants further state that on 4<sup>th</sup> May 2016 after the death of Mrs. Sumati L. Shah, the Respondent verbally terminated the Claimants' employment.
6. The Claimants claim that the termination of their employment was unlawful and unfair in that they were not given any notice, valid reason for the termination nor prior opportunity to be heard.
7. The Claimants tabulate their respective claims as follows:

1<sup>st</sup> Claimant: Kasyoka Wambua

- a) 1 month's salary in lieu of notice.....Kshs. 12,500.00
b) Leave for 3 years.....18,765.00

- c) Overtime worked (8 hours per day).....112,320.00
- d) Off duties.....25,020.00
- e) 12 months' salary in compensation.....150,000.00

**2<sup>nd</sup> Claimant: Rose Ndululu Kingoo**

- a) 1 month's salary in lieu of notice.....Kshs. 10,954.70
- b) Prorata leave for 2016.....6,390.00
- c) Underpayment for 10 months.....19,540.70
- d) Overtime worked (2 hours per day).....11,100.00
- e) Off duties.....14,606.00
- f) 12 months' salary in compensation.....131,456.40

**3<sup>rd</sup> Claimant: Lucy Mutio Makau**

- a) 1 month's salary in lieu of notice.....Kshs. 9,000.00
- b) Prorata leave for 2016.....5,112.00
- c) Underpayment for 8 months.....15,637.60
- d) Overtime worked (2 hours per day).....17,760.00
- e) Off duties.....9,600.00
- f) 12 months' salary in compensation.....131,450.40

8. The Claimants also ask for certificates of service plus costs of the case.

**The Respondent's Case**

9. In his Reply dated 13<sup>th</sup> December 2016 and filed in court on 15<sup>th</sup> December 2016, the Respondent denies having employed the Claimants and states that the Claimants were employed by the late Mrs. Sumati L. Shah who died on 2<sup>nd</sup> May 2016.

10. The Respondent further states that upon the death of Mrs. Sumati L. Shah, the Claimants were rendered redundant upon which they were paid their terminal dues.

11. The Respondent adds that he made the following payments to the Claimants on 4<sup>th</sup> May 2016:

- a) Kasyoka Wambua.....Kshs. 26,500
- b) Rose Ndululu.....5,500
- c) Lucy Makau.....5,500

12. The Respondent denies that the termination of the Claimant's employment was unlawful.

**Findings and Determination**

13. From the pleadings filed by the parties, three issues emerge for determination by the Court:

- a) Whether there was an employment relationship between the Claimants and the Respondent;
- b) Whether the termination of the Claimants' employment was lawful and fair;
- c) Whether the Claimants are entitled to the remedies sought.

## **Employment Relationship?**

14. At paragraph 2 of his Reply, the Respondent states that the Claimants were employed by his late mother, Mrs. Sumati L. Shah and not by the Respondent. At paragraph 6 however, the Respondent claims to have made some payments to the Claimants.

15. Section 2 of the Employment Act defines an employee as:

***“a person employed for wages or a salary and includes an indentured learner”***

16. In the same Section, an employer is defined as:

***“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.”***

17. The Respondent testified that the Claimants used to work for his late mother, Mrs. Sumati L. Shah, to whom he used to provide financial support. The Respondent also admitted having paid some money to the Claimants after his mother’s death.

18. Further, there was no evidence that the late Mrs. Sumati L. Shah, who was described as old and ailing, had any independent source of income from which the Claimants’ salaries were drawn.

19. From the foregoing, it seems to me that the Respondent employed the Claimants and deployed them to take care of his mother. An employment relationship between the Claimants and the Respondent was thus established.

## **The Termination**

20. It is not in dispute that the Claimants employment came to an end upon the death of the Respondent’s mother. The Claimants themselves told the Court that they were deployed to serve the late Mrs. Sumati L. Shah. They further conceded that after the death of Mrs. Sumati L. Shah, there was no more work for them to do.

21. It would appear that the Claimants were well aware that their employment was dependent on the life of Mrs. Sumati L. Shah and upon her death, the employment relationship could not survive. This type of employment is akin to a fixed term contract which terminates by effluxion of time.

22. In light of this, a claim for unlawful termination cannot be sustained. The claims for compensation and notice pay therefore collapse and are dismissed.

## **Other Claims**

23. The Claimants claim that they were not allowed to take annual leave and were not paid in lieu thereof. The Respondent did not adduce any evidence to the contrary. The claims for leave pay therefore succeed and are allowed.

24. The claims for underpayment, overtime and off duties were not supported by any evidence and are consequently dismissed.

25. In the end, I allow the claims for leave pay as follows:

a) 1<sup>st</sup> Claimant: Kasyoka Wambua (12,500/30x21x3).....Kshs. 26,250

b) 2<sup>nd</sup> Claimant: Rose Ndululu Kingoo (10,955/30x1.75x10).....6,390

c) 3<sup>rd</sup> Claimant: Lucy Mutio Makau (9,000/30x1.75x8).....4,200

26. These amounts will attract interest at court rates from the date of judgment until payment in full.

27. The Claimants are also entitled to certificates of service plus costs of the case.

28. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF MAY 2020**

**LINNET NDOLO**

**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 15<sup>th</sup> March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr. Mutisya for the Claimants**

**Mr. Khatib for the Respondent**