



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 551 OF 2014

MOSES LANTAPUNA LESARIS.....1ST CLAIMANT

MS. MUMBE MWANGANGI.....2ND CLAIMANT

VERSUS

GALOLE LODGE.....1ST RESPONDENT

MOHAMED SOMO.....2ND RESPONDENT

JUDGMENT

1. This is a claim for unlawful and unfair termination of employment and the claimants seek the following reliefs:

- (a) An order compelling the respondents to pay the claimants their terminal dues as tabulated in paragraph 25 above.
- (b) An order compelling the respondents to reinstate the claimants to their employment; Or
- (c) Costs of this suit
- (d) Any other or further relief this honourable court may deem fit and just to grant.

2. The respondents deny the alleged unlawful and unfair termination of the claimants' employment. They aver that they only employed the claimants as casual employees for a daily wage and not on monthly salary. Finally, they aver that the claimant deserted work to engage in other businesses and maintained that they had no contract of service with the claimants. They, therefore, prayed for the suit to be dismissed with costs.

3. The suit was heard on 7.3.2019 when the claimants testified but the respondents' adopted the written statement by the 2nd respondent as their evidence. Thereafter only, the claimants filed submissions.

Claimants case

4. The 1st claimant testified as CW1. He stated that the 2nd respondent who is the proprietor of the 1st respondent and employed him as a watchman on 1.6.2009 for a monthly salary of Kshs. 6000. His working hours were from 6.00 a.m. to 6.00 p.m. with no rest days or annual leave. His work record was clean and he was never served with any warning.

5. On 23.11.2013 he enquired about his delayed salary but Abdi Shakur, who was 1st respondent's foreman dismissed him with immediate effect for no valid reason or any wrong doing. He contended that the dismissal was unfair and prayed for the reliefs set out in his claim plus certificate of service.

6. In cross-examination he contended that he used to herd livestock in Marigat until 1.6.2009 when the 2nd respondent brought him to Nairobi and employed him at the 1st respondent in Eastleigh. He maintained that he worked continuously without off days, annual leave until 2nd respondent's son dismissed him for requesting for salary increase.

7. The 2nd claimant testified as Cw2. She stated that she was employed at the 1st respondent on 1.3.2006 as a Cleaner earning Kshs. 2500 per

month. The pay came from the 2nd respondent and who was recording the same in a book. Her working hours were from 7.00 a.m to 4.00 p.m. daily with no rest days or annual leave given to her.

8. On 24.12.2013, she went for Christmas holiday with permission from the 2nd respondent and reported back on 30.12.2013 as directed. On 2.1.2014, she went to collect her December salary but she was told to come back on 3.1.2014. However, on 3.1.2014, Mr. Abdi Shakur, the 2nd respondent's son who was also the 1st respondent foreman denied her the pay and dismissed her for alleged failure to report to work.

9. She contended that the dismissal was for no valid reason and therefore unjustified and unfair. She therefore prayed for the reliefs set out in her claim plus certificate of service.

10. On cross-examination, she contended that the 1st respondent had 17 rooms per floor and she was cleaning one floor. She maintained that there was no off day or holiday. She also reiterated that she was dismissed by Abdi Shakur for demanding her unpaid salary. She denied ever stealing any items from customers.

Defence case

11. The respondents adopted the statement written by the 2nd respondent on 14.2.2019 and filed on 7.3.2019 as their evidence. In brief the 2nd respondent stated that in 2009 he met the 1st claimant in Marigat and claimant requested him to take him to Nairobi to look for a job as a driver. He further requested him for accommodation for 6 months while looking for a job. He granted the claimant's requests by facilitating his transport to Nairobi and accommodated him at the 1st respondent.

12. He further stated that during the 1st claimant's stay at the lodge, he would occasionally assist with work at the 1st respondent if an employee traveled or failed to report to work. He further contended that he also occasionally gave the 1st claimant some money for upkeep to enable him move around to look for a meaningful job. However, he contended that the money given was neither salary nor daily wage since there was no employment relationship between him and the claimant.

13. The 2nd respondent further stated that in course of time the 1st claimant set up a shop. He admitted that occasionally, the 1st claimant was engaged by the 1st respondent as a day watchman on casual basis on need basis for a daily wage of Kshs. 400, and denied the alleged Kshs. 6000 salary per month. He contended that he went on a trip outside Nairobi for two months and when he returned he found that the 1st claimant had left the 1st respondent's premises and upon calling him he informed him that he had secured a well paying job. He therefore contended that the 1st claimant abandoned his job without notice to him.

14. As regards the 2nd claimant, the 2nd respondent stated that the claimant was engaged on casual basis in 2006 to clean rooms and wash beddings. This work took her 2 to 3 hours per day and earned Kshs. 400 per day. He however, contended that she could miss work for weeks and even months and upon being called, she would say that she was working elsewhere or she was away at her rural home

15. He further contended that since the 2nd claimant never worked on daily basis, she is not entitled to annual leave and he further stated that he was informed by Mr. Abdi Shakur, an employee of the 1st respondent that on two occasions in March, 2014 the 2nd claimant was found in possession of customer's phones and alleged that she found them abandoned in the rooms. She then insulted Mr. Abdi Shakur stating that he was only intending to deprive her of her 3 days wages. He therefore denied ever employing the 2nd claimant or dismissing her and prayed for the suit to be dismissed with costs.

Submissions

16. The claimants submitted that they were employed as a day watchman and cleaner respectively but they could assist in any other work given. They reiterated that their employment was governed by an oral contract which was lawful within the meaning of the Employment Act 2007.

17. They relied on **Robari Musinzi v. Safdar Mohamed Khan[2012]eKLR** and **Kenya Union of Domestic Hotel Educational Institutions and Hospital Workers[2015]eKLR** where the court appreciated the validity of contracts entered into orally and held that the obligation to issue a written contract is on the employer.

18. They therefore submitted that they had proved their case and prayed for judgment as prayed in their statement of claim.

Issues for determination

19. The issues arising from the pleadings, evidence and submissions are:

- (a) Whether the claimants were employed by the respondents intermittently on casual, basis or for a monthly salary.
- (b) Whether their services were terminated unfairly by the respondents or they deserted their employment.
- (c) Whether claimants are entitled to the reliefs sought.

Casual or monthly employment

20. The 1st claimant pleaded and testified that he was brought from Marigat to Nairobi by the 2nd respondent who is the owner of the 1st respondent lodge in 2009. He further contended that the 1st Respondent employed him at the lodge as a day watchman for a monthly salary of Kshs. 6000. He further contented the lodge is at Eastleigh but he was residing at Mathare.

21. The 2nd respondent contended that he facilitated the claimant's transport from Marigat to Nairobi because he requested him in order for him to seek a job as a driver. He further stated that he accommodated the claimant at the 1st respondent lodge while looking for a job and occasionally hired him on causal basis for Kshs. 400 per pay day when an employee traveled or failed to report to work.

22. The 2nd claimant contended that she was employed by the respondents as cleaner in 2006 for a monthly salary of Ksh. 2500. Her duties included cleaning rooms and washing of bed sheets. The 2nd respondent admitted the claimants role but denied that she was engaged on a monthly salary. According to him the 2nd claimant was intermittently engaged for 2 to 3 hours per day to clean the rooms and beddings for a diary wage of Kshs. 400 per day. He further averred that the 2nd claimant was working for several other people and thereby missed work at the lodge for weeks or even months.

23. I have carefully considered the evidence and the submissions by the parties. There is no dispute that the 1st claimant was transported from Marigat to Nairobi by the 2nd respondent. The said respondent admitted that he accommodated the claimant at the lodge and supported him financially. He further admitted that he occasionally employed him on casual basis for a daily wage of Kshs. 400. However, he failed to give particulars of the duration of such accommodation and casual employment.

24. According to the 1st claimant he worked continuously from June 2009 till November 2013 when he was dismissed. No employment records were produced to rebut the evidence by the claimant as regards the alleged terms of employment. Section 10(7) of the Employment Act puts the burden of disproving verbally alleged terms of employment by the employee in any legal proceeding, on the employer. Such burden is only discharged by employment records which have not been produced herein. Consequently, I return that the claimant was employed by the respondent as a day watchman for a monthly salary from June 2009 to November 2013.

25. Likewise, I am satisfied that the 2nd claimant has proved on a balance of probability that she was employed by the respondent from 2006 to January 2014 as a cleaner for a monthly salary. I also find that the respondents have not disproved by employment records her verbal allegations of the terms of service as required by section 10(7) of the Act. They did not also prove that she was working for them for 2 to 3 hours per day. Finally they did not prove that she used to miss work for weeks or even months because she was working for several other people.

Whether the claimants were unfairly dismissed.

26. The claimant alleged that they were dismissed by 2nd respondent's son Mr. Abid Shakur for demanding their unpaid salary. They contended that Mr. Shakur was the lodge foreman which allegation was not denied. Infact the 2nd respondent admitted that Mr. Shakur was an employee of the lodge and had reported that 2nd claimant had insulted him in connection with unpaid wages.

27. After careful consideration of the evidence and submission, I am satisfied that the claimants have proved that they were dismissed by Mr. Shakur when the 2nd respondent was away. They have also proved that the reason for the dismissal was demanding unpaid salary. The said reason for the dismissal is not a fair related to their conduct, capacity and compatibility or based on the employers operational requirements as provided by section 45 (2) of the Employment Act. The said Mr. Shakur has not tendered any evidence herein to rebut the evidence by the claimants. I therefore, return that the respondents have failed to prove a valid and fair reason for dismissing the claimant as required under section 45 of the Act.

28. Under section 45 (2) (c) of the Act the employer is barred from dismissing his employee without following a fair procedure. The respondents herein have failed to prove that a fair procedure was followed. Consequently, I find and hold that the dismissal of the claimants was unfair and unlawful within the meaning of section 45 of the Act.

Reliefs

29. In view of the foregoing finding, the claimants are entitled to one month salary in lieu of notice plus 12 months salary compensation for unfair dismissal under section 49 of the Employment Act. In awarding the said compensation I have considered the claimant's long service and the fact that they did not contribute to the dismissal through misconduct.

30. The claims for salary underpayment, public holidays, and rest days lack particulars and they are dismissed. The 1st claimant's salary for November 2013 is granted for 23 days. The 2nd claimants salary for December 2013 and January 2014 is granted. I further award the claims for accrued leave plus service pay. The 1st claimants claim for house allowance is dismissed because he was housed by the employer. However, the 2nd claimant is awarded house allowance at the conventional rate of 15% of the basic pay.

31. In the end, I enter judgment for the claimant against the respondents jointly and severally as follows based on their salaries.

(a) 1st claimant

Notice.....Kshs. 6,000.00

Compensation.....Kshs. 7,200.00
Unpaid salary.....Kshs. 5,307.70
Leave.....Kshs. 19,384.60
Service.....Kshs. 12,000.00
Total.....Kshs. 114,692.30

(b) 2nd claimant

Notice.....Kshs. 2,500.00
Compensation.....Kshs. 30,000.00
Salary December 2013.....Kshs. 2,500.00
Salary for January 2014.....Kshs. 2,088.45
House allowance (7 years).....Kshs. 31,500.00
Leave (7) years.....Kshs. 14,134.60
Service (7) days.....Kshs. 8,750.00
Total.....Kshs. 89,673.05

The said award is subject to statutory deductions but in addition to costs and interest from the date hereof.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE