



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 150 OF 2017

(Before Hon. Justice Mathews N. Nduma)

FARIDA RAMADHAN MAMBOLEO.....CLAIMANT

VERSUS

MOMBASA MAIZE MILLERS (KSM) LIMITED.....1ST RESPONDENT

READY CONSULTANCY LIMITED.....2ND RESPONDENT

JUDGMENT

1. The suit was filed on 18th April 2017, the Claimant praying for the following reliefs: -
 - a. Payment in lieu of three months' notice Kshs. 47,700.
 - b. Arrear salary for June 2016 Kshs. 15,900.
 - c. Payment in lieu of leave days not taken for 8 years in the sum of Ksh. 127,200.
 - d. Severance pay for the period worked.
 - e. Compensation for the unlawful and unfair dismissal and
 - f. Provision of certificate of service.
2. CW1 testified that he was employed by the 1st and 2nd respondents as a cleaner serving the 1st respondent's business premises from the year 2009 until the 15th June 2016 when the claimant was summarily dismissed. The claimant earned Kshs. 15,900 at the time of dismissal calculated at the rate of Kshs. 530 per day.
3. That the claimant has not given reason(s) for dismissal neither was she given a chance to be heard. That she was not given a letter of employment and was not paid salary for the month of June 2016 and prays to be paid the same.
4. CW1 said that she was not paid any terminal benefits including leave days not taken for the entire period she worked.
5. The Claimant prays to be awarded as set out in the statement of claim.
6. The claimant was registered with NSSF and NHIF and produced a search from NSSF which shows that she was appointed by Ready consultant, the 2nd respondent on 6/6/2014. The claimant also produced a search for NHIF for the period 2014 to 2016 which shows contributions were done for that period.
7. The claimant reported the dispute to the Ministry of labour but it was not resolved. She prays to be awarded accordingly.
8. The 1st respondent filed a response to the claim on 9th June 2017. The 2nd respondent did not file any response to the claim. RW1 John Kanguni testified that he was a Human Resource Manager of the 1st respondent for the past nine years. That he knew the claimant. He relied on a witness statement dated 5/6/2015 and produced documents marked exhibit 'I'.

9. RW1 testified that he was responsible for employment of workers and from 14/5/2016, the 1st respondent engaged the 2nd respondent to recruit workers on behalf of the 1st respondent. It is therefore not possible that the claimant could have been recruited by the 2nd respondent for the 1st respondent in the year 2009 as she alleges or at all.

10. RW1 testified that the 1st respondent provided written contracts to the employees and that 1st respondent pays NSSF and NHIF for its employees.

11. RW1 stated that the 1st respondent does not engage casual employees. That the 1st respondent started outsourcing employees from different companies from the year 2006. That the 2nd respondent came on board in the year 2016.

12. RW1 stated that he was not aware that CW1 was a casual for the 1st respondent from the year 2009 since RW1 was not at the company then. RW1 stated that the claimant was not an employee of the 1st respondent. RW1 denied that the claimant was dismissed by the 1st and 2nd respondents.

13. RW1 also denied that the 1st respondent owed the claimant the reliefs sought or at all.

Determination

14. The issue for determination are: -

i. Whether the claimant was an employee of the respondents.

ii. Whether the claimant is entitled to the reliefs sought.

15. In his testimony before Court, CW1 testified that he worked for the 1st respondent. That she served from Tuesday to Saturday at the 1st respondent's premises as a cleaner and on Sundays she worked for his superiors named Salim and Ali who were directors of the 1st respondent at their homes.

16. CW1 testified that she was paid a daily wage of Kshs. 570 and signed a book upon payment. CW1 testified that she signed a contract with the 2nd respondent. CW1 stated that she was dismissed on 15/6/2016, by Mr. Ali. That Mr. Ali saw her talking to her brother and informed her that he did not give work to people who spoke to other men.

17. CW1 stated that she was told to come for payment the following Wednesday, but was not paid the June salary to date. CW1 reported the dispute to the Ministry of labour and the dispute was not resolved.

18. It is the Court's considered view and finding that the claimant worked for the 1st respondent continuously from the year 2009 until the year 2016. During all that period the claimant worked as a cleaner and was regarded as casual employee by the 1st respondent and so was not given annual leave. The claimant's monthly salary was calculated on a daily basis.

19. That sometime in the year 2014, the 1st respondent registered the claimant with NSSF and NHIF and began to remit her statutory dues then. That prior to that no statutory dues were remitted for the claimant.

20. The court finds that the claimant was an employee of the 1st respondent and not employed by the 2nd respondent. The court further finds that the claimant was partly called upon to serve the two named directors in their houses on Sundays. That notwithstanding the claimant remained an employee of the 1st respondent.

21. The claimant has adduced cogent evidence regarding the manner her employment was summarily dismissed by Mr. Ali, a director of the 1st respondent. The claimant has satisfied the court that the 1st respondent had no valid reason to summarily dismiss her and the 1st respondent did not follow a fair procedure in summarily dismissing the claimant.

22. The 1st respondent violated sections 36,41,43,45 and 46 of the Employment Act, 2007 in that it had no valid reason to summarily dismiss the claimant and in doing so it did not follow a fair procedure.

23. The claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Act.

24. In this regard, the claimant had worked continuously for about eight (8) years. The claimant was unfairly and unlawfully treated as a casual during all this time and so did not enjoy minimum statutory benefits she was entitled to including the 21 days annual leave, registration with NSSF and NHIF until the year 2014 when she was duly registered.

25. The claimant was abused by her superiors in that they made her do their private chores without payment of overtime and or any extra consideration.

26. The claimant did not contribute to the job loss which was terminated without notice at all. The claimant suffered loss and damage. The claimant was not paid any terminal benefits nor was he compensated for the job loss. The claimant lost means of livelihood and support and prospects of continued employment to date of retirement.

27. The court takes into consideration **E&LRC cause no. 293/2015 Pamela Nelima Lutta -VS- Mumias Sugar Co. Ltd** in which M. Onyango J. awarded the claimant the maximum compensation. The case has similar elements with the present one. The court however grants the claimant the equivalent of eight (8) month's salary in compensation for the unlawful and unfair summary dismissal.

28. The court also awards the claimant one-month salary in lieu of notice.

29. With regard to the claim for payment in lieu of leave days not taken the court awards the claimant three (3) months' salary in lieu of three years' annual leave. The rest of the claim is time barred.

30. The claimant is also entitled and is granted service pay equivalent to 15 days, salary for the six (6) years she was not registered with NSSF.

31. In the final analysis Judgment is entered in favour of the claimant against the 1st respondent as follows: -

a. Kshs. 127,200 being the equivalent of 8 months' salary in compensation.

b. Kshs. 15,900 in lieu of one-month notice.

c. Ksh. 47,700 in lieu of three months' annual leave not taken.

d. Kshs. 47,700 being service gratuity for six (6) years served without NSSF.

e. Certificate of service within 30 days of this Judgment.

Total award 254,400

f. Interest at Court rates from date of Judgment in respect of (a) above and from date of filing suit in respect of (b) (c) and (d) above till payment in full.

g. Costs of the suit.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

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 15th March 2020, this ruling has been delivered to the parties online with their consent. They 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, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

M/s Wafula for claimant

M/s Onyono for 1st respondent

Mr. Kisia for 2nd respondent

Chrispo: Court clerk