



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 1431 OF 2015

CONSOLATA AKINYI SIDUNDA.....CLAIMANT

VERSUS

HAJI ABDHULAI.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 1432 OF 2015

EVERLYNE AKOTH OWINO.....CLAIMANT

VERSUS

HAJI ABDHULAI.....RESPONDENT

JUDGMENT

Introduction

Consolata Akinyi Sidunda filed her Claim (Cause No. 1431 of 2015) on 14th August 2015 which was amended on 14th February, 2019. In the Amended claim she seeks compensation for her unlawful termination by the Respondent herein. She sought the following reliefs:

a) The sum of Kshs.2,404,578.30 comprising of the following:

i. Service Pay at 15 days for every year worked $9,780.95/26$ (daily rate) = $376.2 \times 15 \times 5$ = Kshs.28,215/-

ii. Annual Leave Pay for 5 years 376.2 (daily rate) $\times 21$ days $\times 5$ years = Kshs.39,501/-

iii. Pay in lieu of Notice = Kshs.9,780.95/-

iv. December 2014 salary = Kshs.9,780.95/-

v. 3 days wages for January 2015 = Kshs.1,128.60/-

vi. Underpayments

· 2009 - 2011 – Kshs.6,743/- - 5000 = $1,743 \times 24$ months = Kshs. 41,832/-

· 2009 - 2012 Kshs.7, 586/- – 5,000/- = 2,586/- $\times 12$ months = Kshs. 31,032/-

· 2012 - 2013 Kshs.8,579.8/- - 5,000/- = 3,579.8/- $\times 12$ months = Kshs. 42,957.6/-

· 2013 – 2014 Kshs.9,780.95/- - 5,000/- = 4,780.95 x 12 months = Kshs.57,371.40/-

vi. Public Holidays for 5 years at double rate = 376.2 daily rate x 2 = 752.4 double rate x 10 Public Holidays x 5 = Kshs.37,620/-

vii. Sundays/ weekly rest days = 52 rest days in one year Kshs.195, 624/-

viii. Overtime 4 hours daily totalling to Kshs.1,785,023.40/-

ix. House allowance at 15 % of basic salary totalling to Kshs.7,340/-

x. Damages for unlawful dismissal at Kshs.9,780.95 x 12 months totalling to Kshs.117,371.40/-

b) Costs of this suit

c) Interest on (a), (b) and (c) above

d) Any other relief.

This Claim was consolidated with Cause No. 1432 of 2015 in which the Claimant therein sought similar reliefs as highlighted above.

The Claimants' Case

Consolata Akinyi Sidunda (the 1st Claimant) avers in her Amended Claim that she was employed by the Respondent in the position of cleaner from the year 2009 and was stationed at his commercial building known as Prestige Building situated at Eastleigh 7th Street. Her monthly salary was Kshs.5,000/-.

She further averred that she performed her duties diligently and to the Respondent's satisfaction until January 2015 when the respondent unlawfully and unfairly terminated her employment without due regard to procedure as provided under the Employment Act, 2007.

Everlyne Akoth Owino (the 2nd Claimant) on her part maintains that she was similarly employed by the Respondent on or about the year 2009 in the position of Cleaner. She earned a monthly salary of Kshs.5,000/-.

The 2nd Claimant further avers that she performed her duties diligently and to the Respondent's satisfaction and as a result was promoted to the position of supervisor, a position she held until January, 2015 when the Respondent unlawfully and un-procedurally terminated her employment.

Her prayers in Cause No. 1432 of 2015 are as follows –

a) The sum of Shs.102,364.00 comprising of –

(i) Service pay

(ii) Leave day accrued

(iii) Pay in lieu of notice

(iv) Three days' wages for January 2015.

(v) 12 months' salary underpayment.

(vi) Damages for unlawful dismissal.

b) Costs of this suit.

c) Interest on (a) and (b) above.

d) Any other relief.

Both Claimants urged the Court to allow their individual Claims as prayed.

Respondent's Case

In response the Respondent filed separate Statements of Response in respect of each suit in which he denies the existence of any employer-

employee relationship between himself and the Claimants as alleged.

He argues that the Claims as filed are baseless, vexatious and disclose no cause of action against him. He maintains that the same have been filed in bad faith and as an attempt by the Claimants to unjustly enrich themselves and embarrass him.

The Respondent further urged the Court to find the Claims devoid of merit and dismiss the same with costs to the Respondent.

Evidence

The Claim proceeded for hearing on 29th October 2019 with both Claimants testifying. The Respondent failed to attend the hearing despite proper service of the hearing notice. The Claimants thereafter filed their submissions to their Claims.

In their evidence both Claimants reiterated the averments made in **their Amended Memoranda of Claim**.

They maintained that their Claims as against the Respondent herein are valid and urged the Court to allow the same as prayed.

Claimants' Submissions

The Claimants submitted that their termination was un-procedural as the Respondent failed to comply with the mandatory provisions of Section 41 of the Employment Act, 2007.

They further submitted that they are entitled to the reliefs sought in their respective claims as the Respondent failed to avail evidence to disapprove their employment status.

It is on this basis that the Claimants maintain that they are entitled to the reliefs sought in their Claims by dint of Sections 35, 49 and 90 of the Employment Act, 2007. The Claimants relied on the cases of **Alfred Kangu v Rudolf Honegger T/A Hotel Rudi/Atlantic Rudolf (2018) eKLR** and **John Rioba Maugo v Riley Falcon Security Services Limited (2016) eKLR**.

The Claimants further maintained that their employment with the Respondent was verbal and were therefore entitled to a fair hearing prior to their termination. The Claimants relied on the case of **Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEHA) v Fatuma Mohammed (2015) eKLR** where the Court in deciding a similar case as the Claimants held that verbal contracts are valid and that an employee is entitled to a fair hearing prior to his termination.

The respondent did not file any submissions.

Analysis and Determination

Having considered the pleadings, evidence, submissions and authorities on record, the issues for determination are:

1. Whether there existed an employer-employee relationship between the Claimants and the Respondent herein.
2. Whether the termination of the Claimants' employment by the Respondent was wrongful, unfair and unlawful.
3. Whether the Claimants are entitled to the reliefs sought.

The determination of the heads of claims advanced by the Claimants will depend on whether the Court finds that there was an employment relationship. Between the claimants and the respondent.

The Claimants maintained that they were under the Respondent's employment until 3rd January 2015 when he unfairly and unlawfully **terminated their employment**.

They further maintained that they each received a salary of Kshs.5,000/- from the Respondent in cash and that no payslip or payment voucher was issued as proof of payment of salaries.

The Respondent on his part maintained that there was no employee – employer relationship existing between himself and the Claimants herein.

Section 47(5) of the Employment Act provides as follows –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

It was thus the burden of the claimants to prove the existence of an employment relationship and the unfair termination thereof.

In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR**, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

In the instant cases the Claimants have each corroborated the evidence of the other. The Respondent having been served and having failed to attend court for hearing, failed to controvert the averments in the testimony of the claimants. The respondent further failed to prove the averments in the defence. I thus find that the claimants have proved their case on a balance of probability.

I therefore award them the following –

Consolata Akinyi Sidunda

- i. Service Pay Kshs.28,215.00
- ii. Annual leave pay for 5 years Kshs.39,501.00
- iii. Pay in lieu of notice Kshs.9,780.95
- iv. December 2014 salary Kshs.9,780.95
- v. 3 days wages for January 2015 Kshs.1,128.60
- vi. House allowance at 15 % of basic salary Kshs.7,340.00
- vii. 5 months compensation Kshs.48,904.75

Total award Kshs.144,651.25

Everlyne Akoth Owino

- i. Service Pay Kshs.28,215.00
- ii. Annual leave pay for 5 years Kshs.39,501.00
- iii. Pay in lieu of notice Kshs.9,780.95
- iv. 3 days wages for January 2015 Kshs.1,128.60
- v. 5 months compensation Kshs.48,904.75

Total award Kshs. 127,530.30

The claimants are awarded costs of the suit and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE