



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1571 OF 2011

EDWARD MWANGI NJIHIA.....1ST CLAIMANT

LYNETTE NYANCHAMA OMAMBIA.....2ND CLAIMANT

STANLEY KIIHIKO MUTUNGU.....3RD CLAIMANT

DANIEL MUNYOLI NDONGOI.....4TH CLAIMANT

PATRICK MWANZIA MULEI.....5TH CLAIMANT

VERSUS

SUSHILA DEVI GAUTAMA (AS LEGAL REPRESENTATIVE

OF THE ESTATE OF SATISH GAUTAMA ADVOCATE).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

JUDGMENT

The claimants filed the memorandum of claim on 14.09.2011 through Kinoti & Kibe Company Advocates. The claimants made claims for withheld emoluments, benefits and entitlements each upon the headings of gratuity, bonus, housing allowance, travelling allowance, and underpayment of salary with respect to their service with Satish Gautama Advocate and Senior Counsel (deceased). The claimants collectively claimed for Kshs. 27, 454, 000.00 from the respondent. The claimants prayed for judgment against the respondent for:

- a) Kshs. 27, 454, 000.00 as broken down in paragraph 7.
- b) Interest on (a) at the commercial rate of 18% per annum from the date of filing of the suit until payment in full.
- c) Cost of the suit together with the interest thereon at court rates from the date of filing the suit until payment in full.
- d) Any other or further relief as the Honourable court may deem proper to grant.

The reply to the memorandum of claim was filed on 05.10.2011 through Kimamo Kuria Advocates. The respondent prayed that the claimants' suit be dismissed with costs to the respondent.

Satish Gautama Advocate was a respected member of and the former chairman of the Law Society of Kenya, a barrister at law from Inner Temple London, admitted to the bar in Kenya on 02.01.1942 and had since then been in continuous legal practice with an impressive record as a litigation counsel. He held the prestigious and distinguished title of Senior Counsel. There is no dispute that he employed the claimants in his law firm as follows:

- a) Edward Njihia Mwangi as office manager effective 1970 who had worked for 41 years and the last monthly pay was Kshs. 85, 000.00.
- b) Lynette Atenyo Nyanchama as secretary effective 1984 who had worked for 27 years and whose last monthly pay was Kshs. 43, 000.00 per month.
- c) Patrick Mulei Mwanzia as tea boy effective 1995 who had worked for 16 years and whose last monthly pay was Kshs. 17, 000.00.

d) Stanley Kihiko Mutungu as Advocate effective 2005 who had worked for 6 years and whose last monthly pay was Kshs. 160, 000.00.

e) Daniel Munyoli Ndongoi as court clerk effective 2006 who had worked for 5 years and whose last monthly pay was Kshs. 36, 000.00.

The claimants' case was that as at the time of filing the suit the advocate was 90 years old and did not enjoy good health. Further that the respondent carried out his private legal practice solely without a partner or associate. The claimants' further case was that the advocate had not instituted succession or transition structures to guarantee continuity of the operations of his office so that the claimants faced uncertainty and unsustainable future job security. They therefore filed the suit so secure their terminal benefits and they prayed that the advocate is ordered to pay them as was claimed and prayed for.

The advocate died on 27.01.2012 when the suit had not been heard and determined. The respondent was duly substituted in that regard.

The only issue for determination is whether the claimants are entitled to the remedies as prayed for. The 1st claimant testified to support the claimants' case and the respondent did not call any witness. The Court has considered the pleadings, the evidence, the claimant's submissions, and the belated submissions filed for the respondent. The Court makes findings as follows:

a) As already found, there is no dispute that the parties were in employment relationship. The employment contracts were oral.

b) The 1st claimant moved evidence to suggest that he had been discriminated against in his pay on account of race. He urged that he had been underpaid in comparison to the salary paid to Mr. Vito and later Mr. Vito's son one Mr. Jiten who had earlier served in the same capacity of office manager that the 1st claimant was promoted to serve. He testified that when he was promoted to replace Mr. Jiten and Mr. Vito were paid Kshs. 150, 000.00 per month when they served as office manager but when he took over from Mr. Jiten, he was paid less despite the advocate having rich clients and making a lot of money. The Court finds that as submitted for the respondent the claimants did not plead underpayment based on racial discrimination and each (and in particular the 1st claimant) is bound by their own pleadings. The Court follows the Court of Appeal in Dakianga Distributors (K) Ltd –Versus- Kenya Seed Company Limited [2015]eKLR, in upholding Malawi Railways Limited –Versus- Nyasulu [1998] MWSC3 that parties are adversaries and is left to each one of them to formulate his case in his own way subject to basic rules of pleading and for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The other claimants moved no basis for the alleged underpayment. The evidence was that parties agreed on the monthly salary and which was paid. Accordingly the Court returns that the claims and prayers for underpayment will collapse as unjustified.

c) As submitted for the respondent the claims for bonus and travelling allowance lacked contractual and statutory basis. The same will therefore fail for want of justification.

f) The claimants prayed for gratuity or service pay. The evidence is that the NSSF statements filed for the respondent on 22.11.2018 show that the claimants were members of NSSF and the relevant contributions to the fund were made as required. As submitted for the respondent under section 35(6) of the Employment Act, 2007 it is provided that service pay or gratuity is not payable where an employee is a member of the NSSF and the prayer will fail on that account. For the claimant the evidence is that the contributions stopped in 1993. For the 2nd claimant who had already been employed the contributions continued through 1993 to the time of filing the suit in 2011. The claimant testified that Mr. Vito Mandaria deducted and remitted NSSF but when his son Jiten Mandaria took over, he stopped the deduction and remission so that when the claimant took over from Jiten as office manager he continued not to deduct the NSSF. However, the 1st claimant's evidence is inconsistent with the NSSF statements on record showing NSSF was deducted. The 1st claimant further testified that he was born in 1943 so that in 1993 he was 50 years old and he was paid the NSSF dues in accordance with the applicable rules. He stated that he continued to work for the advocate after 1993 to 2 months after the advocate's death on 27.01.2012. The Court returns that the 1st claimant served for 18 complete years when he was not a member of NSSF and in absence of alternative gratuity arrangement to cover for that period, he is awarded half month salary for each year served. The last monthly pay was Kshs. 85, 000.00 and half is Kshs 42, 500.00 times 18 making **Kshs.765, 000.00**. While making that finding the Court has considered that the 1st claimant voluntarily got paid Kshs.68, 746.70 on 01.10.1993 under the NSSF and the same was in accordance with the applicable law so that adverse findings will not be made against the claimant in that regard. The consequence of the payment was that under law the advocate and the 1st claimant as employer and employee were respectively released from the operation of the NSSF Act and lawfully so. Accordingly the claimant became entitled to service pay in terms of section 35(5) as read with section 35(6) of the Employment Act, 2007. He is awarded accordingly.

g) The claimants pray for house allowance. Section 31 (2) of the Employment Act, 2007 permits payment of a consolidated salary with reasonable provision for rent. The evidence was that the parties agreed upon a consolidated salary which was paid consistently. There appears to be no documented dispute about the pay over the period of service. In the circumstances the Court returns that parties agreed upon a consolidated monthly pay inclusive a reasonable provision for rent.

h) The Court has considered the parties' margins of success including the subsequent and unfortunate demise of the advocate shortly after filing of the suit and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties and the suit is determined with orders:

a) The respondent to pay the 1st claimant a sum of **Kshs.765, 000.00** by 01.08.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 24th May, 2019**.

BYRAM ONGAYA

JUDGE