



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1524 OF 2016

MARY GATHONI WANJIKU..... CLAIMANT

- VERSUS -

NEW LANDMARC MEDICAL LABORATORIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 03.08.2016 through VSLAW & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action of terminating the claimant's employment is unlawful, inhumane, unfair and contrary to fair labour practices and the claimant is entitled to the payment of terminal dues and compensatory damages.
- b) An order that the respondent do pay the claimant's terminal dues and compensatory damages amounting to Kshs.341, 428.60 (being service pay at 15 days for each year worked over 1,5 years Kshs.21, 428.60; one month pay in lieu of notice Kshs.20, 000.00; 12 months' pay compensation Kshs. 240,000.00; unpaid salary for February, March and April 2016 Kshs. 60, 000.00).
- c) Interest on (b) above from the date of filling the suit till payment in full.
- d) Costs of the suit plus interest therein on full indemnity basis.

The respondent filed the statement of defence and counterclaim on 14.10.2016 in person. The respondent subsequently appointed Mutitu, Thiong'o & Company Advocates to act in the suit.

The respondent prayed for the dismissal of the claimant's suit with costs and for judgment against the claimant on the counterclaim for:

- a) The sum of Kshs. 223, 800.00 being respondent's funds the claimant misappropriated while serving as a trainee in the respondent company.
- b) Costs of the counterclaim.
- c) Interest on 1 and 2 above.
- d) Such further or other reliefs that the Court may deem fit to grant.

The claimant filed the reply to defence and defence to counterclaim on 15.12.2016 and prayed that the defence and counterclaim be dismissed with costs.

The **1st issue** for determination is whether the parties were in a contract of service. The claimant's case is that on 25.12.2014 to 12.05.2016 she was employed by the respondent as a lab technician. The respondent's case is that New Landmarc Medical Laboratories Limited had not been incorporated as at the time the claimant alleges to have been employed by the respondent. Further, the respondent took the claimant as a trainee at the end of June 2015 and left on 18.05.2016 on her own accord after being implicated in fraudulent activities and she was charged in criminal case no. 1054 of 2016 at the Magistrate's Court at Milimani, Nairobi. Further the letter of appointment dated 25.12.2014 relied on by the claimant was a fake and subject of criminal investigations in the pending criminal case and OB 67/7/9/16.

The claimant testified that she was employed as a Lab Technician at Kshs.20, 000.00 per month. In cross examination she testified that they

were family friends with the respondent's director Grace Wanjiku Muriuki (also respondent's witness (RW)). The claimant testified that it was true that her husband Kimani and the claimant approached RW to employ her to gain some experience. At that time the claimant was not a student but later, per her testimony, she joined Thika School of Medical and Health Sciences and was admitted on 08.09.2015. The claimant denied working as an intern but she held the Diploma in Applied Biology. She admitted that Daniel Waithaka who signed her purported letter of appointment dated 25.12.2014 was not one of the respondent's director but was the manager. It was her evidence that she left employment when she was fired on phone on 12.05.2016 and her April salary had not been paid. She testified that she had been employed earlier than 25.12.2014 and she did not know that the respondent had been incorporated in December 2014. She admitted that she had been charged with the alleged offences of forging the letter dated 25.12.2014 and alleged theft of Kshs.223, 800.00 in the pending criminal case. She had been arrested on 20.06.2016 and she filed the suit on 03.08.2016.

RW was the respondent's director. Her evidence was that she came to know the claimant through RW's sister who worked at KARI. The claimant's husband was a teacher to the son to RW's sister and to RW's son at some point. The claimant's husband was therefore a family friend. RW further testified that the claimant's husband requested RW to help the claimant get a job to enable her go back to college because she had not done a Diploma in Applied Biology because she had not done her final examination. RW advised the claimant that year 1 and 2 of Diploma in Applied Biology had similar subjects or units as year 1 and 2 in Medical Laboratory and she could take her on to gain experience and enrol for Diploma in Medical Laboratory. Thus she took the claimant as a trainee or intern in February 2014 when RW was then running Landmarc Medical Laboratory. The purpose was for the claimant to raise some funds to enrol for the pending final examinations for Diploma in Applied Biology and to gain experience in the work of medical laboratory technicians. There were 2 other students and the claimant paid each of them Kshs.20, 000.00 per month.

RW testified that the claimant got a baby in December 2014 and she resumed in July 2015 when RW called her to come back and condition that she enrolled in a college. She enrolled at the Thika College and she was to go for evening lessons.

In December 2014 RW had separated from her previous business partner and in July 2015 she had established the Town Laboratory and therefore she had opportunity for the claimant to come back. Due to prevailing financial problems in paying rent (and yet customers were coming in) RW was prompted to do an audit and her evidence was that it showed that money had disappeared because the claimant had failed to document all tests that had been carried out as prescribed by the doctor. The respondent had lost Kshs.223, 800.00 per RW's evidence and for the period August 2015 to May 2016. The doctor remitted all monies paid for tests but the claimant operated manual book of accounts with the consequence that money for tests the claimant recorded manually was banked but for tests she did not record was not banked. It was in May 2016 that the lost money had been discovered and RW testified that and prior to reporting the case to the police the claimant and her husband agreed to do the reconciliation. It was RW's evidence that the reconciliation was done with her accountant but the claimant refused to sign in acceptance of the shortage. The claimant, her husband and RW had met and agreed to refund the money. RW testified that she never asked the claimant to leave employment and she never left on 12.05.2016 but on 18.05.2016 at around 3.00pm on her own accord. Mediation failed and after a month RW testified that she asked the claimant the way forward and the claimant told RW that they meet in Court. The mediator had been Mr. Mwangi, the chairman at the school the claimant's husband taught. RW denied that she had issued the claimant's alleged letter of appointment dated 25.12.2014 which was Christmas day and especially that the respondent had been registered on 25.12.2014.

The Court has considered the evidence and the submissions made for the parties. The claimant testified that it was true that her husband Kimani and the claimant approached RW to employ her to gain some experience. At that time the claimant was not a student but later, per her testimony, she joined Thika School of Medical and Health Sciences and was admitted on 08.09.2015. The claimant's evidence is consistent with the respondent's evidence that the claimant was an intern waiting to complete her studies. The claimant admitted that she was not qualified as a medical laboratory technician and the Court returns that the alleged letter of appointment was inconsistent with the claimant's qualifications in so far as it designated her as a Lab Technician. The alleged letter is also inconsistent in so far as it shows that the claimant accepted it in February 2014 long before it was issue on 25.12.2014. In the circumstances and as submitted for the respondent the parties were not in a contract of service on reliance on the alleged letter of appointment but in an internship arrangement. As submitted for the respondent, it was not disputed that the claimant had a baby and broke the relationship without demanding paid maternity leave because she knew she was an intern.

It is submitted for the claimant that she was an employee and in a contract of service as defined in section 2 of the Employment Act, 2007. It is true and undisputed that the claimant earned Kshs. 20, 000.00 per month. The section defines employee to mean a person employed for wages or a salary and includes an apprentice and indenture learner. There is no doubt that the claimant was a trainee and the Court returns that she was an employee within the parties' agreement and arrangement.

To answer the **1st issue** for determination the Court returns that the parties were in a contract of service and employment relationship.

The **2nd issue** for determination is whether the claimant's employment was unfairly terminated. The claimant testified that she was terminated on phone. The respondent's evidence was that the claimant left on her own accord on 18.05.2016 at around 3.00pm. There after parties engaged in negotiation and mediation until a month thereafter when the claimant informed RW they meet in Court. The Court finds that there is no reason to doubt RW's evidence that the claimant left on her own accord and parties engaged in negotiation and mediation but failed to resolve their disputes. Accordingly, there was no unfair termination as alleged for the claimant and the Court finds accordingly. The prayers for 12 months' salaries in compensation and pay in lieu of notice will therefore fail.

To answer the **3rd issue** for determination, the Court returns that RW admitted owing **Kshs.20, 000.00** pay for April 2016 and is awarded accordingly. RW testified in March there were financial problems but she had no evidence of the part payment and the claimant is awarded **Kshs.20, 000.00** as prayed for. There is no reason to doubt RW's evidence that the pay effected on 11.03.2016 was for February 2016 and the Court returns that the prayer for February payment will fail.

The **4th issue** for determination is whether the respondent is entitled to the counterclaim. The claimant resumed work in July 2015 and left on 18.05.2016 at around 3.00pm. The financial review by Chege Muvchunguzi Mwangi and Company LLP and CPA (K) was for period August 2015 to May 2016 when the claimant was in charge of Keridam Laboratory. The claimant was responsible of keeping the records on the

respondent's manual book and the variance reported in the financial review was Kshs.223, 800.00. The review was dated 05.07.2016. The parties had no chance to engage in a disciplinary process while the claimant was in the respondent's service. There is no ground established on the part of the claimant to defeat her liability and the amount as claimed have been established on a balance of probability as set out in the financial review dated 05.07.2016. Accordingly, the counterclaim will succeed and the claimant is liable to pay the respondent a sum of **Kshs. 223, 800.00** less **Kshs. 40,000.00** found due to the claimant from the respondent making a net of **Kshs.183, 800.00** due to the respondent.

The Court has considered the parties margins of success and find that the claimant will pay the respondent's partial costs of the suit now fixed at **Kshs. 40,000.00** only.

In conclusion judgment is hereby entered for the respondent against the claimant for payment of **Kshs. 223, 800.00** by 01.08.2019 failing interest to run thereon at Court rates from the date of the judgment till full payment.

Signed, dated and delivered in court at Nairobi this Friday 17th May, 2019.

BYRAM ONGAYA

JUDGE