



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

CAUSE NO. 719 OF 2014

JOSEPH MUNENE MURAGE.....CLAIMANT

VERSUS

SALOME NDUNG'U.....RESPONDENT

JUDGMENT

The Claim herein is filed by Joseph Munene Murage alleging wrongful dismissal and refusal to pay terminal dues contrary to the provisions of the Employment Act. He seeks the following reliefs:

- (i) A declaration that the dismissal of the Claimant was wrongful and unfair.
- (ii) The Claimant to be paid terminal benefits totalling to Kshs. 241,906/-.
- (iii) The Respondent be ordered to pay an equivalent of 12 months gross salary as compensation for unlawful termination.
- (iv) The Respondent to pay costs.
- (v) The Respondent to pay interest.

The Respondent filed a Response to the Memorandum of Claim dated 10th June, 2014 and filed in Court on 12th June, 2014, in which she denies that the Claimant was under her employment as alleged by the Claimant.

The Respondent avers that she had no obligation to grant the Claimant the

Claimed benefits. She further denied having underpaid the claimant or dismissing him unfairly. She denies that she ever employed the Claimant at any time.

She urges the Court to dismiss the Claim with Costs.

The matter was heard on 18th April 2018, when the Claimant (CW1) testified on his behalf and the Respondent called two witnesses (RW1 and RW2) to testify on her behalf. Parties thereafter filed and exchanged written submissions.

Claimant's Evidence

The Claimant in his testimony stated that he was employed by the Respondent as from 17th May 2011 as a caretaker, gardener and security guard at Mountain View Estate, Kangemi earning a monthly salary of Kshs.8,200/-. The claimant further testified that he was not issued with a contract of employment. He added that his salary was paid on or before the 6th day of every month.

The claimant stated that during the subsistence of his employment he used to report for duty at 6 am and would work until 6 pm when the night security guard arrived. He worked for seven days a week for the whole year without a break.

The claimant further testified that on 4th August 2012, he asked for permission to attend his mother's burial and on the date he was scheduled to resume work there was a theft of granite at the work place. He further testified that upon resuming work he found a different person on duty who informed him not to report to work until he spoke to the Respondent. The claimant contended that the theft of the granite occurred

on the date that he was barred from reporting back to work and that it was on the same date that the Respondent informed him that his services were terminated. He testified that his terminal dues were not paid, that he had worked for the Respondent for a total of one year and two months and that he never took any leave during the subsistence of his employment with the Respondent.

The claimant testified that after the termination of his employment he reported to the estate office at Mountain View. However, he did not get any assistance prompting him to report the matter to Kabete Police Station where he was advised to report the matter to the Labour office. He testified that he did report to the Labour Office as advised and was issued with a letter of demand to deliver to the Respondent. The letter is attached to the Memorandum of Claim at page 11. The letter required the respondent to attend a meeting at the Labour Office on 19th October 2012. However, the Respondent failed to attend the meeting, and a subsequent meeting scheduled for 5th February 2012.

The claimant testified that he subsequently instructed his lawyer to file the instant claim.

The claimant urged the Court to allow his Claim as drawn. He added that his salary was paid in cash by the Respondent and the payment recorded in a note book. He contended that he was not a casual employee, did not steal any item and was never charged for the same.

On cross-examination, the claimant stated that he was employed by the Respondent whom he met through a bureau where he had left his telephone contact in the event someone would be interested in hiring him. That he met the Respondent after the bureau gave him directions to the Respondent's house. That he was not aware of any agreement between the bureau and the Respondent on his employment and that he had no records from the bureau on the same.

The claimant further testified that the Respondent lived in the same compound with her tenants, that he was employed by the Respondent as a caretaker, security guard and gardener. He further testified that he washed cars for the Respondent and her husband as well as the verandah leading to the tenant's houses.

On further cross examination the claimant testified that his salary was Kshs.8,200/- which was paid by the Respondent. The claimant also stated he had permission from the Respondent to attend the burial of his mother and that during the three days he was away the night guard took over his duties. He also confirmed to the Court that he knew the Respondent and pointed her out in open Court.

The claimant further testified that he used to open the gate for the Respondent as well as her tenants and that the tenants gave him the receipts for payment of rent for forwarding to the Respondent. He testified that he did not know a person by the name Andrew Babu Muhana.

Upon re-examination the claimant stated that the Respondent's place had two entrances; one used by herself and the other used by her tenants. He testified that he worked in both compounds.

Respondent's Evidence

The Respondent testified that she is the owner of two plots in Mountain View Estate House No. 15(a) and 15(b). That she lived in plot 15(a) and had tenants living in plot 15(b) with Andrew Muhana as one of the tenants.

The testified that she has never engaged the Claimant in the capacity as alleged by the Claimant and that she has never called a bureau to get his contact. She further testified that she has a house girl who washes her car as well as the stairs on the rental premises and that she does not require anyone to manage her tenants as the rent is paid through the bank.

The respondent contended that she never made any payments to the Claimant. She testified that she knew the Claimant by face but not by name as she had seen him outside her gate where people sit to wait for casual work. That she occasionally would get gardeners but never engaged the Claimant in any capacity. She added that the compound housing the tenants did not need a gardener as it did not have a garden but only flowerpots.

The respondent stated that there was a time one of her tenants by the name Andrew Muhana reported to her that his granite slab had disappeared from his apartment and he suspected the Claimant having stolen it as he had contracted the claimant to clean his motor vehicle. It was her evidence that the said Andrew Muhana vacated his apartment in the year 2013.

The respondent further testified that she did not receive any letter from the Ministry of Labour and that she does not owe the Claimant anything. She urged the Court to dismiss the Claim with costs to the Respondent.

On cross examination the respondent confirmed that she resides in Mountain View plot number 15(a) and her tenants at plot number 15(b). She further confirmed that payment of rent by her tenants was done by direct deposits to her bank account and that a tenant is not obligated to give a deposit slip as she was able to monitor the payments online. She further testified that she used to see the Claimant outside her gate. She confirmed that both her and her husband owned cars and both cars were cleaned by the house girl.

ANDREW MUHANA, RW2 also testified on behalf of the Respondent. It was his evidence that the Respondent was his landlady at Mountain View Estate. He confirmed having rented apartment number 4 but could not recall the plot number. He further confirmed that the landlady stayed at the plot behind the apartments and that the two plots were separate.

RW2 further stated that there was no garden within the plot where he lived and that there was no caretaker. He stated that there was a security guard at the gate employed by the estate who was engaged by a security company.

RW2 confirmed having known the Claimant and that he was not employed by the Respondent as a caretaker, gardener or security guard.

RW2 further added that the Claimant used to do manual casual jobs such as cleaning apartments and washing cars and that he often engaged him to wash his car and apartment and would pay for the services.

RW2 testified that the Respondent did not engage the Claimant. He further testified that he had suspected that the Claimant stole from his apartment some granite after he engaged the Claimant to clean his apartment. He added that he rented the premises on 1st December 2010 and vacated the apartment on 9th December 2013. That he was a tenant at the Respondent's premises at the time the Claimant alleges that he was employed by the Respondent.

On cross examination RW2 stated that he was not aware of the number of employees engaged by the Respondent.

RW2 further stated that he did not press any charges for the loss of the granite as he had no proof.

RW2 further testified that during his stay at the Respondent's plot he paid his rent by deposit to the bank and that he did not give the deposit slip to the claimant or to anyone. He added that whenever the landlady required the receipt she would get it herself.

He further averred that he would pay the Claimant Kshs.150/- for washing cars and Kshs.300/- for washing apartments.

On further cross examination RW2 stated that the Respondent lived at the back of the compound where he lived and that there was no access to the said compound from the apartment compound.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

It is submitted by the Claimant that he was indeed an employee of the Respondent as the Respondent is the one who used to pay the Claimant's salary. The Claimant contended that he was a gardener cum caretaker at the apartment owned by the Respondent herein.

The Claimant submitted that his termination from the Respondent's employment was unfair and was contrary to the provisions of Sections 35 and 45(1) of the Employment Act, 2007. The Claimant further submitted that he is entitled to compensation for unfair termination.

The Claimant submitted that he had made out his case for unfair termination and urged the Court to allow his Claim as drawn.

Respondent's Submissions.

The Respondent submitted that she did not engage the Claimant as alleged or at all. She further submitted that the Claimant had failed to prove that he was employed by her by failing to produce any letter of appointment, a payslip or any document evidencing the existence of an employment contract between the Claimant and herself. She further submitted that the Claimant had failed to discharge the burden of proof of the existence of the employer-employee relationship between himself and the Respondent herein as provided by Section 107 of the Evidence Act.

The Respondent urged the Court to dismiss the Claim with costs for lack of evidence to prove the existence of an employer-employee relationship between herself and the Claimant.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

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

On Issue Number 1

The determination of the other heads of claims advanced by the Claimant will depend on whether the Court finds that there was an employment relationship.

Regrettably, this is one of those cases where it is purely the word of the Claimant as against that of the Respondent. The Respondent opted to include an additional witness RW2 with a view of corroborating and strengthening her case as against the Claimant.

The Claimant testified that he was employed by the Respondent on 17th May 2011 as a caretaker, gardener cum security guard at the Respondent's plot number 15(b) earning a monthly salary of Kshs.8,200/-.

The Claimant further stated that he met the Respondent through a bureau where he had left his number in the event someone would be interested to hire him. The Claimant however failed to secure the attendance of any witness from the bureau to ascertain the fact that he was

referred to the Respondent by the agency, or to submit any other evidence to corroborate his evidence.

The Claimant also stated that prior to his termination he sought leave for three days to attend to his mother's burial and that during this time the night guard took over his duties. Similarly, the Claimant failed to call the said night guard as a witness in this matter.

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

(5) 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 claimant to prove the existence of an employment relationship and the unfair termination thereof. Having failed to prove the existence of an employment relationship the claim has no leg to stand and must thus fail. The same is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE