



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 45 OF 2017

CONSOLIDATED WITH CAUSE Nos. 47, 48, 49 AND 50 OF 2017

PATRICK MUTUKU MUSOMA & 4 OTHERS.....CLAIMANTS

VERSUS

SANA INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants herein sued the Respondent seeking recompense for their alleged unlawful dismissal and refusal to pay their terminal dues and compensatory damages. The Claimant in Cause 45 of 2017 Francis Mutuku Musoma averred that he was employed as a machine operator from 15th January 2015 until he was dismissed on 16th August 2016. He averred that during his period of service he would work from Monday to Friday between 7.20am and 5.30pm. and that he used to work for 5 days a week including public holidays and never took leave. He averred that the Respondent never remitted his NSSF and NHIF dues and that his position was taken by a new machine operator on 16th August 2016. He thus sought salary in lieu of notice – Kshs. 11,600/-, unpaid leave dues for leave not taken for past 3 years – Kshs. 8,120/-, payment for public holidays not taken – Kshs. 8,506.06, payment for pro rata leave for 6 months – Kshs. 4,060/-, service gratuity at the rate of 15 days for each completed year – Kshs. 5,800/-, maximum compensation for the unlawful dismissal – Kshs. 139,200/-, costs of the suit, interest from the date of filing suit till payment in full. The Claimant in Cause 47 of 2017 Lucia Nzomo averred that she was employed from 2005 in the plating section till 29th July 2015. She averred that she worked from 7.30.am to 5.30pm with a one hour lunch break. She averred that she never took leave from 2005 till 2013. She averred that the Respondent never remitted her NSSF and NHIF dues. She averred that on arrival at work on 29th July 2015 she was advised that the director had authorized her dismissal and thus sought a declaration that her dismissal was unlawful and unfair. She sought one month's salary in lieu of notice – Kshs. 12,550/-, payment in lieu of leave not taken for the entire period of service – Kshs. 19,320/-, half salary for the month of July 2015 – Kshs. 6,275/- service gratuity for 10 year when NSSF dues were not remitted – Kshs. 62,750/-, maximum compensation for the summary dismissal – Kshs. 150,600/-, costs of the suit as well as interest thereon. The Claimant in Cause No. 48 of 2017 Samuel Muchai Maina averred that he was employed in the hacking department (hair brushing) from June 2012 until 27th May 2015 when his services were terminated. He averred that during his service he worked from Monday to Friday between 7.30am and 5.30pm and that he never took his annual leave for the period of his employment. He averred that the Respondent never remitted his NHIF and NSSF dues for the entire duration of his service. He thus sought one month in lieu of notice – Kshs. 9,600/0, payment in lieu of untaken/unpaid leave for the entire period of service – Kshs. 20,160/-, service gratuity at 15 days for each completed year of service – Kshs. 14,400/-, maximum compensation for the summary dismissal – Kshs. 115,200/-, costs of the suit plus interest thereon. The Claimant in Cause No. 49 of 2017 Denis Maronga Omwange averred that he was employed from September 2012 as a general worker until 18th May 2016 when his services were terminated. He averred that he used to work from Monday to Friday and that he never took his annual leave. He averred that the Respondent never paid his NSSF and NHIF dues for the entire period of his service. He thus sought one month in lieu of notice – Kshs. 9,660/-, payment in lieu of leave not taken – Kshs. 20,916/-, salary for the 18 days worked in May 2016 – Kshs. 8,694/-, service gratuity at rate of 15 days for each year worked – Kshs. 14,490/-, costs of the suit and interest thereon. The Claimant in Cause No. 50 of 2017 Paul Mbugua Wanjiru averred that he was employed in March 2012 as a machine operator until 21st April 2015. He averred that he used to work from Monday to Friday between 7.20am and 5.30pm each day and that for the entire duration of his service the Respondent never remitted his NSSF and NHIF dues. The Claimant averred that he never took leave for the entire period of service. He averred that he was dismissed on 21st April 2015 for reporting that a co-worker had entered the premises with a phone. He averred that his position was taken by a new machine operator while he was still on assignment. He thus sought one month in lieu of notice – Kshs. 9,600/-, payment in lieu of leave not taken – Kshs. 20,160/-, service gratuity at the rate of 15 days for each complete year of service – Kshs. 14,400/-, maximum compensation – Kshs. 115,200/-, costs of the suit as well as interest thereon.

2. The Respondent filed defences against some of the claims and in Cause 47 of 2017, the Respondent averred that the Claimant was earning Kshs. 13,210/- in the plating section until 29th July 2015 when she was terminated due to absenteeism from work without permission. The Respondent averred that the Human Resources Manager wrote a show cause letter to explain why action should not be taken for her absenteeism. The Respondent averred that the Claimant responded to the show cause letter and explained that she was sick without providing proof. The Respondent averred that the Claimant was invited for a disciplinary meeting and was unable to provide proof she was sick. The Respondent averred that the Claimant was not entitled to the reliefs she sought as she did not provide specifics on the public holidays she worked or proof that she never took leave. The Respondent averred that she was summarily dismissed and was not entitled to notice pay. In Cause No. 48 of 2017 the Respondent averred that the Claimant left his place of work on 17th February 2015 and was expected to return the

next day for work but he never reported back until sometime in December 2016 when the Respondent received a demand letter from an advocate claiming that the Claimant had been dismissed. The Respondent averred that on 25th March 2015 the Respondent wrote to the union about the Claimant's absence from duty and that by failing to report to duty the employee had breached his contract. The Respondent averred that the Claimant was not entitled to any of the reliefs he sought. In Cause No. 49 of 2017 the Respondent averred that on 14th March 2015 the Claimant assaulted a lady by the name Damaris when they argued about the opening and closing of a window while at work. The Respondent averred that the Claimant was suspended from work pending investigations and on 19th June 2015 issued with a notification to appear for a disciplinary meeting on 23rd June 2017. The Respondent averred that the Claimant appeared for the hearing before the disciplinary committee but failed to exonerate himself and the management decided to terminate his services from 14th March 2015. In Cause No. 50 of 2017, the Respondent averred that the Claimant was summarily dismissed on 21st April 2014 for taking photos with his phone while within the factory. The Respondent averred that the Claimant was summoned after the security personnel recorded a statement that the Claimant was using a mobile phone while at his workplace. The Respondent averred that the Claimant declined to answer to the charges and alleged that it was his colleague who had a phone. He was accused of failure to report the colleague he alleged was using the phone. The Respondent averred that the Claimant was not entitled to the reliefs sought.

3. The Claimants testified as did the Respondent's witness Agnes Kagwiria. Francis Mutuku Musomba testified that he was terminated unfairly as he was processing hair and was told to just stop working. He stated that no prior warning was given to him. Lucia Nzomo testified that she was unwell and was hospitalized but was dismissed despite being given sick off by the doctor. She stated that she was asked to show cause and after showing cause was exonerated but was not reinstated. In cross-examination she testified that she attended the hearing in the company of the shop steward and was asked for proof of hospitalization and the shop steward did not ask any questions. She stated she was not informed she could appeal. She testified that she informed the union of the dismissal but was not aware if the union wrote to the Ministry of Labour. She admitted that her NSSF and NHIF dues were paid and that she went on leave in 2014 and 2015 only. Paul Mbugua Wanjiru testified that he was dismissed without cause. He stated that his colleague was found with a phone and he was taken by security and after 15 minutes he was asked to record a statement and was dismissed. He stated in cross-examination that he did not see the phone and that his colleague was accused of having a phone. He stated that he was asked to state what had happened and he was only stated that he replied to the questions asked. He testified that the security guard blamed him unfairly and that he was focused on his job and therefore did not see the phone.

4. The Respondent's witness Agnes Kagwiria testified that she worked in the Respondent's HR department for the past 7 years. She stated that Lucia Nzomo was employed in K-Section and absented herself from work without permission and did not communicate about her absence. She testified that the Claimant was terminated after being heard and her explanation found wanting. She testified that Paul Wanjiru was spotted by security taking photos in Section Wing A where he worked and upon being asked to explain declined to and walked out of the office. In cross-examination she stated that Paul was found using the phone taking pictures and that the phone was confiscated by the security guard Julius Kimani. In cross-examination the witness testified that the Claimant Lucia Nzomo failed to explain her absence while Paul was adamant and refused to co-operate after he was found taking photos with his phone.

5. The parties filed submissions and the Claimants submitted that there was no dispute that they were employees of the Respondent. They submitted that they were dismissed without a valid reason. The Claimants submitted that the dismissal was wrongful, unfair and unlawful and that they were entitled to compensation and the reliefs sought save for the NSSF dues claim by Lucia Nzomo which she abandoned.

6. The Respondent submitted that in the dismissal of the Claimants, it followed the dictates of the law and that there was a valid reason for each of the dismissals. In the case of Lucia Nzomo, the Respondent submitted that she failed to prove the reasons for her absence from work and in respect of Paul Mbugua Wanjiru, the Respondent asserts that the provisions of Section 41 were complied with as he was issued with a show cause letter and appeared before the panel. The Respondent cited the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** where the Court of Appeal held that a hearing does not necessarily have to be an oral hearing in all cases. The Respondent submitted that the Claimants were not entitled to any payment as sought in the claims.

7. The Claimant in Cause 45 of 2017 was unable to prove he never went on leave for the years of his service. He also did not attach any statement from NSSF or NHIF to prove his dues were not remitted by the Respondent. He was only able to assert that he was dismissed unfairly. In that regard he would be entitled to one month's salary in lieu of notice – Kshs. 11,600/- and 2 months compensation being Kshs. 23,200/-. He will also have costs of the suit. He did not prove any of his other claims which are dismissed.

8. The Claimant in Cause 47 of 2017 Lucia Nzomo was unwell and had been admitted to hospital as the discharge summary shows. She also produced a sick off which shows she was permitted to be away from work. Her claim for unlawful dismissal is merited. She would be entitled to recover Kshs. 12,550/- being one months salary in lieu of notice, 4 months salary compensation of Kshs. 50,200/- plus costs of her suit. She was unable to prove any of her other claims and those are accordingly dismissed.

9. The Claimant in Cause No. 48 of 2017 was not dismissed as the records from the Respondent show he absconded from work. Where an employee does not present himself at the workplace he cannot thereafter claim dismissal as he is the one who terminated his contract. In this case the Claimant is entitled to nothing and I dismiss his claim with costs.

10. The Claimant in Cause No. 49 of 2017 was dismissed for assaulting a fellow employee. The dismissal was one the Respondent could undertake and after the hearing he as accorded he could not claim not to have been granted an opportunity to defend himself. The record shows he was heard but was dismissed for just cause. His suit is accordingly unproved and is dismissed with costs to the Respondent.

11. The Claimant in Cause No. 50 Paul Mungai Wanjiru was accused of taking photos at the factory and he failed to give an explanation to the satisfaction of the Respondent. Whereas the Respondent alleged he was taking photos it was not able to provide the photos. In the absence of proof for the reasons of dismissal and the explanation given by the Claimant, the dismissal was unlawful and unfair to that extent. He would be entitled to recover 1 month's salary in lieu of notice – Kshs. 9,600/- and 2 months salary as compensation – Kshs. 19,200/- plus costs of the suit. He is not entitled to any other claim as he did not prove them. In the final analysis I enter judgment as follows:-

a. The Claimant in Cause 45 of 2017 Francis Mutuku Musoma

- i. one month's salary in lieu of notice – Kshs. 11,600/-
 - ii. 2 months compensation being Kshs. 23,200/-.
 - iii. costs of the suit.
- b. The Claimant in Cause 47 of 2017 Lucia Nzomo
- i. Kshs. 12,550/- being one months salary in lieu of notice,
 - ii. 4 months salary compensation of Kshs. 50,200/-
 - iii. costs of her suit.
- c. The Claimant in Cause No. 48 of 2017 Samuel Muchai Maina is entitled to nothing. Suit dismissed with costs.
- d. The Claimant in Cause No. 49 of 2017 Denis Maronga Omwange was dismissed for just cause. Suit dismissed with costs to the Respondent.
- e. The Claimant in Cause No. 50 Paul Mungai Wanjiru
- i. 1 month's salary in lieu of notice – Kshs. 9,600/-
 - ii. 2 months salary as compensation – Kshs. 19,200/-
 - iii. costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 24th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar