



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 237 OF 2016

JULIA WAIRIMU NDIRITU.....CLAIMANT

VERSUS

FORWARD MOBILES (K) LTD.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent for her alleged unlawful termination. She averred that she was employed by the Respondent on 15th January 2013 as an M-pesa agent at the Respondent's Karatina Branch earning a monthly salary of Kshs. 7,000/-. The Claimant averred that she served the Respondent diligently until 1st August 2016 when the Respondent illegally terminated her services without notice. The Claimant averred that her termination was unfair unprocedural, wrongful and illegal. She averred that she was never given annual leave for the 4 years she worked and that she had also worked overtime for a total of 214 hours for which she was never paid. The Claimant prays for a declaration that the termination of employment was unfair, unprocedural, wrongful and illegal, a declaration that the acts of the Respondent of not paying her terminal dues was unlawful, illegal and amounted to a breach of the terms of employment. She sought one month's salary in lieu of notice – Kshs. 7,000/-, leave pay – Kshs. 19,600/-, overtime pay – Kshs. 7,000/- and twelve month's compensation for unfair termination – Kshs. 84,000/- all making a grand total of Kshs. 117,600/-. She also sought a certificate of service as well as the costs of the suit.

2. The Respondent filed a response to claim and averred that the Respondent was co-founded by the late Benson Mathenge Muchemi and Anastacia Wambui Mathenge with a 60% and 40% shareholding respectively. It was averred that after the demise of Benson Mathenge Muchemi, proceedings were taken in Nairobi High Court Succession Cause No. 850 of 2014 which proceedings are still pending in court. The Respondent averred that the surviving director was therefore unable to access any funds without an express court order as 60% of the company shares were owned by the deceased. The Respondent averred that the said director was also unable to maintain the company and its subsidiary businesses until the succession cause is determined. The Respondent averred that the succession cause had affected the business in Karatina and other several shops operating under the Respondent countrywide. The Respondent averred that it did not unlawfully dismiss the Claimant from employment and that she was aware that the shops closed as a result of lack of funds to keep them running and that her claim is a premeditated attempt to unjust enrichment. The Respondent averred that the Claimant should not be entitled to the prayers sought.

3. In her reply to the response to claim, the Claimant averred that the issues of shareholding at the Respondent's company as well as the pending High Court matter are unrelated and irrelevant to her claim as it relates to matters of labour and employment. The Claimant averred that the claim is only in furtherance of her labour and unconstitutional rights and is neither premeditated nor meant for unjust enrichment. She prayed for her claim to be allowed and the response to claim be dismissed.

4. The Claimant testified as did the Respondent's witness. The Claimant adopted her statement, produced the documents as enumerated in her list of documents. She testified that she was cleared from work by one Margaret Waruguru. She stated that she did not know why she was cleared and later she found out that her employment had been terminated but she was not issued with notice and her dues were not paid. She testified that the Mpesa outlet at Karatina where she used to work together with Margaret Waruguru was not closed down and that Margaret Waruguru continued working in the outlet. She testified that she was never paid any leave allowance or house allowances and that she was only issued with a certificate of service after a court order. In cross-examination she confirmed that she was aware Mr. Mathenge passed on but she could not remember the time of his demise. She stated that she had a child in boarding school and that she used to request for permission, rush the child to school and come back in the afternoon. She maintained that the Mpesa shop remained operational even after filing this suit.

5. The Respondent's witness was Annastacia Wambui Mathenge the surviving director of the Respondent. She adopted her statement as evidence and produced the list of documents attached to the response as exhibits for the defence. She testified that she co-owned a business with her late husband and that they had an Mpesa shops dealership. She stated that her husband passed away on 21st December 2013 and he was the one running the business together with the manager by the name Peter Wambugu. She testified that the business did not continue due to the succession cause and the shop had arrears of rent. She stated that the shop was closed after they were unable to pay for rent and the landlord took it back. She testified that the business had to be sold and with the court case they could not meet the targets so they were not

allowed to continue. In cross-examination she stated that she did not know if the Claimant was notified of the closure as she was not in-charge of the running of the day to day activities. She stated that when the Claimant was employed the business was in limbo and that she sold the business in July 2017 for Kshs. 22 million after the suit was filed but she never paid the Claimant because she did not have capacity due to the ongoing succession case. She testified that the money is in an escrow account pending the determination of the succession cause. She stated that that she would leave it to the court to determine what was owed to the Claimant.

6. The Claimant submitted that she was not a victim of redundancy but one of unlawful termination without notice. She submitted that apart from the certificate of service that was issued after the court ordered, all the rest of the claims remain. She submitted that the Respondent failed to call the manager Peter Wambugu and that his statement should be disregarded as evidence. The Claimant submitted that the witness statement of Anastasia Wambui Mathenge did not answer the Claimant's case and that her case remained uncontroverted and unchallenged in all material facts and particulars. The Claimant relied on the case **Douglas Wanjohi Muchemi v Geoffrey Kibui Kamau T/A Hotel Starbucks [2016] eKLR** where Ong'aya J. observed that "*the evidence is clear that there was no notice and a hearing for a valid termination on account of poor performance or misconduct as provided in the section 41 of the Employment Act 2017. As was held in Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than it is prescribed by statute or contract*". She therefore prayed that judgment be entered against the Respondent as prayed in the statement of claim with costs and interests of the suit.

7. The Respondents submitted that it had demonstrated through the evidence of its witness and the documents that were produced before the court that the Karatina shop was closed when the landlord took back his shop because the Respondent owed the landlord rent arrears of Kshs. 90,000/-. The Respondent submitted that this evidence demonstrated that indeed it was facing financial difficulties hence the reason why the claimant's employment came to an end. It denied that the Claimant was dismissed from her employment. The Respondent submitted that having demonstrated that it was facing genuine financial constraints that led to the closure of Karatina shop, it submitted that the Claimant was in effect declared redundant due to the aforesaid circumstances hence her claim has no basis. The Respondent submitted that based on the testimony of Mrs. Mathenge that she could not comply with the provisions of the Employment Act on redundancy as despite the fact that she was the only remaining director, she could not operate the business as she did not have capacity to do so because of the succession cause touching on the estate of her late husband. It was submitted that it was not possible to issue the notice as the landlord took back the shop. As regards leave days the Respondent submitted that the Claimant's testimony confirmed that whenever she sought to go on leave, the same was approved. The Respondent submitted that she did not demonstrate that there were any leave days that she was not paid for or that she sought for but were denied by the Respondent's manager. Respondent submitted that the Claimant's claim is not justified and should be dismissed as she did not demonstrate that she was unlawfully dismissed from employment.

8. The Claimant lost her employ suddenly on account of the demise of one of the directors of the Respondent. This fact was admitted as much by the Respondent's witness the remaining director who is the widow of the deceased. The Respondent cannot wring its hands and declare that since the other director was deceased there was nothing it could do to secure the rights of the employees. It is quite telling that the business was sold for Kshs. 22 million though it is asserted the funds are held in escrow. The case of **Douglas Wanjohi Muchemi v Geoffrey Kibui Kamau T/A Hotel Starbucks (supra)** was not relevant to the legal issues arising in this case as her dismissal was not one for which she was accused of misconduct or such as to bring the application of Section 41 of the Employment Act into play. As the Claimant was terminated from employment without any notice, she would be entitled to recover the notice due which was Kshs. 7,000/-. She stated in her evidence that she used to get time to drop her child in boarding school but did not convince the court she had been unable to take normal leave. If it was easy to get the off days and granted that she worked alongside Margaret Waruguru at the Respondent's Karatina shop there was doubt she did not secure annual leave. She did not demonstrate how she worked overtime and that portion of her claim fails as she did not adduce sufficient evidence on the same. She was given the certificate of service and therefore that portion of her claim is superfluous. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. Kshs. 7,000/- as notice pay
- ii. Kshs. 42,000/- being 6 month's salary as compensation
- iii. Costs of the suit which I cap at Kshs. 20,000/-

It is so ordered.

Dated and delivered at Nyeri this 15th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar