



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1405 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 2nd July, 2019)

KINGSFORD MUKIRI GITARI

AGNES WAMBUI MAINA

DANIEL NYAUMA NYANUMBA

BERNADETTE MWAIZI MAYENZE

FAITH KABIRITHU ITHINYAI

RICHARD MUTHEE KIAMBI.....CLAIMANTS

VERSUS

SINTEL SECURITY PRINT SOLUTIONS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants filed suit through the firm of Anambo and Company Advocates seeking damages for unlawful termination,

2. The Claimants were employed by the Respondent on diverse dates as follows:

- | | | |
|-------------------------------------|---|---------------------------------------|
| <i>1. Kingsford Mukiri Gitari</i> | - | <i>1st March, 2011</i> |
| <i>2. Agnes Wambui Maina</i> | - | <i>15th March 2011</i> |
| <i>3. Daniel Nyanumba</i> | - | <i>1st April, 2011</i> |
| <i>4. Bernadette Mwaizi Mayenze</i> | - | <i>2nd June, 2011</i> |
| <i>5. Faith Kabirithu</i> | - | <i>13th November, 2012</i> |
| <i>6. Richard Muthee Kiambi</i> | - | <i>9th January, 2012</i> |

3. They aver that they were all earning a salary of Kshs. 30,000/= per month which was increased to Kshs 35,000/=. That sometime on 28th May, 2013, they found that their money had been reduced by Kshs. 10,000/= and when they questioned the Administration Manager why they did so she instructed the Respondent to sign an undated letter indicating that they had consented to an adjustment of their salary downwards to Kshs. 24,000/=.

4. The Claimants claim that they refused to sign the said letter because no meeting had been held between them and the Respondent agreeing to adjust their salary downwards. They reported the matter to the District Labour Officer Thika but she did not take any action in the matter.

5. They contend that they tried to raise the matter with the Respondent vide a letter dated 6th June, 2013, to reinstate their salaries but the

Respondent responded on 13.6.2013 terminating their services on unjustified allegations of threatening the senior managers and becoming a risk to the Company. That due process was not followed either and for that reason they urge the Court to allow their respective claims.

6. In response to the Claims, the Respondent admit the employment relationship but deny that the Claimants' salaries were increased to Kshs. 35,000/= per month but rather that there was an optional Kshs. 5,000/= paid to the Claimants' dependent on satisfactory work. They deny any arrangement on overtime prior to November 2012 and the additional amount was never in dispute and the Claimants are estopped from denying that they did not accept payments made to them on account of overtime.

7. It is also the Respondent's contention that they had the option to reduce the Claimants salary or declare the Claimants redundant to which the Claimants opted for salary reduction and are therefore estopped from denying acceptance thereof.

8. They deny unlawfully terminating the Claimants and state that the Claimants violated the terms and conditions of employment namely, by threatening senior managers, insubordination and exposing the Company to security risks. That the termination of the Claimants was done in accordance with their respective contracts and the employment law and paid them their terminal dues. They urge the Court to dismiss the suit with costs.

Evidence

9. Kingsford Mukiri Gitari and Agnes Wambui Maina testified on behalf of the Claimants and reiterated the averments on the Memorandum of Claim. The Respondent on the other hand put up one witness who testified the Claimants were probationary employees who were terminated for threatening senior managers but admitted that they did not issue them with Notice to Show Cause and neither was a disciplinary hearing conducted.

Submissions

10. It is submitted on behalf of the 1st, 3rd, 5th & 6th Claimants that they were terminated for no reason, without notice and no disciplinary hearing was ever conducted. That as such they are entitled to salary in lieu of notice, unpaid leave, unpaid overtime, salary increment after the end of the probationary period, deduction of May, 2013 salary and damages for wrongful termination.

11. The 2nd and 4th Claimants submit that they were not probationary employees as no letter of extension was ever issued to them and cite the case of **David Namu Kariuki vs Commission for the implementation of the Constitution (2015)eKLR** that an extension of probation must be formal.

12. It is submitted that the Claimants' services were terminated for refusing to accept a lower salary which is unlawful and they are as such entitled to the reliefs sought.

13. It is submitted on behalf of the Respondents that the Claimants were employed on a contractual basis and they were summarily dismissed under the provisions of Section 44 of the Employment Act. That the Claimants have not established their cases as required under Section 107 of the Evidence act.

14. That the Claimants are not entitled to the payment of service pay as they were registered members of the NSSF. It is also submitted that the Claimants are not entitled to damages for unlawful termination as they were summarily dismissed for threatening senior managers after they had accepted lower salaries voluntarily but decided to confront senior managers on the same. That in accordance to Section 49 of the Employment Act, the Claimants contributed to their termination and are as such not entitled to damages. They urge the Court to dismiss the Claim with costs.

15. I have considered all the evidence and submissions of the Parties. The Respondents have admitted that there was an employment relationship between them and the Claimants which was probationary in nature and which was terminated by Respondent when Claimants became rude and threatened Management.

16. From the documents supplied by the Claimants, which are the appointment letters, they were appointed on different dates in 2011 and 2012 and terminated on 13.6.2013.

17. The probation period was 6 months. The probation period had since ended when they were terminated in June 2013 and the Respondents cannot insist that they were probationary employees.

18. Section 42(2) of Employment Act 2007 states as follows:-

2) "A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee".

19. It is apparent from the above provisions that the Respondent cannot extend the probation period beyond 6 months and silence on the Respondents part would in the circumstances mean non-confirmation in employment.

20. Given that the Claimants had been confirmed on duty, they could not be terminated without any hearing for whatever reason the Respondent aver was in issue. The Respondents aver that the Claimants were rude to their Manager. They have not adduced any evidence to prove this position. The Respondents also failed to take the Claimants through any disciplinary process. They therefore acted in contravention of Section 41 of Employment Act 2007.

21. It is therefore my finding that the Claimants were terminated unfairly and unjustly as envisaged under Section 45(2) of the Employment Act 2007.

22. In terms of remedies, I find for the Claimants and I award them as follows:-

1. 8 months salary as compensation for unlawful and unfair termination = 30,000 x 8 = 240,000/=

2. 1 months salary in lieu of notice = 30,000/=

3. Reduction of salary from May 2013 = 10,000/=

4. Unpaid June 2013 salary = 6,000/=

TOTAL = 286,000/= less statutory deductions

5. Claim for severance pay is not payable as there was no redundancy situation.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 2nd day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyaga for Respondent – Present

Ngethe for 2nd and 4th Claimants – Present

No appearance for 1st, 3rd and 5th Claimants – Present