



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 2160 OF 2014**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 19<sup>th</sup> September 2019)*

**JULIUS ONGOSI ESAU.....CLAIMANT**

**VERSUS**

**MARY WAMBUI KIMANI T/A FLOMIC SERVICES.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Statement of Claim on 5<sup>th</sup> December 2014 alleging his unfair termination by the Respondent for the sole reason that he sought his salary arrears from the month of February 2013 to July 2014. He seeks the following orders against the Respondent:

- i. A declaration that the Claimant's termination of his services was unlawful.*
- ii. The Claimant be paid his terminal benefits as set out in the Statement of Claim amounting to Kshs. 1,201,836.44/=.*
- iii. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of twelve (12) months gross salary.*
- iv. The Respondent to issue the Claimant with a Certificate of Service.*
- v. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.*
- vi. The Respondent to pay costs of this claim.*
- vii. Interest on all the above at Court rates.*

2. The Respondent filed its Response to the Claim on 28<sup>th</sup> May 2018 in which she denies having employed the Claimant, unlawfully terminated him and her refusal to pay his terminal dues amounting to Kshs. 1,201,836.44/.

3. During the hearing the Claimant testified on his own behalf while the Respondent testified on her own behalf as Rw1 and also called one witness, George Gacahu Maina who testified as Rw2. Thereafter, each party filed its written submissions.

**Claimant's case**

4. The Claimant, CW1, testified that he worked as a security guard at Kinoo and Eden Apartments. He testified that the Respondent terminated him for complaining about his salary. He further testified that Laimmemo Security & Investigators was a business name, which was run by the Respondent. He testified that the Flomic Services Limited was incorporated when he was already working for the Respondent.

5. In cross-examination, he testified that he knew the Respondent as she was the one who employed him and that he worked for the Respondent for 3 years 8 months with effect from 1/6/2010 to 29/8/2014. He testified that he was issued with a guard book with the name Flomic Security Services which he used and he handed it over to at the end of the month. He testified that Laimmemo was also the Respondent's company and may have changed its name to Flomic Limited.

6. In re-examination, he testified that he was not given any appointment letter and that he dealt with the Respondent.
7. Mary Wambui Kimani, Rw1, testified that she is one of the directors of Flomic Services Limited, which provides guarding services. She testified that she knew the Claimant before June 2010 while in search of a job and was subsequently employed. She testified that at that time, she was employed by Laimmemo Security & Investigators as a Senior supervisor from 2009 to 2014. It was her case that she was in-charge of workers in Kinoo.
8. It was her case that Flomic Services Ltd was registered on 22/09/2010 and her husband who is also a co-director used the company to trade in real estate. She testified that at that time she was employed by Laimmemo.
9. She testified that they do guarding services and that they give guards a guard book with 60 pages which takes 2 months and is signed by the supervisor daily. She testified that the guard book produced by the Claimant is not similar to the one they used as the logo is different.
10. It was her testimony that she only sent the Claimant Kshs. 1000 via M-pesa which the Claimant had borrowed from her. She testified that there is a difference between Laimmemo and herself.
11. In cross-examination, she testified that Flomic Services Ltd was registered in September 2010 but it started active security operations in November 2013. She testified that Flomic Services did not work at Eden Rock Apartments. She testified that she never owned Laimmemo and that she was not the only supervisor.
12. George Gachau Maina, RW2, testified that he engages in real estate and that Rw1 is his wife. He testified that the Claimant was known to him by appearance. It was his case that his wife sent money to the Claimant using his phone. He testified that since the company was registered in 2014 they started engaging in security business in 2014.
13. In cross-examination, he testified that he was not involved in security business and that it his wife who dealt in that business. He testified he identified Rw1's signature in the Claimant's documents but she was not the one paying workers at Laimmemo and that they have never had any business at Eden Rock Apartments.

#### **Claimant's submissions**

14. The Claimant in his written submissions argued that he was employed by the Respondent and the failure to issue him with an appointment letter contrary to section 9 of the Employment Act should not be a ground to deny the existence of employment relationship. He further submitted that section 10 (7) of the Employment Act requires all employers to prove particulars of an appointment contract if he fails to produce a written contract.
15. He relied on Section 47 (5) of the Employment Act and submitted that the burden of proving a valid reason for terminating a Claimant rests on the employer and that he had met his evidentiary burden while the Respondent has failed to prove a justifiable reason for terminating the Claimant.
16. He submitted that there was no valid reason for his termination and that the Respondent did not observe procedural fairness and the principles of natural justice in terminating him. He averred that the provisions of Section 45 (4) (b) of the Employment Act were not followed.
17. In respect of his terminal dues, he submitted that he should be paid his terminal dues as he had demonstrated that his termination was unfair, unlawful and unprocedural.
18. He argued that the Respondent did not controvert the claim by producing documentary evidence as ordered by the Court to show that the Claimant was duly paid his entire salary for the months of February 2013, April 2013 to July 2014. He submitted that he is also entitled to his unpaid salary for the month of August 2014.
19. He submitted that he is entitled to one month's salary in lieu of notice as he was not issued with a notice as required under section 35 of the Employment Act. He relied on section 28 of the Employment Act and submitted that he did not proceed on annual leave for 4 years thus he was entitled to unpaid annual leave for 4 years.
20. He submitted that for the period between 2010 and 2014 his salary was below the prescribed amount in the regulation of Wages Orders and the Respondent did not prove that she was paying salaries within the prescribed minimum wage.
21. He relied on section 31 of the Employment Act and submitted that the Respondent's failure to provide him with house allowance was in contravention of the law. He further submitted that he did not go on any off day during his employment and that he worked during public holidays and was never paid.
22. He argued that he worked overtime for over 4 hours daily but was never paid hence the court should enter judgment for the full payment of the claimed overtime. In conclusion, the Claimant submitted that he has proved his case and is entitled to costs of the suit and interest thereon.

#### **Respondent's submissions**

23. The Respondent submitted that from the time of its incorporation all through to 2014, Flomic Services Limited did not engage in business

related to provision of security services but rather real estate and management of buildings.

24. She submitted that if the Claimant is allowed a benefit of doubt as to the entity that employed him, the period of 4 months between the date of the company's incorporation to when he was offered employment renders his claim vague.

25. The Respondent submitted that she was known to the Claimant as her workmate and that the management of Flomic Services Limited was done by her husband. She submitted that she was employed by Laimmemo Services Limited where the claimant deserted duty around August 2014. It is therefore her submission that the Claimant was employed by Laimmemo under different positions.

26. She submitted that during her employment as a supervisor, she would occasionally send money to the Claimant. She therefore averred that there was no evidence to corroborate the Claimant's 4 year employment and a single M-pesa transaction cannot be relied on to prove an employment relationship. She submitted that the guard book produced by the Claimant was not similar to that used by Flomic Security Services Limited.

27. She submitted that the Claimant had failed to prove that he was employed by the Respondent and that the two were employed by the same company. She therefore urged the Court to dismiss the claim.

28. I have examined evidence of the Parties plus the submissions. The Claimant has averred that he was employed by the Respondents, which the Respondent denies.

29. The Respondent indicated in their evidence that Flomic Services Limited was incorporated on 22<sup>nd</sup> September 2010 and did not engage in security services. The fact of the incorporation of the Claimant is evidenced by Appendix MW 3 filed by the Respondent.

30. The Claimant has however not produced any evidence to show he was employed by the Respondent. The claim by the Claimant therefore falls on that ground and I dismiss it accordingly with no order of costs.

**Dated and delivered in open Court this 19<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mokaya holding brief Nyabena for Claimant – Present

Respondent – Absent