



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 51 OF 2018

SUSAN WAMBUI MACHARIA..... CLAIMANT

VERSUS

KIGANJO HEALTH CENTRE..... RESPONDENT

AND

CAUSE NO. 52 OF 2018

JOSEPH MWANGI MAINA CLAIMANT

VERSUS

KIGANJO HEALTH CENTRE..... RESPONDENT

AND

CAUSE NO. 53 OF 2018

DICKSON MUKOMA GICHURU..... CLAIMANT

VERSUS

KIGANJO HEALTH CENTRE..... RESPONDENT

JUDGMENT

1. This claim was consolidated with ELRC Cause No. 51 of 2018, ELRC Cause No. 52 of 2018 and ELRC No. 53 of 2018. In the suits, the Claimants sued the Respondent for the alleged unfair termination of their services. Susan Wambui Macharia (for purposes of this judgment referred to as the 1st Claimant) averred that she was employed as a support staff on 27th February 2011 and was working in that position as at the time of dismissal earning a salary of Kshs. 7,120/-. She averred that her employment was terminated on 30th September 2017 by the Respondent's chairman one Mr. Karuri Ndeng'era who is said to have illegally terminated the 1st Claimant's employment without any proof of any misconduct. She averred that she was not served with a notice to show cause before her services were terminated. The 1st Claimant sought compensation for loss of income – Kshs. 85,440/-; one month's salary in lieu of notice – Kshs. 7,120/-; arrears of salary for August and September 2017 – Kshs. 14,240/-; unpaid leave for 6 years - Kshs. 42,720/-; outstanding NSSF dues from July 2016 to September 2017 at Kshs 400/- per month – Kshs. 1,200/-; salary underpayment; and costs of the suit.

2. Joseph Mwangi Maina (hereinafter the 2nd Claimant for purposes of this suit) was employed as a security officer by the 1st Respondent on 1st August 2008. He averred that he earned a salary of Kshs. 7,120/- a month. The 2nd Claimant averred that on 30th September 2017, the Respondent's chairman one Mr. Karuri Ndeng'era illegally terminated his employment without any proof of any misconduct. He averred that he was never issued with any notice to show cause nor was he accorded an opportunity to be heard before being verbally terminated by the Respondent's chairman. The 2nd Claimant averred that the summary dismissal was unfair, unprocedural and unlawful and prays for judgment against the Respondent for compensation for loss of income at - Kshs. 85,440/-; one month's salary in lieu of notice – Kshs. 7,120/-, arrears of salary for August and September, 2017 – Kshs. 14,240/-; unpaid leave for 9 years – Kshs. 64,080/-; unpaid public holidays totaling to 90 days – Kshs. 21,360/-; outstanding NSSF dues from July 2016 to September 2017 – Kshs. 1,200/-, and salary underpayment.

3. Dickson Mukoma Gichuru the 3rd Claimant for purpose of this suit averred that he was employed on 1st August 2011. He averred that he earned a salary of Kshs. 7,120/- a month. The 3rd Claimant averred that on 30th September 2017, the Respondent's chairman one Mr. Karuri Ndeng'era illegally terminated his employment without any proof of any misconduct. He averred that he was never issued with any notice to show cause nor was he accorded an opportunity to be heard before being verbally terminated by the Respondent's chairman. He thus prays for judgment against the Respondent for compensation for loss of income at - Kshs. 85,440/-; one month's salary in lieu of notice - Kshs. 7,120/-, arrears of salary for August and September, 2017 - Kshs. 14,240/-; unpaid leave for 6 years - Kshs. 42,720/-; unpaid public holidays totaling to 60 days - Kshs. 14,240/-; outstanding NSSF dues from July 2016 to September 2017 - Kshs. 1,200/-, and salary underpayment.

4. The Respondent filed responses to the claims and denied its description, its capacity, *locus standi* or that it is a legal persona with capacity to sue or to be sued and issued a notice that it would raise a preliminary objection on these grounds. The Respondent averred that not being a legal persona, it had no ability to employ anyone, and denied having employed the Claimants as a support staff or watchmen or in other capacity on the dates indicated in the pleadings or at any other time. The Respondent averred that the 1st Claimant was a casual labourer of the management committee of the Respondent on a three months renewable contract from 1st August 2011 to 30th June 2017 when it was not renewed after the expiry of 3 months on 30th September 2017. The Respondent denied the allegations of summary dismissal against the Claimants. It denied that the Claimants are entitled to any compensation, arrears of salary, unpaid leave, holidays, NSSF and one month in lieu of notice. The respondent also denied the jurisdiction of this court as the Respondent is not a legal persona.

5. ELRC Cause No 52 of 2018 was picked as the lead file and the other two Claimants Susan Wambui and Dickson Mukoma testified on behalf of the 3 Claimants and the Respondent called one witness. The 1st Claimant Susan Wambui Macharia adopted her statement and testified that she was verbally dismissed from employment by the Respondent's chairman on 30th September 2017. She stated that she had signed a 3 months renewable contract and testified that there was a contract from 1st April 2017 to 30th June 2017. She stated that the contract was for 3 months but they were not told when the work was over as she continued to work. She testified that they had worked continuously since 2011 as they would sign a contract after every 3 months. The 2nd Claimant Dickson Mukoma Gichuru who adopted his statement and testified he used to work as a casual labourer and that they used to sign contracts after every 3 months. He stated that his last contract was from 1st July 2017 to 31st September 2017 after which he did not sign a further contract and he did not write a letter seeking for work in October. He confirmed in cross-examination that he was dismissed by Karori Ndegwa. He stated in re-examination that the Respondent is the correct party to be sued as it is the one that paid him salary according to the bank statement he supplied in court.

6. The Respondent called Grace Nyokabi Ndome a clinical officer who used to work with the Respondent at the material time as its witness. She testified that the Claimants were on a 3 months renewable contracts. She stated that the last contract was from 1st April 2017 to 30th June 2017 and that when the contract came to an end, the Claimants did not apply for or seek renewal. She stated that the Respondent was not obligated to give the Claimants work after the contract had expired. In cross-examination she stated that if the Claimants wished to continue working they would sign a contract after every 3 months with instructions from the department of health in the chief officer's office. She stated in re-examination that the Claimants were casual workers who were provided with work that was available from time to time. She testified that the Respondent is under the Ministry of Health and as such was not a company registered under Companies' Act or a registered trustee. She testified that the Respondent used to give the Claimants' one month break but she conceded that she never indicated that in her statement. That marked the end of oral testimony.

7. Parties were to file submissions and the Claimants submissions were to the effect that what is in dispute is whether the Claimants were casual labourers otherwise not entitled to notice of termination of employment as envisaged under Section 35(1)(c) of the Employment Act. Relying on Section 37(1) of the Employment Act, the Claimants submitted that they had worked for the Respondent without a break in that their contracts of service would be renewed after every 3 months. The Claimants submitted that the work which they were performing could not be completed within a period of 3 months hence the lengthy period of service by the Claimants. The Claimants submitted that they were therefore not casual employees in the strict legal sense and that Section 35(1)(c) applied to them. The Claimants submitted further that the Respondent used to pay them as shown in the bank statements hence it could be ridiculous to suggest that the Respondent should not have been sued. The Claimants submitted that there was an employer-employee relationship thus imposing upon the Respondent legal duties towards the employees. The Claimants submitted that the claim is merited and urged the court to award them 12 months' pay being compensation as per Section 49(1)(c) of the Employment Act and all other reliefs as prayed in the statements of claim.

8. The Respondent's submissions were to the effect that the Claimants were not able to explain in their pleadings whether the Respondent was a legal person with capacity to sue or be sued and because they failed to discharge that burden, their claim should fail on that score. The Respondent submitted that the Claimants were casual labourers employed on three months renewable contracts. The Respondent submitted that the last contract was not renewed on its expiry. The Respondent placed reliance on the case of **Isaiah Makhoha v Basco Products (K) Ltd [2014] eKLR** for the proposition that the Claimants were on a fixed contract and after expiry by effluxion of time, the Respondent had no obligation to renew the same. The Respondent submitted that the claims for unfair termination or the claim for one month's salary in lieu of notice do not arise. The Respondent cited the case of **Justus Miwani v Jiangxi Water & Hydro Power Construction Kenya [2018] eKLR** and submitted that the Claimants produced no evidence for arrears of salary for August and September 2017, the alleged unpaid leave or any outstanding NSSF dues and that the claim should fail. The Respondent submitted that the Claimants had in their submissions appeared to have departed from their pleadings and evidence by introducing a claim of a casual worker. The Respondent submitted that a party is bound by his pleadings and evidence and that nowhere in their pleadings or evidence did the Claimants assert that they were casual labourers. The Respondent submitted that besides, there is abundant evidence that they were on a fixed contract. The Respondent submitted that the Claimants claims lack merit and should be dismissed with costs.

9. The Claimants were on fixed term contracts which lapsed. The contracts were said to have ceased by effluxion of time. The Claimants assert that they were not casuals by dint of the provisions of Section 35 and 37 of the Employment Act. The Respondent on its part asserts it lacks the legal persona to sue or be sued as in this claim. The Claimants sued the Kiganjo Health Center which is not an incorporated entity or duly registered. The contracts exhibited are from the County Government of Nyeri which is the entity the Claimants ought to have sued. In the premises the suits are devoid of merit as they were against a party that had no privity of contract with the Claimants. Each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 30th day of October 2019

Nzioki wa Makau

JUDGE