



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 2250 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 7th October, 2019)

JULIET AKINYI DIMA.....CLAIMANT

VERSUS

HUMAN NEEDS PROJECT (KENYA).....RESPONDENT

JUDGEMENT

1. The Claimant herein filed an Amended Memorandum of Claim dated 8th November, 2016 and filed in Court on 9th November, 2016, seeking compensation for unfair and unlawful constructive dismissal and payment of terminal dues.
2. The Claimant avers that she was engaged by the Respondent, a non-governmental organization whose aim was providing and building self-sustaining and development of water based services and sanitation for the residents of Kibera slums within Nairobi County.
3. The Claimant further avers that her employment to the position of Country Director was made vide the Respondent's employment letter dated 14th June, 2010. Further that her salary was USD 2,500 and that her contract with the Respondent was open ended which could only be terminated upon her attaining the retirement age of Sixty (60) years or upon expiry of projects initiated by the Respondent as a result of lack of funding.
4. The Claimant contends she performed her duties diligently, with integrity and to the Respondent's satisfaction both nationally and internationally, a result of which the Respondent mandated her to sit in the board of the Respondent organization as an ex-officio member.
5. The Claimant further contends that she was further engaged by the Respondent in its project known as Road to Freedom Scholarship (RFS) from 1st September 2011 for which it was agreed that she would be paid an additional USD 500 monthly. However, she averred that the Respondent through its agent Chris Sutton maliciously and wrongfully withheld her salary for a period of 13 months from April 2013 to May 2014 when her employment was unfairly terminated.
6. The Claimant states that the Respondent did enlist the services of Meri McCoy who took over duties and functions performed by the claimant, a result of which the Claimant was engaged by the respondent as an Independent contractor as evidenced by Appendix 4 to the Claimant's Memorandum of Claim which is a copy of the Respondent's Independent Contractor Agreement though unsigned by the parties.
7. The Claimant avers that the Respondent did on 13th May, 2014 unilaterally and un-procedurally terminate her employment without due regard to the provisions of Section 41 of the Employment Act, 2007. She further contended that at the time of her termination the project in Kibera was still on-going and that similar projects were unveiled in other slums under the banner of the Kibera Project.
8. The Claimant avers that her termination was unfair and was contrary to the provisions of Sections 43 and 45 of the Employment Act, 2007. It is her further contention that the same amounts to summary dismissal within the meaning of Section 44 of the Employment Act, 2007.
9. In her Amended Memorandum of Claim the Claimant prays for the following:-
 - a) ***A declaration that the Respondent's acts preceding their decision to summarily dismiss the Claimant amounts to unfair termination.***
 - b) ***Payment of USD 312,355.00 and Kshs. 630,000.00 comprising of the following:-***

20. She further urged this Court to allow her claim in terms of the Amended Memorandum of Claim.
21. On cross-examination, CW1 confirmed that she worked from her house. She further stated that she had no evidence to prove that she was to be paid USD 500 for the special duties allowances.
22. CW1 further confirmed her monthly salary was USD 2,500 however the amount was not paid for a whole year.
23. On re-examination CW1 stated that she begun working for the Respondent on 1/7/2011 and further that the Respondent did not issue her with a contract indicating her specific duties and role.
24. The Respondent witness RW1 testified on 19/6/2019. He reiterated the averments made in the Respondent's Response to the Amended Memorandum of Claim and his witness statement filed in Court on 16/5/2019 as his evidence in chief. He further added that the Claimant was employed by Human Needs Project (USA) and not the Respondent herein.
25. He further testified that the Respondent did advance a loan facility to the Claimant herein for Kshs. 506,714/- and that the amount was partly refunded leaving a balance of Kshs. 406,714/-.
26. RW1 stated that the Claimant was not an exemplary performer as pleaded. He further stated that she was issued with a performance review but her performance did not improve. It was his further testimony that the Claimant was given an opportunity to improve but did not. Further, that she was offered employment as an independent contractor but did not accept.
27. On cross-examination, RW1 confirmed that HNP (USA) and HNP (K) are different and that the Claimant was employed by the former. He however admitted that there was no evidence adduced before this Honourable Court to confirm this position only that the Claimant's termination letter was signed by the Executive Director of HNP (USA).
28. On further cross examination RW1 stated that the Independent Contractor Agreement was never executed by the parties. He also confirmed that there was no warning letter issued to the Claimant in the Cause of her employment.
29. He further confirmed that the reduction in remuneration was to pay for the existing loan facility owed to the Respondent by the Claimant.

Submissions by the Parties

30. It is submitted by the Claimant herein that she was indeed an employee of the Respondent herein as evidenced by the letter of Appointment dated 8th April, 2012. She further submitted that the said letter meets the criteria for a written contract for service as provided under Section 10(2) of the Employment Act, 2007.
31. The Claimant further submitted that it is the responsibility of the employer to draw up contracts for its employees. It is further the Respondent's responsibility that the terms are consented to by both parties as provided by Section 9(2) of the Employment Act, 2007. To fortify this argument the Claimant cited and relied on the decision in the matter of **Charles Juma Oleng Vs M/S Auto Garage Ltd & Another (2014) eKLR** where it was held:-

“The duty to issue a contract, whether a contract for service or a contract for services was on the Respondent as the entity and person allocating the Claimant work. In the absence of such a document to see what terms were agreed between the parties, the evidence of the Claimant will be taken in good faith...”

32. The Claimant further contended that in her termination letter dated 13th May, 2014, the Respondent clearly indicates that her employment with the Respondent had been terminated.
33. It is the Claimant's further submission that she was not an Independent Contractor as alluded to by the Respondent herein and that this is an after-thought by the Respondent to mislead this Honourable Court and is only aimed to disenfranchise the Claimant from her rightful dues.
34. The Claimant further relied on the definition of an employee as provided under Section 2 of the Employment Act, 2007, insisting that her relation with the Respondent herein was that of an employer-employee. For emphasis the Claimant relied on the case of **Charles Juma Oleng Vs M/S Auto Garage Ltd & Another (2014) eKLR** and **Kenneth Kimani Mburu & Another Vs Kibe Muigai Holdings Limited (2014) eKLR**.
35. It is on this basis that the Claimant urged this Honourable Court to find that she was indeed an employee of the Respondent.
36. The Claimant further contended that she only received her full salary of USD 2,500 for the 1st year only when the same was paid directly from the Respondent's "Provident Financial Management" account in San Francisco and that subsequently when the Respondent's board appointed the firm of Deloitte Kenya to be processing their salaries and thereafter the same was done in-house through Mr. Chris Sutton and she received USD 1,169.00 for 21 months up to her termination. She urged the Court to find that the Respondent wrongfully deducted her salary without offering any explanation.
37. The Claimant further submitted that there was an oral agreement between the herself and the Respondent herein that the Claimant continues working from home alongside other members of staff of the Respondent and that she would receive a payment of Kshs. 90,000/-

per month for the space, which arrangement she duly accepted.

38. She further submitted that the Respondent failed and/or ignored to make any payments despite the fact that they used the Claimant's house for a total of 7 months before getting office premises.

39. The Claimant urged this Honourable Court to find in her favour and award her the amount due as rent for the 7 months.

40. The Claimant further submitted that her termination was unfair, unlawful and un-procedural as it failed to comply with the mandatory provisions of Section 41 and 43 of the Employment Act, 2007. To fortify this argument the Claimant relied on the Authority of **Pamela Lutta Vs Mumias Sugar Co. Ltd (2017) eKLR.**

41. The Claimant contended that her termination having been unfair and unlawful she is entitled to full compensation of 12 months' salary as envisaged under Section 49 (1) (c) of the Employment Act, 2007.

42. She further contended that she is entitled to the Reliefs as sought in her Amended Memorandum of Claim and urged this Honourable Court to allow the same as prayed.

Respondent's Submissions

43. The Respondent on the other hand submitted that the Claimant was not its employee as she failed to produce any documentation from the Respondent organisation as proof of her employment.

44. It is further submitted that the Claimant was an employee of HNP (USA) and not HNP (K) as is evidenced by the letter from the Embassy of the United States of America indicating the same and similarly the payment of her salary from the United States.

45. Further the Respondent submitted that the Claimant did admit to having receiving instructions from the United States of America from Connie Nielsen, David Warner and Meri McCoy Thompson all of whom were directors of Human Needs Project USA who would frequently visit Kenya to track the Claimant's progress.

46. It is further submitted that the two entities HNP (USA) and HNP(K) are two different entities and urged the Court to find as much. The Respondent relied on the case of **Kenny Kinako Vs Ringier Kenya Limited (2016) eKLR** where the Court dealt with the issue of separation of entities and stated that a company being distinct on its own right cannot engage and confer responsibility on its subsidiary or parent company.

47. On the Claimant's termination it is submitted that the same was done fairly and due process was followed as provided under the Employment. The Respondent submitted that it had established that the Claimant consistently failed in her duties as a consultant in the Respondent organisation. It is further submitted that the Claimant was given an opportunity to rectify the position and she failed to do so.

48. The Respondent submitted that it did invite the Claimant for a performance appraisal and disciplinary hearing which the Claimant snubbed and they termed the same as a waiver by the Claimant to her right to be heard. They relied on the case of **Nahashon Muriithi Wambugu Vs Teachers Service Commission (2016) eKLR** to buttress that position.

49. On the issue of underpayment, the Respondent submits that the same has not been proved by way of payslip or bank accounts and should not be granted as it is a special damage. They cite the case of **Ndungu Transport Company & Another Vs Daniel Mwangi Waitihaka Leteipa (2018) eKLR** for emphasis.

50. It is further submitted that although Section 20 of the Employment Act, 2007 places the duty to provide documents on the employer the Respondent did not produce the payslip for the reason that the Respondent never paid her salary as she was not its employee.

51. On reimbursement of rental income the Respondent submitted that this prayer was not proved by the Claimant and as such ought to be dismissed.

52. The Respondent further submitted that the Claimant is not entitled to leave pay having been engaged as a consultant.

53. In conclusion, the Respondent urged this Honourable Court to dismiss the Amended Claim with costs to the Respondent.

54. I have examined evidence and submissions of the Parties herein. The issues for determination are as follows:-

- 1. Who was Claimant's employee and when was the employment executed.***
- 2. What were the terms of the contract of employment?***
- 3. How was the Claimant terminated and whether the termination was unfair and unjustified?***
- 4. Whether Claimant is entitled to the remedies sought.***

55. On the first issue, the Claimant exhibited her Appendix 3 which is a letter to whom it may concern dated 8.4.2012 signed by Connie

Nielsen, Co-founder and President of the Respondent herein in which she confirm the engagement of the Claimant by the Respondent therein as Kenya Project Director at a salary of US Dollars 2500 in as per the open ended contract.

56. The letter read as follows:-

“Human Needs Project

2020 Union Street

San Francisco, CA 94123

USA.

San Francisco, April 8th 2012

To whom it may concern

“This letter confirms the engagement between Human Needed Project and Juliet Dima, of Nairobi, Kenya. In July 2011, Human Needs Project (HNP) hired Juliet Dima as HNP’s Kenya Project Director, paying her a monthly salary of US \$2500. Ms. Dima’s contract is open-ended”

57. From this letter, the employer of the Claimant was indeed the Respondent herein and the contract was open ended. The Respondent even went ahead and loaned the Claimant some 506,714 Kshs for purpose of paying for her kids fees from 22.5.2013. The loan was to be offset in instalments of Kshs.50,671.40 Kshs. Month for 10 months as per Respondent’s Appendix at page 7 of their documents.

58. The Respondent submitted that the Claimant was paid by Human Needs Project USA through one Connie Nielsen and also received instructions directly from the USA. There is no indication that the Claimant received instructions from USA directly nor her pay was indeed wired from the Human Needs Project (HNP) USA because even Connie Nielsen gave her instructions and she is one who wrote Appendix 3 and she is also a founder and Director of Respondent.

59. The contention that the Claimant was employed by Human Needs Project (HNP) (USA) and not the Respondent is not true. That settles issue No. 1 above.

60. As to the terms of engagement, Appendix 3 also sets out the salary payable which was 2500 US Dollars per month. The Respondent contends that there was no agreement to that effect. The Respondent however cannot contend that Appendix 3 is not the envisaged agreement because they were the ones responsible for drawing up any agreement with the Respondent as envisaged under Section 9(1) and (2) of the Employment Act 2007 which states as follows:-

1) “A contract of service:-

a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

61. The Respondent cannot therefore benefit from their own omission by stating that there was no agreement between the Respondent and the Claimant.

62. On termination of the contract between Claimant and Respondent, the Claimant was terminated by a letter which is undated and annexed at page 27 of the Claimant’s documents written by the Respondent and which was hand delivered to the Claimant and it states as follows:-

“Juliet Dima,

NAIROBI.

By Hand Delivery

Dear Madam,

RE: TERMINATION OF EMPLOYMENT WITH HUMAN

NEEDS PROJECT ("HNP")

We refer to the above matter; to your letter dated 2nd July 2014 and your subsequent meeting with Connie Nielsen and Patrick Ogola, Advocate on 23rd July 2014.

We acknowledge receipt of the Mac laptop and the 2 blackberry phones that had been issued to you.

We now tabulate your terminal dues as follows:-

- i) Your Salary for the month of May Ksh 229,800.00**
- ii) One Month's Salary in lieu of Notice Ksh 229,800.00**
- iii) Accrued Leave pay for 2014 (5 Months)Ksh 95,750.00**

Less: Loan Owed to HNP (Ksh 406.714.00)

Net Amount Due Ksh 148.636.00

Please find now enclosed your cheque for Ksh.148,636.00

Yours faithfully,

Signed

Meri McCoy–Thomson

Executive Director

“

63. The letter refer to a meeting between Claimant and other staff of the Respondent whose contents is not disclosed. This letter is similar to Claimant's Appendix 5 at page 53 of Claimant's documents, which also refer to a meeting between the Claimant and Meri McCoy–Thomson, the Respondent's Executive Director on 13/5/2014. The details as to reasons which led to the Claimant's termination are not disclosed.

64. Section 43 of Employment Act 2007 envisages as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

65. From the termination letter above, no reasons were attributed to the termination of the Claimant.

66. In the same vein, Section 41 of Employment Act 2007 states as follows:-

1) "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

67. The above procedure was also never followed before the Claimant was terminated. In view of the fact that the Respondent have not demonstrated that they had valid reasons to terminate the services of the Claimant and that they followed due process, the termination of the Claimant was unfair and unjustified as being done against the express provisions of the law.

68. Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

- (b) *that the reason for the termination is a fair reason:-*
- (i) *related to the employee's conduct, capacity or compatibility; or*
- (ii) *based on the operational requirements of the employer; and*
- (c) *that the employment was terminated in accordance with fair procedure”.*

69. In terms of remedies, the Claimant indicated that he also had another oral contract to perform other duties for another Project Road to Freedom Scholarship (RFS) from 1-9-2011 at a pay of US dollars 500 per month but which she was never paid.

70. The Claimant however gave no proof the existence of such a project or a contract with Respondent to pay her for the said duties. I will disregard that part of the Claim accordingly.

71. The Claimant also stated that the Respondent carried out their work in her house and they were to pay her rent of 90,000/= per month which they never paid. The Claimant has not however demonstrated the existence of such arrangement and I find the issue not proved.

72. In terms of remedies therefore, I find for Claimant as follows:-

1. 1 month salary in lieu of notice = US dollars 2500

2. 12 months' salary as compensation for the unlawful and unfair termination = 2500 x 12 = US Dollars 30000

Total = 32,500 US Dollars

3. The Respondent will also 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 7th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wabuko holding brief Miss Ligunya for Claimant – Present

Attika for Respondent – Present