



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 74 & 76 OF 2018**

**1. JACKSON KIVEU KIMOKOTI**

**2. FRED KUYEBI.....CLAIMANTS**

**VERSUS**

**GEORGE KIAI & LUCY WANGUI**

**KIAI T/A CHECKERS BUTCHERY.....RESPONDENTS**

**JUDGMENT**

1. The Claimants herein sued the Respondents seeking recompense for their alleged illegal and unfair termination and non-payment of terminal dues. They each filed a separate suit but the matter is consolidated for purpose of rendering a judgment only. The Claimants averred that they were employed by the Respondents who ran and managed a butchery known as Checkers within Nanyuki Township, Laikipia County. The Claimants allege they were employed as cooks/waiters from mid 2016 to 6<sup>th</sup> January 2018 when they aver they were dismissed. The Claimants aver that they earned Kshs. 10,000/- a month with a daily allowance of Kshs. 300/- per day making a total of Kshs. 19,000/- a month. They allege that they executed their responsibilities as expected with no complaints whatsoever of gross misconduct or failure to perform their duties to the required standards. The Claimants averred that to their utter shock, on the morning of 7<sup>th</sup> January 2018 one Mrs. Salome Kiai a wife to the 1<sup>st</sup> Respondent and a mother to the 2<sup>nd</sup> Respondent came with new employees and replaced the Claimants without notice. The Claimants averred that at the very least they expected to be accorded due process and their services terminated according to the law. The Claimants averred that they were entitled to one month's salary in lieu of notice prior to the dismissal. They averred that they were entitled to annual leave in terms of Section 28 and contended that they had not gone on annual leave for the entire duration of their service. The Claimants averred that their dismissal was contrary to the law, the Constitution and the principles of natural justice. They averred that their terminal dues were unpaid and that these dues comprised of the one month salary in lieu of notice – Kshs. 19,000/-, unpaid leave – Kshs. 19,000/-, twelve months' salary as damages for unfair termination – Kshs. 228,000/-, service pay – Kshs. 9,500/-, a certificate of service and costs of the suit plus interest thereon.

2. The Respondents in their defence averred that the Claimants were employed from March 2017 up to 11<sup>th</sup> January 2018 when they absconded from work without notice to the Respondents a matter that was reported to the County Labour Office Laikipia. The Respondents averred that the Claimants were paid a salary of Kshs. 14,500/- a month inclusive of daily allowances which were duly paid together with NSSF contributions. The Respondents denied receiving a demand letter prior to institution of the suit. The Respondents thus sought the dismissal of the suit with costs.

3. The Claimants testified as did Respondents' witnesses George Kiai and Lucy Wangui Kiai. The Claimants stated that they were employed as cooks, waiters and cashiers with a monthly salary of Kshs. 10,000/- and a daily allowance of Kshs. 300/-. Jackson Kiveu Kimokoti stated that he resided in Nanyuki and that he was not given a reason for the dismissal on 6<sup>th</sup> January 2018. He testified that he caused a demand letter to be issued and there was no reply to it. He stated that it was untrue to assert that he received Kshs. 14,500/- a month or that he left employment. He denied being summoned by the Labour Office Nanyuki. In cross-examination, the Claimant testified that he was employed in March 2017 and had not completed a year of service. He agreed that Lucy was his relative so there was no need to have an agreement. He stated that he had sued both George Kiai and Lucy Wangui Kiai though Lucy was the one who paid him. He testified that he sued both as they were his employers. He stated that he had not searched at the companies registry to find out who owns Checkers Butchery. He denied absconding work and denied seeing the letter to the Labour Officer. He stated that Lucy was his in-law as his brother Fred Kimokoti were married and had many cases against each other and were separated in December 2017. He stated that he was not aware of the litigation on ownership. He testified that he was not aware that his brother had said he was their employer. He denied working in any butchery in Nanyuki town. He sought compensation for 12 months though he did not work for one year. He was re-examined and stated that there was no notice to show cause after he allegedly left employment. Fred Kuyebi testified that he was resident in Kakamega presently and that he had sued both Respondents as his employers. He stated that he was employed in June 2016 as a cook and waiter. He testified that he had documents to show that it was the Respondents' company. He said that he earned Kshs. 10,000/- a month plus Ksh. 300/- daily allowance. He stated that he worked daily and that on 6<sup>th</sup> January 2018 he was dismissed. He testified that Lucy came with new staff and dismissed them with no notice and there was no error ascribed to him prior to the dismissal. He denied absconding from work and was not aware of any report to Labour Office. He said that he was not summoned to the Labour Office. He testified that no notice to show cause was issued and he thus sought the payment of unpaid salaries, unpaid leave dues and a judgment per his claim. In cross-examination he stated that he was employed in June 2016 and worked till January 2018. He was shown the NSSF statement and stated that the employer paid the dues from August 2017 till December 2017. He denied being employed from August 2017 and stated that he worked in the first week of January 2018 before they were chased away. He stated that Fred was his cousin and previously was married to Lucy. He testified that he did not know when they parted. He stated that he was not aware the Labour Office was notified that he had left employment. He stated that he was not aware of any altercation between Lucy and Fred. He denied leaving employment and stated that he was paid cash. He testified that he did not have any record of payment as stated in court.

4. The Respondents' 1<sup>st</sup> witness George Kiai testified that he was a businessman in Nanyuki and that he had rented the premises and that he sourced the premises in June 2016. He stated that he had never employed the Claimants and that they had been employed by his daughter the 2<sup>nd</sup> Respondent. He was cross examined and he testified that he never changed the name of the business when it was taken over by his daughter. He stated that he did not pay any statutory dues as the property was taken over by his daughter mid year. He stated that the receipts for rent are in his name due to the rental agreement between him and the landlord. He was re-examined and stated that the business at the time was Checkers Grill and when his daughter took it up it was Checkers Butchery. The 2<sup>nd</sup> Respondent's witness Lucy Wangui Kiai testified that she was a businesslady and that she knew the Claimants. She stated that Jackson Kimokoti was her brother-in-law and that he was her employee from March 2017 as a casual cook and waiter earning Kshs. 15,200/- a month. She stated that she had issues with the Claimant as she had issues with her husband and the Claimant left in solidarity with his brother. She stated that she had a case before the Nakuru court in a civil case No. 1 of 2018 in regard to the business. She testified that she paid NSSF dues from March to December 2017 and the Claimant left in January. She stated that her dad leased the premises which he gave her. She testified that she notified the Laikipia District Labour Officer through a letter in which she wrote that the Claimants absconded duties. She was cross-examined and stated that the Claimants failed to report to work in January 2017 and she reported to the Labour office on 16<sup>th</sup> January 2017. She testified that the Claimants failed to come to work on 11<sup>th</sup> January and she gave them grace period. She stated that she did not write a notice to show cause as this was a family dispute. She testified that the business was registered on 27<sup>th</sup> February 2017 and that she did not have the Claimants as her employees in March 2017. She stated that her father started the business in 2016 and that after she graduated she started operating the butchery. She testified that they were not her employees in 2016. She stated that she employed them in March 2017. She stated that she begun working in 2016 and was not there full time and gave the instance of the court appearance as one of the times she was not at the work place. She stated that she paid the Claimants Kshs. 14,200/- and that she gave them daily allowances. She testified that they had worked for less than a year and had off days but had not accumulated leave. She stated she was not aware that they were entitled to leave. She stated that she begun remitting NSSF dues in August. She testified that she would open the butchery at 10.00am and work till 6.00pm. She stated that she used to have 2 shifts and even now had 2 shifts. She stated that the Claimants were her inlaws. In re-exam she stated that the Claimants worked from August 2017 and would go for off days and never worked on weekends. She stated they would work on day shifts and never worked overtime. That marked the end of oral testimony.

5. The parties filed written submissions. In their submissions the Claimants submitted that they were not casual employees as the Respondents' witness had confirmed that they were paid Kshs. 14,200/- each month. They called in aid the provisions of Section 37 of the Employment Act. The Claimants submitted that having worked continuously for more than two months they were no longer casual employees but were entitled to the terms and conditions under the converted contracts. They submitted that the fact they were registered for NSSF in February 2017 lend credence to their contention of being employed in June 2016. The Claimants submitted the contention by the Respondents of employment in August 2017 was not proved on a balance of probabilities. The Claimants submitted that under Section 20 of the Employment Act the Respondents were obliged to keep records and that their assertion they were paid Kshs. 19,000/- was credible since the employer was required to keep records and the employer failed to produce any itemized pay slip. The Claimants submitted that their dismissal was unfair and unlawful in terms of Section 43(1) of the Employment Act as well as Section 45(1) and (2). The Claimants submitted that if the Respondents was of the view the Claimants had absconded the correct procedure was to issue notices to show cause and not to write to the Labour Office. The Claimants submitted that they had proved the termination was not for a fair or valid reason. The Claimants submitted that they were therefore entitled to the reliefs sought in their respective claims. They submitted that it has been held time and time again that the basic membership to NSSF does not bar an employee from accessing service pay under Section 35(5) of the Employment Act.

6. The Respondent submitted that the Claimants had an obligation to provide labour but having absconded from duty there was no valid claim and their Claimants were not entitled to the reliefs sought.

7. The Claimants were related to the 2<sup>nd</sup> Respondent through marriage. It was stated that they absconded from work on 16<sup>th</sup> January 2018 and from the Respondents evidence a letter was availed to the Labour Office Nanyuki to this effect. The Claimants on their part submitted that they were replaced on 6<sup>th</sup> January 2018. The Claimants are said to have left the employ of the 2<sup>nd</sup> Respondent in solidarity with the former husband of the 2<sup>nd</sup> Respondent who was a brother to the 1<sup>st</sup> Claimant and a cousin of the 2<sup>nd</sup> Claimant. From the material before me, there was no evidence that the Claimants worked for the Respondents from 2016. Indeed the 1<sup>st</sup> Claimant stated in his testimony that he worked for the Respondents from March 2017. It would seem there was a registration of Checkers Butchery for NSSF deductions in February 2018 which would accord with the statements from NSSF as well as the 1<sup>st</sup> Claimant's testimony that he was employed in March. Given the Claimants had access to documents such as the business permit for 2017 why did they not produce any evidence of employment or a nexus between them and the Respondents from 2016? It would seem therefore the employment aligned more with what the 1<sup>st</sup> Claimant and the Respondents assert and not what the 2<sup>nd</sup> Claimant and the submissions for the Claimants assert. The Claimants were paid a monthly figure which suggested the casual employment initially asserted by the 2<sup>nd</sup> Respondent was not in existence. The Claimants were entitled to notice in the event of dismissal. However, it was asserted they absconded from work and there was a letter to that effect. It was not possible to ascertain the relationship between the Claimants and the 2<sup>nd</sup> Respondent at the time as to whether the 2<sup>nd</sup> Respondent could access them for a notice to show cause or whether she even cared to have them back after they absconded duty. They did not avail any proof that they were dismissed as they themselves never reported this incident to the Labour Office. As such I find there was no proof of the cases on a balance of probabilities and I dismiss the claims with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 12<sup>th</sup> day of November 2019.**

**Nzioki wa Makau**

**JUDGE**