



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 64 OF 2017

BETWEEN

EVERLYNE NINGOMA BWENYE.....CLAIMANT

VERSUS

1. ERICA KAELIN

2. HENRY KNAUS.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. & Company Advocates for the Claimant

Dennis Kinaro & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 9th November 2017. She avers, she was employed by the Respondents as a Human Resource Manager, on 13th December 2014. Her employment contract was terminated by the Respondents on 28th February 2017, on the ground that there were no guests at the Respondents' cottages where the Claimant worked. She was not given notice of intended redundancy, or termination. Her last salary was a rate of Kshs. 10,000 monthly. She was underpaid by a sum of Kshs. 9,403 monthly. She prays for Judgment against the Respondents on the following terms:-

- a) Declaration that termination was unfair.
- b) 12 months' salary in compensation for unfair termination at Kshs. 232,839.
- c) Underpayment of salary at Kshs. 235,174.
- d) 1 month salary in lieu of notice at Kshs. 19,403.
- e) Salary for days worked in December 2014 at Kshs. 3,662.
- f) Leave over a period of 2 years at Kshs. 18,806.
- g) Redundancy at Kshs. 12,388.

Total... Kshs. 522,274

- h) Costs.
- i) Interest.

2. The Respondents filed their Statement of Response on 27th March 2018. They state, they employed the Claimant as their Housekeeper, on 1st May 2015. Her salary was Kshs. 10,000 a month. They transformed their cottages from a domestic setup into a commercial entity, under a limited liability company, offering the Claimant and her Colleagues new contracts. The Claimant declined new contract and opted to leave. Her contract was not terminated by the Respondents. She worked as a Housekeeper. She was not underpaid. She went on paid maternity leave on 1st November 2016, ending 31st January 2017. On 12th December 2016, the Respondents held a meeting with the Claimant, giving her notice of termination effective 28th February 2017, and offering her new contract under their company, Maison Muge Limited effective 1st March 2017. She declined the new contract and left. The Parties later appeared before the Labour Office Kilifi, on 22nd March 2017, where the Respondents were ordered to pay Kshs. 38,098 to the Claimant. They paid the sum as ordered, and do not owe the Claimant further obligations. They pray for dismissal of the Claim with costs.

3. The 3 Parties gave evidence, and rested their respective cases, on 25th March 2019. Joseph Angore Kolani also gave evidence for the Respondents on the same date.

4. **The Claimant** told the Court she was employed on 13th December 2014. She was placed under a written contract, from 1st May 2015. She was at first on probation, working as a Housekeeper. She was designated Human Resource Manager, upon executing the contract of 1st May 2015. The Respondents then offered the Claimant for execution, the document titled “ *Working Description in Casual Basis, from 1st March 2017.*” The document issued in the name of Maison Muge Limited. It changed the terms of Claimant’s employment contract. The Claimant would effective 1st March 2017, earn Kshs. 65 hourly. The new contract could be terminated at any time.

5. The document is unsigned. The Claimant was on maternity leave. She did not have any relationship with Maison Muge Limited. She was underpaid from 1st of May 2015. She did not have any claim with regard to the year 2014. She withdrew the prayer for salary for December 2014. She went on annual leave in 2015. She did not recall if she did in 2016. She was not issued notice and was not advised that there was no more work. She was paid Kshs. 8,000 basic salary and Kshs. 2,000 food allowance- total Kshs. 10,000 monthly. Joseph was her Supervisor. It is not true that the Claimant left employment without permission as alleged by Joseph. The letter of termination does not say this. It is confirmed she went on maternity leave. She left a Reliever on taking maternity leave. On return she was advised the Reliever had been taken in her place. She was paid Kshs. 38,095 in terminal dues as stated in the Response. This was paid after she left employment.

6. Cross-examined, the Claimant told the Court she made a job application at the outset. It was addressed to the Human Resource Manager. She specifically applied for Housekeeping position. She gave her Curriculum Vitae. She was trained in domestic work, not human resource management. Erica was proficient in English. The contract stated the Claimant was Human Resource Manager. She went on maternity leave and while at it, was told the Respondents had placed their business under Maison Muge Limited. She did not go to work and refuse to sign the new contract. Her maternity leave was to end in March 2017. Parties were heard on conciliation at the Ministry of Labour. She was paid the stated amount. She was not satisfied with this amount. The document from the Labour Office shows payment included annual leave days, underpayment of salary and service. She did not want to work under Muge Maison Limited. The Respondents were leaving the Country. Redirected, the Claimant confirmed that the new contract did not have any slot for Maison Muge to sign. It did not show place of work, or the daily rate payable. The Respondents informed the Claimant termination was because of reduced business at their cottages.

7. **Karin Erika** is from Switzerland. For 3 months in a year, she, and her husband Heinrich Knaus, would spend in Kenya. They employed the Claimant as a Housekeeper. She left employment while the Respondents were in Switzerland. Their Supervisor Joseph called the Respondents, informing them the Claimant had gone on maternity leave. Karin described the Claimant as Human Resource Manager by error, as the Claimant’s job application was addressed to the Human Resource Manager. She was a Housekeeper and did a good job as such.

8. Cross-examined, Karin confirmed that the Claimant started working on 13th December 2014. Her contract described her as Human Resource Manager. The Respondents changed from Individual Employers to a Limited Liability Company. She was stopped from working because Muge Maison Limited was going to absorb her. Karin’s English was not good. Redirected, the Witness told the Court that the Claimant declined to work under Maison Muge Limited.

9. **Heinrich Knaus** associated himself fully with the evidence of his spouse. He clarified that his spouse gave the Claimant the job title of Human Resource Manager by error. The Claimant applied for and was employed in the role of housekeeping. She left employment and was paid terminal dues. Cross-examined, Knaus stated that the Claimant worked on probation from December 2014 to May 2015. She was issued contract beginning 1st May 2015. There was no fresh contract executed by the Parties. The Respondents closed existing contracts and changed to Maison Muge Limited. The Respondents did not sign the Job Description document issued under Maison Muge Limited. The fresh contract would suggest the Claimant became a Casual Employee. Redirected, Knaus told the Court that Job Description was not in itself a contract.

10. **Joseph Angore Kolani** told the Court he is a representative of Maison Muge Limited. The Company runs cottages. The Claimant worked as a Housekeeper for the cottages. Respondents were not in Kenya fulltime. She was paid a total of Kshs. 12,400 monthly salary. She was pregnant and left employment in November 2016. In December 2016, Respondents informed its Employees it had incorporated a Company Maison Muge Limited. The Company would enter into fresh contracts with the Employees. All did so, except for the Claimant. She said she was going to discuss the new contract with her Husband. She took a copy of the Job Description and left, never to return. In February 2017, Parties appeared before the Labour Office in Kilifi. The Respondents were ordered to pay Kshs. 38,098 to the Claimant in terminal benefits. Joseph was the senior-most Employee and the Team Leader at the cottages.

11. His evidence on cross-examination is that there were 3 cottages. They had a capacity for 6 guests. The Claimant was issued a contract, describing her as Human Resource Manager. There is no letter saying the error was corrected if indeed this was an error. Letter of termination did not indicate termination was because of change in Employer. The Claimant did not go back to work after maternity leave. She did not commit any act of gross misconduct. The Respondents were limited in the understanding of English language. The Job Description was not executed. It indicated that the Respondents did not have any other obligations. Redirected, Joseph told the Court the Respondents commercialized their business model in early 2017. The Job Description applied to all Employees.

The Court Finds:-

12. The Claimant was employed by the Respondents effective on 13th December 2014. She was issued a written contract. It indicates probation ended 30th April 2015. She was confirmed effective from 1st May 2015. Her salary is stated to be Kshs. 10,000 monthly.
13. There is dispute on the role she was employed to discharge. The contract describes her as Human Resource Manager. The Respondents state they employed the Claimant as Housekeeper. The title 'Human Resource Manager' was conferred upon the Claimant by error. The Respondents are not native speakers of English. They are residents of Switzerland, who were in Kenya for only a small portion of the year. The 1st Respondent drew the contract in question, and by error, describing the Claimant as Human Resource Manager.
14. The Claimant made a written application for employment to the Respondents, attaching her CVs. The letter is addressed to the Human Resource Manager. This would suggest first, that the position of Human Resource Manager was not up for grabs; it was already occupied at the time the Claimant made her application.
15. Second, it would support the view expressed by Karin that she mistakenly referred to the Claimant as Human Resource Manager in the contract, because the job application was addressed to the Human Resource Manager.
16. Third, the Claimant's CV does not disclose any learning, knowledge or experience in the human resource management profession. She was trained in food production and services at a College named Center for Domestic Training and Development. The name of this Institution suggests the Claimant was trained on domestic matters such as the housekeeping role the Respondents claim to have assigned to her, rather than human resource management. The Claimant states in her CV she had not worked elsewhere before, except that she had a professional attachment at Kilima Safari Lodge in Tsavo. The Claimant did not show that she was a Human Resource Management Professional, trained and qualified to work in the field, under the Human Resource Management Professionals Act No. 52 of 2012.
17. Fourth, if Joseph was the Team Leader and senior-most Employee; if there were only 4 Employees at the cottages; why would it be necessary to have an additional Human Resource Manager?
18. The Court believes that the Claimant was designated as Human Resource Manager by Karin through an error. The Claimant in any case, appears to abandon her position that she was a Human Resource Manager, in her Submissions. She submits, contrary to her evidence, "*it is not in doubt that the Claimant was working as a housekeeper and launderer.*"
19. The Court is not persuaded that the Claimant was underpaid. Nowhere in her evidence did the Claimant say she worked as a housekeeper or a launderer. Her prayer for underpayment of salary has not been established.
20. She withdrew her claim for salary for December 2014. She disclosed she took annual leave in 2015, but could not recall if she did so in 2016. The prayer for salary for December 2014 shall be treated as withdrawn, while the prayer for annual leave is declined for lack of evidence. The Claimant prays for 'Redundancy.' Redundancy is not a terminal benefit, but one of the modes through which a contract of employment can be terminated. The prayer is rejected.
21. The last question is whether Claimant's contract was terminated at all by the Respondents, and if termination was instigated by the Respondents, whether it amounted to unfair termination?
22. It is agreed the Claimant was on a contract effective 1st May 2015. Her monthly salary was Kshs. 10,000. The contract was signed between her and the Respondents.
23. She was on maternity leave when the Respondents, through their corporate outfit, named Maison Muge Limited, offered to change the business model and offer the Claimant fresh contract, effective 1st March 2017.
24. The terms offered under Maison Muge are as follows:-
- § The Claimant would work for Maison Muge Limited on casual basis only.
 - § Her salary would be paid on hourly basis.
 - § Her salary would be paid weekly.
 - § She would be paid Kshs. 65 every hour worked.
 - § This rate applied even on vacation.
 - § Employment could be terminated any time.
 - § The author [s] of this document had no other obligation[s].
25. The Claimant declined this offer. The Respondents state they terminated the Claimant's contract on 31st January 2017. The offer above is dated 12th December 2016.

26. It is fair to assume that the Claimant's contract was terminated by the Respondents in January 2017, because she declined to work under the Maison Muge terms.

27. The Court does not think the Respondents acted fairly. The document titled 'Working Description' obviously was changing Claimant's terms and conditions of employment, to her disadvantage, without properly consulting her. She was on maternity leave. It was proposed to make her a Casual Employee. The proposed terms were unclear. She was to be paid hourly, as well as weekly. The hourly rate would include work done on Public Holidays which would appear contrary to the Regulation of Wages under Section 63 of the Labour Institutions Act No. 12 of 2007. Employment could be terminated at any time.

28. The document was not signed by anyone. The details of the entity called Maison Muge were not made known to the Employee. The Claimant was just told she would be offloaded to an unknown entity. Not even Joseph, who claimed to be a representative of Maison Muge, provided the Court with any evidence of the existence of Maison Muge Limited.

29. The Respondents being residents of Switzerland were free to redesign their business. But they needed to do so within the parameters of the law, and in consultation with the Claimant.

30. In the end it cannot be said that the Respondents acted fairly. They did not prove the reason for terminating Claimant's contract in January 2017, while she was on maternity leave. They left her groping in the dark, to understand the changes they had unilaterally imposed on her contract of employment. She did not as much as know, who was Maison Muge. The proposed terms and conditions of her fresh employment were not clear and verged on outright illegalities. She had worked for 2 years and expected to continue working after maternity leave. Her record was unblemished. Her employment details show she was young, unmarried Lady, on her first job. She was paid after conciliation, Kshs. 38,098 comprising annual leave, service and underpayment of salary. She merits compensation and notice pay.

31. ***She is allowed equivalent of 9 ½ months' salary in compensation for unfair termination at Kshs. 95,000 and 1 month salary in lieu of notice at Kshs. 10,000- total Kshs. 105,000.***

32. ***She is granted costs and interest.***

IN SUM, IT IS ORDERED:-

- a) Termination was not based on valid reason, and is declared unfair.***
- b) The Respondents shall pay to the Claimant equivalent of 9½ months' salary in compensation for unfair termination and 1 month salary in lieu of notice, added up at Kshs. 105,000.***
- c) Costs to the Claimant.***
- d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

Dated and signed at Mombasa this 1st day of November 2019.

James Rika

Judge