

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 22 OF 2017

ZIPPORAH GATWIRI RIUNGU.....CLAIMANT

VERSUS

KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her alleged unfair, unprocedural and illegal termination of employment. She averred that she was employed as a secretary in January 2013 till her termination on 6th January 2017. She averred that she was dismissed without due regard to the Employment Act and due process. The Claimant averred that 8 months prior to her termination she did not receive any salary and thus sought a total of Kshs. 120,000/- being 8 months' salary arrears, payment in lieu of notice, payment for leave not taken, general damages for unlawful dismissal and any other dues payable on termination of employment as well as costs of the claim.

2. The Respondent's defence was that the Claimant was not its employee and that she had no cause of action as against it. It was averred that the suit was actuated by malice reasons wherefore the Respondent sought the dismissal of the suit with costs.

3. The Claimant and Salesio Mutea a director of the Respondent testified. The Claimant testified that she was dismissed by the Respondent without notice or pay. She stated that she worked from 2013 till 2017. She testified that she was dismissed by text on 6th January 2017. She stated that the text was from the Chair of the Respondent at the time. She testified that the non-payment of wages covered 8 months a cumulative pay of Kshs. 120,000/- as her salary was Kshs. 15,000/- a month. She testified that her salary was paid intermittently and would be paid either in cash or by Mpesa. She was cross-examined by counsel for the Respondent and she testified that she did not have a letter of employment from the Respondent. She stated that she was engaged by Mr. Gabriel Miungi who had personally employed her. She stated she did not know him as a businessman and politician but as a chair of the Respondent. She testified that she did not have any evidence of her interview. She stated that the text she received communicated that she would no longer be paid her salary as the chair was unable to continue paying her from his own funds. She stated it also communicated that the office would cease being operational end January. She testified that the Respondent denied knowing her and further stated that she would bank for the Respondent as employee. She admitted that the bank deposit slips were in her name but denied that she just used to bank for the Respondent. She stated she had no letter of employment but had banking slips. She testified that she reported the matter to the Labour Office which summoned the Respondent but no one showed up. She stated that she did not have any evidence showing the report to Labour Office. She stated that she had annexed communication with Gabriel Miungi but not from the Respondent. In re-exam she stated that her employer was Gabriel Miungi but not in his personal capacity. She testified that he was the Chairman of the Respondent which was called for a meeting and did not respond. She stated that she did not have copy of cheques paying her salary. She stated that Salesio was the treasurer and that in the banking slip her name appeared as a staff. She stated that banking was part of her duties.

4. The Respondent's witness adopted his statement and testified that the Respondent normally advertises, interviews than gives letter of appointment. He stated that this was mandatory and normally the Respondent would prepare payment vouchers and payslips and of course enters into written contracts with employees. He stated that the Claimant was not an employee of the Respondent. He testified that unless she was a personal employee of the chairman as she was not an employee of the Respondent. He stated that employees are not paid by Mpesa. He stated if she was paid by Mpesa it was perhaps in his personal capacity. He was cross-examined and confirmed knowing the advocate for the Claimant as a friend. He stated that he had sworn to tell the truth and that the truth was the Claimant was not an employee of the Respondent. He stated that he did not know the Claimant as employee of the chamber but as a friend in town. He was re-examined and stated that the Claimant paid in the cash on the banking slip and the slip did not indicate she was an employee as anyone can bank money even if not an employee. He was shown a letter exhibited in evidence and stated that the letter was written by Mutuma David as CEO and not the Chairman. That marked the end of oral testimony and the parties were to file submissions.

5. The Claimant submitted that she had proved her case as there was a letter of commendation by the CEO of the Respondent Mutuma David. She submitted that the contents of her memorandum of defence were not controverted by the Respondent who focused solely on denying the Claimant was its employee. She cited Section 9 of the Employment Act and submitted that it was the duty of the employer to cause a contract of employment to be drawn. The Claimant submitted that under Section 20 of the Employment Act it was the duty of the employer to issue a pay statement and the only available evidence was the Claimant's oral evidence that she received Kshs. 15,000/- a month. She submitted that she had not taken leave for the entire 3 years of service. She submitted that the Employment Act provides for leave entitlement per Section 28 thereof. She submitted that she was not given notice of her termination and was therefore entitled to payment in lieu of notice. The Claimant cited Section 43(1) of the Employment Act and Section 45(1) and (2) of the Act and submitted that she was entitled to the relief sought. The Claimant thus sought the sum of Kshs. 385,000/- being unpaid salary – Kshs. 120,000/-, unpaid leave being 4 month's salary – Kshs. 60,000/-, one month's salary in lieu of notice – Kshs. 15,000/- and general damages – Kshs. 180,000/- as well as costs of the suit.

6. The Respondent submitted that the Claimant was not its employee. It cited the provisions of Section 107 of the Evidence Act and the case of **Top Tank Company Limited v Amos Ondiek Wandaye 2018] eKLR** where Odunga J. (as he then was) held

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

The Respondent submitted that the Claimant did not specify the months she was not paid and was thus unable to prove the sums she was allegedly not paid. The Respondent submitted that the sums sought were special damages in nature and she must specifically plead them and strictly prove them. The Respondent submitted that there was no basis for the grant of the damages sought.

7. The claim was premised on the proposition that the Claimant was an employee of the Respondent. She exhibited the letter of recommendation authored by the CEO of the Respondent and a banking slip indicating a deposit into the Respondent’s account by the Claimant. The Claimant specifically pleaded for unpaid salary but was unable to pinpoint which month this related to. The sums claimed for unpaid leave, one month’s salary in lieu of notice and general damages were not specified in the claim. It was only in submissions that these were crystalized as unpaid leave being 4 month’s salary – Kshs. 60,000/-, one month’s salary in lieu of notice – Kshs. 15,000/- and general damages – Kshs. 180,000/-. In claims between employer and employee, the sums sought should as a matter of course be specified save in exceptional circumstance where a rate may be given instead of the sum but which sum must be identifiable and ascertainable. At the stage of pleading no indication was given as to the sums due on the various aspects of her claim. She stated she was paid Kshs. 15,000/- but was unable to avail even one Mpesa message or payslip showing payment. She did not show the nexus between her and the Respondent. As the suit was bereft of key ingredients it is unproved on a balance of probabilities. Accordingly, I dismiss the suit but order each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 2nd day of December 2019

Nzioki wa Makau

JUDGE