



Nyaga v Nyaga t/a Nyandarua Restaurant & Venezia Shop (Cause 263 of 2016) [2018] KEELRC 1803 (KLR) (15 May 2018) (Judgment)

Mercy Pauline Wawira Nyaga v Susan Wairimu Nyaga t/a Nyandarua Restaurant & Venezia Shop [2018] eKLR

Neutral citation: [2018] KEELRC 1803 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 263 OF 2016
NZIOKI WA MAKAU, J
MAY 15, 2018**

BETWEEN

MERCY PAULINE WAWIRA NYAGA CLAIMANT

AND

SUSAN WAIRIMU NYAGA T/A NYANDARUA RESTAURANT & VENEZZA SHOP RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking the resolution of a dispute she framed as unfair termination of services, non-payment of terminal benefits and unpaid overtime. She averred that the Respondent a sole proprietor employed her as a saleslady in March 2015 at the Respondent's shop and restaurant and that the Claimant was working as a sales lady and cashier at the establishments. The Claimant averred that she was not given a contract of service but that she earned Kshs. 8,000/- a month. She averred that she worked for the Respondent till 4th August 2016 when the Respondent accused her of theft and that she accounted to the Respondent the monies she is alleged to have stolen. Despite this she averred, she was arrested and placed in Police custody without charge for 3 days from 1st August 2016 up to 3rd August 2016 when she was released. She averred that she was dismissed verbally on 4th August 2016 and without payment of the July salary. She sought payment of her terminal benefits through a demand letter on 9th August 2016. She averred that the Respondent did not remit NSSF and NHIF dues despite deducting them from the Claimant's salary. She averred that the Respondent failed to follow the procedure under Section 41 of the *Employment Act*. She submitted that the payment for a cashier and saleslady under the Regulation of Wages Order, 2015 made provision for payment of Kshs. 19,154/- for a saleslady and Kshs. 23,262.40 for a cashier. She averred that she was underpaid to the tune of Kshs. 244,528/- during her period of service. She sought house allowance of Kshs. 55,875/-,



payment of one month's salary in lieu of notice Kshs. 23,262/-, payment in lieu of annual leave Kshs. 23,642/- , service pay for one year Kshs. 11,821/-, compensation up to 12 month's salary, costs of the suit and any other remedy the court may deem fit.

2. The Respondent filed a response and counterclaim on 3rd March 2017. In the defence and counterclaim, the Respondent denied that the Claimant was working as a cashier and saleslady. The Respondent averred that the Claimant stole Kshs. 175,000/- from its shop and was sent on compulsory leave to pave way for investigations. The Respondent averred that after the investigations, the Claimant was found culpable and she admitted the theft and bound herself to pay the lost monies by way of monthly instalments. The Respondent averred that the Claimant did not account for any money lost but admitted to stealing from the Respondent's shop. Due to the gravity of the offence the Claimant's service was terminated in accordance with Section 44(4)(g) of *Employment Act* 2007. The Respondent denied receiving the demand letter and averred that the July salary was withheld pending investigations. The Respondent averred that the Claimant was heard and she made her presentations whereby she admitted to stealing. The Respondent averred that the Claimant was employed as a shop assistant and the salary of a shop assistant in the Regulation of Wages Order 2013 was Kshs. 12,184.25 while the Regulation of Wages Order 2015 provided for the salary of a shop assistant at Kshs. 13,646.40. The Respondent averred that the Claimant was not entitled to house allowance separate from the salary and that the underpayment was therefore Kshs. 8,368.50 for 2 months and Kshs. 79, 049.60 for the balance of 14 months. The Respondent averred that the Claimant is not entitled to payment in lieu of notice or any of the other claims set out in her claim as she was dismissed for lawful cause on account of having committed a criminal offence to the detriment of the Respondent. The Respondent averred that leave days have to be earned and that the Claimant having breached the terms of her employment she cannot benefit from the illegality by claiming payment in lieu of annual leave. By way of counterclaim, the Respondent averred that the Claimant was employed as a shop assistant until her employment was terminated in August 2016 as a result of gross violation of her terms of employment. The Respondent averred that the Claimant caused or aided in the theft of Kshs. 175,000/- from the Respondent's shop where she had been posted as a shop assistant. The Respondent averred that after investigations were conducted the Claimant admitted the theft and bound herself to repay the stolen sum. The Respondent thus sought dismissal of the Claimant's suit and an entry of judgment against the Claimant for the sum claimed Kshs. 175,000/-, costs of the suit and interest on the sums from the date of filing the suit till payment in full.
3. The Claimant filed a reply to response and defence to counterclaim on 26th April 2017, and averred that the agreements to refund were only entered into after the Claimant's unlawful arrest and detention for 3 days at the Police Station. The Claimant denied the averments made by the Respondent and averred that the Respondent was trying to distort facts. The Claimant averred that no investigations were carried out and that she did not owe the Respondent any sums and there can be no set off. The Claimant thus sought the dismissal of the counterclaim with costs and judgment entered as prayed in her claim.
4. The Claimant testified on 16th March 2018 and stated that she had been employed at the shop and restaurant from 1st March 2015 till August 2016. She stated that in July, Susan Nyaga informed her that her money was lost, she was arrested by Police and was in custody for 3 days. She testified that she was harassed to sign a letter for her release. She sued because she was aggrieved and had not been paid her salary for July 2016. She thus sought her salary for July 2016, overtime as she worked from 8.00am till 9.00pm Monday to Sunday. She stated that she earned Kshs. 8,000/- a month and had no accommodation provided and therefore sought payment of house allowance. She testified that she sought evidence of the theft but there was none availed. She stated that the money was banked every day.



5. In cross-examination she testified that she was a shop assistant and that she was a sales lady at the shop and cashier at the restaurant. She admitted she did not have a contract and that she worked on the Mpesa and gave stock in the afternoon. She stated she did not have any qualification as a cashier but she collected money and had no qualification in sales but was employed in sales. She testified that she did not need any qualification and that her employer told her some money was missing. Her employer called the Police and she was taken to the Police station where she was in custody for three days. She confirmed that she had not been shown the investigation diary. She stated that she did not account for the money lost and was forced to sign a letter so that she could be released from the cells. She confirmed that she was not charged before a court of law and that the other person who signed the document was her dad who preferred settlement. She stated that he had no alternative as she was in custody.
6. The Respondent called Susan Wairimu Nyaga who testified that she was an aunt to the Claimant as the Claimant's father was her cousin. She stated the Claimant was her shop assistant earning Kshs. 8,500/- and that while doing her accounts she realised that there was a loss. She did not get proper feedback from the Claimant and called her father who agreed that there was shortage. She testified that the Claimant did not pay up and she reported the matter to the Police who investigated and arrested the Claimant on 31st August. She stated that her sister asked her what had transpired and on being told what had happened asked her to resolve the matter as the Claimant was her niece. She testified that her sister came to see her with the Claimant's father and the statement was recorded where Mercy was to repay the sums. She stated that it was stealing by servant and she withdrew the complain because of the relationship.
7. In cross-examination she testified that the Claimant was in custody on 31st and on 1st she was out. She stated that it was criminal to steal from the employer and Claimant could have been charged in court. She testified that was why the Claimant had called her father for dialogue and that it was the Police to blame if they kept the Claimant in custody for more than 24 hours.
8. In re-examination she stated the Claimant was in custody on 31st and was out on 1st. She testified that it was the duty of the Police to charge the Claimant.
9. The second witness for the Respondent was Maryann Muthoni Njeru who stated that she was called by the Claimant and informed that she was in custody because of the sister. She testified that she knew that the Claimant was in custody because the Claimant had stolen from her sister the Respondent. She stated that Mercy asked her to speak to Susan not to take Mercy to court. She spoke to Mercy's dad and there was an agreement on the payment as Mercy admitted the theft and her dad undertook to pay. The case at the Police was withdrawn. It was agreed as Mercy's dad is her cousin.
10. In cross-examination, she testified that the Claimant called her to speak to Susan and that Mercy was wasting her (Maryann's) time. In re-examination she stated that Mercy called her on 1st to help her.
11. The parties filed submissions as follows, Claimant filed on 8th April 2018 while the Respondent filed submissions on 23rd April 2018. In her submissions, the Claimant asserted that she signed the agreement under duress. The case of Paola Da Fano v Salim Abdalla Bakshwein [2013] eKLR was cited for the position that a court should take a dim view of the agreement entered into while one party was in Police custody. A paragraph from Chitty on Contracts 28th Edition Sweet & Maxwell 7-007 was also cited on voidable contracts. Reliance was placed on the case of Hellen Wangari Wangechi v Carumera Muthoni Githua [2015] eKLR where the court held that duress is defined as unlawful pressure exerted upon a person to coerce that person to perform an act that he or she would not ordinarily perform. Duress exists where a person is coerced by the wrongful conduct or threat of another to enter into a contract under circumstances that deprive the individual of his or her volition. If duress is used to



get someone to sign a document, then the court may find such a document to be null and void, the Respondents testimony that she signed the document at a police station was in my view not rebutted, hence the alleged admission cannot be safely assumed to have been made freely. She submitted that under Section 43(1) of the *Employment Act*, the employer had an obligation to prove that the reason for termination was valid. The Claimant submitted that no evidence was produced on the counterclaim and that the same should be dismissed. It was submitted that it was clear the Claimant submitted she suffered in the hands of the Respondent by being accused of having stolen money and a void agreement entered into to secure her release. On procedural fairness of the termination of the Claimant, it was submitted that the Respondent failed to comply with the provisions of Section 41 of the *Employment Act* and no notice was issued to the Claimant to show notice or explain the alleged loss, no hearing was conducted by the Respondent. Instead, it was asserted that the Claimant was arrested and kept in custody for 3 days. The Claimant submitted that there was underpayment for the period she worked with the Respondent and that the basic minimum monthly wages provided for in the Regulation of Wages (General Amendment) Order is exclusive of house allowance. She submitted that under Section 31 she was entitled to be provided with housing or house allowance. She submitted that she was entitled to payment of notice as her dismissal was verbal and without requisite notice. She sought payment of the leave dues as she never proceeded on leave, severance pay as no NSSF dues were paid she also sought payment of compensation as the Claimant suffered under the Respondent. The Claimant also sought costs and interest.

12. In the submissions for the Respondent, the Respondent submitted that the issues arising were three:-
1. Whether the Claimant's services were unfairly terminated.
 2. Whether the Claimant is entitled to the reliefs sought.
 3. Whether the orders sought by the Respondent in the counter-claim should be granted.

The Respondent submitted that under Section 43, the Respondent genuinely believed circumstances existed for the Claimant's dismissal. She submitted that the provisions of Section 41 did not apply in cases of summary dismissal as the notification before termination cannot be sustained as the Claimant had engaged in gross misconduct and had committed a criminal offence. It was submitted that this warranted summary dismissal where notice is not a pre-requisite. The Respondent submitted that the Claimant's dismissal was in line with Section 44(1) of the *Employment Act*. Section 44(4)(g) and Section 281 of the *Penal Code* were called in aid to elucidate the gross misconduct of the Claimant and the severity of the stealing by servant. It was submitted that a crime committed at the workplace constitutes both a violation of the criminal law and amounts to gross misconduct under Section 44(4)(g) of the *Employment Act* as to justify the dismissal of the Claimant. The Respondent cited the case of Erick Karanja Gakonyo v Samson Gathimba [2011] eKLR where the Court of Appeal held that in the case of a the relationship of the employee and employer, suspicion leads to erosion of confidence and trust by the employer in the employee, and in the cause of suspicion of loss or theft of property of the employer, it may lead to summary dismissal without even notice. The Respondent submitted that the Claimant admitted to having committed theft of Kshs. 175,000/- from the Respondent's shop and this was a criminal act against the Respondent to her substantial detriment and amounted to gross misconduct which warranted summary dismissal in accordance with Section 44. The Respondent associated itself with the holding of Ongaya J. in Kenya Plantation and Agricultural Workers Union v James Finlays (K) Limited [2013] eKLR where the learned judge held that under Sections 43 and 47(5) of the *Employment Act*, 2007, the onus if the employer is to show that the grounds of termination or reasons were justified and not that the termination was fair. Regarding the incarceration of the Claimant, the Respondent submitted that the Claimant never complained against the Police officer and that the Claimant had been handed over to the Kenya Police who is the competent authority



to conduct criminal investigations and prosecute for criminal offences. The Respondent submitted that any allegations of her rights being infringed should be taken up by the relevant authorities and not this forum. The Respondent cited the case of *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR where the court held that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligation to his or her employer. The Respondent also cited the case of *Francis Nyongesa Kweyu v Eldoret Water and Sanitation Company Limited* [2017] eKLR where Marete J. held that the termination of the employment of the Claimant on grounds of misconduct overwhelms this cause. The open and clear display of dishonesty and deficiency of integrity in the claimant in the course of duty in every way eroded all element of trust inter partes. It also destroyed the core of the service contract to the extent it was no longer sustainable. The Respondent cited the case of *Gilbert Kipkorir v Super Expo Limited* [2016] eKLR and submitted that on the strength of the authorities on the basis for dismissal, the Claimant's summary dismissal was justifiable and therefore the Claimant was not entitled to the relief she sought. On the counter-claim, the Respondent submitted that the Claimant stole the money, admitted the theft and undertook to repay the same. The Respondent submitted that she was entitled to a judgment against the Claimant for the sums she stole.

13. The Claimant is a niece of the Respondent who is a cousin to the father of the Claimant. It is heart-breaking that this matter could not be resolved without the intervention of the court. In the case, the Claimant asserts that she was a sales lady and a cashier. In her testimony it was clear she handled the sales at the shop and the Mpesa account for the Respondent and was therefore in the capacity of a shop assistant. It was clear was that she was not a saleslady as no evidence was adduced about any sales she undertook. In the Regulation of Wages Order for the relevant period, the pay for a shop assistant was Kshs. 11,279.50 inclusive of house allowance. She was paid Kshs. 8,000/- a month which was gross underpayment. The Claimant was incarcerated for a theft alleged to have taken place leading to the loss of Kshs. 175,000/-. She was sued for the sum as she admitted the theft. In view of the case of *Paola Da Fano v Salim Abdalla* (supra), the Claimant was under duress to confess as she was in custody. The agreement for payment of the Kshs. 101,000/- she signed is therefore void for all intents and purposes. The second agreement was signed by her father and is not therefore relevant for the proceedings. He could not bind her. In the claim she had made out a clear case of the infringement of her rights which could have been directed to the Police but in another forum. She was entitled to notice despite the fact the Respondent having had reason to terminate for cause. It was a matter which the Respondent acknowledges had been preceded by investigations. The Respondent should have paid a month in lieu of notice and dismiss for cause. In the event this holding is erroneous, the Respondent had the option to undertake procedures under Section 41. Even where there is grounds for summary dismissal, there is room for the exercise of the safeguards under Section 41. The Respondent had options to suspend her and thereafter proceed to hear the matter. In the final result, the Claimant has proved her dismissal was unfair in terms of the law. Given that the Claimant had been underpaid she will be entitled to the difference between her pay per month and the sum she was entitled to being Kshs. 11,279.50 a month. She will also have one month's notice and compensation by payment of 2 months salary for the dismissal. I dismiss the counterclaim and order that each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 15TH DAY OF MAY 2018

NZIOKI WA MAKAU

JUDGE

