



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1569 OF 2013

CHARITY NGOTHO.....1ST CLAIMANT

DEBORAH NANDERA.....2ND CLAIMANT

JOHN NG'ANG'A GUCHU.....3RD CLAIMANT

- VERSUS -

SENSATIONS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

JUDGMENT

The claimants filed a memorandum of claim on 27.09.2013 through Simba & Simba Advocates.

The claimants prayed for judgment against the respondent for:

- a) The declaration that the termination of the claimants by the respondent was unlawful.
- b) The declaration that the termination of the claimants by the respondent was unfair.
- c) In alternative the declaration that the termination of the claimants was wrongful.
- d) The claimants be reinstated or redeployed either in the same position or a higher position than which they held on 29.10.2010.
- e) The respondent to pay the 1st claimant unpaid salaries from November 2010 Kshs. 372, 000.00 as at 20.05.2013 together with such monthly salary that will accrue.
- f) The respondent to pay the 2nd claimant unpaid salaries from November 2010 Kshs. 294, 500.00 as at 20.05.2013 together with such monthly salary that will accrue.
- g) The respondent to pay the 2nd claimant unpaid salaries from November 2010 Kshs. 294, 500.00 as at 20.05.2013 together with such monthly salary that will accrue.
- h) General damages.
- i) Interest from the date of filing the suit.
- j) Costs of the cause.
- k) Such further orders and relief as the Court may deem just and fit to award.

The respondent filed the defence and counterclaim on 17.02.2014 through Ashitiva & Company Advocates. The respondent prayed for:

- a) The dismissal of the suit with costs.

b) The claimants to pay the respondent the amount of Kshs. 446, 194.00 being the value of the goods lost while in the custody of the claimants.

c) Any other relief the Court deems fit to grant.

There is no dispute that the respondent employed the claimants on diverse dates as sales representatives deployed in the respondent's shop. The 1st claimant was employed on 07.04.2009 at Kshs. 12, 000.00, the 2nd claimant on 12.01.2010 at Kshs. 9, 500.00 and the 3rd claimant on 02.10.2009 at Kshs. 9, 500.00 per month.

On 29.10.2010 the claimants were arrested and charged with the offence of stealing by servant contrary to section 281 of the Penal Code and in criminal case No. 4406 of 2010. It was alleged that on diverse dates between 02.09.2010 and 29.10.2010 at the respondent's premises in Industrial Area Nairobi Area the claimants jointly being servants of the said respondent employed as shop attendants stole wrist watches make Titan valued at Kshs. 446, 194.00 the property of the respondent which came in the possession of the claimants by virtue of their employment.

The respondent's case was that the claimants were arrested after stock taking at the shop they were deployed revealed that 43 watches were missing. The three claimants signed the stock taking inventory and it is indicated that 43 watches were missing. After acquittal on 04.04.2013 the claimants testified that they went to the respondent to continue in employment but they were not accepted back.

The 1st issue for determination is whether the claimants were unfairly dismissed from employment by the respondent. The claimants testified that the stock taking showed 43 pieces of watches were missing. On that basis they were arrested. The claimants did not return to their place of work until after acquittal and when they were locked out. The Court returns that the termination of the claimant's employment was constructive effective the date of arrest on 29.10.2010 because once the respondent made an allegation of theft against them, they were entitled to consider themselves terminated because the employer-employee trust and confidence as an implied condition in every contract of service was thereby fundamentally broken. Was the constructive termination unfair? The Court returns that it was not because the claimants had participated in the stock taking and signed to confirm that 43 pieces of watches were missing and as at that moment, the Court finds that the respondent was entitled to form a reasonable suspicion that the claimants were culpable in line with the charge and prosecution that followed. Thus the allegations of unfair termination will collapse. The Court further returns that the prayers made for the claimants will similarly collapse.

The 2nd issue for determination is whether the counterclaim should be allowed. The evidence was that 43 pieces of watches were missing on 29.10.2010 at the shop the claimants were deployed to serve. The respondent provided no evidence to establish the value of the watches. Further the counterclaim was filed on 17.02.2014 and the discovery of missing 43 watches had been on 29.10.2010. The Court returns that for a claim flowing from the contract of service under section 90 of the Employment Act, 2007 the 3 years of limitation had lapsed on or about 29.10.2013 so that the cause of action for the counterclaim had lapsed. It will therefore fail.

In conclusion the memorandum of claim and the counterclaim are hereby dismissed with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 7th December, 2018.

BYRAM ONGAYA

JUDGE