



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 188 OF 2015

BETWEEN

PATRICK NGEKE WANDERA CLAIMANT

VERSUS

1. BARBARA KATSOLE

2. ONESMUS CHITOLE KATANA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kadima & Company Advocates for the Claimant

No appearance by the 1st Respondent

2nd Respondent in Person

JUDGMENT

1. In his Statement of Claim filed on the 7th April 2015, the Claimant alleges he was employed by the 1st Respondent as a Security Guard, assigned guard duties at the 1st Respondent's premises, Plot Number 113 Watamu. The 1st Respondent resided in Germany, and left the premises under the 2nd Respondent. At all material times, the 2nd Respondent paid Claimant's salary of Kshs. 13,000 per month. The Claimant worked until 1st February 2015, when he was dismissed from employment through 1st Respondent's agent named Paul. He was not notified, or heard before termination. He feels termination was unfair and unlawful, and seeks the following orders against the Respondents:-

- a) 3 months' salary in lieu of notice at Kshs. 39,000.
- b) Leave allowance at Kshs. 13,000.
- c) Severance pay at Kshs. 71,980.

d) 2 months' salary arrears at Kshs. 26,000.

e) Overtime pay at Kshs. 32,000.

f) Bonus and other benefits at Kshs. 143,000.

g) Gratuity at Kshs. 143,000.

h) 12 months' salary in compensation for unfair termination at Kshs. 156,000

TotalKshs. 466,480

i) Interest from the date of filing the Claim.

j) Certificate of Service to issue.

k) Any other suitable relief.

2. The Respondents did not file Statements of Response. The 2nd Respondent nonetheless attended Court upon hearing on the 29th July 2016, and was allowed by the Court to give evidence. The Claimant gave his evidence on the same date. The Claimant and the 2nd Respondent subsequently filed their Closing Submissions, confirmed to be on record, at the last mention on 7th October 2016.

Claimant's Position.

3. He testified he was employed by the 1st Respondent's Mother Erika Thieman. He worked under a Caretaker. Thieman died in 2014 in Germany. The Plot devolved to the 1st Respondent. It is residential premises. The Claimant guarded the premises. He earned Kshs. 13,000 per month.

4. The 1st Respondent resided in Germany. Her Husband, Paul Katsole travelled from Germany to Watamu in January 2015. On 1st February 2015, he summarily dismissed the Claimant. The 2nd Respondent was the Caretaker of the premises. He paid the Claimant salary passed onto him by the 1st Respondent.

5. The Claimant reported his grievance to the County Labour Office Malindi. The Claimant and the 2nd Respondent were summoned before the Labour Office. There, they agreed on the dues to be paid to the Claimant. They agreed the Claimant is paid: 3 months' salary in lieu of notice at Kshs. 39,000; annual leave pay at Kshs. 13,000; severance [gratuity?] at Kshs. 71,980; days worked at Kshs. 11,500; and compensation for unfair termination at Kshs. 26,000- total Kshs. 161,480. It was agreed, and Parties signed the agreement witnessed by the Labour Officer, that the full amount is deposited with the Labour Office within 7 days of signing the agreement.

6. The 2nd Respondent and Paul Katsole disagreed on the amount computed at the Labour Office. Paul called on another Senior Labour Officer to re-compute the figure. The Claimant rejected this and reported the matter the Ant-Corruption Commission. He testified he did not go on annual leave in 2014. Parties had agreed on 3 months' salary in lieu of notice. Another Guard was employed after the Claimant left. Work had not diminished. He was paid overtime during the lifetime of Thieman. It ceased to be paid upon her death. He claims overtime from August 2014 to the time of termination. He claims bonus and gratuity. He claims compensation for unfair termination. He wishes to have his Certificate of Service.

7. Questioned by the 2nd Respondent, he told the Court he found the 2nd Respondent already employed as the Caretaker, on recruitment. The 2nd Respondent paid Claimant's salary. The Senior Labour Officer wanted to change what was agreed to by the Parties. Paul Katsole dismissed the Claimant.

2nd Respondent's Position

8. The 2nd Respondent told the Court he was employed by Thieman in 2004, as a General Worker. He left employment in 2006 and was employed in the neighbourhood. He continued to oversee the premises at the request of Thieman.

9. Thieman fell ill and died in Germany. The Plot was inherited by the 1st Respondent. She continued to pay Workers. She wrote e-mail advising the 2nd Respondent to phase out some Workers. The 2nd Respondent asked the 1st Respondent to issue termination notices. Paul came to Kenya later. The Claimant told the 2nd Respondent the Claimant had disagreed with Paul. The 2nd Respondent confirmed Parties had appeared before the Labour Office, where terminal dues were agreed at Kshs. 161,480. Paul rejected this agreement. Paul travelled back to Germany. The 2nd Respondent told the Court he went with the Claimant, to the Claimant's Advocates, where it was further agreed the sum of Kshs. 125,000 be paid to the Claimant. Nearly all the amount was paid to the Claimant's Advocates. Cross-examined, the 2nd Respondent confirmed that the Claimant was employed by the 1st Respondent, upon the terms stated in the Statement of Claim. The 2nd Respondent did not have any document, showing any money was deposited with the Claimant's previous Advocates by the Respondents, in settlement of the Claim.

The Court Finds:-

10. The Claimant has satisfied the Court that he was employed initially by Erika Thieman, as a Guard, deployed at Thieman's Plot 113 Watamu. He earned Kshs. 13,000 per month. Thieman died in 2014, and the Plot was inherited by the 1st Respondent. The 2nd Respondent was the Caretaker, entrusted the role of paying Workers, as both 1st Respondent and Thieman were resident in Germany.

11. The 1st Respondent wrote e-mail to the 2nd Respondent asking the 2nd Respondent to reduce staff at the premises. The 2nd Respondent asked in turn, that the 1st Respondent issues termination notices. There is no evidence that this was followed through. What happened next was that the 1st Respondent's Husband, Paul Katsole, travelled to Kenya from Germany, and terminated the Claimant's contract. No reasons were given for the decision, and no procedural protections were extended to the Claimant.

12. The evidence by the Claimant as well as the 2nd Respondent was that Parties subsequently went before the Labour Office, where it was agreed the Respondents would pay to the Claimant terminal dues computed at Kshs. 161,480. A copy of the agreement, signed by the Claimant, the 2nd Respondent and the Labour Officer, is attached to the Statement of Claim.

13. Once the agreement was shown to the 1st Respondent's Husband, he disagreed with the terms of settlement. He attempted to corrupt the Labour Office into reassessing terminal dues, according to the evidence of the Claimant. The Claimant reported the matter to the Anti- Corruption Authorities, but nothing came out of this, apparently because Paul had returned to Germany.

14. There is no evidence that the agreement at the Labour Office was subsequently varied. There is nothing to show the Claimant agreed to be paid Kshs. 125,000. There is no evidence that this, or any another amount was paid to the Claimant or his previous Advocates.

15. The Court has reached the conclusion that termination was unlawful and unfair, and that in correcting this, Parties agreed before the Labour Office that the Claimant is paid a total sum of Kshs. 161,480. The details constituting this amount are given in the Parties' agreement. It is therefore not necessary to go outside this binding agreement. The Court adopts the agreement as affording Parties fair, regular, lawful and reasonable settlement. There is no reason why the amount was not deposited with the Labour Office and paid out to the Claimant, 7 days after the agreement. The Claimant shall therefore have interest at 14% per annum from the date of the agreement- 3rd February 2015. IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondents shall jointly and severally, pay to the Claimant the total sum of Kshs. 161,480.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum, from 3rd February 2015 till payment in full.

Dated and delivered at Malindi this 10th day of March 2017.

James Rika

Judge