



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 363 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ALICE M'MBOGA OGOLLA.....CLAIMANT

-Versus-

NYAYO TEA ZONES DEVELOPMENT AUTHORITY....RESPONDENT

JUDGMENT

By her Memorandum of Claim dated 28th September 2015 filed in court on the 29th September 2015, the Claimant avers that she was unfairly terminated by the Respondent and seeks the following remedies:

- | | |
|--------------------------------------|---------------|
| 1. 2 months salary in lieu of notice | Kshs 20,754 |
| 2. Leave for 2 years | Kshs. 189,504 |
| 3. Service gratuity | Kshs. 189,504 |
| 4. Compensation | Kshs. 124,524 |

TOTAL CLAIM **Kshs.524,286**

The Claimant pleads in the Claim that there was another case filed vide plaint dated 25th November 2013 being **KAPSABET PMCC NO. 176 OF 2013** between the same parties but for a different cause of action arising from injury in the course of employment which has since been settled.

The Respondent filed a Memorandum of Response on 25th July 2016 in which it denies the averments in the Memorandum of claim and denies that the Claimant was ever in the employment of the Respondent.

At the hearing of the case the claimant testified on her behalf while the Respondent called its Head of Human Resource and Administration, MR. WILLIAM TOGOM (RW1).

The Claimant testified that she was injured while working for the respondent and filed suit at Kapsabet Magistrate's Court. She was later paid damages for the injury. She testified that she worked for the Respondent for 21 years picking, weeding and transplanting tea. She testified that she was not issued with a letter of appointment. She was paid cash based on work done per day.

The claimant stated that she was terminated without a reason. She prayed for payment for work done for the 21 years that she worked.

Under cross examination the Claimant stated that she is 71 years old. She stated she did not have evidence that she worked at Nyayo Tea Zones and had no evidence that her employment was terminated. She further stated she had not brought a copy of the judgment from Kapsabet Court case where she was paid for injury. She further stated she had no evidence of payment of salary by the Respondent.

For the Respondent RW1 relied on his Witness Statement dated 22nd July 2016 and filed in court on 1st August 2016 in which he states that he had worked for the Respondent from 2003 and that he was responsible for managing recruitment and selection of personnel, training and development, compensation and benefits, employee relations, discipline and termination of employment. He further states in the statement that the Claimant is a stranger to him, has never worked for the Respondent and does not appear in the Respondent's human resource records nor had any payment for the Claimant been approved by the Respondent. He states that the suit is brought in bad faith for the sole intention of unjust enrichment.

Under cross examination RW1 stated that he is based in Nairobi and deals with human resource issues in the entire country. He stated that the Respondent has a register with records of all employees but he had not brought it to court. He stated the register does not elaborate the structure, that there are regional managers heading zones called zone managers and human resource officers in zones. He stated that tea pluckers who work on daily basis are paid in cash based on kilos harvested.

He stated that he did not bring any register to prove that the claimant was not in the Respondent's employment. RW1 stated that he was not sure the Claimant was injured as he did not check their records to confirm if the claimant was injured while working for the Respondent and was paid pursuant to Judgment in the Kapsabet Court Case. He stated that all employees have personal numbers except casuals. He declined to comment on payment by the Respondent's lawyers to the Claimant.

Submissions

Both parties filed and exchanged written submissions. In the Submissions filed on behalf of the Claimant it is submitted that her employment was terminated after she filed suit against the Respondent for compensation for injuries she sustained while in the Respondent's employment. It is submitted that from the evidence of RW1 it is clear that the claimant was wrongfully terminated without regard to section 41 of the Employment Act, that the fact that the claimant was paid for injuries sustained at work is proof that she was an employee of the Respondent. The Claimant urges the court to find that she has proved her case against the Respondent and award her prayers.

In the submissions filed on behalf of the Respondent it is submitted that the burden of proof lies on the Claimant to demonstrate the merits of her case and failure of existence of an employment relationship and alleged termination should only lead to a conclusion that the claimant has no cause of action before the court and the claim should be dismissed.

The Respondent relied on the definition of "employee" and "employer" in section 2 of the Employment Act as follows:

***“employee”** means a person employed for wages or a salary and includes an apprentice and indentured learner;*

***“employer”** means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;*

It is submitted that there has never been an employment relationship between the claimant and the Respondent. That all the Claimant did was allege the existence of an employment relationship for 21 years but did not provide any proof of the employment relationship. It is submitted there is no way the claimant would have worked for more than 3 months without an employment contract.

The Respondent submitted that the burden of proving existence of employment relationship lies with the

Claimant and relied on the case of CASMIR NYAKURU NYABERI V MWAKIKAR AGENCIES LIMITED [2016]eKLR in which the court stated as follows:

This court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term if employment shifts to the employer. This does not however release the claimant from the burden of proving their case. Even where an employment contract is oral in nature, the claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obliged to serve a production notice.

The Respondent further submits that this court has no jurisdiction to hear this claim and again relied on the case of CASMIR NYAKURU NYABERI V MWAKIKAR AGENCIES LIMITED [2016]eKLR where the court held:

"The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further."

The Respondent urged the court to return a finding that that this court has no jurisdiction to hear and determine this matter.

On the question whether the claimant was unlawfully dismissed it was submitted for the Respondent that there can be no dismissal without an employment relationship and that the claimant had not established that there was an employment relationship between her and the Respondent.

It is the Respondent's submission that the reliefs sought by the Claimant have no basis and the case should be dismissed and the Claimant ordered to pay costs to the Respondent for dragging it to court unnecessarily.

Determination

I have considered the pleadings and evidence on record as well as the written submissions and authorities cited by the Respondent.

The issues arising for determination on the facts before the court are the following:

1. If there is an employment relationship between the claimant and the Respondent and the related issue of whether this court has jurisdiction to hear this matter;
2. Whether the Claimant's employment was terminated unlawfully by the Respondent; and,
3. If the Claimant is entitled to the remedies sought.

Jurisdiction and Employment Relationship

It is the Respondent's contention that this court has no jurisdiction to hear this matter as there is no employment relationship between the claimant and the Respondent. The question is which court should hear a case where the existence of employment relationship is contested? Under section 12(1) of the Employment and Labour Relations Court Act it is provided that:

*The Court shall have **exclusive original and appellate jurisdiction** to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including-*

(a) disputes relating to or arising out of employment between an employer and employee

[Emphasis added]

In this case the Claimant is alleging that there is an employment relationship while it is the Respondent's contention that no such relationship exists between the parties. It is only this court that can determine the issue. This court therefore is the right court for this dispute that has been referred to it by the Claimant as no other court has such jurisdiction.

I must however point out that issues on jurisdiction are preliminary and should have been raised by the respondent as a preliminary matter to be dealt with before the substantive suit is heard.

Having dealt with the issue of jurisdiction I must now determine if indeed there is an employment relationship between the parties.

It is the respondent's contention that the Claimant did not prove the existence of an employment relationship. In his evidence RW1 did not deny that the Claimant sued the Respondent in KAPSABET PMCC NO. 176 OF 2013. In that case at paragraphs 3,4 and 5 of the plaint it is pleaded as follows:

3. The Plaintiff was at all material times an employee of the Defendant

4. It was a term of the employment contract between the Plaintiff and the Defendant express and or implied that the Defendant will provide the Plaintiff with protective apparel while the Plaintiff was engaged in his work and to ensure that all time the Plaintiff was working in an environment suitable and safe for his work and to ensure that the Plaintiff was not exposed to injury or harm.

5. On or about the 16/3/2009 while the Plaintiff was engaged upon her work, the Plaintiff was pricked by a tea stump on the left ankle joint and as a result the plaintiff sustained serious injuries.

By letter dated March 30th 2015, the firm of Gumbo & Associates (representing the Respondent herein) wrote to Chepkwony and Company Advocates (representing the Claimant herein) as follows:

Chepkwony & Co. Advocates,

P.O. Box 6939-30100

ELDORET

RE: KAPSABET PMCC NO. 176 OF 2013

ALICE M'MBOGA VS NYAYO TEA ZONES DEVELOPMENT

CORPORATION

The above matter refers.

Enclosed herewith please find our client's cheque no. 032030 for Kshs. 73,600/= (Kenya Shillings Seventy Three Thousand Six Hundred only) drawn in favour of yourselves being settlement of the decretal amount in respect to above suit.

Kindly acknowledge receipt and let us have your official receipt for the same.

Yours faithfully

(JAMES GACHOKA)

GUMBO & ASSOCIATES

CC:

Legal Officer'

Nyayo Tea Zones Development Corporation

Nyayo House, 11th Flr,

PO Box 48552-00100

NAIROBI

Your Ref No. NTZDC/18/662VOL.1/4

When asked about the letter and payment RW1 stated that he did not wish to comment. The parties in that suit are the Claimant and respondent herein respectively and the advocates who acted for the parties therein are the same ones acting for the same parties in this suit.

Under section 44 of the Evidence Act, a judgment of a competent court is proof of the matters that are the subject for determination therein.

The foregoing notwithstanding, under section 10 and 74 of the Employment Act it is the responsibility of the employer to keep records of employment for all employees and to produce such records when required. RW1 confirmed that he has custody of all records. It would not have been difficult for him to submit such records to court as proof that the Claimant was not its employee. The Claimant cannot be expected to provide records that are ordinarily in the Respondent's custody when the respondent is a party to the suit.

Under section 3(3) of the Employment and Labour Relations Court Act *"Parties and their representatives, as the case may be, shall assist the court to further the principal objective, to that effect..."*.

The authorities cited by the Respondent are therefore not applicable in this case as there is evidence confirming existence of employment relationship between the Claimant and the Respondent in the form of a plaint and payment of decretal sum arising from the suit.

From the foregoing I find that the Claimant was an employee of the Respondent.

Was the Claimant's employment unfairly terminated

Section 47(5) Section 47(5) of the Employment Act provides that *for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

In the present case the Claimant avers that her employment was terminated after she filed suit against the Respondent for injury sustained in the course of employment. The Respondent did not deny this maintaining that the Claimant was never in its employment.

Having found that the Claimant was in the Respondent's employment as proved by settlement of decretal sum in KAPSABET PMCC NO. 176 OF 2013 and the Respondent having failed to state how the Claimant left its employment if not in the manner she alleges, the court can only conclude that the claimant's averments that her employment was terminated due to filing a court case against the Respondent for injuries sustained in the course of employment are true. Section 46(h) of the Employment

Act provides that termination of employment or imposition of disciplinary penalty on an employee due to initiation or proposed initiation of a complaint or other legal proceedings against the employer, except where the complaint is shown to be irresponsible and without foundation, will constitute unfair termination of employment.

For these reasons I find that the termination of the Claimant's employment was unfair.

Remedies

Having found that the termination of the Claimant's employment was unfair, she is entitled to notice. The Claimant prayed for 2 months salary in lieu of notice but did not justify why she should be granted 2 months notice instead of the one month provided for in law. I award her one months' salary in lieu of notice.

The Claimant further prayed for two years leave in the sum of Kshs. 189,504. She did not adduce any evidence in respect thereof or explain how the sum of Kshs. 189,504 was tabulated. I find that the claimant did not prove the claim and dismiss it.

The claimant prayed for service gratuity. Service pay is payable to an employee under section 35(5) of the Employment Act except in the circumstances set out in section 35(6). I find that the claimant is entitled to service pay at 15 days salary per year worked. She testified that she worked from 1992 to 2013, a fact that was not contested by the Respondent, being a total of 21 years.

The claimant further prayed for compensation. Having found that she was unfairly terminated she is entitled to service pay under section 49 of the Employment Act. Taking into account her long service I award her 12 months' salary as compensation.

The Claimant based her prayers on a monthly salary of 10,377 gross and 9024 basic. The Respondent did not as much as comment on the same and I must therefore assume that it is the correct position. This being the case I award the claimant the following:

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|---|------------------|
| 1. One months' pay in lieu of notice | Kshs. 10,377. |
| 2. Service pay at 15 days salary per year
(10377/30x15x21) | Kshs. 108,958.50 |
| 3. Compensation 10377x12 | kshs. 124,524. |

The Respondent shall also pay Claimant's cost for this suit.

Orders accordingly.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE