



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 302 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JANET KWAMBOKA.....1ST CLAIMANT

JUDITH OGENDO.....2ND CLAIMANT

-Versus-

FLOMANA BEST SOLUTION SERVICES LTD.....RESPONDENT

JUDGEMENT

The Claimants Janet Kwamboka and Judith Ogendo filed this suit by way of Memorandum of Claim dated 23rd October 2013 alleging unfair termination of their employment by the Respondent.

According to the Memorandum of Claim, both Janet Kwamboka and Judith Ogendo were employed as cleaners by the Respondent, a cleaning company, on 1st August 2011 at a monthly salary of Kshs. 5500. They worked in the same position until 15th February 2012 when their employment was terminated without disclosure of the reasons for termination. They reported the matter to their union the Kenya Union of Commercial Food and Allied Workers which wrote several letters to the Respondent in respect thereof but there was no response compelling them to file the claim herein.

They each pray for notice, annual leave, service benefits, underpayments, house allowance and salary for November and December 2012, January and February 2013 all totalling Kshs. 129,404.00 for each of them as more specifically set out in the Memorandum of Claim.

Although the Claim was filed by the Claimants in person they appointed the firm of Chepkwony and Company Advocates to prosecute the claim on their behalf by Notice of Appointment dated 19th February 2014 and filed on 27th February 2014.

The Respondent filed a Memorandum of Defence in person on 22nd January 2015 through its Manager Justus Kiprono in which it denied ever employing the claimants. The Respondent further denied receiving demand letters from Kenya Union of Commercial Food and Allied Workers in respect of the Claimants and prays that the claim be struck out with costs.

The case was heard on 7th December 2016 in the absence of the Respondent after confirming from the Affidavit of service on record that service was effected upon the Respondent by way of registered post.

Janet Ombati Kwamboka testified on behalf of the Claimants that they were employed by the Respondent as cleaners at Moi University Hostels Eldoret from 2011 to February 2013 and worked from Monday to Saturday. They were each paid a salary of Kshs. 5500. They were not housed or paid house allowance.

They worked from 6.30 in the morning to 5 pm.

The Respondent failed to pay salaries to its employees from November 2012 as a result of which the University terminated the cleaning contract. The Respondent promised to pay salaries through Mpesa but failed to do so. The Claimants went to the Union which wrote demand letters to the Respondent on 25th March, 17th April and 9th May 2013 but none of the letters was responded to by the Respondent. The Claimants thereafter filed suit.

Determination

I have considered the evidence on record and the testimony of the 1st Claimant. I have further considered the written submissions filed on behalf of the Claimants. The issues for determination are whether there was an employment relationship between the Claimants and Respondent, whether they were unfairly terminated and if they are entitled to the remedies sought.

Among the documents filed by Janet Kwamboka are a letter of warning dated 1st February 2012 and a certificate of service from the Respondent confirming that she was an employee of the company from 1st August 2011. The two letters are proof that the 1st Claimant was an employee of the Respondent. There is however no evidence of employment of the 2nd Claimant who did not attend court to give evidence or file any documents to prove that there existed an employment relationship between her and the Respondent.

I therefore find that the 1st Claimant was an employee of the Respondent and that the Respondent did not controvert her evidence that her employment was terminated following the termination of the Respondent's cleaning contract with Moi University Eldoret for failure to pay salaries to its employees.

Section 47(5) of the Employment Act provides that -

(5) 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.

Section 45 (2) of the Act provides that -

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Whether considered as a termination of employment or a redundancy, the termination of the 1st Claimant's employment was unlawful for failure to comply with the provisions of the Employment Act.

I therefore find that the 1st Claimant's employment was terminated unfairly by the Respondent.

Remedies

Section 49(1) of the Employment Act, provides for remedies to an employee whose employment has been terminated unfairly as follows:

49. Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

The 1st Claimant prayed for notice, service pay, underpayments of salary and unpaid salary for November and December 2012 and January to 15th February 2013.

The minimum wage for a cleaner in Eldoret from 1st May 2011 was Kshs. 6999. From 1st May 2012 it was Kshs. 7915.90. The 1st Claimant is therefore entitled to pay in lieu of notice of Kshs. 7915+15% house allowance making a total of Kshs. 9103.30 which I award her.

On underpayments she was entitled to Kshs.8048.85 from 1st August 2011 to 30th April 2012 and to Kshs. 9103.30 per month from 1st May 2012 to 15th February 2013. She was therefore underpaid by a total of Kshs. 52,206 which I award her.

On service pay the Claimant is entitled to 15 days salary per year worked. Having worked for only one complete year I award the 1st Claimant Kshs. 4551.65. I

The Claimant further prayed for unpaid salary from November 2012 to 15th February 2013 which I award her at Kshs. 9103.30 per month for November, December 2012 and January 2013. She is entitled to Kshs. 4551.65 for 15 days worked in February 2013. I therefore award her Kshs. 31861.55.

On compensation I award her one months' salary in lieu of notice in the sum of Kshs. 9103.30 taking into account all circumstances of the case.

Conclusion

In conclusion I dismiss the 2nd Claimant's claim for want of proof. I enter judgment for the 1st Claimant against the Respondent in the total sum of Kshs. 106,825.80. The Respondent shall also pay 1st Claimant's costs.

Dated and signed and delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE