



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 84 OF 2016**

*(Before D. K. N. Marete)*

**GRACE CHEPKEMOI TUEI**

**(suing as personal representative of the**

**estate of SAMMY KIPNG'ETICH TUEI..... CLAIMANT**

**VERSUS**

**THE MANAGEMENT COMMITTEE BOMET CONTITUENCY**

**DEVELOPMENT FUNDS.....**

**RESPONDENT**

**JUDGEMENT**

This matter was originated by way of an Amended Statement of Claim amended on 6th June, 2016. It does not display any issue in dispute on its face.

The respondent in a Reply to Amended Statement of Claim dated 21st July, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is the at all material time the deceased was an employee of the respondent with effect from 1st July, 2012. He earned Kshs.26,200.00 per month.

The claimant's further case is one of unlawful termination of employment thereby occasioning the loss and damage for which compensation is now sought.

It is the claimant's other case that the respondent failed to pay the deceased's salary for October, 2013 to the date of filing this case and this is now claimed taking into account the government guidelines on salary for such cadre and office and further including salary increments for the years thereof.

The claimant's further case is that the deceased offered diligent and blemish free service and did not attract any warning letters. This notwithstanding, the deceased's services were terminated without being offered an opportunity to represent himself to the respondent.

She prays as follows;

a. A declaration that the Respondent's dismissal of the claimant from his employment was unfair, unlawful and irregular.

b. Outstanding salary from October 2013 to 30<sup>th</sup> June 2016.

c. General damages for loss of employment and benefits.

d. Aggravated damages and general for loss of salary, allowances and career.

e. 3 months salary in lieu of Notice.

f. Costs of this claim together with interest at court rates of (c), (d) and (e) above.

g. Any further relief that this Honourable Court may deem fit and just to grant.

The respondent's case is that the suit filed herein is bad in law, ambiguous and does not sufficiently disclose proper particulars of the claim and or the cause of action and should be dismissed with costs.

Her further case is a denial of employment of the deceased. She however acknowledges that in the year 2013, Bomet Constituency was divided into Bomet East and Bomet Central Constituencies. Consequently, all Bomet Constituency employees were disbanded and their dues met as per the law. They were then asked to apply for jobs in the newly formed constituencies.

It is the respondent's other averment that it did not fail to pay the claimant's salaries from October, 2013 and that the claimant was paid a sum of Kshs.99,026.00 through Account No. *particulars withheld* – Cooperative Bank, Bomet Branch.

It is her penultimate case that she was not served with any demand notice as alleged.

The matter came to court variously until 9th February, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the deceased was an employee of the respondent?
2. Was there termination of the employment of the claimant by the respondent?
3. Was the termination of the employment of the claimant by the respondent, if at all, wrongful, unfair and unlawful?
4. Is the claimant entitled to the relief sought?
5. Who bears the costs of this claim?

The 1st issue for determination is whether the deceased was an employee of the respondent? The claimant in her written submissions dated 24th February, 2017 in reiteration of her case forments a case of unlawful termination of employment. She does not address or even rebut the case of no employment as pleaded by the respondent.

In this she relies on section 43 (1) and 41 (1) of the Employment Act, 2007 as follows;

*43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

She further seeks to rely on the authority of section 41 (1) of the Employment Act, 2007 in a demonstration of the absence of procedural termination in the employment of the deceased as follows;

*41.(1).... an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

Lastly, the respondent relies on the authority of **Kenya Union of Commercial Food & Allied Workers Versus North Farmers Sacco Ltd, cause no. 74 of 2013;**

*“Whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act., These apply in a case for termination as well as in a case that warrant summary dismissal..... section 41 is couched in mandatory terms. That when employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair.....the situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair.”*

In this, the claimant springs out a case of unlawful termination and prays for a finding in his favour.

The respondent did not substantially participate in these proceedings or even file written submissions in defence.

A scrutiny of the respective cases of the parties propels this matter in favour of the respondent. This is because the claimant has not borne out her burden of establishing and proofing a case of unlawful termination of employment. Like is provided by section 47 (5) of the Employment Act, 2007, the burden of proof of unlawful termination lies on the employee whereas that of justifying the termination lies on the employer.

Here, the claimant does not, or at all, establish a case of employment. This is despite the respondent’s plea that she did not employ the deceased, or at all. With the evidence, or do we call it averment of, *inter alia*, the delineation of Bomet Constituency into two, the burden of proof of employment shifted to the claimant. This is not discharged and forms a serious deficiency in the claimant’s case. I therefore find that a case of employment is not established in the circumstances.

On a finding of no employment of the deceased by the respondent, the other issues for determination fall by the way side. They are not worthy of any further consideration.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Miss.Cherotich instructed by E.M. Orina & Company Advocates for the claimant.
2. No appearance for the respondent.