



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1992 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th January 2016)

NICHOLUS LIHUGU BWUMIRA.....CLAIMANT

VERSUS

COLETTE GURESHI T/A WILD EARTH

WELLNESS CENTRE LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Nicholas Lihugu Bwumira filed his Statement of Claim dated 4.10.2012 through the firm of Nyabena Nyakundi & Company Advocates. His claim against the Respondent is that the Respondent employed him as a gardener on 3.5.2008 at a starting salary of Kshs.6,000/= per month which amount rose upto 10,420/= at the time of leaving employment exclusive of house allowance.
2. The Claimant avers that his contract was orally done and never reduced into writing in contravention of Section 9 of the Employment Act.
3. The Claimant further avers that he worked for the Respondent with due diligence and faithfulness until on or about 30 May 2012 when the Respondent unlawfully and unfairly terminated the Claimant's services on allegation that the Claimant was selling water to outsiders which allegations were not true.
4. The Claimant claims that the termination was done without any notice or letter to show cause and that the Respondent failed to give him any hearing. He further claims that the termination was done without payment of his salary arrears and other dues.
5. The Claimant made a demand to the Respondent to pay him his dues through his Advocate which the Respondent acknowledged receipt but insisted that the termination was lawful as the Claimant was selling water to outsiders which made them pay a fine to Nairobi Water Company amounting to 100,000/=.
6. The claim by the Claimant is for payment of Kshs.415,114/= which includes May 2012 salary, salary in lieu of notice, leave for year 2011/2012, house allowance, gratuity, overtime, NHIF refund and compensation for unlawful termination.
7. The Respondent on the other hand filed their reply to Statement of Claim on 11.2.2013 through the firm of Robson Harris & Company Advocates. It is their defence that the termination was lawful in accordance with Section 44 of Employment Act. The Respondent admits that the Claimant was their

employee and his salary was 10,420/=all inclusive at the time of the termination.

8. The Respondents contend that the Claimant was given a fair hearing and informed of the reasons of dismissal which were reasonable, genuine and in accordance with Section 44 of Employment Act 2007 and that he was not entitled to any notice or terminal dues as alleged. They deny withholding any salary arrears at all.

9. It is the Respondents case that the Claimant is not entitled to any prayers sought and wants this case dismissed accordingly.

10. The claimant contends that he never stole any water nor did he drill water through the wall and that if this was true, he should have been arrested.

11. I have considered evidence of the parties presented plus the submissions filed herein. The issues for determination by this Court are as follows:

1. Whether there were valid reasons to dismiss Claimant.

2. Whether due process was followed in dismissing the Claimant.

3. Whether the Claimant is entitled to any terminal benefits or prayers sought.

12. On the 1st issue, the reason given by the Respondent in dismissing the Claimant was theft of water by Claimant and selling it to 3rd parties. The Respondents have annexed a receipt dated 16/4/2012 to Beyond Interiors for payment of 100,000/= to the Nairobi Water and Sewerage company Limited as fine for illegal connections. Indeed Beyond Interiors are not the Respondents herein and their connection to the Respondent is not explained.

13. There is also a report of some investigations apparently carried out by the Respondents on this illegal sale. The report however does not contain evidence of the witnesses if any and it remains like a statement of the writer. Any interrogation done on the Claimant and his reply is not included. It is therefore this Court's finding that the reasons given for dismissing the Claimant were not conclusively proved under Section 43(1) & (2) of the Employment Act 2007:

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

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

14. Such reasons for the employer to believe, they exist, should have gone ahead and even involved the police given that the allegations made are criminal in nature and apparently costing the Respondent so much as alleged to the tune of 100,000/=.

15. On the 2nd issue, the Respondents have alleged that they gave the Claimant a fair hearing which the Claimant denies. The fair hearing envisaged is the one provided for under Section 41 of Employment Act 2007 which states as follows:

“(1). Subject to section 42 (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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

16. There is no proof that such hearing ever occurred. The minutes of the alleged hearing are not annexed and neither is there any other proof of the said hearing. There being no hearing as envisaged by law this Court finds the termination of the Claimant unfair and unjustified in terms of Section 45 (1) & (2) of Employment Act 2007 which provides that follows:

- 1. No employer shall terminate the employment of an employee unfairly.**
- 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.**

17. Having found the termination unfair, I now turn to the remedies. The Claimant has prayed for various remedies including his May 2012 salary, leave for 2011/2012, house allowance, overtime and gratuity.

18. On these claims, there is no proof that he was paid his May 2012 pay. There is also evidence that his leave for 2011/2012 was cancelled due to alleged investigations in the water theft. On overtime, there is no proof of the same as the Claimant stated that he worked from 8 am to 5 pm which is the normal work time. On gratuity, I have looked at Claimant’s payslip for February 2012 (Appendix 8) annexed by the Respondent. The payslip show remittances of NSSF and NHIF.

19. Having been a member of NSSF the Claimant is not therefore entitled to payment of gratuity as Section 35(6) of Employment Act forbids payment of such payments for NSSF members.

20. The Claimant has however averred that though NSSF dues were deducted, the same were not remitted to NSSF. Proof of this non-remittance in form of a statement was not provided.

21. On house allowance the assertion by the Respondent that the salary paid to the Claimant included house allowance is not proved as there is no written contract with such a provision as envisaged under Section 31(2) of Employment Act which provides as follows:

“This section shall not apply to an employee whose contract of service:

- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or**
- (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).**

22. I therefore find for Claimant as follows:

- 1. May 2012 salary = 10,420/=.**

2. *1 months salary in lieu of notice = 10,420/=.*

3. *Leave for the year 2011/2012 = 20,420/=*

4. *House allowance at 15% of basic salary x 48 months = 15% of 10,420 = 1563 x 48 = 75,024/=.*

5. *12 months salary as compensation for unfair termination = 10,420 x 12 = 125,040/=*

TOTAL = 231,324/=

Plus costs and interest

Read in open Court this 18th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

No appearance for Claimant