



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 216 OF 2015

(Before D. K. N. Marete)

CORNELIUS KIPROTICH ROP.....CLAIMANT

VERSUS

RACHEL JEMELI SINGOEI.....RESPONDENT

JUDGEMENT

This matter was brought to court vide a Memorandum of Claim dated 22nd July, 2015.

The issues in dispute are therein cited as;

- a) Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent.*
- b) Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim.*
- c) Whether the claimant is entitled to an award of certificate of service.*
- d) Who should pay costs and interest of the suit.*

The respondent vide a Statement of Defence to the claimant's claim dated 30th November, 2015 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times to this cause, he was employed by the respondent as a Farm Manager at the respondent's farm at Jua Kali Uasin Gishu with effect from 21st November, 2011 at an agreed salary of Kshs.18,980.00 excluding house allowance.

It is the claimant's case that their terms of employment was that the respondent, who was out of the country would be sending his monthly salary which was not done for the entire period. The respondent would then report him to Eldoret Police Station on a complaint of theft as an excuse for not paying his dues and victimising him for seeking his dues. This is as follows;

7. The claimant submit that Article 28 and 29 of the Constitution of Kenya clearly provide that human dignity must be respected and protected and everyone has the right not to be subjected to any form of violence or punished in a cruel, in human or degrading manner.

Furthermore Article 41 of the Constitution expressly provides that every person has the right to fair labour practices.

8. The claimant submits that the respondent terminated his services summarily without following the right procedure laid down the

Employment Act, 2007.

9. Section 41 (c) of the Employment Act 2007 provides that when an employee intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understand the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained to him the reasons for intended termination.

10. The claimant avers that the termination was unfair because the respondent did not act in accordance with Justice/Equity and it failed to prove that the reason for termination was valid and thus violated Section 45 (2) (a) 4 (b) of the Employment Act 2007.

He claims;

i. One month pay in lieu of notice

Basic + hse allowance

18940 + 2841 Kshs. 21781/ii.

Service payment

15 days x yrs worked x basic /30 days

15 days x 2 yrs x 18940/30 days Kshs.18,940/iii.

Overtime dues

45hrs pwk

12hrs x 6days = 72hrs – 45hrs= 27hrs OT

27hrs x 4wks=108hrs p.m

108 x 1.5 x 18940/195 = 15734

15734 x 36 months Kshs.566,424/iv.

Unpaid wages for entire period

21781 x 25 months Kshs.544,525/v.

Compensation for unfair termination

Gross pay x 12 months

21781 x 12 Kshs.261,372/TOTAL

CLAIM KSHS.1,413,042/He

He prays for;

- a) *A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated.*
- b) *Kshs. 1,413,042/.*
- c) *A certificate of service.*
- d) *Cost of this suit and interests at court rates from time of filing the suit until payment in full and,*
- e) *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The claimant pleads violation of his terms and conditions of employment in that;

- a) *The respondent did not give the claimant a termination notice as provided by Section 35 (1) (b) and 36 of the Employment Act.*
- b) *The respondent did not give the claimant a written contract of service as required under the Employment Act.*
- c) *The respondent did not regulate the working hours of the claimant contrary to Section 27 (1) of the Employment Act. The claimant worked overtime without pay.*
- d) *The respondent failed to pay the claimant service pay contrary to Section of the Employment Act.*
- e) *The respondent breached her agreement with the claimant as she failed to pay her salary for the entire period worked.*
- f) *The respondent dismissed the claimant without proving that the reasons for termination was valid.*
- g) *The respondent failed to give the claimant a certificate of service contrary to section 51 of the Employment Act.*
- h) *The respondent failed to pay the claimant his 12 months wages for loss of Employment as provided under Section 15 (1) of the Labour Institutions Act.*

The respondent's case is a total denial of ever employing the claimant. It is her further case that she had fostered the claimant and his other siblings who also double as the respondent's nieces and nephews due to his brother's family breakup. She has taken care of these children until the claimant matured and got the guts to fluke this claim.

The respondent in her defence boldly denies the existence of an employment relationship *inter partes* and insists that this was always a domestic and charitable matter that is now overlaid in this claim.

4. *The respondent denies ever employing the claimant as a farm manager on the 21st of 2011 as the claimant was in school, Form three at Leseru Secondary School and did not have National Identification Card which the respondent was reliably informed that he got in March 2015.*

5. *The respondent further denies ever terminating the claimant's services as such services never existed and one cannot terminate what does not exist.*

6. *Respondent avers that Article 28 and 29 of the Constitution, sections of the Employment Act 2007 and the Industrial Court of Kenya at Nairobi, Cause 192 of 2013, Moses Kaunda Mono Vs CMC Motors as cited and annexed by the claimant are irrelevant and alien to the facts of this suit*

and therefore inapplicable.

7. The respondent avers that this suit is illadvised, misleading, vexatious and the contents of the claimant's statement of claim are imaginary and conspiracies to defraud through the courts his guardian who has played her role in his upkeep. It is also a waste of the court's precious time.

9. The respondent hereby files and attaches/annexes the following documents to support the facts, explanations and historical contexts in this memorandum of defence:

(a) RJS 1Instrument of Attorney donated to John K. Wanjala Wafula by the respondent Rachael Jemeli Singoei.

(b) RJ2 – Copy of passport of respondent Rachael Jemeli Singoei.

(c) RJS 3Respondent's copy of Kenya National ID.

(d) RJS 4Western

Union Money Transfer Deposit Slip of 450 Euros (Kshs. 45,000) then, sent by respondent to the claimant to pay his form one school fees on the 29th of April, 2009.

(e) RJS 5 – Western Union Money Transfer Deposit of 250 Euros sent to the claimant on 21st October,2009.

(f) RJS 6 – Electronic report/copy of Western Union Transfer of 180 Euros on the 18th of November 2009 sent

to the claimant.

(g) RJS 7 – Electronic report/copy of western union money transfer of 400 Euros on the 6th of January 2010

sent to the claimant.

(h) RJS 8 – Electronic copy of western union money transfer of 180 Euros on the 18th of April, 2013 sent to the claimant.

(i) RJS 9 – Electronic copy of western union transfer of 170 Euros on 22nd of May 2013 sent to the claimant.

(j) RJS 10 – Electronic copy of western union money transfer of 400 Euros on the 22nd of April 2014 sent to the claimant.

(k) RJS 11Electronic copy of Western Union Money Transfer of 280 Euros on the 4th of June 2014 sent to the claimant.

(l) RJS 12 – Electronic copy of Western Union Money transfer on 6th of August 2014 of 260 Euros sent to the claimant.

(m) RJS 13Electronic copy of Western Union Money transfer of 280 Euros on the 28th of 2014 sent to the claimant.

(n) RJS 14 – Copy of the French Passport of Rachael Jemeli Singoei Guillermic.

(o) RJS 15 – A letter from the claimants former school confirming that he joined form one in

2009 and sat for his exams KCSE in November 2012. He collected his KCSE Certificate on the 8th of September, 2015.

(p) RJS 16 Official receipt from the Department of Lands Eldoret being payment for the registration of the Power of Attorney instrument on the 11th of October, 2015

She prays as follows;

(a) Declares the application by the claimant as wanting in facts, irrelevant, conspiratorial, fraudulent, faulty, fictitious and devoid of truth.

(b) Dismisses the claimant's application with costs.

(c) Any other action or orders the court may deem fit and necessary to issue.

The issues for determination therefore are;

1. Whether the claimant was indeed employed by the respondent?
2. Whether the employment of the claimant, if at all, was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the cost of the claim?

This is a rare case. This is because the foundations on which it is based sound familial and to a large degree charitable. The respondent denies the claim on grounds that the claimant was his nephew who, together with his other siblings, she assisted out of destitution at an hour of need. Instead of appreciating this, the claimant is now bent out on unjust enrichment and exploitation of the respondent.

On a test of balance of probabilities, the truth of the matter lies with the respondent. This is emboldened by the claim that the claimant was employed at times that he was also in school. The date of employment provided in the Amended Memorandum of Claim amended on 14th September 2015 is curious and revealing. I therefore find a case of no employment of the claimant and hold as such.

On a finding of no employment of the claimant by the respondent, the other issues for determination slip by the way. They are not worth of consideration.

I am therefore inclined to dismiss the claim with costs to the respondent. This clears the last and viable issue for determination.

Delivered, dated and signed this 19th day of July 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Respondent in person.