



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 300 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 18<sup>th</sup> October, 2016)**

**FLORENCE MUGURE GITAU.....CLAIMANT**

*VERSUS*

**MUSA ABDUL T/A TRENDY TOUCH.....1<sup>ST</sup> RESPONDENT**

**TRENDY TOUCH LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein Florence Mugure Gitau filed her Claim initially as Nairobi – HCCC No. 21 of 2010 through Wamwayi and Company Advocates.

2. On 3/2/2012, this case was transferred to the Employment & Labour Relations Court (ELRC) and now registered as ELRC 300/12. Pursuant to an order of the Industrial Court (as it was then) on 29<sup>th</sup> April 2012, the Claimant filed a Memorandum of Claim whereby she sets out her case.

3. It is the Claimant's case that on or about 25<sup>th</sup> November 1974, she was employed by the Respondents herein. That she was employed as a Saleslady and served the Respondents diligently until 27<sup>th</sup> September 2008 when her services were unlawfully terminated. At the time of her termination, she was earning 14,000/= per month.

4. The Claimant further avers that it was an express and/or implied term of the contract of service that she was entitled to three months' salary in lieu of notice, severance pay, annual leave, 15% basic salary, salary as housing allowance and 4 hours overtime worked on Saturday.

6. The Claimant's prayers are for 3 months' salary in lieu of notice 42,000, 21 days leave not paid 11,307, severance pay at 3 months salary per year for 34 years = 1,428,000/=, house allowance not paid for 40 months 84,000, overtime 3,046,400 all totaling 4,611,707/=. She also prays for costs of this suit and interest.

6. In cross examination the Claimant told Court that she was not given any appointment letter. She told Court that she joined NSSF in 1974 and Respondents were paying the moneys. She also stated that she was paid 245,000 as part of her claim. She told Court that the Respondent was asked by the Labour Officer to produce records and he didn't and so she does not have any records of her employment before 2003.

7. The Respondent on his part filed his reply to the Amended Memorandum of Claim on 2.11.2012 through the firm of M/s Wilfred K. Babu and Company Advocates.

8. The Respondent in his response state that in April 2013 he commenced his business of selling shoes and did this work well taking over some of the workers who had been employed by a previous shoe business.

9. The Claimant was one of such workers and she worked for him until September 2008 when she was caught with stolen shoes from the Respondent shop. The Claimant was arrested and taken to Nairobi Central Police by the Respondent's son and after deliberating on the issue the Respondent summarily dismissed the Claimant and opted not to prefer any criminal charges against her.

10. The Respondent avers that later the Claimant moved to the Ministry of Labour reporting that she had been dismissed unfairly and after deliberations the Claimant was paid 245,000/= in full and final settlement of the claim.

11. The parties filed their respective submissions and the Claimant insists that she was unfairly treated and her demands are as per statement of claim.

12. The Respondent on his part submitted that the claim by the Claimant from 1974 is untenable as the Respondent was not the company she worked for. They also submitted that the Claimant was fully paid from 2003 to 2008 and so the Claimant has no case against the Respondent.

13. Having considered evidence of both parties, the issues for determination by this Court are as follows:

- 1. Whether the Claimant worked for Respondent from 1974 to 2008.**
- 2. Whether there were valid reasons for termination of Claimant's services.**
- 3. Whether due process was followed before Claimant was terminated.**
- 4. What remedies the Claimant is entitled to in the circumstances.**

14. On the 1<sup>st</sup> issue, from the documents on the file, (Appendix 1) the Respondent herein Musa Abdul Quadir registered the business name Trendy Touch on 13<sup>th</sup> April 2003. The Claimant had intimated to Court that she was employed in 1974. In 1974 however the Respondent didn't exist and if the Claimant was in employment, it was not with the Respondent in this case.

15. The claim therefore running from 1974 cannot therefore stand against the Respondent as sued. The Claimant told Court that the Respondent mutated over time changing names over and over again. If that was the case, then, the Claimant was unable to prove this aspect as didn't show any connection between her previous employer is the Respondent.

16. However, there is evidence that the Claimant was previously employed by Trendy Touch as exhibited from documents at page 69 of the claim running from 1996 December. This is the printout from the NSSF.

17. Though the Respondent herein had not been officially registered, they existed and did business with the Claimant from 1996 December. I will therefore set the date of employment with the Respondent from 1<sup>st</sup> december 1996 as evidenced from NSSF print out.

18. On the 2<sup>nd</sup> issue, the Claimant avers that she was unlawfully terminated.

19. The Respondents on their part aver that they caught Claimant red handed stealing shoes from the shop and that is what led to her termination. There is however no evidence that the Claimant was even arrested

and charged with theft by servant.

20. The allegation that she was dismissed due to theft is not tenable given that even in discussion between the Respondent, Claimant and the Ministry of Labour, this aspect never came out. The Respondent were served with a demand notice by the Claimant's Advocate and they also never raised the issue of theft under Section 43 of 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.***

21. It is the duty of the Respondent to prove the reasons (s) for the termination and I find that they have not proved the theft and therefore there was no valid reason to warrant Claimant's termination.

22. On issue No. 3, it is also clear that no due process was followed as envisaged under Section 41 of Employment Act 2007.

23. What remedies then is Claimant entitled to? The cause of action arose on 27<sup>th</sup> September 2008 during the pendency of the repealed Employment Act Cap 224. Under the repealed Employment Act, it was not mandatory that an employer gives reasons for the dismissal. However, I find this dismissal unfair and unlawful for lack of following rules of natural justice.

24. The Respondent has already indicated they are willing to pay Claimant money totaling to Kshs.245,000/=.

25. The breakdown is however not clear. I will award her as follows:

***1. 1 months salary in lieu of notice = 14,000/=.***

***2. Service pay of 15 days for each year worked =  $\frac{1}{2} \times 20 \text{ years} \times 14,000 = 140,000/=$ .***

***3. House allowance equivalent to 15% of salary***

***$15\% \times 14000 \times 240 \text{ months} = 2100 \times 240 = 504,000$***

***4. 12 months' salary as compensation for unlawful termination =  $12 \times 14,000 = 168,000/=$***

***TOTAL = 826,000/=***

***5. Plus costs and interest.***

Read in open Court this 18<sup>th</sup> day of October, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wamwayi for Claimant – Present

No appearance for Respondent