



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 73 OF 2014

ALICE MUCHEMI

CLAIMANT

v

NAKURU CRATER PURE WATER

BOTTLERS LTD

RESPONDENT

JUDGMENT

1. Alice Muchemi (Claimant) filed a Memorandum of Claim against Nakuru Crater Pure Water Bottlers Ltd (Respondent) on 25 March 2014 and she stated the issue in dispute as *unfair and wrongful termination of employment*.
2. The Respondent was served and it filed a Memorandum of Reply on 7 May 2014, and the Cause was heard on 20 November 2014 and 26 November 2014. The Claimant testified on her behalf while the Respondent called 2 witnesses.
3. The Claimant filed her submissions on 15 December 2014...
4. After considering the pleadings, evidence and documents produced and the written submissions, the Court has identified issues arising for determination as, *whether the Claimant was an employee of the Respondent (whether Respondent is non suited), whether the Respondent terminated the services of the Claimant, whether termination was unfair and appropriate relief/Claimant's statutory and or contractual entitlements*.

Whether Claimant was an employee of the Respondent

5. Resolution of this issue may dispose of the entire Cause without need to consider the other issues identified by the Court. And if the Court finds that the Respondent was not the Claimant's employer, then the defence of being non-suited would have succeeded. Closely linked to this issue is who should be liable should the Court find in favour of the Claimant. Should that person be the Respondent, Margaret Muthoni Kabiru or the estate of Amos Kabiru Kimemia.
6. The Claimant pleaded that she was employed by the Respondent as a sales representative from 21 September 2004 at a salary of Kshs 12,000/-. In examination in chief, she stated to the same effect but further stated that she was not given a written employment contract.
7. In cross examination, she stated that none of the Respondent's employees were issued with written contracts and that she was employed by the Respondent's director called Amos Kabiru Kimemia. She also stated that the Respondent run 4 different businesses within the same compound.
8. She further stated that the employees were not given pay slips and that she had no documentation to prove she was employed by the Respondent.
9. The Respondent's first witness was Margaret Muthoni Kabiru who stated she was the daughter of Amos Kabiru Kimemia (deceased) and that the Respondent was incorporated in 2002. She stated that her father had several businesses and that she was appointed a Manager of the Respondent

- through a resolution dated 5 September 2012.
10. She also stated that the Respondent's employees were given appointment letters and that at the time of hearing the Respondent had 3 employees down from 7 employees previously. The employees did not include sales persons.'
 11. The witness admitted that she knew the Claimant and that the Claimant was employed in the carpentry workshop which had licenses from the municipal authority for 2011 and 2012 in the name of Amos Kabiru Kimemia (Exhs 3 and 4). The duties of the Claimant included receiving money from customers.
 12. The witness further stated that when her father fell ill she took on the responsibility of paying the Claimant her wages, and records of the payments were produced (exh 9).
 13. The witness stated that according to records, the Claimant was employed in 2006.
 14. The Respondent's second witness Samuel Musyoka stated that he was employed by Amos Kabiru Kimemia in the workshop in 2008. When he joined, the Claimant was already working.
 15. There is no direct evidence or documentation to indicate whether the Claimant was employed by the Respondent or Amos Kabiru Kimemia. The Court must therefore examine all the surrounding circumstances to resolve the issue.
 16. Amos Kabiru Kimemia was one of the directors of the Respondent. The Claimant stated and was not challenged that it is the said Kimemia who employed her.
 17. The Respondent seeks to rely on single business licenses issued by the Municipal Council of Nakuru in 2011 and 2012, to a business name *AMOS KABIRU KIMEMIA* to operate a furniture workshop to demonstrate that the Claimant was an employee, not of the Respondent, but of Amos Kabiru Kimemia.
 18. The Respondent stated that according to records, the Claimant was employed in 2006. But the witness who must have had access to all the records did not suggest when the business name *AMOS KABIRU KIMEMIA* was registered.
 19. Business names are by law required to be registered. The Respondent did not disclose when the business name was registered. There was also no information as to whether the business name was granted licenses by the Municipality prior to 2011. At least, the Respondent could have produced licenses from 2006.
 20. Further, the Respondent's first witness admitted she took over the running of her father's business in October 2012, and payment of Claimant's wages from March 2013 to December 2013. But she did not disclose whether she took over on the basis of the resolution of 5 September 2012 or under what circumstances.
 21. The Employment Act, 2007 defines an employer to mean

any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

22. The definition of employer in the Act is wide enough to cover persons who are in a legal sense an employer and includes agents and management staff of the legal employer.
23. With the scant material placed before Court, and on the basis of the testimonies of the Claimant and the Respondent's two witnesses and definition of employer in the Employment Act, 2007, the Court is of the view that it is more probable that the Claimant was employed by the Respondent from 2004, and in the alternative it is Margaret Muthoni Kabiru who was the employer of the Claimant after taking over the management of the business.
24. Margaret Muthoni confirmed taking over the running of the business in October 2012, and payment of wages of the Claimant from March 2013.

Whether Respondent terminated the services of the Claimant

25. According to the Claimant, she worked until 28 December 2013, when she was called and paid her salary and told to await to be called. The call never came. She stated she was not given notice of termination of services.
26. The Respondent's first witness stated that the carpentry workshop was not doing well and in November 2013, she decided to close it down. On 20 December 2013, the employees were called

- to a meeting and were informed.
27. At the meeting, the Claimant was requested if she could be transferred to a shop in town and she agreed but asked for 3 days off to get a house help. The transfer was out of goodwill. But the Claimant never reported.
28. The witness stated that the Claimant was not dismissed.
29. Although the Claimant's case was not pleaded as one of redundancy, the facts and evidence point to redundancy.
30. But as already stated, the Claimant's case was presented as one of unfair termination. Unfair termination has two mandatory elements. These are *procedural fairness* as provided for under sections 35 and 41 of the Employment Act, 2007 and *substantive fairness* under sections 43, 45 and 47 of the Act.
31. Before making a finding on this issue, the Court must deal with the legal implications where the facts as proved are different from the case as pleaded.
32. The issue of redundancy as adverted to was not pleaded. But the Respondent's own witnesses brought it up in their examination in chief. In *Odd Jobs v Mubia* (1970) EA 476, it was held that

A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision..

33. The decision in the *Odd Jobs* case has been followed and approved in several cases including *Herman P Steyns v Charles Thys* (1997) eKLR.
34. In employment relationships, it is invariably in most cases, the employer who takes the decision to terminate the relationship. It therefore means that it is the employer who knows the real and correct reasons for taking the decision to end the contract. That is why under the current statutory framework, it is incumbent upon an employer to prove the reasons for termination and that the reasons are valid and fair.
35. In my view, in order to do substantive justice, it is in order to treat the instant case and decide it on the basis of redundancy. The Respondent would not suffer any injustice or prejudice by the Court taking that course of action.
36. The Court finds that this was a case of redundancy.

Whether the termination through redundancy was unfair

37. The Respondent was under an obligation to comply with the conditions for declaration of redundancy outlined in section 40 of the Employment Act, 2007. The conditions include giving one month written notice in advance and notification to the Local labour officer.
38. There was no suggestion that any of the conditions were complied with.
39. The Court therefore finds that the Claimant's services were terminated through redundancy without compliance with the conditions set out in section 40 of the Employment Act, 2007. The termination through redundancy was therefore unfair.

Appropriate relief/entitlements

40. The Claimant mainly sought declarations. Further, employees are entitled to certain rights which do not depend on the circumstances of separation. The Court will now discuss the heads of relief sought and their appropriateness.

Declarations

A declaration that the claimant was an employee of the respondent and dismissal amounted to unfair dismissal/termination and condemned to pay 3 months' salary in lieu of notice.

41. In my view, the declaration sought by the Claimant is not an appropriate and effective remedy. In lieu of the declaration, the Court would award the Claimant the equivalent of one month salary being Kshs 8,500/- pursuant to section 40(1)(f) of the Employment Act, 2007.

A declaration that the claimant is entitled to payment of 12 months salary for unfair and wrongful termination of the claimant contract of employment.

42. Again a declaration would not be appropriate. In lieu of the declaration, the Court would award the Claimant severance pay pursuant to section 40(1)(g) of the Employment Act, 2007.

43. The Claimant served for 9 years and would be entitled to the equivalent of 135 days pay as severance pay. Using the formula of basic pay divided by 26 days to get the daily rate, the Court awards the Claimant Kshs 44,134/- as severance pay.

A declaration that the claimant is entitled to payment of 10 months' salary for the leave that the claimant was never granted during her time of employment.

44. An employee is entitled to at least 21 days annual leave with full pay. The Claimant testified and was not challenged that she did not take her annual leave. In the pleadings, she pleaded that she did not go on leave for 10 years.

45. The Claimant knew or ought to have known exactly how much she was seeking under this head but she did not disclose this to the Court. The award is declined.

A declaration that the claimant is entitled to payment of overtime hours and holidays and particularly 483 Sundays, 89 holidays and 18 days of overtime of 8 hours each coming to a total of 590 days.

46. No evidential basis for this head of claim was laid nor the sums disclosed, although this head of claim was capable of precise mathematical calculation.

47. It is declined.

Costs and interest of this suit at court's rate

48. The Claimant has succeeded. The Court had ordered her to file and serve submissions before 11 December 2014. The submissions were only filed on 15 December 2014 and no explanation was offered.

49. On this ground the Court declines to award costs.

Conclusion and Orders

50. The Court finds and holds that the Claimant was employed by the Respondent in 2004, and was terminated through redundancy without compliance with the law hence the redundancy was unfair, and awards her and orders the Respondent to pay her

a. One month pay in lieu of Notice Kshs 8,500/-

b. 135 days pay as severance pay Kshs 44,134/-

TOTAL **Kshs 52,634/-**

51. The Court wishes to observe that practitioners in the employment/labour law field should familiarize themselves with the primary labour statutes so that they can present their cases with precision because the Employment Act, 2007 and the Labour Relations Act are in many respects complete codes.

Delivered, dated and signed in Nakuru on this 6th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant

Ms. Fatma instructed by Gordon Ogola & Co. Advocates

For Respondent

Mr. Konosi instructed by Konosi & Co. Advocates