



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1804 OF 2013

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 21ST APRIL, 2015)

SERAH MUTHONI MUTUACLAIMANT

VERSUS

AMURT INTERNATIONALRESPONDENT

JUDGMENT

Introduction

1. The Claimant herein filed her Memorandum of Claim on 8/11/2013 through the firm of Kiplangat & Associates Advocates. The Respondent is an International Emergency Relief and Sustainable Development Co-operation which is registered in Kenya as a NGO under Section 109 of the Non Governmental Organizations Co-ordination Act No. 19 of 1990. Its regional office in African is at Kenya Re Towers, Upperhill, Nairobi.

Claimant's case

2. The Claimant avers that she was employed by the Respondent as a cleaner at a basic monthly salary of Kshs.2,000/= from the year 2003 to 2006. She contends that during this period, she was paid salary below the minimum amounts as stipulated in various Legal Notices which came into operation every year. The Claimant stipulated the underpayment as being Kshs.133,329/=. During the same period, she was also not paid any house allowance, leave pay nor overtime.
3. The Claimant states that her salary was however reviewed in January 2007 when she was assigned duties of cleaning and cooking which position she held for 7 years until her termination on 26/8/2013. Her salary also rose immediately from 10,000/= to 13,000/= and by 1st July 2010 to 16,000/= as per documents annexed.

The Claimant avers that she performed her duties and responsibilities with unrivalled passion, earnest and diligence which was also acknowledged by the Respondents in a recommendation letter annexed herein as Annexure SMM 4.

4. The Claimant states that by a letter dated 26th August 2013, she was unlawfully maliciously and summarily terminated from duty contrary to law as per the Annexure SMM 5. It is her contention that the termination was not in accordance with fair procedure and the purported reasons for the termination was not valid and/or did not constitute fair reasons in law. That the Respondent also failed to pay her, her lawful dues and benefits and also willfully failed to give her a certificate of

service. The Claimant therefore seeks payments as enumerated in paragraph 3.12 of her claim all totaling 1,521,329/=.

5. In answer to the counter claim by the Respondent, the Claimant stated that she does not owe the Respondent anything as alleged being 56,000/=. As to properties the Respondent allege is in her possession, the Claimant stated that what is in her possession was given to her by the Respondent as a gift for the good services the Claimant had rendered the Respondent as per the letter SMM 8 dated 27/9/2013 from the Claimant's Advocates to the Respondents Advocates attesting to the same.

Respondent's case

6. On 19/2/2011 the Respondents filed the reply to Memorandum of claim through the firm of Mucheru-Oyatta & Associates Advocates. They totally denied the Claimant's claim. They deny that between 2003-2006 that the claimant was their employee but state that she was an Independent contractor who would be assigned specific tasks to undertake by the Respondent and was paid for these tasks as per the various payment vouchers Annexure 1 (a) for the years 2003-2006.
7. The Respondents also deny summarily unlawfully and maliciously terminating the Claimant's employment as alleged at paragraph 3-10 of the statement of claim. They contend that they rely on donor funding for all their operations and due to funding constraints, it was not able to continue employing the claimant and they therefore issued her with a termination letter on 26/8/2013.

They aver that they followed the legal parameters set in the law as they terminated the Claimant's services. On non-payment of NSSF, NHIF and PAYE, they contend that these are only payable to relevant statutory bodies. They aver that they started paying NSSF for the Claimant from 2007 when they formally employed Claimant.

They also contend that the Claimant adamantly refused to go on leave claiming that she had no place to go but would occasionally seek leave for a day or two as seen from the Annexure 5. The Respondent also deny any intention of leaving this court's jurisdiction.

8. The Respondents have further counter –claimed for 134,995/= being amounts advanced to Claimant, a desktop computer and household items she took. They deny the said items were gifts to the Claimant as referred to their Appendix 7 – stating that the computer was in her custody but remained the property of the Respondent.

As for cash advances they relied on Appendix 8 – showing that the Claimant was advanced 60,000/= and this was to be paid for 8 months with effect from (October 2009 to September 2010) as deduction from her salary. The Respondents asked this court to dismiss the Claimant's case with costs.

9. Issues for determination

1. **Whether Claimant was employed by Respondent from 2003 to time of termination.**
2. **Whether Claimant's termination was lawful.**
3. **If so, what remedies the Claimant is entitled to.**
4. **Whether the counter-claim has merit.**

10. On 1st issue, the 1st formal communication between Claimant and Respondent is Appendix SMM 1, the contract agreement stating that the agreement was between January 4th 2007 to 5th June 2007. Subsequently other agreements followed with the last one being from July 2010 to June 30th 2011. However there in the Claimants SMM 4 there is a communication from the Respondent as follows:

“This is to confirm that the person Ref, Ms. Sera Muthoni has worked for AMURT

International in various positions as; office cleaner for 3 years from 2003 to 2006 and as cleaner and cook for 7 years from January 2007 to 2013 ---“.

The express provision of this letter of recommendation is an acknowledgement of that employment relationship between Claimant and Respondent and cannot be denied. I therefore find that contrary to Respondent claiming that Claimant worked during the period of 2003 to 2006 as an Independent contractor who would be assigned specific duties is false.

I therefore find that the Claimant worked for the Respondent from 2003 to 2013 when her services were terminated.

11. On 2nd issue, the termination of the Claimant was effected on 26/8/2013 as per Appendix SMM 5 where the Respondent acknowledged that the Claimant had been a valued worker but the termination was due to failure by Respondent to increase donor funding of their projects. This statement means that the Claimant was being declared redundant under Section 2 of Employment Act redundancy is defined as follows:

“redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.

Under Section 40(1) of Employment:

- a. ***Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
- b. ***Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
- c. ***The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
- d. ***Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
- e. ***The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
- f. ***The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
- g. ***The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

12. In case of the Claimant however, the Respondent failed to give Claimant 1 months notice as provided under Clause (a) above. They also failed to follow provisions of Clause (f) and (g) above. That being the case, this court finds the termination unlawful and unfair.

13. The counter claim, the Respondents documents show that the computer was still their property and the Claimants assertion that was a gift is not true. The same to the cash advanced to the Claimant, the claimant has not shown proof of having paid the same. I therefore find the counter claim proved to the extent of Kshs.113,000/= only being for the desk top computer and cash advances. The household items claim is not proved.

14. Having found as above I find for Claimant in the following terms:

(1) I declare the termination unlawful and unfair.

(2) The Claimant is awarded:

(a) Kshs.133,329/= as underpayment of wages as enumerated under Clause 3.2 of her statement of claim.

- b. 1 month salary in lieu of notice = Kshs.16,000/=.**
- c. Severance pay of 15 days for each completed year of service = $16,000/2 \times 10 = 80,000/=$.**
- d. 12 months salary for unlawfully termination of employment = $12 \times 16,000 = 192,000/=$.**
- e. Leave claim is not proved.**
- f. Certificate of Service.**

TOTAL awarded = 421,329/=

Less counter claim 113,000/=

Balance = 308,329/=

Plus costs and interest

Dated and delivered in open court this 21st day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

n the presence of:

No appearance Claimant

No appearance for Respondent