



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 5 OF 2012

(Formerly Cause No. 330 of 2011 at Nairobi)

JOYCE WACHUKA

NJURA..... CLAIMANT

VERSUS

**KIRITIRI, EMBU-THIKA-NAIROBI (KETNA) NISSAN MATATU
OPERATORS..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 8.03.2011 through Igati Mwai & Company Advocates. The amended statement of claim was filed on 23.10.2012. The claimant prayed for judgment against the respondent for:

- a. Special damages of Kshs. 2, 914, 783 being 13 days worked in January 2011 Kshs. 4, 203.00, one month pay in lieu of notice Kshs. 9, 700.00, unpaid leave allowance for 3 years Kshs. 29, 100.00, gratuity for 37 years of service Kshs. 29, 100.00, gratuity pay for 37 years she could have worked to attain mandatory retirement age Kshs. 2, 153, 400.00, allowance for 37 years she could have worked before retirement Kshs. 666, 000.00, unpaid house allowance for 3 years Kshs. 52, 380.00.
- b. General damages for illegal termination of employment.
- c. Costs of the suit.
- d. Interest on (a), (b) and (c) above at court rates.
- e. Any other relief as the honourable court may deem fit and just to grant.
- f. Alternatively payment of the terminal dues and benefits by the defendant.

The memorandum of response was filed on 15.08.2011 through Njeri R. Ngari & Company Advocates. The respondent prayed that the suit be dismissed with costs. The respondent pleaded that the claimant had never been an employee of the respondent at all material time as alleged in the memorandum of claim.

The **1st issue** for determination is whether the claimant was employed by the respondent. The claimant testified that she applied for the job, was interviewed by the respondent's officials whose names are recorded by the court as per her evidence, and she was employed with effect from 1.08.2008 to the position of a clerk. It was her testimony that she was given an employees' card but was not given a letter of appointment and the card was given to her by the respondent's chairman to be worn by the claimant over her shoulders while on duty. A copy of the card was filed in court.

The respondent's 1st witness (RW1) was James Kathiga Mugecha. He stated that the claimant was a bus conductor at a stage in Nairobi city in a place called Tea Room. She assisted passengers to board public service vehicles known as *Matatus* and she served all passengers and all such vehicles and was paid by the owners of the vehicles as she was not the respondent's employee. RW1 denied that the respondent was his organisation as the relevant business establishment was not known by the respondent's name.

Respondent's 2nd witness was Partrick Muenya Warui. His evidence was that in 2008 the respondent was not functional. The respondent's business was to advance credit to members and not to run *matatus*.

The court has considered the pleadings and the evidence on record. The respondent alleged that it did not exist at all material times but the relevant evidence was not filed. The three respondent's witnesses testified that they all knew the claimant. The court finds that on a balance of probabilities, the claimant has established that she was employed by the respondent's officials at an interview on 29.06.2008 and assumed duty on 1.08.2008 as advised by the respondent's Treasurer one Patrick Warui.

To answer the 1st issue for determination the court finds that the claimant was employed by the respondent to the position of a clerk from 1.08.2008 to 13.01.2011.

The 2nd issue for determination is whether the claimant's termination was unfair. The claimant testified that on 13.01.2011 she was at work in Nairobi when at about 2.00p.m the respondent's chairman arrived and told her that the respondent's meeting held earlier that day had decided that she be terminated from work. There is no reason to doubt that account and the court finds that the termination was unfair for want of a genuine reason as provided under section 43 of the Employment Act, 2007. The court has considered that the claimant had served for 3 years and she contributed to her predicament by failing to demand for formal terms of service while she was in employment. She testified that she applied for the job in writing and was given a formal interview but she offered no reason why at all material times she failed to formalise the engagement. The court considers that 3 months' salaries at Kshs. 9, 700.00 x 3 making **Kshs. 29,100.00** will meet the ends of justice.

The 3rd issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court finds that the claimant is entitled to **Kshs. 4, 203.00** being pay for 13 days worked in January 2011 as well as **Kshs. 9, 700.00** being a month's pay in lieu of the termination notice. The court finds that the claimant did not provide evidence or justify all other prayers made in the memorandum of claim except for costs which will follow the outcome of the suit.

In conclusion judgment is entered for the claimant against the respondent for:

- a. The respondent to pay the claimant Kshs.43, 003.00 by 1.09.2015 in default the respondent to pay interest thereon from the date of this judgment till the date of full payment.
- b. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 10th July, 2015.

BYRAM ONGAYA

JUDGE