



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 276 OF 2011

(Before D.K.N. Marete)

ELIZABETH WANGARE GATHONI & 2 OTHERS.....CLAIMANT

Versus

ANDREW NIGHTNGALE AND KEMBU E.A. LTD RESPONDENT

JUDGEMENT

On 14th December, 2010, this matter was brought to court. The issues in dispute are cited as

- 1. Unfair termination/dismissal**
- 2. Underpayment of wages**

The respondent vide a memorandum of defence dated 18th March, 2011 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that they were employees of the respondent and were engaged on diverse dates as follows;

1. Elizabeth Wangare Gathoni - 1st August, 2005 as housekeeper and breakfast cook
2. Anne Nyokabi - 1988 as farm hand or gardener and cook for Kembu E.A. Ltd
3. Patson Khadisia Alusiola - July, 1990 as Manager

The claimants' case is that at the time of engagement by the respondents, they enjoyed normal terms and conditions of service until the 2007/2008 election violence which was adverse to the tourist industry and led to massive cancellation of bookings thereby forcing the respondents to adjust their employment terms to Term Contracts to conform with the times. Their initial employment ended in February, 2008 whereupon Kembu Ltd now took upon their employment as term contract due to the indeterminable nature of the tourist industry.

The claimants fault the new terms of employment and also their termination. The 1st claimant was sacked after a service stint of 6 years and 5 months on grounds that she had abused Faith Muriuki the respondent's Manager. She posits that this was improper in that she was not given a chance to defend herself.

That on 3rd July, 2010, while on duty, a commotion arose between Ann, the 2nd claimant and a Mr. David Ng'eno and thereafter her employment was terminated by George, the Manager. That the incidents of strangulation and termination were reported to the lady wife of the Director and also security officer but no action was taken. The workers were left to suffer without any hearing. At the time of termination, she had served the respondent for 22 years, 7 months. She called the respondent's Director and asked for a hearing but this was ignored. She was paid Ksh.3,045.00 on termination.

The 3rd claimant was employed by the respondent in July, 1990. She rose through the ranks of the respondents up to the rank of Manager of Kemu Tents. This employee was accused of stealing gutters from the work site on three incidents in the months of October to November, 2009. This loss had been reported to the Directors by the claimant on information from the security guards. He testified and submitted that the respondent wrote a letter purporting the same had been authorized by the 3rd claimant opting to walk out of the firm.

All the contracts of employment ended 5, 3 and 4 months before their terms for the 1st, 2nd and 3rd claimants respectively. They discount the veracity of their termination and pray for;

- i. ***THAT*** the Honourable Industrial Court do issue **ORDERS** compelling the Respondents to pay the claimants herein this matter all benefits due for unfair Termination of Employment as follows;
- ii.
 - a. *One month salary in lieu of Notice*
 - b. *The period which could have been the period for the claimants to serve could the Respondents not broke contractual services unfairly i.e for Annn Nyokabi – 3 months, Alisiola – 4 months and Elizabeth Wangare 5 months respectively*
 - c. *Both employees be paid housing allowance arrears for 36 months each based on 15% housing allowances as contained in the Government Orders of 1st May of every year derived from their basic salaries*
 - d. *That both employees be awarded a compensation based on section 49 C of the employment Act No. 11 of 2007 12 months gross salary. Both claims are Broken down as enumerated hereunder.*

1. **ELIZABETH WANGARE GATHONI**

Employed 1st May 2005

Position – House keeper/cooking breakfast

Terminated on 11th November 2010

Had worked for 5 years

Salary at Termination – 9,500/=

1st service paid off on 4th February 2008

2. **ANN NYOKABI NDIRANGU**

- a. *1 month salary in lieu of Notice 9,500*
 - i. *The 3 months pay for the period of contract – 28,500*
 - ii. *Housing allowance*

$$\frac{9500 \times 15}{100} = 1,425.00 \text{ pm}$$

iii. Compensation based on Section 49 of the employment Act No. 11 of 2007

$$9500 + 1425 = 10,925 \times 12 \text{ months}$$

$$= 131,100.00$$

3. PATSON KHADASIA ALUSIOLA

- Employed in July 1990
- Position - Manager
- Terminated on November 2009
- Salary at Termination – Kshs.16,500
- Worked for 20 years

1. 1 month salary in lieu of Notice - Kshs.16,500/=
2. 4 months salary contract balance month 16,500 x 4 months

66,000.00

3. Housing allowance arrears

$$\frac{16,500 \times 15}{100} = 2,475 \times 36 \text{ months} - 89,100.00$$

4. Compensation based on Section 49 C of the employment Act No. 11 of 2007. 16,500 + 2475

$$1897 \times 12 \text{ months} = \underline{227,700.00}$$

399,300.00

1. **THAT** the Honourable Industrial Court do issue Orders compelling the respondent to issue the claimants with a Certificate of service in the meaning of the Provision of Section 51 of the Employment Act No. 11 of 2007 Law of Kenya.
2. **THAT** the cost of this application be borne by the Respondent.
3. **THAT** any other relief this Honourable Industrial Court may deem fit to grant to the claimants.

The respondent denies the claim. She admits paragraph 3 and 4 of the claim on employment and terms but denies the balance of the claim. She further contends that summary dismissal was instituted on the 1st claimant due to use of abusive language against the employer and her supervisors which issue had been investigated and a report formed and filed. That upon summary dismissal, the 1st claimant acknowledged receipt of all her dues in full and final settlement. She was also issued with a bonus for the period worked and a letter of recommendation. She denies owing the 1st claimant a farthing and rubbishes her claims as such.

As for the 2nd claimant, the respondent submits that she absconded from duty without leave or other lawful cause and therefore summary dismissal. That on 8th July, 2010, the claimant approached the respondent's Head of Security and advised him that she would not be coming to work for reasons she did not disclose. She was therefore summarily dismissed. Her claim for compensation, or at all, is denied.

The respondent submits that the 3rd claimant voluntarily resigned from service and therefore his claim is a non-starter. He was terminated and issued with a letter of acknowledgement of resignation which he also acknowledged. There was a happy parting and he was paid all his dues including Ksh.8,000.00 loan that he was forgiven. He was further issued with two (2) recommendation letters and a detailed Curriculum Vitae to enable him settle for another employment. The respondent therefore denies any claims by the 3rd respondent as well.

The issues for determination in this cause therefore are;

1. Was the termination of the employment of the 1st and 2nd claimants wrongful, unfair and unlawful?
2. Was there a termination of employment for the 3rd claimant?
3. Are the claimants entitled to the relief sought?
4. Who bears the costs of this cause?

The matter came to court for mention and hearing severally until 23rd May, 2013 when they agreed to dispose of the matter by way of written submissions with a clear cut schedule for the filing of the same.

The claimants did file their written submissions dated 29th November, 2012 on the following day but there is a slacked pace in dealing with the matter until the 8th October, 2013 when it was set for judgement. No written submissions have been had from the respondents.

The 1st and determinant issue for determination is whether the termination of the 1st and 2nd claimants' employment was wrongful, unfair and unlawful. These claimants submit that this was indeed wrongful, unfair and unlawful and also that they were underpaid in their wages. The claimants had indeed put in different but long stints in their employment with the respondents.

The respondents submit that the 1st and 2nd claimants' contracts of employment were terminated through summary dismissal for gross misconduct in the performance of their duties. They were served with letters of summary dismissal dated 11th November and 9th November, 2010 respectively. Elizabeth was dismissed on grounds of incitement of other workers, use of abusive language against the employer and staff and guests and abuse of the respondent's laundry for laundering personal items. This is demonstrated in a report made by the respondent's security officer on the subject. The 1st claimant does not deny or rebut these allegations and evidence but merely takes a contrary position and relies on the provision of the Employment Act, 2007 to sustain her case.

The 2nd claimant was summarily dismissed for absconding duty. She had not been to work for a week and was not able to report to work as required. She was also accused of using derogatory language against the respondent all of which she did not deny or rebut. All this amounts to misconduct on the part of the 1st and 2nd claimants leading to their summary dismissal.

Section 44, Employment Act, 2007 provides the law on the subject of summary dismissal. The 1st and 2nd claimants case particularly falls within the ambit of Section 44(a), (d), (e) and (g).

44.(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- a. **without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**
- b. *during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*
- c. *an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
- d. **an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed in authority over him by his employer;**
- e. **an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.**
- f. *in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*
- g. **an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.**

Section 45 of the Act sets the parameters for unfair termination.

45.(1) *No employer shall terminate the employment of an employee unfairly.*

(2) A termination of employment by an employer is unfair if the employer fails to prove-

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
 - i. **related to the employees conduct, capacity or compatibility; or**
 - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

- a. *the termination is for one of the reasons specified in section 46; or*

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee.

S.45(2)(1) and S.45 (5)(b) are equally applicable and come in to buttress a case for fair termination of employment.

I therefore find a case for lawful termination of employment for the 1st and 2nd claimants. And this answers issue No. 1 above.

The 2nd issue for determination is whether indeed there was termination of employment for the 3rd claimant. It is the respondent's position that the 3rd claimant, Patson Khandasia Alusiola's contract of employment was terminated on his own volition. He did write a letter dubbed 'Notice to leave company' dated 18th November, 2009 in which he requested that he be allowed to exit and amplify his career at any other establishment. He wished to seek greener pastures, his career having reached its peak and there being no hope of any further career development with the respondent. This was agreed *inter partes* and an amicable parting was had. He and all the other claimants were paid their terminal benefits which they received heartily.

The 3rd claimant now denies originating the letter of resignation, or at all. He submits that this is a concoction of the respondent intended to justify an illegal termination of employment. The 1st and 2nd claimants also deny the grounds of summary dismissal and cling on unfair termination. For the 3rd claimant, the denial comes in even after elaborate ceremony, acceptance and formal parting with the respondent that even included an excellent letter of recommendation. The other claimants also received good letters of recommendation from the respondent.

So, who of the two sides to this suit is believable and what are their gains on the principle of balance of probabilities? The matter comes out in favour of the respondents and against the claimants and I so find. The respondents' case is explicit and well documented. The claimants did not in any way adduce evidence in support of their positions or even rebut the evidence of the respondent. The case of the 3rd claimant appears an afterthought and should be discounted and dismissed. This also applies to the others.

The law does not seem to accommodate the case for the claimants in that the legal parameters for termination were apt and fair. The reasons for termination do not offend the law on summary dismissal or unfair termination hence my finding that all was well and amounted to fair termination.

The 2nd issue for determination is whether indeed there was termination of employment of the 3rd claimant. Each party seems to have its version of the termination of employment. Termination of

employment is cessation from a contract of employment. In this case the respondent posits that termination indeed occurred but this was on the agreement of the parties. The 3rd claimant pushed in a case of resignation with a view to seeking greener pastures after having put in a lot of time in the respondent's employ and having exhausted his capacity and office with the respondent. There is ample evidence of a happy parting *inter parties*. The claimant does not bring out a different view or position in evidence. It would be in the circumstances prudent to find a case of no termination of the claimant's employment and I so find. The 2nd issue therefore flies out.

The 3rd issue for determination is whether the claimants are entitled to the relief sought. They are not. Having established a case of fair termination and agreed parting for the claimants respectively disentitles them to the relief sought.

The issue of costs speaks for itself. Costs customarily follow the event. The costs of this cause shall be borne by the losing party, the claimants.

The claim in the circumstances is dismissed with costs to the respondents.

Dated, delivered and signed the 4th day of March, 2014.

D.K.Njagi Marete

JUDGE

Appearances

2. Muketi Musangi & Company Advocates for the respondents.
3. Mrs. Kamau instructed by Enonda, Makoloo, Makori & Advocates for the claimants.