



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 27 OF 2012
(Originally Nairobi Cause No. 1135 of 2011)

ELIZABETH WAIRIMU KURIA **1st CLAIMANT**

ANN MUTHONI GATHECHA **2nd CLAIMANT**

V

QUICKMART SUPERMARKET LTD **RESPONDENT**

JUDGMENT

1. Elizabeth Wairimu Kuria (1st Claimant) was employed by Quickmart Supermarket Ltd (Respondent) on 3 July 2009, while Ann Muthoni Gathecha (2nd Claimant) was employed on 20 January 2010. They allege they were engaged as Shop Assistants.

2. On 15 February 2010 and 24 July 2010, the 1st Claimant was issued with warning letters for *mis-respect/rudeness* and conducting own business at work area respectively. The 1st claimant responded to the warning letters on 17 February 2010 and 29 July 2010.

3. On 21 January 2011, the Claimants commenced legal proceedings through a needlessly verbose and incoherent Memorandum of Claim against the Respondent stating the issues in dispute as

1. Failure to pay wages to the Claimants in accordance with the provisions of the Employment Act No. 11 of 2007.

2. Gross underpayment of wages.

4. The Claimants cause of action appears to be constructive dismissal in that they allege the Respondent made the work environment difficult and forced them to resign.

4. The Respondent filed a Response on 15 August 2011. On 4 November 2013, the Claimants filed a Reply to the Response. The Claimants case was taken by Ongaya J on 21 July 2014, while I took the Respondents case on 29 October 2014.

1st Claimant's case

5. The 1st Claimant testified and stated that she was employed by the Respondent in 2009 as a Shop Assistant, selling goods at a wage of Kshs 5,000/-.

6. On working hours, the Claimant stated that she reported to work at 6.00 am and worked until 9.00pm, seven days a week. She stated she worked even during public holidays.

7. On the separation, the 1st Claimant testified that on 21 January 2011 a Friday, a manager of the Respondent gave her a letter and instructed her to go read it at home and report back the next Monday.

8. When she reported back, she was instructed to report to the labour offices for her pay.

9. The Claimant stated that she reported to the labour office and was asked to write a resignation letter so as to get her wages (Exh 4) and she was thereafter paid Kshs 21,896/- for which she signed an acknowledgment (Exh 5). The letter was dated 22 February 2011.

10. The Claimant admitted she received warnings in 2010 to which she responded.

11. According to the 1st Claimant, she was victimised because her husband who also worked for the Respondent had joined a union and that she was threatened by a manager called Ngugi not to join the union.

12. She further stated that her husband sued the Respondent for unfair termination.

13. The 1st Claimant stated that she was seeking one month pay in lieu of notice, overtime, pay for work on public holidays, compensation and costs.

14. In cross examination, the 1st Claimant stated that she was earning Kshs 10,718/- according to her letter of appointment annexed to the Response (QMSL 1a). She agreed this was confirmed in her pay slip (Exh 7) but rejoined that she earned Kshs 5,000/- upto January 2010, when the appointment letter was issued.

15. She confirmed she went on leave for 3 months.

16. She further stated that she was forced to author termination letter and that she received Kshs 21,896/- but was dissatisfied. She confirmed that according to Respondents exh IV(c), she was paid Kshs 6,221/- in lieu of notice and other entitlements.

2nd Claimant's case

17. The 2nd Claimant testified that she was employed by the Respondent on 20 January 2010, and that the working hours were as stated by the 1st Claimant.

18. On separation, she stated that she was dismissed on 18 January 2011.

19. Regarding the circumstances of the dismissal, she stated that she went to the 1st Claimant to borrow a cloth to dust the shelves and a manager who saw her talk with the 1st Claimant directed her to go home and report back the next day for her money.

20. The next day she reported but she was told to keep on coming back until she wrote a letter asking for her terminal dues and that after a meeting at the labour office, she was forced to write a resignation letter and was thereafter paid Kshs 13,372/-. She stated she never resigned.

21. In cross examination, the 2nd Claimant stated that she applied for general work and that she was told to resign by the labour officer so that she could be paid.

22. She further stated that she never complained of underpayments.

Respondent's case

23. The Respondent called its Operations Manager, Charles Mathenge to testify on its behalf.

24. In respect of the 1st Claimant, he stated that she was employed on 1 January 2010 as a general worker or shop attendant.

25. On separation, the witness stated that the 1st Claimant resigned on 22 February 2011, and she was paid her terminal dues after an agreement before the Labour office.

26. On terms and conditions of service: the witness stated that the 1st Claimant was paid normal and double overtime inclusive of public holidays as indicated in her pay slips.

27. As for the 2nd Claimant, the witness stated she was also a general labourer, but she was underperforming and was warned severally but the underperformance continued.

28. As a result, the 2nd Claimant was summoned before a Panel and directed to return after 2 days because the Respondent's director was not present. Instead the 2nd Claimant wrote a resignation letter dated 23 February 2011 and she was paid Kshs 13,372/-.

29. The witness denied that the Claimant was underpaid and stated that though she did not request for annual leave, she was paid in lieu thereof and was equally paid overtime for work on public holidays and rest days.

30. In cross examination, the witness reaffirmed that the Claimants were shop attendants and not shop assistants and that the 1st Claimant was a troublemaker who was served with 2 written warnings.

31. On wages, he stated that the basic wage was Kshs 5,655/- and that working hours were 8.00 am to 7.45 pm and that according to the pay slips, overtime was paid.

32. He further stated that the Respondent's director caught the Claimants rumour mongering on 21 January 2011 and they were sent away to report back the next Monday but the director was not in, so the reporting was rescheduled by 2 days. When the Claimants came, they brought resignation letters.

33. The witness denied the Claimants were forced to resign but agreed that the Respondent had a court case involving 1st Claimants husband.

34. The Court has copiously narrated the testimonies of the witnesses as tendered in Court.

35. The Claimants filed their submissions on 7 November 2014 while the Respondent filed its submissions on 1 December 2014.

Issues for determination

36. It is not disputed that both Claimants wrote resignation letters. The Claimants assert the resignations were forced. But the Respondent contends the resignations were not forced.

37. The determination of the Cause will therefore turn on whether the Claimants were shop assistants or general labourers and whether the Claimants have demonstrated that they were forced to resign to bring their respective cases under constructive dismissal.

38. The Court will also discuss the remedies sought by the Claimants, which relate to fulfillment of statutory and contractual rights and exist independently of the manner of dismissal.

Shop Assistants or genera/labourers

39. The 1st Claimant was issued with a written contract indicating her occupation as a Shop Attendant. The appointment letter (a page appears missing from copy annexed to Response) did not expressly set out the 1st Claimant's duties but Clause 7 provided that

You will serve the company in such capacity and at such a place as the company may from time to time decide.

40. The 2nd Claimant was not given a written contract but she testified that she was a shop assistant.

41. The Regulation of Wages (General) (Amendment) Order does not have a category called shop attendant. There is a category of shop assistant.

42. The Regulation of Wages (Wholesale and Retail Distributive Trades) Order has an occupation designated as shop assistant and which has been defined to mean

any person wholly or mainly employed for the purpose of transacting business with customers in a department of an undertaking to which customers have access but who is not in charge of such a department.

There is no definition of a shop attendant.

43. The 1st Claimant did not clearly state her day to day duties except to state that her work was to sell goods at the shop (cosmetics and stationary). The Respondent did not cross examine the Claimant on this testimony and also did not place before Court what were **the** distinguishing day to day duties of a shop assistant as opposed to a shop attendant or general labourer.

44. Based on the material placed before Court, and considering that the 1st Claimant's appointment letter did not explicitly state her job description and duties, and the failure to issue the 2nd Claimant with a written contract, and pursuant to sections 9 and 10 of the Employment Act, the Court finds that the Claimants were shop assistants.

Forced or voluntary resignations

45. The Court has gone to great lengths to narrate the testimonies of the parties. The Court must now determine whether, based on the testimony and paragraphs 11 to 26 of the Memorandum of Claim, the decisions taken by the Claimants to resign was forced upon them by the Respondent or originated by any of its officer's conduct.

46. The current statutory framework in Kenya has not expressly provided for constructive dismissal. But under the broad right to fair labour practices in Article 41 of the Constitution, the Court has the power to look at whether an employee has been forced to leave because of the conduct of an employer.

47. Constructive dismissal has its antecedents in the contractual doctrine of discharge by breach and the principle is that the employer should be guilty of conduct which is a significant breach going to the root of the contract, or which shows that the employer no longer intends to be bound by a fundamental term of the employment contract.

48. Under these circumstances, an employee may consider himself discharged from the relationship because of the employer's conduct.

49. The narrative given by the 1st Claimant was confusing. She muddled the instances in 2010 when she had been issued with the warning letters and the events of January 2011, when the separation occurred.

50. She stated that it was the Labour officer who coerced her to resign so that she could be paid.

51. Prior to the appearance before the Labour officer, she had been sent away after work on 21 January 2011 and instructed to report back the next Monday. The resignation letter was written on 22 February 2011, nearly one month after the 1st Claimant had been sent away. The Respondent did not explain why it took nearly a month to resolve the case of this Claimant. During that period she was not at work.

52. The Respondent annexed to its Response a letter dated 27 January 2011 written by the 1st Claimant. But the 1st Claimant did not give any explanations regarding this letter. In the letter she made reference to being asked to report to work but not being told anything substantive regarding her status.

53. The Respondent through its Human Resource Manager replied to the letter on 31 January 2011 denying that it had dismissed the 1st Claimant. The letter asked the 1st Claimant to resign. The Respondent did not attempt to deal with the issue of why the 1st Claimant had been sent away on 21 January 2011 or what it was doing about her case for over a month until her resignation.

54. The circumstances presented point to the 1st Claimant being forced to resign at the behest of the Respondent, after being left frustrated and hanging for nearly a month. She was constructively dismissed.

55. The 2nd Claimant had a similar narrative. She was sent away at the same time as the 1st Claimant and requested to report back the next Monday. She did not write a letter like the 1st Claimant but the situation leading to the eventual separation were intractably linked. She was also left in the dark for nearly a month.

56. I therefore find that she was also forced out by the Respondent's conduct.

Appropriate relief

One month pay in lieu of Notice

57. The Claimants were deducted one month pay in lieu of notice. With the conclusion reached, it is the Respondent who should pay each of them one month pay in lieu of notice assessed at Kshs 10,718/- and Kshs 8,400/- respectively.

Wages for days worked in January 2011

58. The 1st Claimant sought Kshs 6,785/- , being earned wages for January 2011. She was paid Kshs 7,498/-.

59. The 2nd Claimant sought wages for days worked in January 2011 computed as Kshs 5,880/-. She was paid Kshs 8,209/-.

60. These heads of claim are rejected.

Annual /leave

61. The 1st Claimant was paid Kshs 8,838/- being pro-rated leave for 2009/2011.

62. The 2nd Claimant on her part was paid Kshs 5,024/- as prorated leave.

63. These heads of claim are rejected.

Off duties

64. The Claimants were paid Kshs 4,546/- and Kshs 1,650/- respectively on account of off days. They did not lay any proper evidential basis for any other off days.

Normal and double overtime

65. Some of the pay slips annexed to the Memorandum of Claim indicate that overtime was being paid. On a balance, and based on the material placed before Court, these heads of claim are declined.

Public holidays

66: Again, some of the pay slips annexed indicate that work on public holidays was compensated. This relief is also declined.

Compensation

67. The Court has reached the conclusion that the Claimants were constructively dismissed. They had served the Respondent for about two years each.

68. Based on the length of service, the Court awards them the equivalent of three months gross wages as compensation assessed as Kshs 32,154/- and Kshs 25,200/- respectively.

Underpayments

69. The 1st Claimant sought Kshs 58,587/- as underpayments from 3 July 2009 to 31 January 2010 by dint of Legal Notice No. 70 of 2009 and Legal Notice No. 98 of 2010.

70. Pursuant to Legal Notice No. 70 of 2009, the prescribed minimum wage for a shop assistant outside Nairobi, Mombasa and Kisumu from 1 May 2009 to 30 April 2010, was Kshs 7,636/- exclusive of house allowance. When 15% house allowance was factored the wage was Kshs 8,781/-.

71. The 1st Claimant did not produce any pay slips for this period. The employment letter dated 1 January 2010 indicated the pay was Kshs 10,718/- but did not state effective date of the wage. The Court would find this wage was effective 1 January 2010.

72. The Respondent knew it was facing a claim for underpayments. It did not produce the requisite pay records. The 1st Claimant's testimony was that she earned Kshs 5,000/- up to January 2010. The 1st Claimant should have been earning Kshs 8,781/- per month inclusive of house allowance. The Court therefore finds that for the 6 months she was underpaid by Kshs 22,686/-. (Kshs 8,781 x 6 = Kshs 52,686/- less Kshs 5,000 x 6 = Kshs 30,000).

73. From 1 May 2010 to 30 April 2011, the prescribed minimum wage for a shop assistant outside Nairobi, Mombasa and Kisumu exclusive of house allowance was Kshs 8,400/-. With 15% house allowance factored, the total wage was Kshs 9,660/-.

74. The 1st Claimant testified that she earned Kshs 5,000/- till January 2010. The appointment letter set the wage at Kshs 10,718/-.

75. The 1st Claimant's pay slips for June and July 2010 show that the basic wage was Kshs 5,655/- while the house allowance was Kshs 848/- (total of Kshs 6,503/-).

76. The parties effectively separated in March 2011 and thus from May 2010 to February 2011, some 10 (ten) months, the 1st Claimant was underpaid by Kshs 31,570/-.

77. The 2nd Claimant sought Kshs 6,280/- as underpayments from 1 May 2010 to 31 December 2010 pursuant to Legal Notice No. 98 of 2010.

78. The prescribed basic minimum wage for a shop assistant outside Nairobi, Mombasa and Kisumu exclusive of house allowance from 1 May 2010 to 30 April 2011 was Kshs 8,400/-.

79. The 2nd Claimant annexed her pay slips for May 2010 (Kshs 6,956 basic pay), October 2010 (Kshs 7,826/- basic pay), November 2010 (Kshs 7,826/- basic pay) and December 2010 (Kshs 7,826/- basic pay).

80. It is clear she was underpaid and because the Respondent did not contest the calculations as advanced, the Court awards her the Kshs 6,280/- as claimed.

81. Before concluding the Court would urge parties to interrogate documents annexed to pleadings and not leave it to the Court to interpret them while preparing judgment.

Conclusion and Orders

82. The Court finds and holds that both Claimants were Shop Assistants and they were constructively dismissed and awards them and orders the Respondent to pay them

83. 1st Claimant

(i) One month wage in lieu of Notice Kshs 10,718/-

(ii) 3 months wages as compensation Kshs 32,154/-

(iii) Underpayments July/Dec 2009 Kshs 22,686/-

(iv) Underpayments May 2010/2011 Kshs 31,570/-

TOTAL **Kshs 97,128/-**

84. 2nd Claimant

(i) One month wage in lieu of Notice Kshs 8,400/-

(ii) 3 months wages as compensation Kshs 25,200/-

(iii) Underpayments Kshs 6280/-

TOTAL **Kshs 39880/-**

85. Claimants to have costs.

Delivered, dated and signed in open Court in Nakuru on this 5th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Co. Advocates

For Respondent Mr. Mugambi instructed by Mugambi Nguthari & Co. Advocates