



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 811 of 2012

LUCY NYANDIA MWANGI.....
CLAIMANT

VERSUS

MATHENGE AND MUCHEMI
ADVOCATES.....RESPONDENT

Rika J
Cc. Elizabeth Anyango

Mr. C.Kimathi instructed by the Law Firm of C.Kimathi and Company Advocates for the Claimant

Mr. James Joroge instructed by the Law Firm of Joroge and Company Advocates for the Respondent

ISSUE IN DISPUTE: UNLAWFUL AND UNFAIR TERMINATION

AWARD

1. The Respondent is a Law Firm registered and carrying on its business at Nairobi Kenya. The Claimant was employed by the Respondent with effect from 2nd December 2003, as a Receptionist/ Typist. She earned a gross monthly salary of Kshs. 12,000. Unfortunately, G.K. Mathenge, a Founder of the Respondent Law Firm passed away. On 15th April 2011, the Respondent wrote a letter to the Claimant stating:

“Following the sad demise of the late Mr. G.K. Mathenge Advocate, your employment contract with him automatically lapsed on the 21st March 2011.”

This is the origin of the dispute. The Claimant felt termination was unlawful and unfair. She was not paid terminal benefits. The Employment Act 2007 was not honoured. She filed the Statement of Claim on 11th May 2012, in which she seeks:-

- a. Severance pay of 15 days’ salary for each of the 7 ½ years completed in employment, on a salary of 16,000 per month, amounting to Kshs. 60,000;
- b. Certificate of service;
- c. Costs of the Claim;

- d. Damages for unfair termination;
- e. Interest; and
- f. Any other relief the Court may deem just to grant.

2. The Respondent filed its Statement of Reply on 6th June 2012. It argues that Mathenge & Muchemi Advocates was initially constituted as a sole proprietorship. Upon the demise of G.K. Mathenge the sole Proprietor, the Law Firm was reconstituted, extinguishing all the contractual obligations [if any] hitherto owed to the Claimant. The Respondent does not owe the Claimant any obligation under the Employment Act 2007, or any other Act. The contract was not unfairly terminated. The Claimant was a member of the National Social Security Fund and not entitled to any severance pay. She was supplied with the Certificate of Service. She does not merit any damages. The Respondent prays for dismissal of the Claim with costs to the Respondent.

3. Nyandia testified on 23rd October 2012. Agnes Wairimu Njoroge, an Advocate of the High Court of Kenya working for the Respondent, gave evidence on behalf of the Respondent on the same date. The Claimant filed her closing submissions on 12th October 2012, while the Respondent did so on 23rd November 2012. The dispute was last mentioned in Court on 30th November 2012 when parties were advised Award would be delivered on notice.

4. The Claimant told the Court that her duties included receiving of Clients; making telephone calls; and other general administrative duties. Her initial appointment was by word of mouth. She was issued with a letter confirming her, dated 6th August 2004. She was confirmed with effect from the date she reported for duty, 2nd December 2003. Her contract of employment was terminated on 21st March 2011 by M/S Njoroge and Mr. Waweru Mathenge, Advocates, upon the death of the Managing Partner G.K. Mathenge. G. K. Mathenge was working with M/S Njoroge. The Claimant was promised she would be paid her terminal benefits in due course; she was paid nothing. She pursued her claim for benefits. In August 2011, she was paid salary for 21 days worked in March 2011; leave balance of 21 days; and accrued leave of 21 days. In total she was paid Kshs. 15, 351.

5. Her salary was Kshs. 16,000 on the date of termination. She was not issued with the certificate of service. She asked for a recommendation letter in vain. She requested for severance pay, but the Respondent would not budge. Nyandia asked to be paid severance based on the 7 ½ years worked. The Respondent told her there was no money. She instructed her lawyer to make a demand upon the Respondent. The Respondent did not settle. The Claimant came to Court seeking the prayers shown at the beginning of this Award.

6. She testified on cross-examination that she was employed by G.K. Mathenge. The Law Firm was under G.K. Mathenge and Waweru Mathenge as Partners. Waweru's name was on the Law Firm's letterhead. She was employed at Nairobi. G.K. Kibira worked at Nyeri. G.K. Mathenge died on 21st March 2011. It was then that Nyandia received the lapse of employment letter. She was advised to reapply for the job by Mr. Waweru Mathenge and M/S Njoroge, which she did unsuccessfully on 18th April 2011. The Law Firm did not cease to operate. Mr. Muchemi had left earlier, while Mr. Kibira was based at the Law Firm in Nyeri. The Claimant was aware there would be other applicants. She did not have a diploma in law. She was not shown the certificate of service dated 17th August 2011. She conceded she was subscribed to the N.S.S.F and contributions were remitted by the Respondent. She was paid Kshs. 15,351. Redirected, she clarified that she reapplied for the job on the Advice of Waweru and Njoroge. G.K. Mathenge employed her in 2003 on behalf of the Law Firm. She was an employee of the Law Firm.

7. Njoroge was called to the Kenyan Bar on 20th May 2004. She joined Mathenge & Muchemi Advocates in August 2010. She worked as an associate of G.K. Mathenge. He was a sole proprietor. In 2004, Muchemi left to serve in the Public Service. G.K. Mathenge passed away on 21st March 2011. Njoroge, and Waweru Mathenge, a beneficiary under the late G.K. Mathenge's Estate, reconstituted the Law Firm.

Waweru Guandaru Mathenge and Agnes Wairimu Njoroge were registered as the partners, and a Certificate of Registration of a Change of Particulars issued. Njoroge remained the active partner, with Waweru Mathenge employed elsewhere as a Corporate Lawyer.

8. The Respondent requested the Claimant for details of the Partnership. Her Advocates furnished the Respondent with particulars listing G.K. Mathenge and G.K. Kibira as the partners. This was on 18th June 2012. After the demise of G.K. Mathenge, the new Partners requested new and old employees to apply for various openings. The Claimant was not successful. Some of the old employees were successful, and together with new employees were taken in. The Claimant was allowed to continue working for a few days in the transition, as a casual employee and was compensated. The Respondent has prepared her certificate of service. N.S.S.F dues were paid erratically before the new Partners took over. Njoroge consulted N.S.S.F and the Firm was allowed to pay the arrears gradually. Eventually, the Firm paid and was reimbursed by the Estate of G.K. Mathenge.

9. On cross-examination, Njoroge testified that G.K. Mathenge was the Sole Proprietor at the time he died. Njoroge was his Associate. She reported G. K. Mathenge's demise to the Law Society of Kenya. The LSK gave her authority to transact the Firm's Bank Accounts. She would not transact without authority. Her mandate was to secure clients' interests. She conceded that the Firm's employees mattered to her also. She is now running the Firm in partnership. She employed Nyandia as a casual employee between 22nd March 2011 and 30th April 2011. It is shown in the certificate of service. There were other employees, such as Messengers and Court Clerks. The witness denied that she took advantage of the employees. She did not have a contract with the Claimant. She negotiated the arrears with N.S.S.F to ensure the Firm was up-to-date on its statutory contributions. She told the Court on redirection that the authority from LSK was not given to facilitate any dealings with the employees. These were former employees, and not Njoroge's employees. The Respondent urges the Court to throw out the Claim.

The Court Finds and Awards:-

10. There is common evidence that the Claimant was employed on 2nd December 2003, as the Receptionist/ Typist for the Law Firm of Mathenge and Muchemi Advocates. She was employed by G.K. Mathenge who was the Founder and Managing Partner of the Firm. Her first salary was Kshs. 12,000. She was confirmed in position through a letter given by G.K. Mathenge on 6th August 2004. It is agreed that G.K. Mathenge died on 21st March 2011. On 15th April 2011, the Claimant received a letter from the Respondent advising that her contract of employment lapsed automatically, following the death of G.K. Mathenge. The Claimant was asked to hold over up to 30th April 2011, during which period the Respondent explained in the termination letter that: *"You may be called upon from time to time to provide any necessary assistance in the said ongoing determinations of the state of affairs of the now deceased business entity, where in any event such engagement shall strictly be on casual terms at a remuneration to be agreed on."* It is not contested that the Claimant was asked by Waweru and Njoroge to apply for re-employment. She did so and was unsuccessful. She does not deny that she was paid Kshs. 15, 351 in terminal benefits.

11. Evidence provided by the Respondent shows the Respondent was registered under the Registration of Business Names Act Cap 499 the Laws of Kenya, on 12th February 1979. Registration was given to two individuals, Wanjuki Muchemi and Gichuru Kireru [G.K.] Mathenge. The Claimant was asked to give details of the Partnership, and named the Partners as G.K. Mathenge and G.K. Kibira, in her Furnishing of Particulars issued to the Respondent's Advocates, dated 18th June 2011. The furnishing was done under Order 30 Rule 1 of the Civil Procedure Rules 2010. This is a Rule that has no relevance in the proceedings of the Industrial Court, which are governed by the Industrial Court [Procedure] Rules 2010. The Industrial Court only borrows from the Civil Procedure Rules as may be expressly provided for by the Industrial Court Procedure [Rules] 2010 themselves. The second point on this wrong information supplied by the Claimant is that she was not under obligation from any Labour and Employment Laws, to give details to an employer, disclosing to the employer who she thought the identity of the employer to be. Employees should not be made to shoulder the burden of unmasking the legal or business structures adopted by their employers. Such a burden would imperil the employees' rights granted by the

Constitution, to access full industrial justice. From the evidence of the parties, it is clear the Law Firm was initially in the names of Mathenge and Muchemi. G.K. Kibira was named as a Partner in the letterhead working at the Nyeri Office, but not a Legal Partner entered in the Register of Business Names.

12. Waweru Mathenge was working with G.K. Mathenge as early as 2004. Muchemi resigned in 2004 to join Public Service of Kenya. Kibira was in Nyeri, which was not shown to be an integrated business with Nairobi. Njoroge on her part joined G.K. Mathenge in 2010. She was an Associate to G.K. Mathenge. She testified that Waweru was not working as a lawyer in the Firm, but worked as a Corporate Lawyer. At the time G.K. Mathenge died, there were two Lawyers actively running Mathenge & Muchemi at Nairobi- G.K. Mathenge and Agnes Wairimu Njoroge. G.K. Mathenge passed away on 21st March 2011. Waweru Mathenge and Agnes Wairimu became registered as the persons carrying on the business of Mathenge & Muchemi Advocates, on the same day G.K. Mathenge died, 21st March 2011. Waweru Mathenge is a beneficiary under the Estate of G.K. Mathenge. Njoroge did not say exactly what Waweru Mathenge is to G.K. Mathenge, beyond being a Legal Associate and Beneficiary. Njoroge herself was an Associate of G.K. Mathenge at the time of his death. By securing registration as the new Partners managing the affairs of Mathenge & Muchemi Advocates, it can be presumed that, the two became the successor employers of all employees working for the Law Firm, at the time of G.K. Mathenge's death.

13. An *employer* is defined both by statutory law and the common law. The Employment Act 2007, the Labour Relations Act 2007 and the Industrial Court Act 2011 define an *employer* to include, "**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, the foreman, manager or factor of such person, public body, firm of corporation.**" This makes it possible for other persons acting for the principal employer to be held to be employers themselves. Managers, agents and factors in businesses can be employers. An Associate or Manager in a Law Firm can be an employer. An Associate or Manager who exercises decisional control; defines the work to be done by the employees; controls the tools of trade of the business; and who perhaps even pays the employees their salaries, can be deemed to be an employer. The law deliberately broadens the definition of an *employer* so that the employee is not technically barred from accessing redress for employment wrongs, from employers who hide behind intricate legal and business formations. The Labour Institutions Act 2007 adopts a slightly different definition of the term employer, closer to the impugned Work Injury Benefits Act 2007. It defines the term to mean, "**a person, including the government, who employs or has employed an employee and where appropriate includes: [a] an heir, successor or transferor of an employer; or [b] the agent, director, or any person authorized to represent the employer.**" Under this definition Waweru and Njoroge could be deemed to have employed Nyandia. Waweru was a beneficiary under the Estate of G.K. Mathenge. He and Nyandia transferred, or inherited the business from G.K. Mathenge. They have at one time or the other, been authorized to represent Mathenge & Muchemi Advocates. The term *employee* is defined across the Statutes as "**any person employed for wages or salary and includes an apprentice of indentured learner.**" The common law uses a four-fold test in determining the existence of an employment relationship. These are: **the control test; the ownership of the tools test; the chance of profit/ risk of loss test; and the integration test.** The control test looks at whether the person defines duties to the employer, and determines how the duties are performed. The common law holds that "**the principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.**" The ownership of the tools test holds that the employer must provide the tools for performance of labour. The employer owns the tools and must bear the cost of insuring and maintaining the tools of work. The chance of profit/ risk of loss test requires that the employer alone assumes the responsibility for any profits and losses the business may sustain. The employee does not assume any responsibility and must be paid his salary at the end of the agreed period. The last test on integration examines if the service provided by the worker, is performed as an integral part of the business, or done on behalf of the business but not integrated into that business. The work done by the employee must not be accessory to the business. Did the contract of employment of Nyandia lapse automatically upon the death of G.K. Mathenge?

14. In view of the term *employer* as defined by statutory and common law, the answer is no. Mathenge & Muchemi Advocates did not *close* its business on the demise of its Founder. It did not *change* the nature of its business; it continues to be in the business of legal practice. The business *named* did not change. It

remains the Law Firm of Mathenge and Muchemi Advocates. The only thing that changed is that G.K. Mathenge left by death and Wanjuki Muchemi by Public Service appointment, and have been replaced by Waweru Mathenge and Agnes Njoroge. The *place* of business has not changed. The assertion by the successor employers that the Claimant's contract of employment was automatically terminated upon the death of G.K. Mathenge, was not a valid termination reason, under section 43 of the Employment Act 2007. The result is that termination was unfair under Section 45 of the Employment Act, for which the Claimant is entitled to compensation.

15. If the Respondent was convinced after the death of G.K. Mathenge that it did not wish to proceed with the old employees, then it ought to have come out openly and advised the employees it considered the contracts terminated by reason of death or restructuring, and proceed to offer redundancy benefits under Section 40 of the Employment Act. It was not sufficient to tell the employee that her contract had automatically lapsed by reason of death. It ought to have declared redundancy and offered redundancy package. If a business owner dies, and the business stops trading because he or she has died, redundancy law comes into play, because redundancy is the "*loss of employment, occupation, job or career, by involuntary means, through no fault of the employee.*" In this case the business did not cease operations, and it would be inappropriate to invoke the redundancy law. The deceased's personal representative, or the successor employers where the business continues, would be responsible for payment of redundancy dues. Where the employer has died and the employee is not re-employed, the employee is taken as having left employment by reason of redundancy. An employer in the circumstances would include any person, who as a consequence of the death of the original employer has inherited the power to run the business. Waweru inherited the business through both professional and consanguine ties. Njoroge did so as a Professional who had served as an Associate to G.K. Mathenge and, by registration with Waweru as the successor Partners. She effectively took the control and management of the Firm, obtained the blessings of the Law Society of Kenya to run the Firm's bank accounts, and even settled the Firm's liabilities with the N.S.S.F, in consultation with the Estate of G.K. Mathenge of which Waweru was a beneficiary. This was a business in continuity. The successor employer does not, in employment law, have to be the personal representative as understood in the law of succession. In this case, both Waweru and Njoroge qualify to shoulder responsibility for any redundancy benefits to employees, in the event they deemed the death of G.K. Mathenge to result in termination of the employees' contracts. The other way one may look at it is that after the death of G.K. Mathenge, the successor employers felt there was need to restructure the Law Firm. They may have felt the need to move away from the old way of business administration. They would be free to do so, but were under obligation to consult the employees in a clearly drawn redundancy process, where alternatives to redundancy, and payment of redundancy benefits were to be considered. The Court is however persuaded that there was no genuine redundancy situation. The Respondent did not see the death of G.K. Mathenge as resulting in redundancy and offered no redundancy payments. The employer was comfortable having the employees left to struggle to find out their actual employment status, and entitlements under the law, after the death of the Founder. The failure to give the Claimant valid reason or reasons for termination amounts to unfair termination. The Court does not consider the claim for severance pay under section 40 to have merit, but finds termination was unfair. The Court would also like to point out in conclusion, that service pay is regulated under Section 35 of the Employment Act. Section 35 [6] lists circumstances under which an employee would not be eligible to access service pay. Among the ineligible employees are those due for pension under the National Social Security Fund. This law does not have anything to do with severance pay, which is paid on redundancy, under Section 40 of the Employment Act. The redundancy law requires payment of a minimum of 15 days' salary for each year completed in service as severance pay. The Claimant would not therefore have been barred from earning severance pay by her N.S.S.F membership. In the end, the Court does not see this as a case where redundancy law was to be invoked.

Severance pay is not payable. Service pay is not payable as Nyandia was subscribed to the N.S.S.F. Compensation for unfair termination is payable. *It is ordered:-*

[a] Termination of the Claimant's contract of employment on the ground that the Respondent's Founding Partner G.K. Mathenge had died, was unfair termination;

[b] The Respondent shall pay to the Claimant 10 months' gross salary amounting to Kshs. 160,000;

[c] The said amount shall be paid within 30 days of the delivery of this Award;

[d] The Claimant to collect her certificate of service from the Respondent forthwith; and

[e] No order on the costs.

Dated and delivered at Nairobi this 9th day of May 2013

James Rika

Judge