



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1131 OF 2012

GLADYS NAROCHO OKUMU.....CLAIMANT

VS

TIDY SITE CLEANING SERVICES LTD.....1ST RESPONDENT

CHARLES MWANGI KARIUKI.....2ND RESPONDENT

AWARD

Introduction

1. The Claimant brought this claim against the 1st and 2nd Respondents by way of a Memorandum of Claim dated 3rd July 2012 and a Supplementary Memorandum dated 19th October 2012. The 1st and 2nd Respondents filed a joint Response on 22nd August 2012 but did not attend the hearing in spite of due service. The matter therefore proceeded *ex parte* with Miss Mwila instructed by Omboga & Co Advocates appearing for the Claimant. The Claimant testified on her on behalf and her Counsel filed written submissions.

The Claimant's Case

2. According to the Claimant, she was employed by the Respondents by verbal agreement on 24th October 2009 as a cleaner at a monthly salary of Kshs. 7,000. She worked as such until 26th June 2012 when her employment was terminated verbally without any lawful cause.

3. The Claimant therefore claimed the following:

- a. One month's salary in lieu of notice.....Kshs. 8,579.80
- b. Salary for June 2012.....8,579.80
- c. Underpayment for 32 months.....31,801.60
- d. Accrued leave for 2.8 years.....12,210.00
- e. Severance pay @ 15 days per year.....9,900.00
- f. Overtime.....213,840.00
- g. Public holidays.....8,910.00
- h. Rest days.....42,240.00
- i. Compensation for loss of employment.....118,401.20
- j. House allowance for 32 months @ 15%.....41,184.00
- k. Certificate of Service
- l. Costs

The Respondents' Case

4. In their Response, the Respondents admitted that the Claimant was employed by the 1st Respondent as a general cleaner on contract basis. The Respondents denied the Claimant's claim that she had been unlawfully terminated. Rather, the Claimant was suspended for gross misconduct for a period of two weeks. The Respondents had also received complaints against the Claimant from its customers. Upon expiry of the two weeks' suspension period, the Claimant's Supervisor, Simon Murage recalled her but she declined to resume duty.

5. It was the Respondents' case that the 2nd Respondent, being merely the Managing Director of the 1st Respondent, was not properly joined in these proceedings as no reasonable cause of action against him had been demonstrated.

6. The Respondents further stated that the Claimant was not employed for a continuous period of time since the 1st Respondent was a small establishment engaged on short-term contracts to supply cleaning services to its customers. The 1st Respondent's employee retention was therefore dependent on the volume of business.

Findings and Determination

7. The first issue for determination in this case is whether the 2nd Respondent is properly joined in these proceedings. The 1st Respondent being a limited liability company is a legal entity with capacity to enter into contract, sue and be sued in its own name. The corporate identity of companies and other bodies corporate is well grounded in law and all things being equal Courts are encouraged to respect the corporate identity.

8. In the case of **Aviation and Allied Workers Union Vs Kenya Aerotech Limited (Industrial Court Cause No 1494 of 2011)** this Court held that:

“Only in cases where it has been demonstrated that the corporate veil is being used to defeat the ends of justice, would the Court allow lifting of the veil. No such argument has been advanced in this case and I therefore find no basis for enjoining the 2nd Respondent in these proceedings.”

9. In the case before me, no reason as to why the 1st Respondent's Managing Director was joined in these proceedings was advanced. The name of the 1st Respondent is consequently struck out from these proceedings.

10. I will now address the Claimant's claim for unfair termination.

Section 47(5) of the Employment Act, 2007 provides that:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

11. Each party must discharge its respective burden. The Claimant told the Court that the Respondent terminated her employment verbally without any lawful cause. The Respondent on the other hand maintained that the Claimant was suspended for two weeks and when she was recalled she declined to resume duty. Indeed, the Claimant confirmed in her pleadings that she did not wish to continue working for the Respondent.

12. In the circumstances no case for unfair termination has been made out and the claim for unfair termination therefore fails and is dismissed. Since the Claimant did not prove unfair termination of her employment, the claim for one month's salary in lieu of notice also fails. The Claimant is however entitled to her salary for June 2012, accrued leave and service pay. The claims for underpayment, overtime, public holidays, rest days and house allowance were not proved and are dismissed.

13. The final effect of this Award is as follows:

a) Salary for June 2012 (Regulation of Wages Order 2012+15% H/A) Kshs. 9,867

b) Accrued leave (9,867) x 56 days).....18,418

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c) Service pay (@ 15 days per completed year of service)9,867

Total.....38,152

The Respondent is directed to issue the Claimant with a Certificate of Service.

Each party will bear their own costs.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*