



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 23 OF 2013

HELLEN NJOKI

KIBOI.....CLAIMANT

-VERSUS-

HARUN MWANGI

MURIITHI

PETER NDIRITU

WAMBUGU

SUSAN WANJIRA MWARARI (SUED FOR AND ON BEHALF OF WIYUMIRIRIE WATER AND SANITATION

SOCIETY).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2013)

JUDGMENT

The claimant is **Hellen Njoki Kiboi**. She filed a memorandum of claim on 21.02.2013 through Gakuhi Chege & Company Advocates. She prayed for:

- a. **A declaration that she is a lawful employee of the respondent society.**
- b. **A finding that the respondent's conduct of withholding her salary payments and allowances is wrongful, unlawful and unfair together with an order for payment thereof forthwith.**
- c. **The respondent to pay claimant's unpaid dues being salary from 1.09.2011 to 31.01.2013 being Kshs.212,500.00; unpaid overtime of Kshs.30,198.00; three years annual leave for 2010, 2011 and 2012 being Kshs.37,500.00; and monthly pay of Kshs.12,500 per month until determination of the suit.**
- d. **Costs of the cause and interest on (c) above.**

The respondent **Wiyumiririe Water and Sanitation Society** filed the statement of defence on 23.04.2013 through Nderitu Komu & Company Advocates. The respondent prayed for dismissal of the claim with costs.

The case was heard on 29.10.2013. The claimant (**CW1**) and her witness Jeremia Wanyiri Wambugu (**CW2**), the respondent's former chairperson gave evidence to support the claimant's case. The

respondent's witness was Harun Mwangi Muriithi (**RW**), the respondent's chairperson effective 11.02.2012.

The respondent runs a business of selling water to the community. The claimant applied for employment, she was interviewed on 9.02.2010 and was the successful candidate. She was given the letter of appointment on 10.02.2010 and she gave her acceptance being **exhibits 1(a) and (b)** on the memorandum of claim.

The claimant reported at work on 12.02.2010 and at termination, her salary was Kshs.12,500.00 per month. On 24.02.2012, the respondent's offices were demolished in circumstances involving the conflicts in the respondent's leadership and management. Thus, the claimant's employment came to an abrupt termination and she testified that she had not been paid from 1.09.2011 to 24.02.2012. The claimant also testified that she claimed overtime of Kshs.30,198.00 because it was agreed she reports at work 9.00 am but she had to report at 6.00 am every day, Monday to Saturday to sell water up to 9.00 am after which she would embark on her regular duties as agreed. The claimant relied upon **exhibit 5(a)** on the memorandum of claim to urge her claim for overtime of over 700 hours. It was her testimony that throughout her service she never went on annual leave and she prayed for pay as per the memorandum of claim. The claimant dropped her claim for future earnings. She denied signing the alleged agreement of 18.12.2012 at the labour office and attached to the defence under which her case was to be decided by the respondent's general meeting.

CW2 testified that he was the respondent's chairperson from 27.1.2010 to 24.02.2012. His term as chairperson ended during the dispute for implementation of a new water tariff. He testified that the claimant was employed by the respondent as a clerk from 9.02.2010 till 24.02.2012 when the respondent's offices were demolished. He confirmed that the respondent owed the claimant salaries and the claimant never took annual leave throughout her service. He confirmed that the claimant sold water between 6.00 am and 9.00 am and was entitled to the overtime as claimed.

RW testified that the claimant failed to account to the new management the daily revenues of water sales. Instead, she continued to cooperate with the outgoing respondent's officials. Thus, effective 13.02.2012, the claimant ceased to work for the respondent. The matter was discussed before the labour officer and the agreement of 18.12.2012 signed but the claimant failed to appear at the respondent's general meeting of 28.12.2012. The minutes showed that the claimant's issue was not discussed because she was absent at the meeting. RW confirmed that the claimant was at work on 13.02.2013 but did not know that she was an employee.

The only issue for determination in this case is whether the claimant is entitled to the remedies as prayed for.

First, the court has considered the evidence on record and finds that the claimant was the respondent's employee at all material time. In particular, CW2's evidence confirms that the respondent employed the claimant. RW gave contradictory evidence on this point and his evidence was found incredible.

Secondly, the respondent has submitted that **exhibit 5(a)** on the claim showing that for September, 2011 the claimant was paid Kshs.9,000.00 and there was no evidence that the claimant ever earned Kshs.12,500.00 per month. Further, it was submitted that **exhibit 1(e)** on the claim was prepared with the suit claim in mind and should not be relied upon to show that the claimant was to be paid Kshs.12,500.00 per month.

The court has considered the submissions and finds that there is no ground to doubt the documents as filed and CW2 confirmed the claimant's case. For the unpaid salary between 1.9.2011 to 24.02.2012 and as submitted for the claimant, the court finds that the claimant is entitled to **Kshs.73,214.30**. The court finds that the claimant is entitled to leave for 2 years and 2 months being **Kshs.26,458.00** as submitted for the claimant and as per section 28 of the Employment Act, 2007. The court finds that the claimant has established the claim for overtime and she is entitled to **Kshs.30,198.00** as submitted.

In conclusion, the court enters judgment for the claimant against the respondent for:

1. **a declaration that the claimant was a lawful employee of the respondent society;**
2. **a declaration that it was wrongful, unlawful and unfair for the respondent to withhold the claimant's salary and allowances as the claimant was entitled to the payment;**
3. **the respondent to pay the claimant Kshs.129,870.60 by 15.12.2013, in default interest at court rates to be payable from the date of the filing of the suit, 21.02.2013; and**
4. **the respondent to pay costs of the suit.**

Signed, dated and delivered in court at Nakuru this Friday, 29th November, 2013.

BYRAM ONGAYA

JUDGE