



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1605 OF 2012

**KENYA UNION OF EMPLOYEES OF VOLUNTARY AND CHARITABLE ORGANIZATIONS
(KUEVACO).....CLAIMANT**

VERSUS

DAGORETTI CHILDREN'S CENTRE.....1ST RESPONDENT

FEED THE CHILDREN KENYA2ND RESPONDENT

JUDGMENT

This case was commenced through a Memorandum of claim dated 7th September, 2012 and filed in court on 11th September 2012. The Claimant is a Trade Union and filed the case on behalf of the Grievants (1) Susan Wanjiku Kimani, (2) Esther Wanjiku, (3) Susan Wanjiru Ngugi, (4) Margaret Mbutu Njoroge, (5) Margaret Wairimu Njoroge, (6) Zipporah Wanjiru, (7) Mary Wanjiku Wandaka, (8) Monica Wanjiku Njoroge, (9) Grace Njoki Muchengi, (10) Grace Hunja, (11) Pamela Julian Aloo, (12) Nancy Gathoni Wamwaki, and (13) Jane Njeri Njoroge

The claimant alleges that the 1st and 2nd Grievants were summarily dismissed while the 3rd to 13th Grievants were declared redundant. The particulars of the Grievants are captured in the table below:-

THE TRAPS OF RES JUDICATA AND LES PENDENS

The Grievants herein were:

No	Name of Grievant	Date Employed	Starting Salary	Job Occupation	Date Terminated	Cause Termination	Last Salary
1	Susan Wanjiku Kimani	3/08/1989	300.00	Child Care/ House Mother	12.02.2002	Dismissal	6,000
2	Esther Wanjiku	1/08/1989	800.00	Child Care/ House Mother	12.02.2002	Dismissal	6,000
3	Susan Wangui Ngugi	14/5/1972	60.00	Child Care/ House Mother	08.04.2002	Redundancy	6,000
4	Margaret Mbutu Njoroge	1/10/1980	450.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000
5	Margaret Wairimu Njoroge	9/04/1992	600.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000
6	Zipporah Wanjiru	1/10/1977	240.00	Child Care/ House Mother	08.04.2002	Redundancy	6,000

				House Mother			
7	Mary Wanjiku Wandaka	1/07/1969	120.00	Child Care/ House Mother	08.04.2002	Redundancy	6,000
8	Monica Wanjiku Njoroge	2/08/1980	300.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000
9	Grace Njoki Muchengi	1/02/1984	300.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000
10	Grace Wambui Hunja	1/01/1996	1,200	Child Care/ House Mother	08.04.2002	Redundancy	5,000
11	Pamela Julian Aloo	1/01/1992	800.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000
12	Nancy Gathoni Wamwaki	25/6/1973	60.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000
13	Jane Njeri Njoroge	1/02/1986	300.00	Child Care/ House Mother	08.04.2002	Redundancy	5,000

The first 2 Grievants were dismissed on 12th February, 2002 by letters dated 8th February, 2002 on the grounds of theft of sugar which was impounded by the guards at the gate when the 2 Grievants were searched while leaving the work premises. Susan Wanjiku was paid Kshs.4,230 on account of earned leave and 8 days worked less loans and advances of Kshs.2,000/= leaving a balance of 2,920 which she received. Esther Wanjiku was paid Kshs.4,500 on account of days worked and earned leave.

The Grievants declared redundant were paid as follows

No	Grievant Names	Year of Service	Days leave & Notice	Exgratia	Total
3	Susan Wangui Ngugi	29	9,980.00	5,000	14,980.00
4	Margaret Mbutu Njoroge	21	8,280.00	5,000	13,280.00
5	Margaret Wairimu Njoroge	10	9,172.00	5,000	14,172.00
6	Zipporah Wanjiru	24	8,960.00	5,000	13,960.00
7	Mary Wanjiku Wandaka	32	9,172.00	5,000	14,172.00
8	Monica Wanjiku Njoroge	21	9,172.00	5,000	14,172.00
9	Grace Njoki Muchengi	18	7,470.00	5,000	12,470.00
10	Grace Wambui Hunja	6	5,000.00	5,000	10,000.00
11	Pamela Julian Aloo	10	6,901.00	5,000	11,901.00
12	Nancy Gathoni Wamwaki	28	5,000.00	5,000	10,000.00
13	Jane Njeri Njoroge	16	9,172.00	5,000	14,172.00

The Claimant alleges that both the dismissals and redundancies were wrongful. The dismissals were wrongful as the 1st and 2nd Grievants were condemned unheard and dismissed for no valid reason and therefore contrary to natural justice while Grievants No. 3 to 13 according to the claimant were declared redundant without compliance with Section 72 of the Finance Act No. 6 of 1994 which provided for the procedure for redundancy.

The claimant seeks the following orders:

1. That, the Honourable Court finds that, the dismissals/terminations of all the thirteen (13) Grievants "were unfair and wrongful".
2. That, the Honourable Court finds that, all the thirteen (13) Grievants lost their job occupations at the

initiative of the Respondents, therefore, they were declared redundant.

3. That, the Honourable Court finds that, the Grievants redundancies were "unprocedural, unlawful, unfair and wrongful".

4. That, the Honourable Court orders the Respondents to reinstate the Grievants antebellum, without loss of employment rights; status, benefits and privileges.

5. That, the Honourable Court orders the respondents to pay kshs.9,913,170/= with interest at Court rates from February, 2002 to the Grievants as follows:

No	Grievant Name	(A) Reasonable Notice	(B) Overtime	(C) Severance pay	(D) Compensation	Total
1	Susan Wanjiku Kimani	216,000.00	538,857.90	36,000.00	72,000.00	862,857.90
2	Esther Wanjiku	216,000.00	538,857.90	36,000.00	72,000.00	862,857.90
3	Susan Wangui Ngugi	216,000.00	545,700.55	87,000.00	72,000.00	920,700.55
4	Margaret Mbutu Njoroge	180,000.00	454,728.10	52,500.00	60,000.00	747,228.10
5	Margaret Wairimu Njoroge	180,000.00	454,728.10	25,000.00	60,000.00	719,728.10
6	Zipporah Wanjiru	216,000.00	545,700.55	72,000.00	72,000.00	905,700.55
7	Mary Wanjiku Wandaka	180,000.00	454,728.10	80,000.00	60,000.00	774,728.10
8	Monica Wanjiku Njoroge	180,000.00	454,728.10	52,500.00	60,000.00	747,228.10
9	Grace Njoki Muchengi	180,000.00	454,728.10	45,000.00	60,000.00	739,728.10
10	Grace Wambui Hunja	180,000.00	232,353.25	15,000.00	60,000.00	487,353.25
11	Pamela Julian Aloo	180,000.00	380,603.15	25,000.00	60,000.00	645,603.15
12	Nancy Gathoni Wamwaki	180,000.00	454,728.10	70,000.00	60,000.00	764,728.10
13	Jane Njeri Njoroge	180,000.00	454,728.10	40,000.00	60,000.00	734,728.10
Total KSHS.						9,913,170.00

6. That, the Honourable Court orders the Respondents to pay back

Kshs.28,000.00 with interest to Susan Wangui Ngugi (Grievant No. 3) in respect of CM Civil Case No. 13269 of 2003 Court Costs.

7. That, the costs hereof be in the cause.

The Claimant relied on the following authorities:

- (i) Exodus 3:9, 10 and 16
- (ii) Articles 22 (2) (d) and 258 (2) d) of the Constitution of Kenya, 2010.
- (iii) Section 62 (1) (a) of the Labour Relations Act, 2007

- (iv) Section 22 of the Industrial Court Act, 2011
- (v) Genesis 29:15-20
- (vi) Section 54 (1) of the Labour Relations Act 2007

The Respondent filed a Memorandum of Defence on 31st October, 2012 in which it denied the claim on the grounds that the suit was time barred, the cause of action having arisen in 2002 while the claim was filed in 2012, that the claim in respect of Susan Wangui is res judicata having been determined in CMCC No. 13269 of 2003; that Susan Wanjiku Kimani and Esther Wanjiku had instituted labour disputes and were paid further terminal dues following successful conciliation by a Labour Officer; that Susan Kimani filed yet another labour complaint in 2005 and the Respondent once again paid her further terminal dues following her assurance that the matter would be finally concluded following the payment. The Respondent further avers in the defence that the Grievants were lawfully terminated in accordance with the law applicable at the time and were paid full terminal benefits.

The Respondent denies that the employees were declared redundant as alleged by the Claimant. The Respondent avers that the Grievants are not entitled to overtime. The Respondent also denies that it is liable to pay costs incurred by Susan Wangui Ngugi in CMCC 13269 of 2003. The Respondent avers that the claim is scandalous, vexatious and an abuse of court process and should be struck out on a preliminary basis.

The case was disposed off by way of oral and written submissions. The Claimant was represented by Mr. Janitor Odin Boaz Otieno instructed Claimant Union.

The Respondent was represented by Mrs. Wetende instructed by Kaplan & Straton Advocates.

I have considered the written submissions as well as oral submissions of the parties. In my opinion the issues for determination are the following:

1. Whether the suit by the Claimant is statute barred
2. Whether the claim is res judicata
3. Whether the claim has been settled and
4. Whether the Grievants are entitled to the remedies sought.

On 25th March 2014 Mr. Otieno informed the court that the cases of Grievants 3 to 13 is res judicata and the claims were withdrawn. This case therefore proceeded only in respect of the 1st and 2nd Grievants, that is Susan Wanjiku Kimani and Esther Wanjiku.

Mr. Otieno on behalf of the claimant submitted as follows:

Section 11 of the Employment Act (Cap 226) (now repealed) provides that once food is given to an employee it remains the property of the employee. He submitted that the Grievants who were engaged as house mothers were given sugar for consumption during the night and the employees selected one of them to take care of the sugar. That since the employees were not given a place to keep it, the Grievants were taking the sugar home for safe custody when the guard at the gate arrested them with the sugar, and the quantity found on the Grievants was very little. He submitted that the Grievants were

never given a hearing. They were never issued with a statement of the offences alleged to have been committed, that the action was against Section 17 of the then Employment Act (Cap 226) (now repealed) which provided for employees to contest the reasons for their dismissal, that the dismissals were also in contravention of ILO Convention No. 158. Mr. Otieno submitted that the dismissals were unconventional, unlawful, unjust, unfair and wrongful. He submitted that since the jobs that the Grievants were engaged in were advertised, their dismissal amounted to redundancy and they were entitled to redundancy benefits. He prayed also for reasonable notice of 12 months. Mr. Otieno also submitted that the Claimants who were supposed to work for 8 hours worked an extra 3 and a half hours daily as overtime. He however dropped the claim for leave and prorata leave. Mr. Otieno stated that he relied on the Memorandum of claim and annexures thereto.

Mrs. Wetende for the Respondents submitted that the 1st and 2nd Grievants were dismissed from employment after being found to have been engaged in theft of sugar intended for children at the Children's home in which they were working as house mothers. She submitted that the employment contracts of the Grievants did not provide for them to be provided with sugar.

Mrs. Wetende also submitted that the claim was filed 10 years after the cause of action arose. She submitted that under Section 38 of the repealed Employment Act employers were only required to keep employment records for 12 months. She submitted that after dismissal the claimants reported a labour dispute. That pursuant to the dispute the summary dismissal was reduced to normal termination on humanitarian grounds and the Grievants were paid their terminal dues in the presence of the Labour Officer. That in 2005 Esther Wanjiku Kimani went back to the Labour office and after conciliation the Labour Officer ordered that a further Kshs.8,800/= to be paid to her. The money was paid to the labour office and an official receipt issued. That after that the Grievant again tried to pursue the matter with Kituo cha Sheria and the Respondent had to explain the position to Kituo Cha Sheria.

Mr. Wetende submitted that Susan Wanjiku Kimani yet again filed an application in the Principal Magistrates court being Misc. Application No. 340 of 2005 seeking leave to file suit as a pauper. That in the draft statement of claim filed with the application the Grievant claimed Kshs.6,000/= as salary in lieu of notice and Kshs.39,000 as severance pay.

In the ruling delivered on 15th February, 2006, the application by the Grievant was dismissed on the grounds that the claim as framed in the draft statement of claim did not disclose a cause of action against the Respondent. Mrs. Wetende submitted that the Grievant did not appeal against the ruling. On 23rd March 2012 the Grievant withdrew the claim but the withdrawal had no effect as the application had already been dismissed on 15th February, 2006.

Mrs. Wetende submitted that the claimant had failed to prove its case, that the law applicable at the time of dismissal of the Grievants permitted dismissal on reasonable suspicion, that ILO Convention No.158 relied upon by the Claimant was not applicable, that the suit is time barred and cannot be salvaged, that the proceedings at the Labour office concluded the Grievants case when payment was made by the Respondent.

Mrs. Wetende further submitted that the dismissal of the Grievants was procedural and they were paid what was due to them. She further submitted that the Claimant had not proved that the sugar was given to them. That they were entitled to only 1 month's notice. She submitted that they were not declared redundant and are not entitled to severance pay. She submitted that the other heads of claim such as overtime were an afterthought as they were not contained in the claim filed in the Labour office and magistrates court.

The Respondent relied on the following authorities:

1. Charles Sairo v KNH Misc Application No. 9 of 2012
2. Maria Machocho v total Kenya Limited [2013] eKLR
3. Rift Valley Textiles v Oganda [1992] LLR 308 CAK
4. Kenya Oilfield Services v Njorgoe [1985] LLR 1459 (CAK)
5. Central Bank of Kenya v Nkabu [2002] 1 EA 34 (CAK)
6. Barclays Bank of Kenya Ltd v Njau [2006] 2 EA 15
7. Githinji v Mumias Sugar Co. Ltd (1994) LLR 1373 (CAK)
8. Abudi ali Mahadhi v Ramadhani Saidi & Another, [1999] eKLR
9. Jackson Butiya v Eastern Produce Kenya Limited Industrial Cause No. 335 of 2011
10. Jonathan Zacharia and others v Magadi Soda Ltd Cause No. 45 of 2012

Having summarized the evidence, I now consider the issues for determination as outlined above.

1. Whether the suit is statute barred

The Respondent submitted that the claimant's suit is statute barred as the cause of action arose in 2002 while the claim was filed in 2012, 10 years later against the provisions of the Limitations of Actions Act. The claimant however submitted that under the Trade Disputes Act (repealed) a claim was commenced by reporting to the Labour Officer and such claim could not be statute barred before the Minister finalized conciliation.

This case has been the subject of 2 cases in the Magistrates Court's and 2 labour disputes. The first case is No. 13269 of 2003 filed by Susan Wangui Ngugi against Dagoretti Children's Centre in the Resident Magistrates Court, Milimani. The case was for severance pay and notice. The case was dismissed by Mrs. P. Gichohi, SRM.

The second is a Labour Dispute by Susan Wanjiku and Esther Wanjiku No. LD 64/ASA/2 of March 2002. This was concluded by payment of terminal dues of Kshs.4,560/= to Esther Wanjiku and Kshs.2,920/= to Susan Wanjiku before Mr. A. S. Abdirashid, Labour Officer, on 5th March 2002. Susan Wanjiku again reported a dispute in 2004 and in 2005 was paid a further Kshs.8,800 at the Labour office on 30th March 2005.

The Claimant Union also reported a dispute to the Minister for Labour by letter dated 5th June 2006. The dispute was not resolved and was referred to the Industrial Court on 18th May 2009. It would appear that the Claimant did not follow up the dispute.

While all this was going on, the Grievant Susan Wanjiku filed an application for leave to sue the Respondent as a pauper. The application was dismissed by Hon. Okundi, SRM on 15th February, 2006 on grounds that she had not established a prima facie case against the Respondent. This was in PMCC

MISC App. No. 340 of 2005. The Grievant purported to withdraw this case by notice of withdrawal dated 20th February 2012 and granted by the court on 23rd March, 2012. However, as pointed out by the Respondent the case had long been dismissed on 15th February 2006 and the withdrawal was of no impact. It is after this that the Claimant filed the present case.

From the foregoing it would not be proper to conclude that the Claimants case is time barred as it has been undergoing adjudication of one form or another since 2002.

2. Whether the claim is res judicata

From the facts stated above, the claim by both Grievants have been concluded severally. They were first concluded at the Labour office on 5th March 2002 when the Grievants accepted payment of settlement before Mr. Abdirashid, Labour Officer; secondly in 2005 when the Respondent deposited Kshs.8,800/= at the Labour office on 30th March, 2005. The case was again concluded by the rulings of Hon. Okundi on 15th February 2006 and by Hon. Gichohi, SRM. No appeals were preferred against the decisions of Hon. Okundi and Hon. Gichohi.

For the foregoing reasons I find that the claim for Susan Wanjiku Kimani is res judicata while the claim for Esther Wanjiku is settled as she never raised any complaint after the settlement by the Labour Officer in March 2002.

3. Whether the claim has been settled

As stated above, both claimants were paid terminal benefits of Kshs.4,560 for Esther Wanjiku and Kshs.2,920 for Susan Wanjiku on 5th March, 20002 pursuant to a Labour Dispute. Susan Wanjiku was paid a further Kshs.8,800/= on 8th March, 2005 pursuant to a second Labour Dispute. Thereafter her claim for severance pay and notice was dismissed by the court. Another application by Susan Wanjiku seeking leave to sue as a pauper was also dismissed on the ground that the draft plaint she filed did not disclose any cause of action against the Respondent in the plaint she was claiming 1 month's salary in lieu of notice and severance pay.

The present claim is for re-instatement, which cannot be granted by virtue of Section 12 (3) (vii) of Industrial Court Act which prohibits re-instatement more than 3 years after termination of dismissal. Susan Wanjiku also claims refund of court fees in civil case No. 13269 of 2003 which was dismissed and she is not entitled to refund of costs.

The claimant further seeks overtime pay which according to the Regulation of Wages and Conditions of Employment Act (repealed) should have been claimed within 2 years. I find that the claim by the 1st and 2nd Grievants have been either settled or are time barred.

4. Whether the Grievants are entitled to the remedies sought

Having found that the claims by the Grievants have either been settled res judicata or are out of time, I find that the Grievants are not entitled to any of the prayers sought.

The upshot is that the Claimant's case has no merit and is dismissed. There shall be no orders for costs.

Read in open Court this 6th day of October, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Gitaka holding brief for Mrs. Wetende for Respondent

Janitor Odin Boaz Otieno for Claimant



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