



Case Number:	Cause 2 of 2018
Date Delivered:	05 Dec 2018
Case Class:	Civil
Court:	Employment and Labour Relations Court at Malindi
Case Action:	Judgment
Judge:	Linnet Ndolo
Citation:	Agripina Nthambi Ngondu v Sandro Giouse [2018] eKLR
Advocates:	Mr. Mwabonje for the Claimant, Ms. Chepkwony for the Respondent
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claim Dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CAUSE NO 2 OF 2018**

**AGRIPINA NTHAMBI NGONDU.....CLAIMANT**

**VS**

**SANDRO GIOUSE.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Agripina Nthambi Ngondo against Sandro Giouse. The claim is documented by a Memorandum of Claim filed in court on 15<sup>th</sup> January 2018.
2. The Respondent filed a Response on 25<sup>th</sup> January 2018 but did not appear for the hearing. The Court therefore heard the Claimant *ex parte* on 27<sup>th</sup> September 2018. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that she was employed by the Respondent as a caretaker at Villa No. 62 at Karibuni Villas. She was paid an all-inclusive salary of Kshs. 10,000.
4. The Claimant claims that she was underpaid. She adds that initially she used to work late into the night and from November 2015, the Respondent made her to stay in the Villa to ensure safety of equipment therein.
5. The Claimant avers that on 30<sup>th</sup> January 2017, the Respondent terminated her employment without notice. She states that the Respondent had heard that the Claimant was assisting a sick neighbour and demanded to know why. The Claimant explained to the Respondent that she had known the neighbour for a long time and there was no conflict with her work as caretaker. The Respondent told the Claimant to either delink herself from the neighbour or she would be dismissed.
6. The Claimant told the Respondent that he was being unfair and asked him to pay her dues for the 3 years she had worked for him. The Respondent failed to pay the dues prompting the Claimant to report a dispute at the Labour Office in Malindi. The Respondent went to the Labour Office on 22<sup>nd</sup> March 2017 and denied that the Claimant was his employee. He stated that she was his guest. The Labour Officer tabulated what was due to the Claimant but the Respondent declined to pay.
7. The Claimant therefore claims the following:
  - a) One month's salary in lieu of notice.....Kshs. 21,213
  - b) Gratuity for 3 years.....36,715
  - c) Unpaid leave for 2017.....51,401
  - d) Underpayment for 3 years.....353,207
  - e) Compensation for loss of employment.....254,556

f) Costs plus interest

### **The Respondent's Case**

8. In his Response dated 25<sup>th</sup> January 2018 and filed in court on even date, the Respondent states that there was no and has never been any contract of employment between the Claimant and the Respondent. He denies that the Claimant was a caretaker in his Villa No 62.

9. The Respondent states that the Claimant was at all material times employed by one Gianni Aggrigo of Villa No 36 and was also running a business known as Agripina Boutique Shop at Karibuni Villas. The Respondent adds that the Claimant sought assistance to keep her business items after work in one of the Respondent's rooms.

10. The Respondent further states that he and the Claimant were in a partnership to buy a plot on behalf of an organisation known as ONLUS to help the local community and also to make beads for sale. The Respondent therefore used to send money to the Claimant for the joint venture. However, after opening the business, buying the plot, building rooms and huts and after the Respondent investing a lot of money in the joint venture, the Claimant started threatening the Respondent and excluded him from the venture.

11. The Respondent accuses the Claimant of obtaining money from him by false pretences.

12. The Respondent avers that due to the mutual friendship and trust he had with the Claimant, he assisted her financially. The Claimant also sold a car to the Respondent at a purchase price of 3,000 Euros but failed to transfer the logbook. The car had since disappeared.

### **Findings and Determination**

13. The first issue for determination in this case is whether there was an employment relationship between the parties capable of enforcement by the Court. In his defence, the Respondent denies ever employing the Claimant and states that she was a guest in his Villa and that the two of them had entered into some form of a partnership to set up a business as well as a social project for the local community.

14. In support of her case, the Claimant produced several Western Union documents showing transfer of funds from the Respondent to her. The value of transfer ranges from 95 to 500 Euros. The Claimant sought to explain the discrepancies by stating that apart from paying her a monthly salary of Kshs. 10,000, the Respondent would sometimes send her money to purchase items for the Villa.

15. The Court was unconvinced. First, there was no single document to show payment of the sum of Kshs. 10,000 which the Claimant alleges was her monthly salary; second, the Claimant made no effort to provide details of the items she claims to have purchased for the Respondent's Villa.

16. This is a specialized court which deals exclusively with employment and labour matters. A party laying a claim arising from employment must therefore establish by way of evidence, the existence of an employment relationship. It is not enough for a claim to state that they were employed by a particular person or entity. Even in cases where employment is by way of oral agreement, the claimant must call independent evidence to support their word.

17. Moreover, not every work relationship is an employment contract and not every exchange of money evidences an employment relationship. Section 2 of the Employment Act, 2007 defines an employee as:

***“a person employed for wages or a salary and includes an apprentice and indentured learner.”***

18. The same section defines an employer as:

***“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any***

*individual.”*

19. In *John Kamau Mburu v Program for Appropriate Technology in Health (PATH) & another [2015] eKLR* this Court held that the mere fact that parties work together does not automatically give rise to an employment relationship.

20. From the evidence on record, it seems to me that the parties had some form of work relationship for their mutual benefit with a tinge of social responsibility. This arrangement did not however give rise to any employment relationship as defined in law.

21. The Claimant’s claim is therefore without basis and is dismissed with costs to the Respondent.

22. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF DECEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mwabonje for the Claimant

Ms. Chepkwony for the Respondent



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