



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1333 OF 2013

INVAILET BUYESHE AMBEI.....CLAIMANT

VERSUS

LUKE PLAPAN.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent on 20th August 2013. The Claimant averred that she was employed by the Respondent on or about September 2009 as a house help at a monthly salary of Kshs. 10,000/-. It was averred that the Claimant used to cook, clean the house, take care of the child and wash clothes for the respondent family of 6 people. She averred that she was not issued with a letter of employment and that she was not paid house allowance throughout the employment or any leave allowance. She averred that the Respondent did not make any contributions to NSSF and NHIF. It was averred that the Claimant worked for the Respondent for 3 years 3 months within which period she never went on leave. She averred that in or about December 2011 while the Claimant was on a bus returning to her work place at the Respondent's home in Nairobi, the Respondent telephoned her and terminated her employment without notice or payment of her terminal dues. She averred that the dismissal was done contrary to the principles of natural justice and Section 41 of the Employment Act 2007. She thus sought payment of one month's salary in lieu of notice, leave allowance, house allowance from September 2009 till December 2011 at 15% of basic pay, gratuity at 15% of basic pay, 12 months salary compensation for wrongful dismissal and costs of the claim. To her claim she attached her verifying affidavit and statement as well as the demand letter dated 7th March 2012 from Kituo Cha Sheria.

2. The Respondent filed a response on 10th October 2013. It was averred that he never employed the Claimant at any one time as alleged by the Claimant in her pleadings or at all and put the Claimant to strict proof thereof. The Respondent averred that in the circumstances he was a stranger to the averments in the Claimant's claim. He averred that upon receipt of a demand letter from Kituo Cha Sheria the Respondent's lawyers replied on his behalf indicating that the Claimant had never been his employee. The Respondent averred that in his reply to the letter he sought proof from the Claimant of the said employment but none was supplied by the Claimant's lawyers. The Respondent thus sought dismissal of the suit which he termed as an abuse of the court process, frivolous, vexatious, scandalous, baseless and an amount to extortion by the Claimant fit for dismissal in entirety with costs to the Respondent.

3. On 16th July 2015, pursuant to leave granted by the Court, the Claimant filed a list of documents to exhibit a transaction by Mpesa, the money transfer platform of a cell phone service provider.

4. The Claimant testified on 17th November 2014 and stated that she knew the Respondent as her

employer from 2009 till December 2012. She testified that she used to work for the Respondent and care for his children. She stated that she was not given a letter of appointment and that she earned Kshs. 10,000/- per month. She used to clean, cook, care for the child named L N and was paid in cash. She testified that she commenced working for the Respondent when the child was just 3 days old. She testified that she was allowed to go home for Christmas in 2012 and was advised she would be sent cash. She was to return on 2nd January and when she called him in December he did not pick her calls and when she reached Kakamega she called and when she reached Kericho he called her and told her he had found someone else. She got to Nairobi that evening and she sought to go and see him but he declined. She testified that he asked her through the caretaker to go and collect her things and was not allowed into the house. She stated that she collected her belongings and was sent Kshs. 9,000/- by the Respondent. She testified that there was no payment of NSSF and that she was unemployed for 5 months. She stated that if the Respondent stated he did not know her he would be lying. She testified that the Respondent wrote a letter which he left at the gate and that it was the Respondent who used to pay her salary. She stated that she asked for a letter when she was dismissed and that the Claimant gave the caretaker the letter then later took it and tore it up.

5. In cross-exam by Mr. Wamiti, she testified that she knew the Respondent and had known him for 3 years. She testified that she had the letter the Respondent wrote after her dismissal and that the letter was among the papers filed in Court. It was put to her that the letter was not among the documents filed and she replied that it was there. She testified that she used to be paid in cash and that she was paid 9,000/- by Mpesa. She stated that the house was near the road that goes to Methodist and was an apartment and that it had a caretaker and other tenants. She testified that Boniface the caretaker is the one who had told her. She identified the apartment as apartment no. 4 and could not tell how many apartments were there. When asked whether she was a day to day casual she stated it was not true and testified that she did not have NSSF card or number. She stated she resided in Kijiji. She testified that she used to sleep in the apartment.

6. In re-examination by Mr. Khalwale, she testified that the letter was written on 9th January 2013 and the letter was to the effect that the Claimant does not enter the premises.

7. The Respondent testified on the 9th July 2015. He testified that he worked at Central Bank and lived in Kileleshwa. He stated that he did not know the Claimant and got to know her when a demand letter from Kituo Cha Sheria was served on him. He contacted his lawyers who responded to the letter. He stated that no one contacted him after the reply by his lawyers and was only informed a case had been filed. He testified that he asked members of his household if they knew the Claimant and he was informed that she is known as one of the people who used to look for work at the apartments. He testified that he lived at an apartment at Mazeras Road and at the time he lived with his wife, a son named K and a house boy named Robert. He stated that it was his wife who interacted with and engaged help. He testified that his wife is a house wife and the times she went to the store the house boy would babysit. He stated that the Claimant never spent a night in his house and was therefore not an employee. He testified that he never paid her directly and did not send her any Mpesa payments. He sought the dismissal of the suit with costs.

8. In cross-examination by Mr. Khalwale, he testified that he was a resident of Zenith Heights Apartments and gave his telephone number. He stated that he never sent the Claimant any money. On further examination regarding a Safaricom sourced document, the Court gave a ruling upon objection by Mr. Wamiti for proper production of the document through the list of documents filed.

9. The hearing resumed on 1st December 2015 and in the absence of the counsel for the Claimant the cross-examination was closed. In re-examination, the Respondent testified that he did not know the person to whom the 9,000/- was sent but on asking his wife she confirmed sending the 9,000/- to the Claimant. He testified that she made the payment using his phone. He stated she would be a witness and would testify. He stated that was the only statement that appeared on the paper.

10. Further hearing was deferred to 18th January 2016 upon application by the defence counsel Mr. Njage who sought time to call the caretaker who was unable to leave his place of work that day and the

Respondent's wife who was up-country following funeral of the Respondent's mother. Hearing resumed on 18th January 2016 when 3 witnesses testified.

11. The Respondent called Robert Amadiva who testified that he worked at Vichanga in Mombasa as a driver for a construction company at the time of testifying and that he had been engaged by the Respondent as a house boy and lived in the Respondent's house at Kileleshwa at the time. He relied on his statement filed on 14th January 2016. In it he stated that he was employed by Monica the wife of the Respondent and was paid Kshs. 8,000/- a month in cash. He stated that he knew the Claimant who did casual work. He stated that he did not remember a time that the Claimant spent a night there as he slept in the apartment. He stated that the Respondent was not involved in the payment of his salary.

12. He was cross-examined by Mr. Khalwale and testified that he knew the Claimant who did not work permanently for the Respondent but worked on and off. He testified that there were 3 people living in the house namely his employer Monica, the Respondent and their son Lucky.

13. On re-exam, he stated that he was employed by the wife to the Respondent – Monica and reported to Monica.

14. The next witness called was Boniface Akula who resided in Kawangware and was the caretaker at Zenith Apartments. He had recorded a statement in respect of the case and relied on it. In it, he stated that he worked at Zenith Apartment's Kileleshwa from January 2009 and used to see the Claimant among other casual labourers who sought work at the apartments. He stated that he got to know the Claimant as Violet the name she used to use to sign in. He stated that all casuals had to leave by 5.00pm as a security requirement and that he did not recall having a conversation with the Claimant on any issue pertaining to the matter before it came to Court.

15. In cross-exam he testified that he was a caretaker from 2009 to date and he knew the Claimant. He stated that the Claimant lived at Zenith Apartment and that he worked both in and out of the apartments and maintained the compound. He testified that no worker lived in the apartment of the Respondent. He stated that the Respondent would get people on casual basis. He testified that the Respondent's wife was not employed and that he could not be involved in the matters of their house. He stated that he did not know where she got her money from and that the Claimant worked but not every day. He testified that he would see the Claimant on errands to the shop and that he did not know what tasks the Claimant performed in the Respondent's house. He stated that the Respondent would notify him or the security officer if he did not want any person to go to his house.

16. In re-exam by Mr. Njage, he testified that there is a book at the gate and the book lists the visitors to the apartments. He stated that he knew the Claimant when the Respondent's wife Monica asked for someone to work for them. He testified that the Claimant would work in other houses and that she would be registered as a visitor and not a resident of apartment A4. He testified that she would be sent for vegetables at the market.

17. The next witness was Monica Jeptun Chemirmir who testified that the Respondent is her husband and that she knew the Claimant. She had recorded a statement filed in Court on 14th January 2016 and in it had stated that she resided at Zenith Apartments A4 with her husband and child and that at the time the house boy Robert Amadiva resided on the premises. She stated that a number of times though not consistently she had engaged the Claimant and would have the Claimant run errands for her. She stated that she would use her husband's safaricom line to make calls or make Mpesa payments for groceries and other expenditure. She stated that her husband was not aware she had sent the money to the Claimant using his phone and that he was far too busy to be involved in the hiring of casual labour house helps in their home. She stated that she was engaging the Claimant as a casual on and off up to around March 2012 when she stopped seeing the Claimant amongst the women who sought casual jobs at the gate.

18. In cross-exam by Mr. Khalwale, she testified that she lived at the apartments from 2008 and that Robert was her house boy and that she knew the Claimant who she gave casual work. She testified that between 2008 and 2010 she engaged the Claimant. She stated that there were 3 people resident in the

house, her husband, her son Lucky Kiptoo and her house boy. She testified that she used to pay the staff including the Claimant. She stated that she has a business with her husband and makes between 200,000/- and 300,000/- a month. She testified that she is the one who used her husband's phone to send the Claimant Kshs. 9,000/- to buy household items for her. She stated that she had sent the money to the Claimant to buy 3 big *sufurias* that go for 2,400/- a piece. She stated that she did not have a record of the work she gave the Claimant or of the records of payments made to the Claimant. She testified that Robert is her employee and that she had no record of his employment and that payments were in cash. She testified that the Claimant would only do some washing and clean the house and nothing else. She stated that the Claimant worked for her as a casual and would be paid in cash. She testified that she used her husband's phone to send the money to the Claimant and that she used his phone to transact business with his knowledge.

19. In brief re-examination by Mr. Njage she testified that when the Claimant came for work she would work for the day and was paid per day. She stated that she shared the phone with her husband especially when she was making payment for electricity and water and did not see any reason to inform the husband of the payment. She stated the money was for *sufurias* and vegetables.

20. Parties opted to file written submission and the Claimant filed her submissions on 20th January 2016 and the Respondent filed his submissions and list of authorities on 3rd February 2016. The Claimant submitted that the issue for determination was whether the Respondent ever employed the Claimant as a househelp. The Claimant submitted that the Respondent called 3 witnesses who confirmed that the Claimant worked in the Respondent's house. The Claimant submitted that the Mpesa transaction on 4th February 2012 was after the termination. She submitted that if the Respondent's wife had business earning her between 200,000/- to 300,000/- why did she need to use the Respondent's phone to make payment? The Claimant submitted that she was employed by the Respondent and was not issued with a contract of service and neither was she issued with a document to show she was employed by the Respondent. The Claimant submitted that she was terminated on phone without notice or reason and that Section 45(i) of the Employment Act provides that no employer shall terminate the employment of the employee unfairly. She submitted that she had made out a *bona fide* case of unfair termination and that she was not housed and never went on leave. The Claimant submitted that she was terminated verbally and not given any notice or reason for the termination. She submitted that the actions of the Respondent were in breach of the Constitution and they amounted to unfair labour practice and unfair termination as defined under the Employment Act.

21. The Respondent submitted that the issues for determination were whether or not the Respondent was the Claimant's employer for purposes of the claim herein, whether or not the Claimant's claim was valid and whether or not the Claimant is entitled to the reliefs sought in her pleadings. The Respondent submitted that the evidence adduced clearly showed that the Respondent never at any time engaged the Claimant in any form of employment; casual, contractual or permanent. He submitted that it was his wife who had confirmed engaging the Claimant on and off on totally casual basis and that she earned enough each month to be able to make payments. The Respondent submitted that with admissions by the Respondent's wife the Court cannot find that the Respondent was the employer of the Claimant. The Respondent submitted that the Claimant's case was fraudulent and that her demeanour in cross-examination was of an untruthful witness. He submitted that the Court should find the entire case fraudulent and thus invalid and dismiss it. The Respondent relied on Sections 107, 108 and 109 of the Evidence Act and Sections 7, 8 and 37 of the Employment Act as well as the case of **Wyckliffe Daniel Bengi v M/S Rgnal Oil (Kenya) Limited [2015] eKLR** with regard to proof of existence or non-existence of an employer/employee relationship.

22. The claim fails or succeeds on the evidence adduced. In the case, the Claimant averred she was employed by the Respondent. She asserted that she worked for 3 years and some months for the Respondent. The evidence that was adduced for the Respondent is that the Claimant was employed by the wife of the Respondent one Monica Chemirmir. In a case involving parties to an employment dispute, it is incumbent on the one who alleges to prove. The Claimant having allegedly worked for the Respondent for 3 years should have had more than what she presented to Court as evidence. The fact that she sued the husband of the employer does not aid her case at all. At best, she should have joined the two if she was

not sure of the exact parameters of the employment relationship. She testified that she had a letter penned by the Respondent attached to her pleadings only to turn around and state that the letter was taken by the Respondent and torn. Her evidence was incoherent as was part of the Respondent's testimony. It was however not the Respondent's duty to prove employment and as such the Claimant failed to prove her case on a balance of probabilities. In the final analysis, the Court deems an order for costs for either party to be punitive to the other and thus orders that each party bears their own costs and hopes the matter finds rest at this point.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of June 2016

Nzioki wa Makau

JUDGE