



**Machika v Raval (Employment and Labour Relations Cause
2139 of 2017) [2024] KEELRC 1720 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1720 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2139 OF 2017**

AN MWAURE, J

JUNE 28, 2024

BETWEEN

ROSELINE MACHIKA CLAIMANT

AND

MUKESH RAVAL RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated October 23, 2017

Claimant's Case

2. The Claimant avers that the Respondent engaged her services as a chef/house help at a monthly salary of Kshs 30,000, however, she was not issued with a letter of employment.
3. The Claimant avers that she used to work from 5am to 6 pm including weekends and public holidays without overtime pay.
4. The Claimant avers that she was not housed and the Respondent did not pay her house allowance as stipulated by the law.
5. The Claimant avers that on 10/10/2017, the Respondent terminated her services without notice or reason. This caused her tremendous anguish and financial embarrassment as she could not afford her basic needs.
6. The Claimant avers that she was not given any prior notice of the termination and neither was she paid her terminal dues after working 15 months without going on leave.
7. The Claimant avers that the Respondent did not make statutory contributions to NHIF and NSSF.



Respondent's Case

8. In opposition to the Memorandum of Claim, the Respondent filed a response dated February 3, 2022.
9. The Respondent avers that the Claimant was employed on temporary basis for a period of 3 months from July to October 2017.
10. The Respondent avers that the Claimant was awarded one day off every week as required by law and that she was employed strictly as a cook/chef and he had 2 other domestic staff in charge of domestic chores.
11. The Respondent avers that Claimant's employment was terminated because her services was no longer needed and that the Claimant was aware she was employed on a temporary basis.

Evidence in Court

12. The Claimant (CW1) adopted her witness statement dated 23/10/2017 as her evidence in chief and produced her demand letter as her exhibit.
13. CW1 testified that the Respondent was not paying her house allowance, NSSF and NHIF. On the date of termination , she reported to work but after breakfast, she was informed she was terminated and asked to leave.
14. During cross examination, CW1 testified that she used to cook from 6 am but she would start preparing the ingredients from 5 am. She used to work from 5 am to 6 pm or later in the evening.
15. CW1 testified that she used to open the gate and wash cars even though there was a shamba boy.
16. CW1 testified that she did not work for 3 months when the Respondent's wife had travelled; the wife used to travel for a week and come back, she worked for 15 months.
17. CW1 testified that there was a serious system issue and they asked for an upgrade. The excel computation was what she would use to try and handle the challenges.
18. CW1 testified that she worked for 15 months and used to sign vouchers all of these months therefore its not clear why the Respondent only produced 3 vouchers. She was however not given copies of the vouchers.

Respondent's case

19. The Respondent (RW1) adopted his witness statement dated 03/02/2022 as his evidence in chief and produced his exhibits R1-3 list of documents dated 29/09/2023 as his exhibits.
20. During cross examination, RW1 testified that the Claimant worked as her chef earning Kshs 30,000. However, he neither gave her an employment letter nor termination letter.
21. RW1 testified that the Claimant worked for him for 3 months when his wife had travelled to the UK. His wife did not go for one week and come back.
22. RW1 testified that the Claimant did not proceed on leave for that period and she did not pay her terminal dues.



Claimant's Submissions

23. It is the Claimant's submission that the Respondent agreed during cross examination that he did not issue the Claimant with a termination notice which is unlawful. The Claimant was informed of the decision when she reported to work and after doing part of the day's work.
24. The Claimant submitted that Section 10 of the [Employment Act](#) provides that an employer ought to particularize the terms of employment before the start of the employment. There is no indication in pleadings or during trial that the Claimant and Respondent's relationship was to run for 3 months and the Claimant was aware of this.
25. The Claimant submitted that the Respondent chose to produce 3 petty cash vouchers to support his narrative that the Claimant was engaged for 3 months. The Claimant was informed of her termination when she reported to work showing there was no notice given therefore she is entitled to salary in lieu of notice.
26. The Claimant submitted that the fact that she was given a day off during the week does not mean she went for annual leave. The Claimant served the Respondent for 15 months which fits the timeline within which an employee needs to go for annual leave.
27. The Claimant submitted that she was not housed by the Respondent and the petty cash vouchers submitted did not indicate whether Kshs 30,000 was inclusive of house allowance.

Respondent's Submissions

28. The Respondent submitted that the Claimant was employed for a period of 3 months from 01/07/2017 to 02/10/2017 when his wife was overseas attending to her ailing mother. The Claimant did not produce any document to confirm the alleged employment from 01/07/2016 while the Respondent gave both oral and documentary testimony demonstrating his case that he had employed the claimant only for three months.
29. The Respondent submitted that the Claimant was not lawfully terminated as she was employed for a specific period of 3 months which was orally explained to the Claimant.
30. The Respondent submitted that the Claimant is not entitled to any claim sought. One month's notice salary is not payable as there was no further notice required in the temporary arrangement between the parties.
31. The Respondent further submitted that the Claimant was paid a gross salary above the salary of a house help. She was housed by the Respondent and cannot make a claim for house and travelling allowance.

Analysis and Determination

32. Having considered the pleadings, affidavits, submissions and evidence on record, the issues for the Court's determination are:
 - a. Whether the Claimant was employed by the Respondent for 15 months.
 - b. Whether the Claimant's employment was lawfully terminated.
 - c. Whether the Claimant is entitled to the reliefs sought.



Whether the Claimant was employed by the Respondent for 15 months.

33. It is the Claimant's case that she was employed by the Respondent on 01/07/2016 as a chef/house help at a monthly salary of Kshs 30,000, however, she was not issued with a letter of employment.
34. It is trite law that "whoever alleges must prove". Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya states as follows:
- “ 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
 - 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
35. Section 109 of the [Evidence Act](#) continues to state that: -
- “The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”
36. In view of the foregoing, the Claimant failed to prove to this court that she was employed by the Respondent a period of 15 months from 01/07/2016.
37. However, the Respondent vide the petty cash voucher produced in court and which the Claimant testified that she indeed signed the vouchers at the end of each month while receiving her salary clearly demonstrate she was only an employee of the Respondent for 3 months up until the termination of her employment. The court can only be guided by the factual evidence and exhibits produced before it. The claimant has produced nothing whatsoever to demonstrate he period she was employed by the respondent. Therefore the court will in accordance to he documents produced find that the claimant worked for the respondent 3 months as per those documents produced by the respondent.

Whether the Claimant's employment was lawfully terminated

38. Section 47(5) of the [Employment Act](#), Cap 226, Laws of Kenya states: -
- “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.”
39. It is the Claimant's case that on 10/10/2017, she reported to work as usual and undertook her duties of preparing breakfast, however, while serving the same she was informed that her services were no longer required. It is her submission that the Respondent's action amounted to unfair termination of her employment.
40. It is the Respondent's submission that the Claimant was verbally informed her employment was for a specified period of 3 months hence the termination was lawful.
41. However, the Respondent has failed to prove to this court that the Claimant's employment was indeed for a specified term and that the Claimant was aware of the same. The Claimant in fact denied this allegation during her testimony.



42. The law is very clear that for an employer to lawfully terminate an employee's employment, it must demonstrate that there exists both substantive justification and procedural fairness as set out under the *Employment Act*.
43. This was reiterated in *Walter Ogal Anuro vs. Teachers Service Commission* (2013) eKLR which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment as follows;
- “for termination of employment to pass the fairness test, there must be both substantive and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in affecting the termination.”
44. An employer should establish that the termination of the Claimant's employment was justified and for fair reasons. Section 43(1) of the *Employment Act* provides as follows;
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
45. The Respondent herein has failed to prove that he had fair reasons to terminate the Claimant's employment as his explanation that the Claimant was aware she was only engaged for 3 months has not been proven. He has not presented any evidence that the claimant was aware she was only employed for three months.
46. Section 41 of the *Employment Act* provides for procedural fairness, it is not in dispute that the Respondent did not accord the Claimant any chance to defend his case (if any), and was not given any reason for her termination therefore, the termination of the Claimant's employment was unlawful and unfair.
47. The court is therefore persuaded that for the claimant albeit how short she served deserved to have been given a valid reason for termination and to be given time to defend herself. The court rules that the claimant was therefore unlawfully and unprocedurally terminated and so judgment is entered in her favour.
48. Judgment having been entered in favour of the claimant she is entitled to the following relief.
1. One month salary in lieu of notice Ksh 30,000/-
 2. *Pro rata* leave days for 3 months 6,000/-
 3. Leave traveling allowance is not supported in law and is not proved and so is declined.
 4. House allowance not proved as the respondent was categorical he had housed the claimant
 5. Two month salary as compensation for unlawful termination 60,000/-
 6. Certificate of service to be issued within 14 days from today's date.
 7. Claimant is awarded costs as well as interest at court rates from the date of judgment till full payment.
 8. Total award is Kshs 96,000.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JUNE, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

