



Mutua v Center (Cause 1876 of 2016) [2024] KEELRC 1905 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1905 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1876 OF 2016
BOM MANANI, J
JULY 25, 2024

BETWEEN

MARY MUMBUA MUTUA CLAIMANT

AND

TEXAS CANCER CENTER RESPONDENT

JUDGMENT

1. This action was filed by the Claimant to seek redress for what she describes as the unfair termination of her contract of employment by the Respondent. The Claimant avers that the Respondent engaged her services in May 2005 as an assistant nurse. She says that her salary per month was agreed at Ksh. 30,000.00.
2. She contends that at some point in time, the Respondent's supervisor asked her to take care of critically ill cancer patients. However, she felt that she was not able to do so since her qualifications were those of an assistant nurse. She avers that as a result of her position on the matter, the Respondent's supervisor threatened her with assault, a matter which she took up with the police.
3. The Claimant avers that the Respondent's management were unamused by her aforesaid conduct. As a consequence, they unilaterally changed her terms of engagement from assistant nurse to home care nurse. This meant that she was no longer required to report to work at the Respondent's premises but to work remotely by visiting patients in their homes. She was to be paid Ksh. 500.00 per visit.
4. The Claimant contends that shortly after the changes to her terms of service, the Respondent accused her of absconding duty. As a result, her contract of service was terminated.
5. The Claimant says that she sought the assistance of Kituo Cha Sheria to address the matter. However, the agency's letter to the Respondent did not elicit a response. As a consequence, she was forced to institute this action.



6. In the claim, the Claimant prays for a declaration that her contract of service was unfairly terminated. She also prays for pay in lieu of notice and compensation for unfair termination of her contract.
7. The Respondent entered appearance and filed a statement of defense together with a statement by its witness. However, it did not present evidence on oath in the cause.

Issues for Determination

8. After evaluating the pleadings and evidence on record, I consider the following to be the issues for determination in the cause:-
 - a. Whether the parties to the action had an employment relationship.
 - b. If yes, whether the relationship was unlawfully terminated by the Respondent.
 - c. Whether the Claimant is entitled to the reliefs that she seeks through the Statement of Claim.

Analysis

9. Although the Respondent filed a defense to the cause, it did not call witnesses in the matter. As a result, the case was closed without its evidence.
10. The position in law is that where a defendant files a statement of defense but does not call evidence, the statement of defense is of no evidential value. Such defense constitutes a mere statement which has not been established through evidence.
11. In the circumstances, the court is entitled to consider the Claimant's case as uncontroverted. However, she is still required to establish her case to the required legal standard.
12. Alluding to the foregoing, Mativo J (as he then was) stated as follows in the case of *Hydro Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)* (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax) (10 August 2021) (Judgment):-

“The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff. In the instant case, the existence of the contract is not disputed. The defendant filed a statement of defense, but failed to attend the trial. As a consequence, the plaintiff's evidence is uncontroverted. I have considered the evidence before me and the documents submitted. I am persuaded that the plaintiff has demonstrated that the defendants were in breach of the contract. What remains is whether the plaintiff has proved the loss suffered and whether it is entitled to various heads of damages claimed.”
13. In the case before me, the Claimant states that she was hired by the Respondent as an assistant nurse. It is her case that although the Respondent did not issue her with a formal contract of employment, she was paid her salary at the close of every month.
14. The Claimant has produced excerpts of her bank statements for the period between 1st January 2016 and 5th August 2016 to corroborate her contention. The statements establish the fact that the Respondent used to remit the sum of Ksh. 30,348.00 into her (the Claimant's) bank account on monthly basis to settle her salary. The statements cover payments for the months of April, May and June 2016 which are clearly described as “salary”.



15. It does not make sense for the Respondent to have been paying the Claimant a monthly lump sum described as "salary" if the two did not have an employment relationship. The only logical explanation for the payments is that the Respondent was discharging its reciprocal obligation under the contract of service between them to pay the Claimant for services rendered. As such, I am satisfied on a balance of probabilities that the two had an employment relationship. It is so declared.
16. The Claimant avers that the Respondent unilaterally changed her terms of engagement with the consequence that she was required to offer homecare services for patients instead of reporting to the hospital premises. However and shortly thereafter, the Respondent accused her of having absconded duty. She says that this led to the decision to terminate her contract.
17. It is the Claimant's case that the Respondent's action amounted to unfair termination of her contract of service. She contends that the Respondent did not notify her of the reason for terminating the contract. Neither did it take her through a hearing as required by law.
18. The Claimant avers that the Respondent's actions breached the provisions of the Employment Act. As well, the said actions violated her right to fair administrative action which is protected under article 47 of the Constitution.
19. I have considered the Claimant's evidence against the applicable law. Section 41 of the Employment Act obligates an employer to notify an employee of the accusations leveled against him before terminating the employee's contract of service. The section also requires the employer to allow the employee the opportunity to defend himself against the accusations. This contemplates a disciplinary process against the employee.
20. There is no evidence to demonstrate that the Respondent adhered to these requirements of law before it terminated the Claimant's contract. The fact that the Claimant was accused of absconding duty did not mean that she was not entitled to have her case processed in accordance with section 41 of the Employment Act. She was entitled to be informed of the charge against her and allowed a chance to offer her defense before her contract could be terminated. This was not done. As such, I declare the Respondent's decision unlawful.
21. The Claimant has prayed for salary in lieu of notice to terminate her contract. Section 35 of the Employment Act entitled her to notice of twenty eight days before her contract could be terminated. If the Respondent was not ready to issue her with this notice, it was required to pay her salary in lieu of notice in terms of section 36 of the Act. As the record shows, the Respondent did neither of the two. As such, judgment is entered for the Claimant for pay in lieu of notice to terminate her contract in the sum of Ksh. 30,000.00.
22. The Claimant has also prayed for compensation for unlawful termination of her contract. From the record, the parties did not work together for long before the Claimant's contract was terminated. There is also evidence that the Claimant secured alternative employment after her contract with the Respondent was terminated. Taking these factors into account, I award the Claimant compensation for unfair termination of her contract which is equivalent to her salary for six months, that is to say, Ksh. 30,000.00 x 6 = Ksh. 180,000.00
23. The Claimant has prayed for a Certificate of Service in terms of section 51 of the Employment Act. This is a statutory right to a departing employee. As such, the Respondent is ordered to issue the Claimant with the certificate
24. The above award shall attract interest at court rates from the date of this decision.
25. The above award is subject to the applicable statutory deductions.



26. I award the Claimant costs of the case.

Summary of Award

27. After evaluating the evidence on record, the court makes the following findings and attendant orders:-
- a. The parties to the action had an employment relationship.
 - b. The aforesaid relation was unlawfully terminated by the Respondent.
 - c. The Respondent is ordered to pay the Claimant salary in lieu of notice to terminate her contract of service in the sum of Ksh. 30,000.00.
 - d. The Respondent is ordered to pay the Claimant compensation for unfair termination of her contract of service in the sum of Ksh. 180,000.00.
 - e. The above amounts attract interest at court rates from the date of this decision.
 - f. The above amounts are subject to the applicable statutory deductions.
 - g. The Respondent is ordered to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
 - h. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

