

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO 426 OF 2018

GRACE MAKUNGU
MAHONGA.....CLAIMANT

VERSUS

MARKUS
WEISS.....RESPONDENT

JUDGEMENT

Background

1. The Claimant instituted these proceedings through a Memorandum of Claim dated 26th March 2018. She claimed that the Respondent hired her services as a house help with effect from 28th July 2012 but unlawfully terminated the contract on 25th March 2017.
2. The Claimant averred that the Respondent used to pay her Ksh. 15,000.00 per month as salary for her services. She averred that she worked diligently and with loyalty but the Respondent terminated her contract without lawful cause.
3. The Claimant thus prayed for: compensation for unfair termination of her contract; one month's salary in lieu of notice to terminate the contract; service pay; and accrued annual leave pay. She also prayed for interest on the amount prayed for and costs of the suit.

4. During the trial, the Claimant contended that the Respondent employed her in July 2012. She asserted that she worked for him for five years before he terminated her services.
5. The Claimant asserted that her starting salary was Ksh. 13,000.00. She said that her work involved taking care of the Respondent's house, children and dogs.
6. The Claimant mentioned the Respondent's children by name and stated that she used to take care of them. She stated that she was not housed in the Respondent's residence and that she used to report to work in the morning and leave in the evening.
7. The Claimant stated that she was brought to the Respondent's house by one Philomena and the Respondent. She further asserted that she never got to know where the Respondent was working. She stated that the Respondent would visit for a week or two then leave for another one or two weeks.
8. The Claimant stated that the Respondent would sometimes pay her salary through Mpesa. For instance, she mentioned that he paid her using this mode of payment in October, November and December 2016 and on 29th January 2017 and 25th February 2017. She produced Mpesa statements to back her claim.
9. The Claimant further stated that her salary would sometimes be paid by Philomena and Ivy on the Respondent's behalf

- whenever he was out of the country. She contended that Philomena was the Respondent's wife and Ivy was his friend.
10. The Claimant conceded that she had no documentary evidence to demonstrate that the Respondent used to pay her salary before October 2016. However, she clarified that her salary would sometimes be paid in cash.
 11. The Claimant stated that Philomena relocated to Germany with the children in March 2016. However, she stated that she was left behind to continue taking care of the Respondent's dogs.
 12. The Claimant contended that the Respondent stopped her from working in March 2017. She stated that the Respondent was in the country at the time.
 13. The Respondent opposed the claim. He denied having employed the Claimant.
 14. The Respondent averred that at the time the Claimant alleged that she was his employee, he was residing in the Republic of Somalia where he was working for the United Nations support office. As such, he contended that it was not possible for the Claimant to have been working for him at the time.
 15. During trial, the Respondent asserted that he was in Somalia from June 2016 until July 2025. He contended that he only spent a ten days' holiday in Kenya in 2012.
 16. The Respondent averred that his records show that he was in Kenya on an assignment on 3rd October 2012. He further

said that in July 2012, he was in the Republic of Guinea. As such, he denied that he could have engaged the Claimant's services in Kenya on 28th July 2012 as she claimed since he was not in the country.

17. The Respondent contended that the Claimant was not his employee. However, he confirmed that she used to work in the house of his former spouse. He denied that he was part of his former spouse's household.
18. The Respondent admitted that he wrote a letter of recommendation for the Claimant in August 2017. However, he contended that he only did so at the Claimant's request.
19. The Respondent averred that the Claimant told him that it had become difficult for her to procure alternative employment without the recommendation. As such, he contended that she requested him to do the letter to assist her get another job.
20. The Respondent conceded that he occasionally sent the Claimant money. However, he contended that he only did so on the instructions of his former spouse in order to support the Claimant because she did not have a job at the time.
21. The Respondent contended that the Mpesa payments he made to the Claimant were seldom. Therefore, he contended that the Claimant cannot rely on them to assert that he used to pay her salary.
22. The Respondent denied that he was responsible for the Claimant's leave and service pay because he was not her

employer. He however, asserted that it was unusual for someone to work for five years without leave.

23. On cross examination, the Respondent contended that he wrote the letter of recommendation for the Claimant whilst he was in Somalia. He alleged that the Claimant called him to request for the letter and that he wrote it and sent it to her. However, he alleged that he could not recall how the letter was delivered to the Claimant but suspected that he left it with someone who knew her to hand it over to her.
24. The Respondent asserted that he never met the Claimant in person. He asserted that he would live in Gigiri whenever he visited Kenya but would occasionally visit his children.
25. The Respondent confirmed that Philomena was his wife. He conceded that the two had children together.

Issues for Determination

26. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for determination:-
 - a) Whether the parties to the action had an employment relationship.
 - b) If the answer to the first issue is in the affirmative, whether the employment contract was unlawfully terminated.
 - c) Whether the Claimant is entitled to the reliefs pleaded in the Statement of Claim.

Analysis

27. The Claimant alleged that the Respondent was her employer. However, the Respondent disputed this assertion.
28. There is no evidence that the parties ever entered into a written contract of service. However, that alone cannot discount the fact that they may have had an employment relationship.
29. The law recognizes that an employment relation may be entered into orally (see section 8 of *the Employment Act*). Further, the relation may be inferred from the conduct of the parties.
30. The evidence on record shows that although the Respondent denied having been the employer of the Claimant, the latter was working in the household of his spouse and children. Whilst the Respondent asserted that the Claimant was an employee of his spouse, the Claimant contended that it is the Respondent who engaged her services.
31. The fact of the matter is that the Claimant was working in a household where the Respondent's children were staying for purposes of taking care of the said children. The evidence on record shows that the Respondent in fact used to pay the Claimant's salary albeit interchangeably with his spouse.
32. Although the Respondent asserted that he only sent the Claimant money on the instructions of his spouse, no evidence was tendered to support this assertion. The spouse did not testify or do a letter or affidavit to speak to the alleged arrangement.

33. Further, there is evidence that apart from Philomena, another lady by the name Ivy would also sometimes pay the Claimant's salary on the Respondent's instructions. The Respondent did not account for how this lady (Ivy) would pay salary to the Claimant on his instructions. The inescapable conclusion is that she was doing so on his behalf as the Claimant's employer.
34. The fact that the Respondent was the Claimant's employer is further fortified by the fact that he continued to send her money in 2017 after his spouse had left Kenya for Germany. It cannot be said that the Claimant was working for the Respondent's spouse after 2016 since she had already relocated to Germany. Therefore, the only plausible explanation for the Respondent's decision to continue sending her (the Claimant) money is that he was remunerating her for the services of taking care of his dogs and house after his spouse had moved to Germany.
35. The court also takes note of the fact that the Respondent did a letter of recommendation for the Claimant in August 2017 long after his spouse had relocated to Germany. He can only have done so in his capacity as her former employer. This being the case, the court is convinced on a balance of probabilities that the Claimant was the Respondent's employee.
36. The next issue for determination is whether the contract between the parties was lawfully terminated. According to

the Claimant, the Respondent asked her to stop reporting to work in March 2017. The Respondent's response was that he could not have done so because she was not his employee. However, the court has already determined that the two had an employment relationship

37. There is no evidence that the Respondent complied with the requirements of sections 41, 43 and 45 of *the Employment Act* whilst terminating the employment relationship between the parties. At the same time, there is no evidence that the parties agreed to separate mutually.
38. The above provisions of law obligate an employer to demonstrate that the decision to terminate a contract of service is based on valid grounds. The provisions also require that the employee be released from service in accordance with fair procedure. As such, for a decision to terminate a contract of service to be valid, the employer must demonstrate that it (the decision) satisfied the requirements of substantive and procedural fairness (***Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR)***).
39. The Respondent did not comply with these provisions of statute. As such, the separation of the parties was unlawful. It is so declared.
40. In their closing submissions, the Respondent's lawyers make a case for termination of the contract on account of

redundancy. However, this was not the Respondent's case if his pleadings are anything to go by.

41. It is trite that parties are bound by their pleadings and cannot re-characterize their case to be at variance with the pleadings (***Githaiga v Mwangi [2024] KEHC 13449 (KLR)***). It is also trite that parties cannot introduce a new case through submissions as submissions are not evidence (***Mwavula v Waweru t/a Antique Auctioneers Agencies & another (Civil Appeal E374 of 2023) [2024] KEHC 5988 (KLR) (24 May 2024) (Ruling)***). For this reason, the submission that this was a case of redundancy is disregarded.
42. The Claimant prayed for compensation for unfair termination of her contract. Since the decision to sever the employment relationship between the parties was unlawful, she is entitled to this relief. As such, the court awards her compensation for unfair termination of her contract which is equivalent to her salary for five months.
43. Both parties confirmed during the trial that the Claimant's salary was Ksh. 15,000.00. As such, the award of compensation for unfair termination totals Ksh. 75,000.00.
44. The Claimant has prayed for service pay. Under section 35 (5) of *the Employment Act*, an employee who has served for more than one year is entitled to service pay for every year worked. The quantum of this benefit is normally worked out at the rate of 15 days' salary for every year worked (***Wanjai***

v Mediamax Network Limited
[2024] KEELRC 1085 (KLR).

45. According to the evidence on record, the Respondent hired the Claimant in July 2012 and terminated her services in March 2017. As such, at the time the contract between the parties was terminated, the Claimant had been in the Respondent's service for close to five years. Consequently, her service charge works to Ksh. 7,500.00 x 4 = Ksh. 30,000.00.
46. The Claimant has prayed for accrued leave pay for the time she worked for the Respondent. In response, the Respondent whilst denying that she was his employee, only commended that it was unusual for one to work for close to five years without taking leave.
47. In law, the obligation to maintain employment records rests with the employer (see section 74 of *the Employment Act*). As such, if there is a dispute about fulfilment of a term of a contract of employment, the burden is on the employer to speak to the matter since he is presumed to have special knowledge of it (see section 112 of *the Evidence Act* read with section 10(7) of *the Employment Act*).
48. Therefore, in the instant case, the burden rested with the Respondent to demonstrate that the Claimant took her annual leave. As the record shows, he did not do so. Consequently, the court is bound to presume in favour of the fact that the Claimant did not enjoy her leave days (**Jackson**

Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] KECA 388 (KLR).

49. The Respondent having not dislodged the Claimant's assertion that she was not granted leave, the court finds in the Claimant's favour in respect of the leave claim. However, she is awarded leave pay for four years, that is to say, Ksh. 42,000.00.
50. The Claimant also prayed for salary for one month in lieu of notice to terminate her services. Under sections 35 and 36 of *the Employment Act*, she was entitled to notice to terminate her contract or pay in lieu thereof.
51. There is no evidence that the Respondent complied with this requirement of statute. Accordingly, the Claimant is awarded Ksh. 15,000.00 as pay in lieu of notice to terminate her services.
52. The court awards the Claimant interest on the amount awarded at court rates from the date of the decision.
53. The amount awarded to the Claimant is subject to the statutory deductions that were in force at the time the contract between the parties was terminated.
54. The court awards the Claimant costs of the suit.

Summary of the Findings and attendant Orders

55. After evaluating the pleadings, evidence, submissions and the law on the matter, the court makes the following findings and orders:-

- a) The parties to the dispute had an employment relationship.
- b) The Respondent unlawfully terminated the contract of service between the parties.
- c) The Claimant is awarded compensation for unfair termination of her contract in the sum of Ksh. 75,000.00.
- d) The Claimant is awarded service pay of Ksh. 30,000.00.
- e) The Claimant is awarded accrued leave pay of Ksh. 42,000.00.
- f) The Claimant is awarded Ksh. 15,000.00 as pay in lieu of notice to terminate her contract of service.
- g) The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
- h) The award to the Claimant is subject to the statutory deductions that were in force at the time the contract between the parties was terminated.
- i) The Claimant is awarded costs of the case.

**Dated, signed and delivered on the 16th day of March,
2026**

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