



**Kibisu v Bird (Cause 296 of 2017) [2025] KEELRC 1249 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1249 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 296 OF 2017  
BOM MANANI, J  
APRIL 30, 2025**

**BETWEEN**

**JESCAH KIBISU ..... CLAIMANT**

**AND**

**HEIDI BIRD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant contends that the Respondent hired her services in August 1999 at an initial monthly salary of Ksh. 8,000.00 which was subsequently adjusted to Ksh. 20,000.00. She contends that on 7<sup>th</sup> August 2016, the Respondent terminated her employment without lawful cause or notice.
2. The Claimant contends that the Respondent did not pay her terminal benefits comprising of unpaid wages, overtime pay, service pay, house allowance and vacation pay. As such, she contends that the Respondent’s conduct violated the law.
3. In response, the Respondent avers that the Claimant was initially an employee of her (the Respondent’s) mother. The Respondent contends that the Claimant served under this first contract until 2001 when she left her (the Respondent’s) mother’s employment.
4. The Respondent avers that after the Claimant quit her mother’s employment, she left until around February 2008 when she resurfaced and requested her (the Respondent) to take her in as her employee. The Respondent avers that it is upon this request that she offered the Claimant employment as a domestic worker at a net monthly salary of Ksh. 12,000.00.
5. The Respondent contends that in June 2016, the Claimant stole USD 450 from her (the Respondent’s) son. The Respondent further avers that on discovery of the theft, she asked the Claimant to return the stolen funds whereupon the Claimant returned USD 150.



6. The Respondent avers that she informed the Claimant that she was obligated to return the balance of the stolen money to wit USD 300. However, she (the Claimant) allegedly did not make good this demand.
7. The Respondent contends that instead of the Claimant returning the balance of the stolen money, she asked to be released from employment. She (the Respondent) further contends that the Claimant offered to refund the balance of the stolen money through her terminal dues.
8. The Respondent avers that the theft incident occurred when she was in the process of relocating from Nairobi to Mombasa. She contends that as a result of the aforesaid transition, she reported the incident to Likoni Police Station in Mombasa.
9. The Respondent avers that during the subsistence of the employment relationship between the parties, she treated the Claimant with utmost respect and dignity. She contends that she provided the Claimant with food and personal care items and as well met her medical and dental expenses.
10. The Respondent contends that during the Claimant's employment, she took her annual leave. And where she did not, she was paid in lieu thereof.
11. The Respondent avers that the Claimant's acts of theft amounted to gross misconduct. Further, she contends that when she discovered the misconduct, the Claimant opted to leave employment of her own motion. As such, the Respondent contends that the instant suit ought to be dismissed.

#### **Issues for Determination**

12. After evaluating the pleadings and evidence on record, the following emerge as the issues for determination:-
  - a. Whether the Claimant's employment was unfairly terminated.
  - b. Whether the Claimant is entitled to the reliefs which she seeks through this action.

#### **Analysis**

13. The parties gave oral evidence in support of their respective claims. The Claimant affirmed the Respondent's position that she (the Claimant) was initially employed by the Respondent's mother before the latter took her in as her employee. However, she contended that the Respondent terminated her contract of service in August 2016.
14. The Claimant stated that the Respondent accused her of having stolen USD 450 from her (the Respondent's) son. She however, denied this accusation.
15. The Claimant further confirmed that during her employment with the Respondent, the latter provided her with housing. She conceded that she was housed in the Respondent's servant's quarter.
16. The Claimant denied having taken leave for the duration that she worked for the Respondent. She contended that although the Respondent used to release her for leave, she would recall her back to work hardly a week into her leave break. In her view, the few days break she used to enjoy before she would be recalled to work did not amount to leave days. As such, she insisted on the claim for accrued leave.
17. The Claimant contended that on the fateful day, the Respondent asked her to leave her compound and not to return. As such, she maintained that the decision to terminate her services was un-procedural and without cause.



18. In response, the Respondent reiterated her defense. She also called her son whose money was allegedly stolen to corroborate her case.
19. The Respondent denied that she terminated the Claimant's services. It was her case that when the Claimant was confronted about the stolen cash, she left her (the Respondent's) premises and never reported back.
20. From the evidence on record, there is no doubt that the parties had an employment relation. It is also not in doubt that this relationship came to a close sometime in August 2016.
21. However, the reason for the separation by the parties is contested. Whilst the Claimant contended that the Respondent threw her out without lawful cause, the Respondent averred that it is the Claimant who left employment after she was asked to return the money which she had allegedly stolen from the Respondent's son. Whatever the cause, the parties were obligated to terminate the employment relationship between them in accordance with the law.
22. Under section 41 of the *Employment Act*, if the employer wishes to terminate the services of an employee for misconduct, poor performance or physical incapacity, he (the employer) must notify the employee of the infraction against him and provide him an opportunity to respond to the charge. The duty to demonstrate that this requirement was satisfied lies with the employer in terms of sections 43 and 45 of the Act.
23. As such, where the employer contends that the employee deserted duty having committed an infraction, he (the employer) must demonstrate that he made reasonable efforts to locate the whereabouts of the employee in a bid to require him to answer to the charges against him. In effect, it is not open to the employer to seek to escape this obligation by simply asserting that the employee terminated his services by absconding duty (David Opondo Onyango v Apex Steel Limited [2022] eKLR)
24. In the instant case, whilst the Respondent asserted that the Claimant left employment and never came back, she did not provide evidence of the efforts she made to trace the whereabouts of the Claimant with a view to taking her through the disciplinary process under sections 41, 43 and 45 of the *Employment Act*. As such, the court finds that the Respondent did not ensure due process in closing the contract between the parties.
25. The Claimant has claimed a myriad reliefs. First, she pleaded for house allowance. However, during trial, she admitted that the Respondent housed her during the period of her employment. As such, she is not entitled to claim house allowance.
26. The Claimant also claimed for accrued leave days. In her testimony, she asserted that the Respondent did not permit her to utilize her leave days. She further denied that the Respondent paid her leave commutation.
27. However, the Respondent produced a chit which demonstrated that the Claimant had on some occasions commuted her leave days when she could not take her actual leave. The Claimant attempted to dispute the authenticity of the document. However, it is noted that this attempt was not anchored on her pleadings. Despite the Respondent having pleaded that she (the Claimant) had taken her leave, she (the Claimant) did not file a reply to defense to controvert this fact.
28. Importantly, during cross examination, the Claimant conceded that the Respondent used to allow her to proceed on her annual leave only to allegedly cancel the leave a few days later and require her to resume duty. In effect, the Claimant conceded that she used to take leave albeit not fully. However, she did not give an accurate account of the days she would remain on leave before she would be recalled. In



- the absence of this evidence, the court is not satisfied that the claim for accrued annual leave has been cogently proved. As such, it is declined.
29. The Claimant made claims for unpaid salary and overtime pay but did not tender evidence on them. As such, the court finds that the claims were not substantiated. Accordingly, they are declined.
  30. Since the court has found that the Respondent unfairly terminated the Claimant's employment, the Claimant is entitled to compensation for the unfair termination of her contract of service. The Claimant averred that at the time of termination of her contract, she was earning monthly salary of Ksh. 20,000.00. The Respondent did not provide evidence to controvert this assertion despite the obligation on it under section 10(7) of the Employment Act. As such, the court finds that the Claimant's monthly salary was Ksh. 20,000.00.
  31. Having regard to the fact that the parties had been in the employment relation for a considerably long period of time, I award the Claimant compensation which is equivalent to her gross monthly salary for four (4) months, that is to say,  $\text{Ksh. } 20,000.00 \times 4 = \text{Ksh. } 80,000.00$ .
  32. The Claimant has claimed for service pay for the duration she served the Respondent. From the evidence on record, the court is convinced that the Respondent hired the Claimant's services as from February 2008 as contended by the Respondent. Further, the record shows that the parties parted ways in August 2016. As such, the parties were in the employment relationship for a period of approximately eight (8) years.
  33. Section 35 (5) of the Employment Act entitles an employee who leaves employment to service pay for every year worked if the employee was not a member of a pension scheme or provident fund run by the employer or a contributor to the National Social Security Fund. There was no evidence tendered to demonstrate that the Claimant was a beneficiary of any of the above schemes. As such, she is entitled to claim service pay.
  34. The Employment Act does not provide for the method of computing service pay. However, case law suggests that the amount payable in this regard should be equivalent to fifteen (15) days' salary for the employee for every year worked (*George M. Kirungaru v Next Generation Communications Limited* [2014] eKLR).
  35. As noted earlier, the Claimant's salary was Ksh. 20,000.00. Thus her salary for fifteen (15) days works out to Ksh. 10,000.00.
  36. The Claimant worked for the Respondent for eight (8) years before the contract between the parties was closed. As such, the service pay due to her (the Claimant) is  $\text{Ksh. } 10,000.00 \times 8 = \text{Ksh. } 80,000.00$ . Accordingly, the court awards her this amount.
  37. In terms of section 49 of the Employment Act, a compensatory award to an employee is subject to tax. As such, the amount awarded to the Claimant is subject to the applicable statutory deductions.
  38. The award attracts interest at court rates from the date of this decision.
  39. I award the Claimant costs of the case.

### **Summary of the Award**

40. After evaluating the evidence on record against the applicable law, the court finds and awards as followings:-
  - a. The court finds that the Respondent improperly terminated the contract between the parties.



- b. The court awards the Claimant compensation for the unfair termination of her contract in the sum of Ksh. 80,000.00.
- c. The court awards the Claimant service pay of Ksh. 80,000.00.
- d. The award is subject to the applicable statutory deductions.
- e. The court declines the Claimant's prayers for house allowance, leave pay, unpaid salary and overtime pay.
- f. The court awards the Claimant interest on the amount awarded at court rates from the date of this decision.
- g. The court awards the Claimant costs of the case.

**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> DAY OF APRIL, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> 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**

