



REPUBLIC OF KENYA



Nyalingu v Ali (Cause 1328 of 2017) [2024] KEELRC 390 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 390 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1328 OF 2017
NZIOKI WA MAKAU, J
FEBRUARY 27, 2024**

BETWEEN

RACHAEL ANGULO NYALINGU CLAIMANT

AND

MOHAMMED ALI RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent claiming unfair termination of employment and non-payment of terminal benefits. She averred that pursuant to an oral contract, the Respondent employed her as a House Help at his residence in South C on 6th August 2014 at an initial consolidated salary of Kshs. 7,000/- per month. She stated that her monthly salary eventually rose to Kshs. 9,000/- in 2014 and to Kshs. 11,000/- in June 2015. According to the Claimant, she stayed in the Respondent's compound and worked from 4am to 11pm daily doing the usual house chores including looking after the children, and had Sunday as an off-day.
2. The Claimant's case was that on 30th October 2016, she became sick and fainted in the Respondent's house and that the Respondent then allowed her to go seek medical attention and resume work once she had gotten better and or well. That on 31st October 2016 at 09.05pm, the Respondent's son sent her a text message saying, "utatuma msichana wako anisaidie ama?" and that before she could respond, he sent another text message at around 09.13pm saying, "mpaka lini utaregea kazi siku gani?". She asserted that when the Respondent sent her a text message on 1st November 2016 at 09.49am asking whether she would go to work the following day, she responded that she was still weak. That the Respondent then went on threaten that he would employ somebody else and she begged him not to and promised to resume work once she got better. It was the Claimant's averment that considering her only daughter who would have stood in for her had a young child, on 1st November 2016 she sent to the Respondent her neighbour named Mama Lydia, who only worked at the Respondent's premises for one day and was told not to report the following day. The Claimant stated that when she felt slightly better on 6th



- or 7th November 2016 and went back to work, she found that the Respondent had employed another person.
3. The Claimant averred that the Respondent refused to allow her back to work or pay her terminal benefits, which include one month's salary *in lieu* of notice, leave allowance for two years, unpaid salary for seven (7) days in July 2016, service for two years, and maximum compensation at 12 months' salary. She therefore prayed for an award against the Respondent for: a declaration that the termination of the Claimant's employment by the Respondent was unfair and unlawful; an Order compelling the Respondent to pay the Claimant her terminal benefits and compensation for unfair termination; and costs and interests of this Cause.
 4. In his Memorandum of Response dated 26th January 2018, the Respondent averred that the Claimant was employed as a part-time house-help in August 2014 to assist with household chores only. Whereas he denied the Claimant's working hours and the assertion that she resided in his residence, he admitted that the Claimant had Sunday as an off-day. According to the Respondent, the Claimant would report to work between 8.00am - 9.00am and worked until 2.00pm – 3.00pm from Monday to Saturday.
 5. The Respondent's averred that in January 2016, the Claimant informed him that she was suffering from high blood pressure and thus needed to drink milk in addition to the meals they were providing her. He denied the allegation that the Claimant fainted in his house and averred that on 13th July 2016, the Claimant reported to him that she was feeling unwell and requested for sick leave for the following day to go perform some medical test. That the Claimant however failed to present any medical report or test results when she resumed work the following day. He further averred that later on 19th and 20th August 2016, the Claimant took further sick leave and only informed him on phone that she was unwell and needed to rest. The Respondent explained the sequence of the text messages between him and the Claimant, asserting that it was the Claimant who first sent him a message at 8.56pm saying, "nimelemewa na ugonjwa sa sitakuja kesho" and after his response on whether she would send over her girl, she asked him to get another person "wa kibarua". He asserted that the Claimant refused to respond to his request on when she would resume her duties and offered to have Mama Lydia work for him but Mama Lydia's performance was unsatisfactory.
 6. The Respondent's further case was that from 1st November 2016 to 7th November 2016, the Claimant neither reported to work nor communicated to him the reasons for not reporting to work. That he tried to reach the Claimant on phone on several occasions but she ignored and or neglected to pick their calls or even message back until on 7th November 2016 when she picked his call and informed him she could no longer perform her duties due to her health. That the Claimant then came over to his house on 12th November 2016 at about 10:00am, informed him that she had come to collect her dues and requested to be discharged, which he accepted and then paid her Kshs. 13,500/-. The Respondent averred that the Claimant's dues totalled Kshs. 29,699/-, less Kshs. 10,000/- that his son had loaned the Claimant and that having made some payment to her, she was thus supposed to go collect the balance of Kshs. 6,199/- which he is still willing to remit to her. He notified the Court that he thereafter even gratuitously paid Kshs. 4,000/- for the Claimant's treatment at his doctor's place. The Respondent thus denied the prayers sought in the Claim and produced a breakdown of the Claimant's leave days.

Evidence

7. The Claimant testified that she was not given any notice when she was terminated in July 2016 and that she never went for leave. Under cross-examination, the Claimant stated that she did not live in the Respondent's house and that she would come in, work and leave every day. She confirmed that she did not produce any documents for the treatment she sought when she allegedly fainted in the



Respondent's house. She further confirmed that she was not at work between 1st and 11th November 2016, did not text the employer that she would not go to work and was paid salary for July on the date she left employment.

8. The Court closed the Defence case after the Respondent failed to show up for hearing.

Claimant's Submissions

9. According to the Claimant, the matter raises three issues:
 - a. Whether the Claimant was unfairly and unlawfully terminated;
 - b. Whether the Claimant is entitled to the terminal dues in her Memorandum of Claim; and
 - c. party bears the costs of the claim.
10. The Claimant submitted that the allegations that she opted to leave work on the ground that she was sick is unfounded. That in any event, since the Respondent did not challenge her averments, this Court should be persuaded by the Claimant's evidence and testimony. It was the Claimant's submission that her employment was terminated without due procedure or substantive justification for want of reason for the termination, meaning the dismissal unfair and unlawful as under section 45(2) of the *Employment Act*. She urged this Court to be persuaded by the holding in the case of *Daniel Kiplagat Kipkeibut v SMEP Deposit Taking Micro Finance Limited* [2016] eKLR on the issue of substantive justification and the case of *Victor Egesa Oguta v Unigroup Transporters Ltd* [2017] eKLR on procedural fairness.
11. It was the Claimant's submission that having proved that she was unlawfully terminated from employment, she is entitled to one month's salary *in lieu* of notice as under section 35(1)(c) and 36 of the *Employment Act* and to compensation as under section 49 of the Act. That she is also entitled to the days she worked in July 2016 but was not paid and to unpaid leave days as under section 28(1) of the Act. Further, that since she was not a member of any pension scheme and the Respondent did not deduct and remit any NSSF payments, she is due to be paid service for the period she worked for the Respondent. The Claimant asked the Court to consider the period she worked for the Respondent and the circumstances surrounding her dismissal and award her maximum compensation at 12 months' salary.
12. The Respondent did not file any submissions.
13. The Claimant's service was terminated after she fell ill. The Respondent admitted that the Claimant fell ill and was absent from work for a few days. From the narration of the events leading to the termination, the Claimant was terminated since the Respondent required someone to work at his residence. It was alleged the Claimant was undertaking part time work. This does not accord with the parties take on the issue of accommodation. Why would the Respondent provide accommodation to someone engaged in part time work at his residence? It makes no logical sense to have such an arrangement and in my considered view, the employer tried to distance himself from the employee for purposes of demonstrating he was not liable for the claims before court since he had offered employment to the Claimant and had not made the required payments.
14. The Claimant was terminated without any notice and is thus entitled to one month's salary *in lieu* of notice, leave allowance for one year, service pay for two years worked, and compensation which I set to 2 months' salary given the abrupt manner of termination sans notice. The Respondent made payment which is construed to have been her salary that had been unpaid. She thus will not recover on the claims for unpaid salary.



15. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. one month's salary *in lieu* of notice – Kshs. 11,000/-,
- b. leave allowance for one year – Kshs. 11,000/-,
- c. service pay for the completed years of service – Kshs. 11,000/-,
- d. 2 months' salary compensation – Kshs. 22,000/-.
- e. Costs of the suit.
- f. Interest on the sums in (a), (b), (c) and (d) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

