



Adhiambo v Nyokabi & another (Employment and Labour Relations Cause 1223 of 2018) [2024] KEELRC 788 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 788 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1223 OF 2018**

MN NDUMA, J

APRIL 11, 2024

BETWEEN

MARY ADHIAMBO CLAIMANT

AND

MOSES KARANJA NYOKABI 1ST RESPONDENT

SHELMITH WAMBUI MAINA 2ND RESPONDENT

JUDGMENT

Facts of the claim.

1. This suit is by the claimant, a house help employed by the respondent. CW 1, the claimant testified that she was employed in the year 2015 until 20th May 2018.
2. CW 1, testified that she was initially paid Kshs 5,000/= and was raised to Ksh. 8,000/= in 2017 monthly salary during the tenure of her employment. That she was therefore underpaid.
3. That she was not granted annual leave during the two years of employment and had no rest or off days during the period. That she worked over time from 5 p.m. up to midnight. CW 1 said that her employment was terminated without notice, or any lawful cause and was not paid for 20 days worked in May 2018. That she was not paid *in lieu* of notice and was not paid service upon termination. CW 1 said she did not get a letter of dismissal.
4. CW 1 explained that termination of her employment occurred on a Sunday 20/5/2018 when she asked her employer to lend her two thousand Kenya shillings but the employer declined. That the claimant then asked to be granted off to go and borrow the money. That she was granted off at 1 p.m. and came back at 6 p.m.



5. That upon her return she rang the doorbell and the 2nd respondent who was wife to the 1st respondent opened for her and told her that she did not want to work and should leave. That the claimant took her clothes and left.
6. CW 1 said during her work, she stayed with the child of the respondents watching television at night. That she asked for salary increment but same was not granted.
7. That she was not able to visit her sick husband at Limuru since she lived with the respondents. That she got off day only on 25th December 2017. That the respondents had two children. One was one year old and the other child was in form three. That she cleaned the house, cooked and washed clothes. That she slept at midnight and woke up at 5 a.m. in the morning. That she shared a bedroom with the child who was about 5 years. That the child was picked by a school bus early in the morning and she is the one who took the child to the bus.
8. CW 1 testified further that she had no payslip and was paid in cash. That her starting salary was Kshs 5,000/= and it was increased to Kshs 8,000/= in 2017. CW 1 denied that she was paid Kshs 13,372/= . That the work place was at Kikuyu. That she opened front gate and the house door for the couple at night when they arrived.
9. CW 1 said she rented her house at Limuru for Kshs 3,500/=. That the husband had gotten injuries from a road accident. That she had 5 children and suffered loss of income upon being dismissed without notice. That prior to being employed by the respondents she had a good job at a school and was able to pay rent.
10. CW 1 said she was paid Kshs 5,200/= via Mpesa upon termination. CW 1 said she worked for 3 years and did not visit her house at Limuru during that period.
11. CW 1 said she was registered with NSSF by the previous employer. That the respondent did not pay NSSF for her between the years 2015 to 2018.
12. RW1, Shelmith Wambui Maina, the 2nd respondent testified and adopted a witness statement dated 31/8/2018. RW1 admitted that claimant worked for her between the years 2016 and 2018. That the claimant took care of her two children in the morning. That the 1st child was 2 years going to 3 years and was born in September 2013. That the child went to a play group in the morning and would come back in the afternoon. That RW1 had a shop in town and worked from 7:30 a.m. to 5 p.m. That by 6 p.m. RW1 was at home. That the child slept before 8 p.m. That the child could not watch television up to midnight as alleged by the claimant. That the claimant worked for 2 years. That the claimant was like her sister and RW1 used to help her with money all the time.
13. That RW1 paid the claimant Kshs 13,572/= per month. That RW1 had agreed with the claimant to give her advance payment within the month to give her husband to take care of the children. That the claimant took items from her shop and same were sent on Easy Coach to her family at Limuru or the children would come to collect the shopping.

Response.

14. RW1 said the claimant was employed in February 2016 up to 20th May 2018. It was for a two years period and not three years as alleged by the claimant. That the claimant went to her home every Sunday and on the day she stopped working she had left the house at 7 a.m. and came back at 6 p.m.
15. That RW1 and her mother in law were in the house at the time cooking in the kitchen. That RW1 went to her bedroom and then came to the kitchen and RW1 asked her to clean a place next to a cupboard the coming week.



16. That CW 1 asked RW1 if she meant that the claimant was not working properly and RW1 told her nobody is perfect.
17. That RW1 went to the bedroom at that point, came out with her clothes and told RW1 she could not continue working anymore. That RW1 sent the claimant Kshs 5,200/= via Mpesa on that day. That RW1 had already given the claimant advance during the month.
18. RW1 said she regularly gave the claimant advance payment upon her request. RW1 said she took the claimant to hospital whenever she was sick. That the claimant had no written agreement. That RW1 had gotten the claimant from an employment bureau. That RW1 and CW 1 had a good relationship. RW1 said she had lent CW 1 Kshs 2,000/= in the morning of the Sunday she left employment. That CW 1 always took off on Sundays early in the morning and came back at 6 p.m. That RW1 always paid CW 1 in cash but on the day she left, RW1 paid her via Mpesa.
19. RW1 prays the suit be dismissed.

Determination.

20. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW 1 and RW1. The issues for determination are:
 - i. Whether the claimant was employed in 2015 or 2016?
 - ii. Whether the claimant left employment of the respondents voluntarily or the 2nd respondent terminated her employment unlawfully?
 - iii. What remedies are available to the claimant?
21. In terms of section 8 of the Employment Act, 2007 a contract of employment may be oral or in writing.
22. The terms of employment that must be kept and updated in a written contract of employment are set out under section 9 and 10 of the Employment 2007.

Under sub-section 10(7) is provided:-

“(7) if any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

23. In the present suit the claimant has alleged that:
 - i. She was employed on 13/2/2015 whereas the 2nd respondent alleges that she was employed in February 2016. The date of separation is not in dispute being 20/5/2018.
 - ii. She never took any off day during the entire period of employment whereas, the 2nd respondent alleges that the claimant took every Sunday off from morning to 6 p.m.
 - iii. She alleges that she was paid Kshs 8,000/= monthly salary whereas the 2nd respondent alleges that she paid the claimant Kshs 13,572/= per month.
 - iv. She alleges that she worked from morning to midnight everyday whereas 2nd respondent alleges that the claimant only took care of the child in the afternoon and that she was back from work at 6 p.m. daily to take charge of home affairs.



24. The truthfulness of the alleged facts above is dependent on the say so of either CW 1 or RW1 since we do not have any written contract of employment or any written particulars of employment of the claimant in terms of sections 8, 9 and 10 of the Employment Act, 2007. RW1 only produced Mpesa printout for the period 19/5/2018 to 20/5/2018 for the account number 0722365385 as evidence of the various payments she made to the claimant. However, RW1 testified that she paid the claimant's salary mainly in cash and by credit of goods picked from her shop on behalf of the claimant and her family as advance payment.
25. From the provision of subsection 10(7) the respondent having failed to produce a written contract of employment and or particulars of employment bears the burden of proving and disproving any matters that ought to have been kept in those records and produced as evidence before court. However, the court finds that the claimant bears the initial burden of setting out a prima facie case of the existence of the facts she relies on to prove her case on a balance of probability.
26. The burden of proving and disproving by the respondent within the meaning of subsection 10(7) is discharged by rebuttal of the evidence presented by the claimant to the court in the first place.
27. The credibility of the evidence adduced initially by the claimant to establish her case is material in weighing the balance of probabilities upon receiving the rebuttal from the respondent.
28. In the present case, the court has carefully considered the evidence before court and has arrived at the following findings of fact:-
29. In the Memorandum of Claim dated 28th June 2018, the claimant pleaded that at all material times from 13th February 2015 up to 20th May 2018, she worked as a house help for the respondents earning a monthly salary of Kshs 13,572/= per month. The claimant contradicted these pleadings in her evidence in chief by testifying that she was paid Kshs 5,000/= per month initially and the salary was increased to Kshs 8,000/= in the year 2017.
30. RW1 the respondent testified that she paid a monthly salary of Kshs 13,572/= to the claimant which testimony confirms the facts set out in the pleadings.
31. The credibility of the claimant was dented by this contradiction. The court finds that the 2nd respondent has proved that she paid the claimant a monthly salary of Kshs 13,572/= and not as alleged by the claimant in her testimony. The claimant did not prove that she was underpaid during her tenure of employment therefore and the claim for underpayment lack merit and is dismissed.
32. The credibility of the claimant having been dented, the court is satisfied that the respondent has proved that the claimant took Sunday off, every week to visit her family from morning to 6 p.m. Indeed, the events of 20/5/2018, the date the claimant separated from the respondent add credibility and modicum of truthfulness in the evidence adduced by RW1 vis a vis that adduced by CW 1.
33. CW 1 had told the court in chief that she was only allowed to visit her family on 25th December of each year and not any other day. Clearly on 20/5/2018 the respondent had given the claimant a Sunday off to visit her family. The claim for unpaid rest days from 2015 to 2018 lacks merit for lack of prove and same is dismissed.
34. Equally, the testimony by the claimant as set out at paragraph 6 of the Memorandum of Claim that she worked overtime from 5 a.m. to midnight has not been proved satisfactorily. The testimony by CW 1 that she watched television with the child of the respondent up to midnight is incapable of believe. The 2nd respondent proved that the child in question was during the material period between two to three years and would sleep before 8 p.m. ready to attend nursery school the next day.



35. CW 1 confirmed that the child went to school early in the morning and she took the child to the school bus. The court finds that the claimant has failed to tender any credible evidence to prove that she worked overtime as claimed or at all and the claim is dismissed accordingly.
36. The court finds that the claimant worked from 13th February 2016 up to 20th May 2018 in the absence of any contract of employment produced by the respondent and going by the prayers of payment of terminal benefits calculated for two years in the memorandum of claim. The claimant proved that no NSSF was paid on her behalf during that period. The claimant is entitled to payment of service pay in the sum of Kshs 15,666/= as prayed for by the claimant.
37. Furthermore, the claimant has proved that she was entitled to payment in lieu of two (2) years leave not taken in the sum of Ksh. 20,434/= as claimed. The court awards her accordingly.

Compensation.

38. The circumstance upon which the claimant picked her clothes and left the house of the respondents on the evening of 20/5/2018 remain unclear, the claimant maintaining that she was chased away by the 2nd respondent whereas the 2nd respondent testified that, the claimant left in a huff upon the 2nd respondent pointing out to her an area next to the cupboard that the claimant needed to clean the following week.
39. This occurrence happened in the presence of the mother in law of the 2nd respondent who was not a witness.
40. However, given the dented credibility of the claimant, the court finds that the respondent has demonstrated that the claimant was not dismissed from employment but she took initiative to leave employment on the heat of the moment.
41. The choice to leave employment by the claimant, even though she may have been aggrieved by the conversation that took place between herself and the 2nd respondent cannot be construed from the pleadings and the evidence before court to have been a dismissal or termination of employment of the claimant by the 2nd respondent.
42. Accordingly, the claimant has failed to discharge the onus placed on her under section 47(5) of the Employment Act, that her employment was wrongly terminated by the respondents. To the contrary, the respondents have disproved this claim by the claimant.
43. The court finds that the claimant voluntarily separated herself from the employment of the respondents, on the heat of the moment. The claim for unlawful and unfair termination of employment has thus failed and is dismissed.
44. In the final analysis, judgement is entered in favour of the claimant against the respondent limited only to the following prayers:-
 - a. Kshs 20,434/= *in lieu* of leave days not taken.
 - b. Kshs 15,666 being service pay
Total award: Kshs 36,100/=
 - c. Interest at court rates from date of filing suit till payment in full.
 - d. Half the costs of the suit
45. For the avoidance of doubt, all other prayers in the suit have been dismissed for lack of merit.



DATED AT NAIROBI THIS 11TH DAY OF APRIL, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Odede for claimant

Mr. Gachune for respondent

Mr. Kemboi, Court Assistant

