



Elolo v Tabu (Cause 636 of 2016) [2024] KEELRC 1644 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1644 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 636 OF 2016
NZIOKI WA MAKAU, J
JUNE 24, 2024

BETWEEN

LUCY ANDISI ELOLO CLAIMANT

AND

MRS. IREN TABU RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 19th April 2016 and in it averred that the Respondent engaged her as a House Help on 1st August 2008 at an entry basic salary of Kshs. 3,500/- per month instead of Kshs. 5,195/- as per the Legal Notice No. 38 of 2006. That she was also underpaid having earned varied progressed wages not within the meaning of subsequent Regulation of Wages (General) (Amendment) Orders Nos. 98 of 2010, 64 of 2011, 71 of 2012, 197 of 2013 and 117 of 2015. She asserted that she served the Respondent for seven years, three months (7¼ years) without any disciplinary record and/or action being preferred against her.
2. The Claimant's case is that on 3rd November 2015, the Respondent verbally terminated her employment services without affording her an opportunity to defend herself and/or explaining to her the reasons for the termination, which act is unlawful and unprocedural. She further averred that she neither belonged to any registered pension or provident fund scheme nor was a member of NSSF. That she had more years to serve in the service of the Respondent and that the unlawful termination and/or wrongful dismissal left her at a loss and subjected her to untold sufferings. The Claimant prays that judgment be entered against the Respondent for Orders that the termination of her employment services is wrongful, unlawful and unfair hence, null and void. She further seeks three (3) days worked in November 2015, underpayments, accrued annual leave, leave travelling allowance, one month's pay in lieu of notice, 12 months maximum compensation for unfair termination, general damages, compensation for the lost income, interest on the total amount at Court rates, issuance of a certificate of service, costs, and any other relief this Honourable Court may deem fit to grant.



3. In reply, the Respondent filed a Statement of Response to Claim and Witness Statement both dated 4th January 2022, wherein she admitted having employed the Claimant from 2008 to 2015 at a net salary of Kshs. 3,500/-, which amount was inclusive of house and travel allowances. The Respondent's stance was that in 2015, all her children were in boarding school thus making the services of the Claimant unwanted and that together with the Claimant, they mutually agreed to terminate the employment. That she accorded the Claimant a formal hearing in a language she understood and thereafter advanced her one (1) month's notice as contemplated in law, after which the parties released each other from the employment contract.
4. Further, according to the Respondent, any misunderstandings that would previously arise between her and the Claimant would be amicably settled vide discussions between themselves and that they as such enjoyed a cordial work relationship, hence the lengthy period within which she engaged the Claimant. That she once granted the Claimant two months' paid leave after which she dutifully returned and continued with her duties and that she later found out that the Claimant was pregnant. That on account of the lengthy period of time they had peacefully stayed together, she decided to accommodate the Claimant with her pregnancy and promised to raise her child as her own and that the Claimant agreed to the same. That the Claimant subsequently requested for leave to attend her father's memorial service, which leave the Respondent granted her for a period of one (1) week. That instead, the Claimant took three weeks without any explanation thus greatly inconveniencing her and that the Claimant surprisingly returned no longer being pregnant, as she had earlier stated. The Respondent further narrated how her child began crying inconsolably exactly at the stroke of midnight upon the Claimant's return from the memorial and they had to seek intervention of a preacher from their church. That the said preacher spent a night in the Respondent's house and eventually prompted the Claimant to remove from hiding, bones and other strange paraphernalia believed to have been laced with witchcraft. That soon after the discovery of the said items, the Respondent's child stopped crying at the stroke of midnight.
5. The Respondent's case was that the Claimant was verbally abusive and cruel towards her children and that she verbally warned the Claimant on various occasions but she failed to improve in her conduct. She contended that at the end of the contract, she was ready and willing to pay the Claimant the terminal dues owed to her and thus requested her to tabulate her terminal dues. That instead, the Claimant filed a complaint with the KUDHEIHA Union that tabulated the amount owed to the Claimant in the sum of Kshs. 58,000/-, which amount the Respondent fully remitted and deposited to KUDHEIHA Workers Account. The Respondent thus denies owing the Claimant the sum claimed or any other sum at all and stated that she granted the Claimant off days during the weekends and on Public Holidays. She asserted that in the alternative, when the Claimant did not go on leave days, she was paid her leave days in cash and that the claim for unpaid leave days is false, malicious and ought to be dismissed with costs. She further denied the claim for emoluments/contingencies, positing that there is no provision for the same under the *Employment Act* or any other law. It was the Respondent's averment that the suit herein is bad in law, discloses no cause of action but a mere grievance, is frivolous and vexatious, and amounts to abuse of the process of this Court. That the Claimant is not entitled to the prayers or orders sought as she is on a fishing expedition for financial support from the Respondent and that the suit should be dismissed with costs.
6. Claimant's Submissions
The Claimant submitted that the Respondent violated sections 36, 41, 43 and 45 of the *Employment Act*, 2007 and failed to follow fair procedure in terminating her employment and that she is hence entitled to compensation in terms of section 49(1)(c) and (4) of the *Employment Act*. She fronted that an award of 12 months' gross salary compensation based on the last applicable Legal Notice at Kshs.



9,780 x 12 = Kshs. 117,360/-, will be adequate compensation on this limb. She further submitted that she was not compensated for the job loss and therefore suffered loss and damage that this Court should consider all her claims and award her as tabulated. The Claimant relied on the case of *Moreen Mubani v Namuben Manji Bhinji [2020]* eKLR wherein the Court applied the basic minimum wage of Kshs. 10,107/- at the time in awarding the claims sought, upon finding that the termination was unlawful. It was the Claimant's prayer that this Court should apply the wage of Kshs. 9,780/- per month in computing compensation due to her for the eight (8) years served and to allow the entire claim as sought.

7. The Respondent did not file any submissions.
8. The Claimant served the Respondent for 7¼ years. She asserts she was underpaid for the entire duration of her employ. Applying the law on underpayment, she would only recover for the last 3 years of her employ meaning she forfeited the amounts due to her for the 4¼ years she took no action to seek recompense for. As such, her claim for underpayment is only successful to the extent she recovers Kshs. 226,080/- under this heard being the difference between the wage due – Kshs. 9,780/- and amount paid – Kshs. 3,500/- multiplied by 3 years. The Claimant asserts she was not paid for the 3 days worked in November 2015 and she would be entitled to Kshs. 1,550.55 for this. She would also get one month's salary as notice. She did not prove leave was not given and as such will not recover at all on that score. She was accused of absconding work for 3 weeks after getting a one week off and did not rebut that. In essence, she confirmed that she would get time off from the employer and it is inconceivable that she could get off but never get leave. The Claimant is not entitled to general damages/emoluments/contingencies at the discount of 15% of the total amount as claimed in the claim. She will get one month's salary as compensation for the manner of termination which from all accounts was also contributed to by the Claimant.
9. In the final analysis, judgment is entered for the Claimant for:-
 - a. Kshs. 226,080/- being underpayment of wages.
 - b. Kshs. 1,550.55 being wages for 3 days worked.
 - c. Kshs. 9,780/- being one month's salary as notice.
 - d. Kshs. 9,780/- being one month's salary as compensation.
 - e. Costs of the suit strictly limited to the award made in (a) – (d) above.
 - f. Interest at court rates on the sums in (a),(b), (c) and (d) above from date of judgment till payment in full
 - g. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2024

Nzioki wa Makau

JUDGE

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