



Kisina v Keah (Cause 320 of 2018) [2023] KEELRC 463 (KLR) (23 February 2023) (Judgment)

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REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 320 OF 2018
BOM MANANI, J
FEBRUARY 23, 2023

BETWEEN

LUCY KISINA CLAIMANT

AND

MIRIAM KEAH RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation for unlawful termination. The claimant alleges that the respondent unfairly terminated her contract of employment. Consequently, she prays that she be paid damages to redress the alleged unlawful action by the respondent.
2. The respondent has denied liability. It is the respondent's case that the claimant was not her employee. As such, the claim for compensation for unlawful termination is unfounded.

Claimant's Case

3. The claimant filed a statement of claim dated March 8, 2018 through which she alleges that the respondent engaged her services as a house help around July 4, 2014. She contends that the contract of service between the parties was orally made and that her starting salary was Ksh 10,000/=.
4. The claimant asserts that upon her engagement, she served the respondent until December 6, 2015 when her services were terminated. It is the claimant's case that the respondent did not provide her with the reason for terminating the contract of employment. And neither did she follow the procedure stipulated in law in bringing the said contract to a close.
5. The claimant avers that she was not paid salary for the month of November 2015 and part of December 2015. She alleges that she was also not granted annual leave for the one year she worked for the respondent.



6. It is the claimant's case that her dismissal from employment was contrary to the law. In the premises, she pleads for the various reliefs as set out in her statement of claim.

Respondent's Case

7. On the other hand, the respondent denies having employed the claimant as alleged or at all. It is the respondent's case that the claimant was hired by a contractor who was undertaking construction works for respondent's husband. That the claimant used to work at the construction site which was within the same compound as the respondent's residence. That as a result, the claimant would occasionally assist the respondent with some domestic chores for which she would be paid at the close of the day. That these engagements would only happen when the claimant had not been assigned work at the respondent's husband's construction site.
8. It was the respondent's case that the casual engagement between the parties was very temporary and did not last beyond May 2015. In her own words as set out at paragraph 10 of her written witness statement, the casual labour relation was for no more than five (5) months.
9. To support her defense, the respondent called the individual who is said to have hired the services of the claimant at the respondent's husband's premises. This witness asserted that it is him who engaged the claimant as a casual labourer at the respondent's husband's construction site.
10. The witness stated that as the site was within the same compound as the residence of the respondent, the claimant would occasionally undertake some chores for the respondent. However, the claimant remained principally an employee of the said contractor but on casual basis.
11. The witness stated that the engagement between the parties was very temporary. That the construction work begun in April 2014 and was finalized in September 2014 when the claimant left the respondent's compound. The witness was emphatic that the claimant remained at the construction site for only six (6) months.

Issues of Determination

12. The parties did not file a list of agreed issues at the pre-trial stage. However, they individually framed their issues in their final submissions for consideration by the court. Having heard the evidence in the cause and studied the pleadings on record, I am of the view that the following are the issues for determination in the cause:-
 - a. Whether there was an employer-employee relationship between the claimant and respondent.
 - b. If the answer to a) above is in the affirmative, whether the relation was terminated in accordance with the law.
 - c. Whether the parties are entitled to the reliefs pleaded.

Analysis and Determination

13. The first issue is whether there was an employer-employee relationship between the claimant and respondent. On this question, the parties have taken diametrically different positions with the claimant asserting that she was employed by the respondent whilst the respondent denies having employed the claimant. Whether there exists an employment relation between parties to a labour relation is a matter of fact to be established by evidence.



14. At the very outset, it is perhaps necessary to mention that there are various tests that the court often deploys to discern the presence of an employer-employee relation. These include: the control test; the mutuality of obligation test; and the degree of integration test.
15. These tests are usually critical tools in drawing a distinction between contracts of service and contracts for services. The court may also discern the existence of an employment relation from implied admissions by the parties.
16. The *Employment Act* recognizes a variety of contracts of service. These include seasonal contracts, casual contracts, fixed term contracts, indefinite term contracts and piece rate contracts among others (see *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR). The importance of this observation is to disabuse the notion that casual and seasonal labour contracts may not be employment contracts in the strict sense of the word.
17. Whilst the respondent denies having employed the claimant, she admits in her evidence that she would occasionally engage the claimant to clean her compound. It is the respondent's case that this engagement was temporary and only when there was need to clear and clean the compound. The respondent states that every time the claimant was engaged for this purpose, she would be paid at the close of the day. Therefore, in the respondent's view, the claimant never acquired the status of the respondent's employee.
18. This position by the respondent is inaccurate. It implies that all temporary labour engagements are necessarily not employment contracts. This reasoning is at cross purposes with the position expressed in the *Employment Act*. The Act recognizes casual employment as a form of employment. It defines a casual employee as "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time". In all respects, the evidence on record points to the respondent having engaged the claimant as an employee but on casual basis in the first instance.
19. It is noteworthy that whilst the respondent's witness stated that it is him who had employed the claimant at his construction site, he admits that the claimant would occasionally serve the respondent whenever there was need. However, he argues that this arrangement was purely temporary and the claimant would be paid at the close of the day.
20. Importantly, this witness suggested that the construction works came to a close in September 2014 and that the claimant left the respondent's compound around this time. However, the respondent contradicts this evidence when she pleads in her defense and witness statement that the claimant remained at the construction site until May 2015 during which period, she occasionally worked for the respondent on need basis. That the claimant left the site in May 2015 and never came back.
21. The respondent also states that the casual labour engagement between her and the claimant did not in any event last more than five (5) months. This statement, in my view, is an admission by the respondent that the casual labour relation between her and the claimant was for at least five (5) months.
22. This evidence should be contradistinguished with the contents of the letter by the respondent's advocates dated February 12, 2018. In the letter, the advocates allude to the fact that the respondent would engage the claimant on casual basis whenever she was available until late 2015 when the respondent employed a house help on permanent basis. This statement, in my view corroborates the claimant's position that she served the respondent, whether temporary or otherwise, until late 2015.
23. The Respondent cannot admit to having engaged the claimant on casual basis and at the same time deny having employed her. This is a contradiction in terms. The inevitable conclusion the court draws



from this contradictions is that the respondent is trying to run away from the true position that she had an employer-employee relationship with the claimant, whether temporary or otherwise. In the premises, the court finds that the claimant was employed by the respondent.

24. The next question for determination relates to whether the contract of employment between the parties was lawfully terminated. The claimant avers that she was neither given reasons for termination of the contract nor did the respondent follow the procedure under the *Employment Act* to close the relation. On her part, the respondent appears to suggest that the issues raised by the claimant in this respect do not arise as she was not an employee of the respondent. After she left in May 2015, the claimant never went back to the respondent's home.
25. From the record, the court has established that the parties were engaged in an employer-employee relation albeit on casual basis in the first instance. In her witness statement which was adopted as her evidence in chief, the respondent alludes to the fact that the casual labour relation did not last for more than five (5) months. During her oral testimony, the respondent stated that for the duration they engaged, the claimant used to stay away on Sundays.
26. Under section 37 of the *Employment Act*, casual employment converts into term employment if the parties remain in the casual labour relation for a continuous period of at least one month. Whilst the claimant asserts that she worked for the respondent continuously between July 2014 and December 2015, the respondent denies employing the claimant but on the other hand through her witness statement, admits having been in a casual employment relation with the claimant for at most five (5) months. As a matter of fact, the respondent stated in evidence that the claimant would work in the week except for Sundays. This evidence suggests that the parties engaged continuously with breaks on Sundays. On the basis of this evidence, the court believes the claimant's statement that she served the respondent continuously for at least one month with the consequence that the casual employment between the parties automatically converted into indefinite term employment (see *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR).
27. In terms of the *Employment Act*, employees serving on indefinite term basis cannot be dismissed from employment except as provided for under the Act. Under sections 40, 41, 43 and 45 of the Act, the employer must have a valid reason to terminate the employment contract. Further, the employer must follow due process in terminating the contract.
28. Some of the grounds for termination of employment include: redundancy; physical incapacity; incompetence or poor performance; and misconduct. In terms of the procedure to be followed, there is a distinction between redundancy and the other grounds of termination. These are specified under sections 40 and 41 of the *Employment Act*.
29. From the record, there is no evidence that the separation between the parties was based on any of the grounds mentioned above. Neither has it been demonstrated that the respondent followed the procedure for termination either under section 40 or 41 of the Act. Importantly, the claimant was not issued with notice to terminate under section 35 of the Act. The respondent would like the court to believe that the claimant just vanished from the respondent's compound in May 2015, the parties allegedly having had no contract of service between them. Having regard to the foregoing, the court finds that the separation of the parties was not finalized in any of the ways contemplated under the *Employment Act*.
30. The final issue for determination is whether the parties are entitled to the reliefs pleaded. The respondent has prayed that the claimant's case be dismissed with costs. Having regard to the findings of this court on issues numbers one and two, I am disinclined to grant the request by the respondent.



31. The claimant prays for a series of reliefs as more specifically enumerated in the statement of claim. The court has already made a finding that the closure of the contract of service between the parties was not in the manner contemplated in law. Accordingly, it is declared that the claimant's contract of service was unlawfully and unprocedurally terminated.
32. Whilst the claimant avers that her monthly salary was Ksh 10,000/=, the respondent states that for the few days that the claimant was engaged, she would be paid Ksh 500/= per day. That the claimant was not entitled to fixed monthly salary.
33. In the absence of consensus on the issue, the court will revert to the applicable minimum wage order in force at the time the parties entered into the employment relation to determine the monthly wage for the claimant. By legal notice number 197, the Government published the 2013 minimum general wage order. This order remained in force until 2015 May. Under the order, monthly salary for house helps in Nairobi inclusive of house allowance was fixed at Ksh 9,780.95. I will apply this as the all inclusive monthly salary of the claimant.
34. The claimant has prayed for salary *in lieu* of notice. Having regard to the court's findings above, it is clear that the claimant was not issued with notice before her contract of service was terminated. The claimant's contract of service having been converted into an indefinite term contract by virtue of section 37 of the *Employment Act*, she was amenable to salary payment on monthly basis and therefore entitled to a termination notice of one month. Having not been served with such notice, I award her Ksh 9,781/= as salary in lieu of notice.
35. I find that the claimant had served the respondent for a period of one year having been engaged in July 2014 and terminated in December 2015. She had earned annual leave for one year. There is no evidence that the claimant utilized her leave days. Accordingly, I award her leave pay equivalent to her salary for one month, that is to say, Ksh 9,781/=.
36. The respondent does not contest the fact of not having paid the claimant salary for November 2015 and December 2015. The position the respondent takes is that the claimant was not her employee. Therefore, she cannot claim this amount.
37. However, as the court has held, the parties had an employer-employee relation which terminated in late 2015. Therefore, in the absence of evidence by the respondent to controvert the claimant's assertion that she worked up to December 2015 and her salary for November and December was not paid, I find that she is entitled to claim this amount. Accordingly, I enter judgment for the claimant for Ksh 11,737/= being salary for the month of November 2015 and the six (6) days worked in December 2015.
38. The claimant has prayed for judgment for service pay. under section 35 (5) of the *Employment Act*, the claimant is entitled to service pay for every year worked. The law does not provide for the methodology for ascertaining the quantum of service pay. Absent this, courts often borrow the method applied to compute severance pay under section 40 of the *Employment Act* to compute service pay under section 35 (5) of the Act (see *George M. Kirungaru v Next Generation Communications Limited* [2014] eKLR). Accordingly, the claimant is awarded service pay equivalent to 15 days' salary for the year worked, that is to say, Ksh 4,881/=.
39. The claimant has prayed for house allowance. However, as indicated above, the applicable wage order indicates that the salary for house helps for the period under review was inclusive of house allowance. As such, the prayer for house allowance is declined.
40. The claimant has prayed for off duty days. The respondent gave evidence that during the duration of their temporary engagement, the claimant would stay away on Sundays. The claimant did not



controvert this evidence. Section 27 (2) of the Employment Act entitles an employee to one rest day every week. Having regard to the evidence by the respondent, I find that the claimant was afforded her rest days. Consequently, the claim for off duty is declined.

41. As held earlier, the claimant's employment contract was wrongfully terminated. Under section 49 of the Employment Act, she is entitled to compensation for wrongful termination. I have considered that the parties had been in the labour relation for a fairly short duration. The court, in determining the quantum of compensation must bear in mind that this exercise is not intended to enrich the claimant. Having this in mind, I will award the claimant compensation equivalent to her gross monthly pay for four (4) months, that is to say, Ksh 39,124/=.
42. Section 51 of the Employment Act entitles a departing employee to a certificate of service. Accordingly, I order the respondent to issue the claimant with the said certificate.
43. The claimant is awarded interest at court rates from the date of judgment. The claimant is also awarded costs of the case.
44. The award is subject to the applicable statutory deductions.

Summary of Award

- a. The court finds that the parties to the action had a valid employer-employee relation.
- b. The court finds that the relation was terminated unlawfully and without regard for the procedure under the law.
- c. The claimant is awarded:-
 - i. Salary *in lieu* of notice of Ksh 9,781/=.
 - ii. Pay *in lieu* of annual leave of Ksh 9,781/=.
 - iii. Service pay of Ksh 4,881/=.
 - iv. Salary for November 2015 and part salary for December 2015 of Ksh 11,737/=.
 - v. Compensation for wrongful termination of Ksh 39,124/=.
- d. The claims for house allowance and off days are declined.
- e. Claimant is awarded interest on the amounts awarded at court rates to run from the date of judgment.
- f. The claimant is also awarded costs of the case.
- g. The award is subject to the applicable statutory deductions.
- h. The respondent to issue the claimant with a certificate of service.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF FEBRUARY, 2023

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

