



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Sabatia v Singh (Cause 1666 of 2017) [2023] KEELRC 1076 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1076 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1666 OF 2017
AN MWAURE, J
APRIL 28, 2023

BETWEEN

FLORENCE NYANGASI SABATIA CLAIMANT

AND

GIDDIE SINGH RESPONDENT

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JUDGMENT

1. The claimant filed a memorandum of claim dated March 3, 2017.

Claimant's case

2. The claimant's evidence is that she was employed by the respondent in March 2003 as a house help.
3. He says in February 2015 she fell ill and was given sick leave. He says during the sick leave she was not given her entitlements she prays for compensation of Kshs 237,627/79 plus one month salary in lieu of notice 10954/70 and compensation for 12 months being kshs 131,456/40.

Respondent's Case

4. The respondent admits that indeed her claimant worked for the respondent as a house help but the employment was not continuous as she kept absconding from work.
5. He says claimant was ill and that she was entitled to medical attention.
6. He says the claimant absconded from work for three months. He says he learnt of her illness on June 6, 2019 from her advocates Nyachoti & company advocates when they served him with a memorandum of claim dated March 3, 2017. He says the medical report presented was dated May 31, 2015 which was three months since she absconded from work.



7. He says he did not terminate the claimant's employment but that he absconded from work. He says he was ready to pay her final dues being Kshs 728/50 but she has reused or failed to collect it.
8. The respondent therefore submits that the claimant terminated her own employment when she absconded work and so she is not entitled to the prayers claimed. He prays that her claim be dismissed with costs to the respondent.

Claimants evidence

9. The claimant says she worked for the respondent but in February 2015 she fell ill and was hospitalised. She says she was sick for over two months and upon recovery she reported back to work. She says the respondent told her they had nothing to discuss and she had no other option. She says she used to get Kshs 13,000/-. She says she never got any appointment letter and termination letter. She also says she did not get her terminal dues.
10. The claimant's submissions are considered by the court accordingly. They are dated February 1, 2023.
11. The court also as well considered the respondent submissions and authorities cited therein dated February 24, 2023.
12. The issues for determination as deciphered by the honourable court are whether the claimant absconded from duty or was she terminated by the respondent unlawfully and wrongfully. The second issue is whether the claimant is entitled to the reliefs claimed.
13. The averment by the claimant is that she fell ill and was taken to hospital when unconscious. She says she was hospitalised for two months or so until she was well enough to contact her employer. The employer informed her there was nothing for them to discuss. She says she then had no other option.
14. The claimant claims she has worked for the respondent since 2003 as a house help until February 2015 when she fell ill and was hospitalised.
15. The court took cognizance that the respondent did not controvert He commencement date of the claimant's employment. Indeed he was very silent on the timeliness but only stated claimant did not work consistently as she absconded from time to time details of such abscondment re however not provided.
16. Respondent did not also provide court details of efforts made to contact t claimant when she absconded form work,. And if she absconded form time to time as respondent alleges them it is amazing she still worked for tem 2003 to 2015. The curt noted that the respondent did not repute the allegation that the claimant worked for the respondent from 2003 to 2015. It is equally intriguing that the claimant having worked for the respondent for that long could one day just desert her employment for that long and without any reason.
17. The explanation she gave that she fell ill and was hospitalised for over two months seem more credible. She may then not have been in a position to inform her employer of her state. She says she contacted her employer on recovery but her employer informed her there was nothing to discuss and so she had no chance but to leave.
18. The offence is desertion of employment is a serious offence and according to section 44(9) of the [Employment Act](#) 2007 calls for summary dismissal. The law however is that an employer who is considering terminating an employee on grounds of desertion will not just wake up and declare his employee has deserted work. The employer must show efforts made to recall the employee. If that fails



the employer must then give notice to the employee and inform him he is considering terminating him on grounds of desertion.

19. There are several authorities including the one of *Simon Mbiti Mbane vs Intra Security Services Limited* 2018 eKLR where courts have held that in an allegation of abscondment of duties calls upon an employer to reasonably demonstrate efforts made to contact such an employee without success.
20. The case of abscondment has been said as hereinbefore that it is a serious administrative issue and calls for summary dismissal. However the employer must demonstrate it was a case of desertion and not a mere allegation.
21. In view of the foregoing there is no evidence of efforts made by the employer that he attempted to look for his employee of over ten years. In fact the claimant said the employer did not pay her salary during the time she was sick and when she recovered and attempted to speak to her employer he was not ready to speak to her. He also was not ready to pay her any dues except kshs 728.50 according to his evidence.
22. Clearly this was constructive dismissal because the respondent was not ready to pay her or to re-engage her. As in case of *Coca Cola East & Central Africa Limited vs Marie Kigaga* (2015) eKLR constructive dismissal occurs where an employee terminates the contract under which he is employed (with or without malice) in circumstances in which he is entitled to terminate it without notice by reason of employer's conduct.
23. The way things are in this case it did not seem there was room for claimant to work for the respondent anymore. That was a clear case of constructive dismissal and not abscondment. In the upshot the court finds and holds that the claimant was terminated wrongfully and unlawfully and also un procedurally as the respondent was not even willing to engage her in any discussions.
24. Under the circumstances she is entitled to some of the reliefs prayed as hereunder:-
 - a. Salary in lieu of notice Kshs 10,954.70
 - b. Salary for 13 days is not clear the period claimed and is declined.
 - c. Unpaid house allowance is very ambiguous and is not reasonable being claimed over 10 years since she was employed and so is declined.
 - d. Service pay is declined as there is no evidence the actual period the client was employed and period the NSSF dues were remitted or not remitted so is declined.
 - e. 10 months compensation for unlawful termination $10,954.70 \times 10 = 109,547$ Total award is Kshs 120,501.70/- plus costs to the claimant.
- 25 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

