



Kenya Union of Domestic, Hotels Education Institutions and Hospital Workers v Abdalla (Cause 47 of 2019) [2023] KEELRC 1119 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1119 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 47 OF 2019**

AK NZEI, J

APRIL 27, 2023

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS EDUCATION INSTITUTIONS AND HOSPITAL WORKERS CLAIMANT

AND

IDMA MOHAMMED ABDALLA RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent *vide* a Memorandum of Claim dated 2/8/2019 and filed in Court on 8/8/2018 and pleaded that she was employed by the Respondent as a Domestic Worker on 1st August 2013, earning a monthly salary of ksh. 6,000 without house allowance, which amount was subsequently adjusted to ksh. 7,000 in 2014 to 2016, then ksh. 8,000 in 2017 and ksh. 9000 per month in 2018. The Claimant further pleaded that she served the Respondent diligently with loyalty and devotion from the said date of employment until the date of her dismissal on 1st August 2018.
2. The Claimant further pleaded that termination of her employment was wrongful, unlawful, unfair and in total disregard of Sections 17,18,35,36,41,43,45,46 and 49 of the *Employment Act*; that the Respondent did not follow due procedure in terminating her and that she had not been accorded an opportunity to be heard before being dismissed.
3. It was the Claimant's further pleading that she was not paid in lieu of notice, that she was underpaid by the Respondent for five (5) years, was not paid service pay and that she was not issued with a certificate of service.
4. The Claimant set out her claim against the Respondent as follows:-
 - a. One month salary in lieu of noticeksh. 15,609
 - b. Underpayment of wages for 2 years and two months:-



- i. October 2016 – April 2017 (seven months).....12,597 – 5,000 = 7,097X7
.....ksh. 38,500
 - ii. May 2017 -April 2018 (12) – 14,866-600 =
8,866X12 =106,392
 - iii. May 2018 – December 2018 – 15,609 – 6,000
= 9,609x8 =ksh. 76,872
 - c. Unpaid leave for 26 months X 15,609 =.....ksh. 32,258
 - d. Service pay for two years X 15,609ksh. 31,218
 - e. Unpaid salary for July 2018.....ksh. 14,866
 - f. Compensation for public holidays for 2 yearsksh. 20,520
 - g. 12 months salary compensation for unlawful termination
..... ksh. 15,609X12 .187,308
- Total ksh. 525,143
- h. Certificate of service.
 - i. Cost of the suit and interest at Court rates.

5. The Respondent filed Response to the Claimant’s claim on 11th October 2019 and denied the Claimant’s claim. The Respondent, in particular, denied having employed the Claimant at any time, or having terminated her employment, and put the Claimant to strict proof of her claim.
6. Documents filed by the Claimant along with her memorandum of claim included a written witness statement dated 11th January 2019 and some correspondence relating to failed conciliation attempts prior to institution of the suit herein.
7. On her part, the Respondent filed her written witness statement on 30th June 2022, and did not file any evidential documents.
8. When trial opened on 28th July 2022, the Claimant adopted her said filed witness statement as her testimony, and produced in evidence copies of the documents referred to in paragraph 6 of this judgment. The Respondent further testified that she was employed by the Respondent on 5/11/2015 and was terminated in January 2019.
9. Cross-examined by Counsel for the Respondent, the Claimant testified that she was employed by the Respondent on 5/11/2015 and was terminated in January 2019. She further testified that she had no evidence on her employment as she had not been given a written contract and had no evidence on any payment to her by her employer.
10. The Claimant further testified that she was a member of the Claimant union, though her membership card bore an identity card number that was different from that on her national identity card.
11. It is to be noted that the Claimant, in her filed witness statement which she adopted in Court as her testimony, stated that she was employed by the Respondent on 3rd October 2016 and was terminated 10th January 2019. The Claimant gave three different dates and years as being the dates of her employment, these being:-



- a. 20th March 2013 as pleaded in the memorandum of claim.
 - b. 3rd October 2016 as stated in the Claimant’s written and filed witness statement dated 11th January 2019 which the Claimant adopted on oath as her testimony.
 - c. 5th November 2015 as testified in Court by the Claimant.
12. The Respondent adopted her filed witness statement as her testimony and maintained that she never employed the Claimant at any given time, but only gave her shelter and took care of the Claimant sometimes between 2017 and 2019 after the Claimant was introduced to her by a family friend as a well-mannered young lady with no family and in need of shelter and assistance. That guided by religious teachings, the Respondent took the Claimant into her house, and that the Claimant could go visiting her friends for days. That sometimes in or about 2019, the Claimant disappeared from the Respondent’s house for days and when the Respondent refused to accept her back to her house due to that behavior of disappearing for days; the Respondent received a notice from the Claimant union.
13. It was the Respondent’s contention that the Claimant’s allegations were actuated by malice, and asked the Court to dismiss the claim.
14. Having considered the pleadings filed and evidence presented by both parties, issues that emerge for determination, in my view, are as follows:-
- a. whether the Claimant was employed by the Respondent.
 - b. whether the Claimant is entitled to the reliefs sought.
15. On the first issue, the Claimant pleaded that she was employed by the Respondent on 20th March 2013, and in her evidence in Court gave other two different dates, 3rd October 2016 and 5th November 2015 as the dates of her employment by the Respondent. The Claimant did not evidentially prove that she was ever employed by the Respondent. Worse still, the Claimant gave conflicting evidence on the date and year of her employment, which materially contradicted the averments made in her pleadings/ memorandum of claim. Such evidence can only be disregarded. The Claimant did not, in any way, prove that she was ever employed by the Respondent.
16. It was stated in *Mary Mmbone Mboyi -vs- Chandubhai Patel & Another* [industrial Cause No. 761 OF 2011] as cited in *Zarika Adoyo Obondo -vs- Tai Shunjun & Another* [2020] eKLR as follows:-
- “even in cases where there may be no documentary proof of an employment relationship or termination thereof, the Claimant retains the burden of proving their case through viva voce evidence.”
- The Claimant did not adduce any evidence to prove the existence of an employment relationship between the grievant and the Respondent.
- The Claimant’s entire claim therefore fails and is hereby dismissed.”
17. Further, parties are forever bound by their pleadings, and any evidence that is at variance with pleadings as filed in Court is not only devoid of evidential value, but goes a long way to expose the Claimant’s case as one that is not founded on true and valid facts. It was held as follows in the case of *Daniel Otieno Migore -vs- South Nyanza Sugar Company Limited* [2018] eKLR:-
- “it is now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced



in a matter must be in consonance with the pleadings. Any evidence, however strong that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral And Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 Others* [2014] eKLR, which cited with approval the decision of the Supreme Court of *Nigeria in Adetoun Oladeji [nig] -vs- Nigeria Breweries PLC SC 91/2002* where Adereji; JSC expressed himself thus on the importance and place of pleadings:-

“...it is now a trite principle in law that parties are bound by their own pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...”

18. It follows that the Claimant is not entitled to the reliefs sought. This settles the second issue.
19. I find and hold that the Claimant has totally failed to prove her claim against the Respondent. Accordingly, the suit is hereby dismissed.
20. Each party will bear its own costs of the suit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

