



REPUBLIC OF KENYA



MUTHUI v HASSAN (Cause 94 of 2017) [2023] KEELRC 1224 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1224 (KLR)

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

CAUSE 94 OF 2017

B ONGAYA, J

MAY 25, 2023

BETWEEN

FAITH KAKOA MUTHUI CLAIMANT

AND

HUSSEIN HASSAN RESPONDENT

JUDGMENT

1. The claimant Faith Kakoa Muthui filed on 19.01.2017 the memorandum of claim through Njoroge Jimnah & Company Advocates. It is pleaded as follows. The respondent employed the claimant as a house servant (house keeper, nanny and cook) effective April 2004 at Kshs 8,000.00 per month as at termination. She worked with due diligence until 07.12.2015 when her service was suddenly terminated. On that date at 6.00am she reported at work and informed the respondent she was unwell and requested for permission to go to hospital but the respondent denied her the permission. The respondent instructed her to continue working and failing her employment would be terminated. She attempted to work but her condition got worse and renewed her request for permission. At that point the respondent told her to leave and never to come back as her employment was henceforth terminated. The claimant was shocked as her employment came to an end. It is her case that it was unfair, wrongful, malicious and in breach of tenets of natural justice.
2. It her further case that she worked extra hours without pay because she reported at work say at 6.00am to 8.30pm being 14.5 hours per day for 6 days a week making a total of 87 hours a week beyond the weekly statutory 52 hours by 35 hours a week. She claims payment for overtime. She also worked for 12 years without being allowed to take annual leave or being paid *in lieu* thereof. She also claimed her terminal dues including pay in lieu of notice, salary for days worked, pay for 12 years' annual leave, house allowance, service pay and underpayment per statutory minimum wages. 7 days worked in December 2015 were not paid. The claimant computed her claims as follows:
 - a. Pay *in lieu* of notice based on minimum statutory wage for children ayah and house servant per Regulation of Wages (General) (Amendment) Kshs 9, 780.00.



- b. Salary for 7 days worked in December 2015 Kshs 2, 282.00.
 - c. Pay for leave for 12 years at 9, 780 per year Kshs 117, 360.00.
 - d. Underpayment based on the minimum wage (9, 780-8,000)12=Kshs 256, 320.00.
 - e. House allowance based on minimum wage at 15% of wage for 12 years making Kshs 211, 248.
 - f. Overtime at 1.5 hourly rate for 12 years Kshs 1, 314, 230.40.
 - g. 10 holidays each year worked for 12 years Kshs 83, 443.20.
 - h. Service pay at 15 days for each year worked Kshs 58, 680.00.
 - i. Compensation for unlawful termination 9,800 x12 making Kshs 117, 360.00
 - j. Total claimed Kshs 2, 170, 703.60.
3. The claimant prayed for judgment against the respondent for:
- a. Payment of Kshs 2,170,703.
 - b. Costs of the suit.
 - c. Interest on (a) and (b) at Court rates.
 - d. Any other or further relief that the honourable court may deem fit to grant.
4. The respondent appointed Kakai Mugalo & Company Advocates to act in the suit. The respondent filed on 20.02.2017 the statement of response. The respondent pleaded as follows. Admitted employing the claimant in April 2004. The claimant absconded on 11.01.2016 when she was assigned the duties of a nanny. She had taken break for the December holidays on 20.12.2015 and expected back on 11.01.2016 but she failed to report back. The respondent tried to reach her including intervention of the local chief but he was unsuccessful. The claims are unfounded as the respondent further states the suit be dismissed with costs.
5. The claimant filed the reply to the response on 24.02.2017. she denied absconding duty on 11.01.2016 or that she had proceeded for December holidays effective 20.12.2015. She stated that she was not aware of interventions of the area chief and further repeated that she was unfairly terminated.
6. The claimant testified to support her case by adopting her witness statement. The respondent did not attend at the hearing and the respondent's witness also failed to attend at the hearing. Final submissions were filed for the parties. The Court returns as follows:
7. To answer the 1st issue, the Court returns that parties were in an employment relationship. The respondent employed the claimant in April 2004 as a house servant and her last pay was Kshs 8,000.00. While making that finding the Court considers that while the claimant alleged minimum monthly statutory wage of Kshs 9, 780.00, she did not plead the exact wage order relied upon and the date it may have come into effect.
8. To answer the 2nd issue the Court finds that the claimant has failed to show on a balance of probability that on 07.12.2015 she was overwhelmed with ill-health and upon renewing her request for permission, the respondent terminated the employment. In making that finding, the Court considers that the claimant's design was that on that date she was very sick and she needed to go to hospital. However, she has not exhibited the medical records showing that she thereafter, after the termination, sought the medical attention. The Court therefore finds that her account cannot be



trusted. In the circumstance that the respondent offered no testimony on the circumstances of the alleged absconding of duty, the Court returns that it is difficult to tell whether termination by the respondent indeed took place. Thus the issues of procedural and substantive fairness of termination in the instant case does not start to emerge.

9. The 3rd issue is whether the claimant is entitled to the remedies as prayed for. The Court returns as follows:
- a. the Court has found that the circumstances of the separation are at large and a finding that termination took place is difficult to ascertain. Thus the prayers for pay in lieu of the termination notice and compensation of 12 months' salaries for unfair termination are declined.
 - b. It is difficult to tell the date the separation took place and 7 days' wages for December 2015 is declined as unfounded or evidence based.
 - c. Pay *in lieu* of annual leave for 12 yrs, underpayment for 12 years, house allowance for 12 years, overtime for 12 years, holidays worked for 12 years are all claims in the nature of continuing injuries whose time of limitation under section 90 of the Act is 12 months from the date of their cessation. They ceased sometimes in December 2015 or January 2016 looking at the parties' pleadings. The 12 months of limitation lapsed sometimes on 11.01.2017 going by the respondent's date of 11.01.2016 when the claimant allegedly failed to resume after December break. Thus the claims were time barred when the suit was filed on 19.01.2017. In any event there was no alleged or established grievances in respect of these belated claims and which appear to the Court to have been mere afterthoughts. The basis for claiming service pay was not pleaded, no evidence was given in that regard and no submission was as well provided. The prayer will fail as unjustified.
10. The respondent did not participate at the hearing and each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for the dismissal of the suit with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

