



**Kenya Union of Domestic, Hotels, Educational Institutions
and Hospital Workers Union (KUDHEIHA) v Abashei (Cause
29 of 2019) [2023] KEELRC 1516 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1516 (KLR)

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

CAUSE 29 OF 2019

AK NZEI, J

JUNE 15, 2023

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS UNION (KUDHEIHA) CLAIMANT**

AND

YUSUF SHUBI ABASHEI RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 27/5/2019 and filed in this Court on 31/5/2019. The Claimant pleaded that the grievant, Rose Ajikon Lokeyo, was employed by the Respondent as a Domestic Worker on 10th August 2013 at a salary of ksh. 5,600, which was subsequently adjusted to ksh. 7000. That the grievant held the said position upto the date of her termination on 27th March 2018 for reason that she failed to report to work for two days.
2. The Claimant further pleaded that the grievant reported the matter to the Union and that although a Conciliator was subsequently appointed by the Minister, the Respondent failed to appear before the Conciliator who then issued a certificate of an unresolved dispute, leading to institution of the claim herein.
3. The Claimant further pleaded that termination of the grievant's employment was wrongful, unlawful, unfair and in total disregard of Section 17,18,35,36,41,43,45,46 and 49 of the *Employment Act*. That the Respondent did not follow due procedure in dismissing the grievant from employment, and that the grievant was not paid notice pay, overtime worked, service pay, public holidays worked, that the Respondent did not pay the grievant compensation under Section 49 of the *Employment Act*, and did not issue the grievant with a certificate of service.



4. It was the Claimant's further pleading that the grievant was under paid by the Respondent, and set out the grievant's claim against the Respondent as follows:-
- a. One month salary in lieu of notice.....ksh. 14,866
 - b. Public holidays for 3 years (496X2X10 days
X3 years).....ksh. 47,616
 - c. Annual leave for 4 years (496X21 days X4 years).ksh. 41,664
 - d. Service pay for 4 years (14,866/30X15 days
X4 years).....ksh. 29,760
 - e. Underpayment of wages
 - i. October 2013 – April 2014.....ksh. 36,729
 - ii. May 2014 – April 2015 (12 months).....ksh. 79,164
 - iii. May 2015 – April 2016 (12 months)ksh. 79,164
 - iv. May 2016 – April 2017 (12 months)ksh. 67,164
 - v. May 2017 – February 2018 (10 months).....ksh. 78,660
 - f. 2 off days less per month for
years 496X12X4.....ksh. 47,616
 - g. 12 months salary compensation for loss
of employmentksh. 178,392
Total ksh. 692,859
5. The Claimant sought the following reliefs:-
- a. a declaration that summary and/or termination of employment by the Respondent was unlawful and illegal.
 - b. an order directing the Respondent to pay the grievant ksh. 692,859 for wage underpayment, salary in lieu of notice, public holidays, service pay, annual leave for 4 years and compensation under Section 49(1) of the Employment Act.
 - c. an order directing the Respondent to issue a certificate of service to the grievant.
 - d. costs of the suit and interest.
 - e. Any further orders as the Court may deem just and appropriate to grant.
6. Other documents filed by the Claimant along with the memorandum of claim included an affidavit in verification of the claim shown to have been sworn by the grievant on 30th May 2019, the grievant's written witness statement dated 17th May 2019 and a list of documents dated 27th May 2019, listing some four documents. The listed documents included the Claimant Union's letter dated 24th April 2018 requesting for a meeting with the Respondent, a letter dated 21st June 2018 by the Chief Industrial Relations Officer appointing a Conciliator, the Conciliator's letter dated 10th September 2018 inviting parties for conciliation and the Conciliator's recommendation dated 5th December 2018.



7. The Respondent entered appearance and filed a response to the Claimant's claim on 14th October 2019, denying the Claimant's claim and stating that the grievant was a total stranger to him.
8. The Respondent pleaded that in the alternative, and without prejudice to the Respondent's denial of the claim, the grievant may have been a regular casual worker periodically offering cleaning services to residents of the Respondent's Estate, and that the grievant's claim herein is an attempt to unjust enrichment through false and fabricated claim against the Respondent. The Respondent called for dismissal of the grievant's claim against him.
9. The Respondent also filed his written witness statement dated 7th September 2020.
10. When trial opened on 8th November 2022, the Claimant adopted her filed witness statement dated 27/5/2019 as her testimony, and produced in evidence the documents referred to in paragraph 6 of this judgment. The Claimant testified that she was employed by the Respondent as a house help on 10/8/2013, earning ksh. 5,600 at first, which was subsequently increased to ksh. 7,000 per month, and that the Respondent's house was at Likoni Towers. That the grievant was not being given any off days and that the Respondent was not deducting NSSF and NHIF. That during the period of employment, the grievant became pregnant and the Respondent told her that she could not continue in employment. That the dispute was reported to the Labour Office but the Respondent refused to attend, hence the claim herein.
11. Cross-examined, the grievant testified that she had been employed on 10/8/2013 by Yusuf, whose full names she did not know, that she was not given a written contract and that she was being paid monthly, though she did not have any proof of that payment. The Claimant further testified that she was being paid by Yusuf's wife (abdiya) in cash. That the family she worked for lived in Likoni Towers and the family's children's names were Hafsa, Abdul, Hanan and Mahir.
12. The Claimant further testified:
 - a. that she reported for work at 7.30 am and left at 3.00pm. that she used to go home after finishing her duties of washing clothes, ironing and cleaning the house and windows; and worked upto Sundays without off days until she complained and was given one day in every 2 weeks.
 - b. that the Claimant did not know how to read, but could write her name. That she did not know who had signed her verifying affidavit.
13. The Respondent testified and adopted his witness statement dated 7/9/2020 as his testimony. He further told the Court that he did not know the person who had sued him. That he lives in Likoni Towers in Kizingo where one of his families lives, and that they do not usually employ any employees, but take casuals at the gate to do given house chores when such duties/chores are available. That his wife takes the casuals and pays them at the end of the given day/date; and that he (the Respondent) has never paid any salary to such casuals. That it is not unusual for such casuals to know the names of his children. That he was summoned by the Claimant Union and he told them exactly what he had told the Court herein. That he has never had any employment contract with the grievant.
14. Cross-examined, the Respondent testified that the names of his children in the family living in Likoni Towers are Abdulfatar, Hanan and Maher. He denied ever paying the Claimant, either in cash or by M-pesa.
15. Having considered the pleadings filed and evidence adduced herein, issues that present for determination, in my view, are:-



- a. whether the grievant was employed by the Respondent, and if so,
 - b. whether the employment was unfairly terminated by the Respondent.
 - c. whether the Claimant is entitled to the reliefs sought.
16. On the first issue, it is to be noted that other than her pleading and oral evidence to the effect that she was employed by the Respondent from 10/8/2013 upto March 2018, for a period of over four years, the Claimant did not tender any documentary evidence to demonstrate that the grievant was ever employed by the Respondent. Further, the Claimant did not call any witness to corroborate the grievant's oral evidence to the effect that she was employed by the Respondent. Four years is a long time and if, indeed, the grievant worked for the Respondent for that period of time or for any period of time, someone, say a friend, a neighbour or even a relative, must have seen her working in the Respondent's house or must have known that she was working there. The Claimant and/or the grievant chose not to call any witness at all.
17. An employee who sues an employer for unfair termination of employment must, as a basic requirement, prove, on a balance of probability, that he or she was employed by such employer. This requirement remains regardless of whether or not the alleged contract of service in issue was written. It is only after that basic issue is resolved in favour of the employee that the Court can go further and interrogate any allegation of unfair termination of an employee.
18. It was stated as follows in the case of Joel Mutuku Mwanzaku -vs- Mul Oil Construction Limited [2019] eKLR:-
- “ 10. Because the Claimant's entire claim is premised on an employment relationship, it was incumbent upon him to prove its existence. I have said before, and I will say it again, that not every work relationship is an employment relationship (see John Kamau Mburu -vs- Program for Appropriate Technology in Health & Another [2015] eKLR).
 13. This case turns on the question whether there was an employment relationship between the Claimant and the Respondent, and the burden of proving this fell squarely on the Claimant. Having failed to call independent evidence to prove this, the only finding to make is that there was no employment relationship between the parties capable of enforcement by this Court, which exercises specialized jurisdiction.”
19. In Geoffrey Wambua King'oo -vs- Dinesh Construction Limited [2019] eKLR; the Court stated as follows:-
- “ 13. After considering the evidence and the submissions presented by parties, the Court finds that the Claimant has not proved, on a balance of probability, that he was employed by the Respondent. All what he said was that he was employed but tendered no documentary evidence or called any person as a witness to corroborate his oral testimony. It is trite law that he who alleges must prove his allegations, and cannot ride on the other party's default to produce documents to succeed in his case.”
20. Having said that, I find and hold that the Claimant has not proved, on a balance of probability, that she was employed by the Respondent.



21. It follows that there could not have been unfair termination of an employment contract and/or employment relationship which did not exist, in the first place. Reliefs sought are not available to the Claimant, in the circumstances. This answers to the second and the third issues herein.
22. Consequently, and having considered written submissions filed by the parties herein, I find and hold that the Claimant has failed to prove her claim against the Respondent; and the same is hereby dismissed.
23. Each party will bear its own costs of these proceedings.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH JUNE 2023

AGNES KITIKU NZEI

JUDGE

ORDER

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

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Oyondi for Claimant

Mr. Wafula for Respondent

