



REPUBLIC OF KENYA



Isami v Musyoka (Cause 920 of 2018) [2023] KEELRC 2663 (KLR) (30 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2663 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 920 OF 2018
B ONGAYA, J
OCTOBER 30, 2023

BETWEEN

PAMELA IMALI ISAMI CLAIMANT

AND

MARY SIRINDI MUSYOKA RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 11.06.2018 through Mudeshi Muhanda and Company Advocates. She alleged that she was employed by the respondent as a housekeeper at the respondent's residence along Ole Odume Road in Nairobi County sometimes in August 2014 at Kshs 7,500.00. She pleaded that she woke up at 4.30am to cook and took care of the respondent's youngest child. He further case is as follows. In January 2018 the claimant requested the respondent to review her salary which was below the minimum statutory pay but the respondent declined to increase the same. The respondent started to allege poor performance and restricted the claimant from interacting with other housekeepers who were thought to influence her demands for wage increase. On 15.04.2018 she worked under strict supervision of the respondent who later summoned her and informed her that the respondent's business was not performing well and that the respondent wished to employ another person at a lower wage. The claimant states that she requested for a notice period to seek alternative employment but the respondent declined and instead instructed her to leave the premises immediately. The claimant pleaded that the dismissal was unfair, in breach of natural justice and amounted to unfair labour practices in breach of the *Employment Act*. Further, there was no hearing, explanation for the dismissal or due process. She claimed as follows:
 - a. A month's salary in lieu of the notice Kshs 12, 926.55.
 - b. Underpayment by Kshs 5,426.55 x 44 = Kshs 238, 768.20.
 - c. Leave pay for 3 years Kshs 38, 780.00.
 - d. Service pay Kshs 12, 926.55.



- e. Damages for unlawful termination 12, 926.55 x12=Kshs 360, 000.00
 - f. Total claim Kshs 491, 740.00.
2. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the respondent's dismissal of the claimant from employment was un-procedural, and improper and the claimant is entitled to compensation and terminal dues as pleaded.
 - b. Payment of Kshs 491, 740.00.
 - c. Issuance of a certificate of service.
 - d. Costs plus interest of the suit.
 - e. Any other relief the Court may deem just.
3. The respondent filed on 09.07.2018 a statement of defence and in person. On 19.06.2023 the respondent appointed Ngaruiya Gitau & Company Advocates to act in the suit. The respondent pleaded as follows:
 - a. The claimant was paid Kshs 7, 500.00 per month and was not underpaid because she was housed and fed by the respondent.
 - b. The claimant has fabricated the facts because she was summarily dismissed for gross misconduct.
 - c. The respondent admitted that she employed the claimant in August 2014. She worked for three months and she left without notice after her pastor obtained her alternative employment. In 2015 she returned to the respondent and who employed her on part-time basis. In 2017 she employed the claimant on regular basis and after a few months she became arrogant, rude and untidy. She failed to improve even after warnings and on 21.12.2017 the claimant left the respondent's home without a warning.
 - d. On 27.12.2017 the respondent send a text message on phone asking the claimant whether she would be resuming duty by 01.02.2018 by 4.00pm since schools were opening on 02.01.2018. The claimant failed to respond but she came back to work on 01.01.2018. On 01.01.2018 the respondent gave the claimant a notice that at end of April 2018 she would be relieving her duties as she had become unreliable. By end of April 2018, the parties separated accordingly.
4. The claimant filed a reply to the defence dated 30.01.2020. She stated that on 24.12.2017 she left for her December holiday, she returned to work on 01.01.2018 and on 15.04.2018 her services were terminated without being paid her dues.
5. The respondent pleaded and prayed that the memorandum of claim be dismissed with costs.
6. The parties testified to support their respective cases.
7. To answer the 1st issue, the Court returns that parties were in a contract of service. By her own testimony, the claimant testified that for February 2015 to 2017 the parties agreed she could work



elsewhere. In a contradictory manner she stated thus, “February 2015 to March 2017 I was not a part timer” Earlier in her testimony she confirmed that upon being employed she worked for 3 months and she told the respondent she was tired of working but denied deserting duty between August 2013 to February 2015. She confirmed by her testimony that the agreed monthly pay was Kshs 7, 500.00. The respondent testified that the claimant worked for her from August 2014 to 20.04.2018 and it was with breaks. The respondent testified that the employment was with gaps and regular employment was only for a year. Further that in 2014 she deserted on account that her pastor had secured her a job. The Court has considered the claimant’s contradictory testimony against the testimony by the respondent. The contradictory account by the claimant cannot be trusted. The Court finds that the claimant was employed by the respondent as a house keeper, with a break when her pastor secured her a job and later returned - when she worked with offs on Saturdays and Sundays. The agreed monthly payment was Kshs 7,500.00.

8. To answer the 2nd issue the Court returns that the termination was not unfair but that the claimant had fully contributed to the same by her own misconduct. The claimant by her own testimony has confirmed that she resumed duty on 01.01.2018 and she was informed about her poor performance. She testified thus, “in January 2018 I was informed about poor performance. I was told in January. She asked me to leave job. I was not released to leave. April 11, 2018 I was released. Since January warning I worked till April, 2018.” The account appears to be consistent with the respondent’s pleading and further, the respondent’s testimony that the claimant pushed her to dismiss her in April 2018 when she refused to change her cloths for four days and without bathing. The Court finds that the respondent’s testimony about the claimant’s misconducts of being untidy and arrogant are established on a balance of probabilities. The Court finds that the claimant fully contributed to her termination and the reasons for termination amounted to gross misconduct per section 44 of the *Employment Act*; as submitted for the respondent. The reasons existed as at termination per section 43 and were fair reasons per section 45 of the *Employment Act* as they related to the claimant’s conduct and the respondent’s operational requirements .
9. The 3rd issue is on remedies. The Court returns as follows:
 - a. The dismissal having been found not to have been unfair, the claims for payment in lieu of notice and damages for unfair termination will collapse.
 - b. In view of the gaps in the service as established the claim for underpayment cannot be said to be strictly proved as required in claims for special damages. For service commencing 2014, it is submitted that the claimant relies upon the *Regulation of Wages (General) (Amendment) Order, 2017*. It should be obvious that the computation with respect to the period of the claim is unjustified. It will fail.
 - c. Leave pay is claimed for three years. There are established gaps in the service. Further the claimant was given two days’ offs on Saturdays and Sundays per week including for visiting her family. There is no reason to doubt the respondent’s testimony that she allowed the claimant 2 weeks of leave during the general elections. It appears that on a balance of probabilities the claimant has failed to establish and strictly prove the claim which is hereby declined.
 - d. The respondent confirmed the claimant worked regularly and not on part time for one year. In absence of NSSF contributions, the Court awards her the Kshs 12, 926.55 for service pay under section 35 of the *Employment Act* as a reasonable payment in that regard. She is entitled to a certificate of service per



section 51 of the *Employment Act*, 2007. Considering the parties' margins of success, each to bear own costs of the suit.

10. In conclusion judgment is hereby entered for the parties for:
- a. The respondent to pay the claimant a sum of Kshs 12, 926.55 by 01.12.2023 failing interest to run thereon at Court rates from the date of filing the suit till full payment.
 - b. The claimant's certificate of service to issue and be delivered by 01.12.2023.
 - c. Each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 30TH DAY OF OCTOBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

