



Marucha v Waituika & another (Sued as the Legal administrators of the estate of Alex Chege Waituika) (Cause 2162 of 2016) [2023] KEELRC 2626 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2626 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2162 OF 2016
MN NDUMA, J
OCTOBER 19, 2023

BETWEEN

EDWARD AMENYA MARUCHA CLAIMANT

AND

**MARGARET WAITUIKA & CHARLES WAITUIKA (SUED AS THE
LEGAL ADMINISTRATORS OF THE ESTATE OF ALEX CHEGE
WAITUIKA) RESPONDENT**

JUDGMENT

1. The claimant was employed by the late Alex Chege Waituika, who is sued vide the legal administrators of the Estate of Margaret Waituika and Charles Waituika.
2. CW1, the claimant testified that he was employed by the respondent around February, 2014 to work at his home in Nairobi as Security Guard at a monthly salary of Kshs 17,500.
3. That the claimant did other duties including general cleaning, digging, cooking; landscaping and acting as gym assistant
4. That the respondent started paying the claimant Kshs 8,000 and said that he would save the balance of Kshs 9,500 to give the claimant in lumpsum at the end of the year.
5. That CW1 worked in such capacity for one year until February, 2015 when he fell ill and his services were terminated.
6. That the respondent refused to provide the claimant with medical treatment and told CW1 to go home. That the respondent also refused to pay the claimant the retained Kshs 9,500 per month. That CW1 worked for ten (10) hours a day and 7 days a week and was never given off days nor leave days.
7. That the termination was for no valid reason and no letter of termination was given to CW1.



8. CW1 stated that he was never paid overtime, for extra hours worked during weekdays, weekends and public holidays.
9. That the termination traumatised CW1 and was wrongful and unlawful.
10. The Claimant seeks the following reliefs:-
 - i. Notice pay for one month – Kshs 17,500
 - ii. Salary for February, 2015 – Kshs 17,500.
 - iii. Service pay for 1 year at 15 days salary – Kshs 8,750.
 - iv. Overtime during week days at 85 hours per week x 56 weeks – Kshs 261,800.
 - v. Public Holidays worked being 9 days in the year x 880 – 7,950.
 - vi. Withheld salary at Kshs 9,500 for 10 months – Kshs 96,000.
 - vii. Unpaid house allowance at 15% of the salary of 12 months – Kshs 31,500.
 - (viii) Unpaid weekend at 21 hours x 50 weeks x Kshs 110 – 129,360.
 - (ix) Compensation for unlawful termination.
 - (x) Provision of Certificate of Service.
11. The respondent had filed Statement of response and witness statement before his death. The same were adopted as the defence by the next of kin and administrators of his estate aforesaid. RW1 stated that the claimant was around March, 2014 employed by the respondent to work at his home as a gardener at a monthly salary of Kshs 8,000.
12. That during the course of his work, the claimant requested for a loan of Kshs 70,000 which was duly given to him on 27/11/2014 through the respondent's company the investment house. That the terms and conditions of repayment were stated in an agreement produced before Court and signed by the claimant and the respondent as the director of the company.
13. That CW1 started failing to report to work and got into altercations with other domestic workers. The claimant was given several verbal warnings, but failed to heed the same.
14. That around February, 2015, the claimant upon receipt of his salary absconded his duties and never returned to work again.
 - 15 That at the time the claimant absconded, he was to repay Kshs 117,620 in respect of the loan advanced to him.
16. That the claimant has failed to pay the loan despite demand.
17. That the suit has no merit and it be dismissed.
18. The parties filed written submissions which the Court has carefully considered together with the testimony by CW1 and RW1. The issues for determination are:-
 - (a) Whether the claimant's employment was terminated or the claimant absconded work and failed to repay the loan advanced to him.
 - (b) Whether the claimant is entitled to the reliefs sought.



19. In the present suit, it is not in dispute that the claimant was employed by the respondent as a domestic worker at his home for a period of about 12 months.
20. There is no written agreement of employment between the parties. The claimant testified that he was entitled to payment of Kshs 17500 per month but was paid Kshs 8000 and the respondent retained Kshs 9,500 to be paid in lumpsum at the end of the year. The respondent on the other hand testified that the claimant was entitled to a monthly salary of Kshs 8,000 per month which, he was paid monthly until when he absconded in February, 2015 upon receipt of the salary.
21. In the absence of any written agreement and corroboration by a third person, it is the word of the claimant against that of the respondent. It is not in dispute that the respondent did not pay National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) statutory dues on behalf of the claimant. The claimant does not deny that he had received a loan of Kshs 117,620 from a company in which the respondent was a director. The claimant did not deny that he had not repaid the money but stated that the company was a separate entity from the respondent.
22. The claimant did not produce any records to demonstrate that he worked overtime during weekdays, weekends, and holidays as alleged or at all. The claimant did not produce any documentary evidence to show that the respondent had retained Kshs 9,500 on his behalf every month. The claimant did not also produce any evidence to show that he was entitled to payment of a house allowance over and above the salary he received every month. Whilst the claimant was in the employment of the respondent, he did not in writing demand payment of overtime, house allowance and the alleged salary retained on his behalf by the respondent.
23. In terms of Section 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya, the claimant bears the onus of proving that he is entitled to payment of overtime, house allowance and retained salary by the respondent. The claims must be proved on a balance of probabilities. The respondent has denied these claims stating that it is the claimant who owes the respondent Kshs 117,620 lent to him by the respondent vide his company. The claimant did not deny having received this money. The respondent stated that the claimant absconded work to avoid repaying the loan.
24. In the absence of any records to prove the claims made by the claimant in respect of hours worked; overtime, house allowance and money retained on his behalf by the respondent, the Court finds that the claims have not been satisfactorily proved by the claimant on a balance of probabilities.
25. The respective claims are therefore dismissed for lack of merit.
26. With regard to the manner of separation between the claimant and the respondent, the Court is not satisfied that the claimant has proved on a balance of probabilities that the respondent verbally chased him from employment.
27. The claimant was not at the time of filing suit candid about the loan he had been advanced by the respondent vide his company. The Court finds that it is more probable than not that the claimant absconded work to avoid payment of the loan. The Court finds that the claim that the respondent wrongfully terminated the employment of the claimant lacks merit and is dismissed.
28. The claimant having worked for a period of about 12 months for the respondent and no NHIF and NSSF paid on his behalf is entitled to payment of gratuity calculated at half the salary earned for each completed year of service. The claimant is therefore entitled to payment of Kshs 4,000 in respect of gratuity. The claimant is also entitled to a certificate of service and the Court directs the respondent to grant the claimant Certificate of Service.



29. In the final analysis, the Court notes that a proper case for underpayment contrary to the relevant Minimum Wage Order would have been appropriately filed by the claimant but this was not done.
30. Accordingly, the entire suit by the claimant with exception of Kshs 4,000 gratuity and provision of Certificate of Service within 30 days of the judgment is dismissed for lack of merit.
31. Each party to meet their costs of the suit.

DATED AND DELIVERED AT NAIROBI(VIRTUALLY) THIS 19TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

