



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 69 OF 2018

DANIEL CHARO KARANI.....CLAIMANT

VERSUS

DANIELA MALANCHINI.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent sometime between 1998 and 2000 as a domestic worker. The Respondent suggests that this arrangement terminated temporarily but was renewed in 2004.

2. The parties agree that the Claimant's employment eventually terminated following a request by the Claimant to the Respondent in March 2016 that he retires from service. While the Claimant suggests that the contract terminated much later in February 2017 following the March 2016 request, the Respondent suggests that the Claimant was released on 7th March 2016.

3. This dispute is centered on whether the Respondent paid the Claimant what the Claimant describes as his terminal dues following the Claimant's retirement in March 2016. It is the Claimant's case that the Respondent failed to pay these dues thus necessitating this action. On the other hand, the Respondent states that she paid the Claimant all his dues and that nothing remains outstanding between the parties arising from the contract of service between them.

4. The parties filed their respective pleading in support of and opposition to the Claim. In the Statement of Claim, the Claimant asserts that he was employed by the Respondent as a room steward sometime in 1998. That his starting salary was Ksh. 2,400/=. That his work involved keeping the Respondent's house clean. That however, the Respondent would sometimes require the Claimant to undertake some other duties such as cleaning the Respondent's compound, tending to flowers in the Respondent's compound, cleaning the swimming pool, cooking, painting and messenger services. That these additional services were not part of the initial contract of service between the parties and that the Respondent did not pay for the additional services despite the Claimant rendering them.

5. The Claimant asserts that when he retired, the Respondent tricked him into signing a document suggesting that the Respondent had paid the Claimant his terminal dues when she in fact had not. That besides, the Respondent had over the years caused the Claimant to sign a series of documents purporting to be acknowledgments by the Claimant of the fact that the Respondent was living up to the terms of the contract of service between the parties.

6. The Claimant further contended that for the duration of the contract of service between him and the Respondent, he was not granted various benefits and rights under employment law. These include: annual leave; public holidays offs; and overtime pay.

7. The Claimant therefore claims for a number of reliefs including:

a) Pay in lieu of notice.

b) Pay for leave days not utilized in the 18 years of service.

c) Pay for public holidays the Claimant worked over the 18 years of service.

d) Gratuity.

e) Overtime pay.

f) Certificate of service.

g) Interest.

h) Costs of the suit.

8. In her response to the Statement of Claim, the Respondent, while admitting having hired the Claimant as a general worker, denied that she had not paid him for the services he rendered over the years as he alleges. The Respondent asserted that while she hired the Claimant at the initial salary of Ksh. 2,400/=, this was regularly reviewed and stood at Ksh 15,000/= at the time the Claimant retired from service.

9. The Respondent further pleaded that as she was in the country for only three (3) months in any given year, the Claimant would serve as a room steward for that duration only. For the rest of the year when the Respondent was away, the Claimant would undertake other general duties in the Respondent's compound as her house remained closed. That all these services were remunerated under the contract of service between the parties.

10. That for the duties that fell outside the contract of service between the parties, the Claimant would, where necessary, execute them with other casual workers and was paid separately. Specifically, the Respondent denied that the Claimant routinely undertook services such as: cleaning of the swimming pool; cooking; gardening; messenger; and painter. That even though she tried to interest the Claimant in some of the activities aforesaid, the Claimant's performance was never satisfactory. As a result, the Respondent relied on other workers hired on temporary terms to execute the various tasks. That she would pay these casual employees immediately upon conclusion of every task and if the Claimant had joined the casuals in executing the said tasks, he would be paid alongside the casuals.

11. The Respondent denied that she forced the Claimant to write letters suggesting that the Respondent had fulfilled her contractual obligations in order to shield herself from adverse claims by the Claimant and obligations in law. She asserted that the Claimant wrote the notes voluntarily and that the notes reflected the true status of the relationship between the parties. That the Claimant had been granted all the privileges and rights associated with a contract of service such as: leave; rest days; and public holidays.

12. That the Claimant retired voluntarily and was paid all his terminal dues worked at Ksh. 180,000/=. That this payment was effected in cash on 9th March 2016 and the Claimant signed an acknowledgement slip. In effect, the Respondent prays that the Claimant's claim against her be dismissed with costs.

13. The parties filed their witness statements and lists of documents together with copies of the documents to be relied on as exhibits. At the trial, they led oral evidence and as well relied on the witness statements and documents as filed. In large part, the evidence tendered reiterates the contents of the pleadings as summarized above.

14. I note that there was an attempt to dispose of the matter through a preliminary objection. The objection was premised on limitation of time to commence the current proceedings in view of the provisions of section 90 of the Employment Act. The objection was declined after the court (differently constituted) considered that the claim was filed within two and a half years of the Claimant's termination.

15. I must say that if the objection had been heard by me, I would perhaps have arrived at a different conclusion. I think that part of the objection relating to whether claims by the Claimant spanning over eighteen (18) years from the time he was employed was not considered.

16. In my view, the Claimant would perhaps have only been entitled to lodge parts of the claims that fell within three years of the date he instituted the suit in terms of section 90 of the Employment Act, that is to say, claims falling between 20th September 2015 and 20th September 2018. Any claim falling before 20th September 2015 appears to me to have been time barred as at 20th September 2018. I do not think that the various grievances raised constituted a continuing injury in terms of the section aforesaid.

17. However, as I do not sit as an appellate court over my brother's decision, my views on the issue of limitation of time in the cause can only constitute obiter dicta. They count for nothing in so far as resolving this cause is concerned.

18. I will straight away go to the issues for determination in the cause as I perceive them. Helpfully, the Respondent framed her perspective of issues which I will consider. However, I should mention that I did not have the benefit of seeing the issues as framed by the Claimant.

19. From the evidence tendered, it appears clear to me that the parties had a contract of service whose remuneration was determined by reference to the time worked rather than the units of production by the Claimant. The Employment Act, 2007 draws a distinction between these two contracts with the latter referred to as 'a piece-rate contract'. From the evidence tendered, the parties agree that they engaged at an initial monthly salary of Ksh. 2,400/=. Whilst the Respondent argues that the Claimant's salary was gradually increased from this sum to Ksh. 15,000/= when he retired, the Claimant appears to suggest that the salary was hardly reviewed.

20. Whichever way one looks at it, it appears plain to me that the Claimant's salary was to be paid periodically at monthly intervals and not by reference to the various tasks assigned to the Claimant. In law therefore, it does not make sense for the Claimant to assert that besides housekeeping, he undertook other duties for which he was not paid.

21. The aforesaid notwithstanding, there was cogent evidence that if the Claimant undertook any tasks beyond his ordinary duties, he was paid for them. RW1, Thomas Bahati Karani testified that he was employed by the Respondent as a night watchman. However, he would undertake other assignments for the Respondent whenever it was possible to do so. And that every time he did this, he would be remunerated separately for the additional tasks.

22. It was RW1's evidence that the extra works that the Respondent assigned him such as gardening, working on the pool and cooking would also sometimes be executed together with other persons including the Claimant. And that payment for such tasks would be entrusted to the Claimant who would then share it out with the individuals assigned the task.

23. This evidence is consistent with that of RW2 who stated both orally and in his written statement that the Claimant would sometimes clean the Respondent's house, cook and do garden work. However, most of the time, these duties were shared with other employees of the Respondent.
24. This evidence is contrasted with that of CW2 and CW3 who stated that the Claimant used to execute the additional tasks alone. It is to be noted that unlike RW1 and RW2, CW2 and CW3 were not employees of the Respondent. In my view, therefore, they were not in a position to understand the operations in the Respondent's home better than RW1 and RW2 who were employees in the home. I therefore find the evidence of RW1 and RW2 more believable and hold that the Claimant was paid for whatever other assignment that fell outside his main tasks at work. The Claimant is not therefore entitled to claim for separate payments for the alleged extra works.
25. The Claimant has also claimed payments in lieu of notice to terminate his contract of service. Yet, he concedes that he retired of his own volition. He does not suggest that he was forced by the Respondent into quitting employment.
26. It is inconceivable that an employee who voluntarily issues notice to terminate a contract of service would demand for payment in lieu of notice outside the provisions of section 38 of the Employment Act. It has not been alleged that the Respondent waived the Claimant's notice to quit employment. In fact both parties agree that after the Claimant asked to retire, the Respondent asked him to stay on for a while to enable the Respondent manage the transition. Consequently, the claim for pay in lieu of notice is bad in law and is declined.
27. Although the Claimant has lodged other claims including: pay in lieu of leave; overtime pay; and pay for public holidays worked, he has provided no cogent evidence to support them. As was correctly submitted by the Respondent's counsel, this not being a case for unlawful termination, the burden is on the Claimant to demonstrate that he did not take his leave, worked during public holidays and was required to work overtime.
28. In his list of documents, the Claimant has attached a series of letters indicating that he worked for the Respondent. That he "did all off duties, public holidays and leave too." In evidence, it was explained that this statement was intended to confirm that the Claimant had taken all off duty days, public holidays and leave days.
29. The Claimant, whilst admitting that he authored the several letters, tried to disown them from two fronts: that he was forced by the Respondent to write and sign the letters after the Respondent dictated the contents thereof to him; that he did not understand the content of the letters. The Claimant however confirms that he wrote and signed the letters.
30. It is of course curious that nearly all the letters contained in item number one (1) of the Claimant's list of documents are written in the same prose. The only difference that one picks from them is that they were intended for and related to different periods of time. The inevitable conclusion I draw in this respect is that the letters were recycled from one template.
31. However, nothing really turns on this peculiarity in the notes because the Claimant readily concedes that he indeed wrote and signed them. The only issue he raises is that the letters were dictated to him by the Respondent in order to meet a particular objective. Alternately, the Claimant asserts that he did not understand the content of the letters even though he signed them.
32. I find this explanation by the Claimant rather curious. How would he sign a document whose contents he did not understand unless under compulsion? And if there was force used against him to sign the letters, what form of force was it? Is it possible that the Claimant was forced to continuously sign these similar letters without raising a red flag about this peculiar habit over the eighteen years he worked for the Respondent? If it be assumed that the Claimant did not understand the content of the letters, is it because of illiteracy or some other reason?
33. There was evidence that the Claimant has received formal education. In cross examination, he stated that he began working for the Respondent after he left school. There was also evidence that the Claimant enjoyed some level of literacy. He confirmed in cross examination that he was the secretary of his local church and that he used to write letters and do emails to the Respondent whenever the Respondent was out of the country. How would an individual who enjoyed this level of literacy fail to understand the content of the letters he admits to have authored to the Respondent whether voluntarily or under dictation?
34. Ordinarily as was stated in *Josephine Mwikali Kikenye v Omar Abdalla Kombo & another [2018] eKLR*, an individual is bound by his/her signature to a document unless he/she can successfully plead the defense of *non est factum*. *By this, the signor of a document would be saying that he has been misled into executing a deed or signing a document which is essentially different from that which he intended to execute or sign. Essentially, the signor would be saying that he did not genuinely understand the content of the document.*
35. In order to establish this defense, the signor must be able to demonstrate that his/her **understanding of the document's effect was fundamentally different from its true effect. With respect, this was not the Claimant's case in respect of the impugned documents. Unlike in the Josephine Mwikali case aforesaid, it was demonstrated that the Claimant could read and write and had the capacity to appreciate the content and effect of the documents he was appending his signature to.**
36. **I find that the Claimant voluntarily executed the several documents indicating that he had taken his off days, leave and public holidays. I see no evidence to suggest that any form of coercion or violence was visited or threatened to be visited on the Claimant in order to procure his signature on the said documents. I see no evidence that he lacked literary competence to appreciate their content.**
37. **Further, even if it were to be assumed that the Claimant indeed is entitled to claim compensation for unutilized public holidays and off days, he must provide specific evidence of the dates he was denied this right. Indeed, this point is underscored in *Rogoli Ole Manadiagi v General Cargo Services Limited [2016] eKLR*. No such evidence was tendered before me. In the premises, I find that the Claimant's own evidence displaces his assertion that he was denied leave, public holidays and his rest days or was required to work overtime without pay.**

38. In relation to gratuity, it must be emphasized that it is not payable to an employee as of right unless it is specifically included in the contract of service between the parties. This sum is payable at the employer's discretion. The point is made in ***Bamburi Cement Limited v William Kilonzi [2016] eKLR***. There was no evidence provided that either the parties had agreed on this benefit in their contract or that the Respondent had offered to pay it.

39. The foregoing notwithstanding, it was the Respondent's case that she paid the Claimant some Ksh. 180,000/= as his terminal benefits. The Claimant disputes this assertion. According to the Claimant, the Respondent tricked him into signing a document acknowledging this sum but never, in truth, paid it to him. That the Respondent asked the Claimant to sign the document promising that she was going to get the cash from the bank. That she never did after the Claimant signed the document.

40. I have looked at the document in question. I note that the Claimant signed it on two occasions: first acknowledging Ksh. 150,000/=; second acknowledging Ksh. 30,000/= as the balance. The total is Ksh. 180,000/=. The entries on the document are inconsistent with the Claimant's assertion that he signed the document on the promise that the Respondent was going to collect the cash. The impression one gets from the Claimant's evidence is that he was taken to the swimming pool area where he signed the document once. Yet, the document is clear that it was signed on two occasions as shown above. I am therefore inclined to believe the Respondent's version that she paid the sum of Ksh. 180,000/= to the Claimant.

41. I will however order that the Respondent issues the Claimant with a Certificate of Service. This is a right of every departing employee in terms of section 51 of the Employment Act. This is irrespective of the manner in which the parties to the contract of service terminate it.

42. In the end I dismiss the Claimant's claim against the Respondent except in so far as I have allowed it in respect of the Certificate of Service. As either party has succeeded partially, I make no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 17TH DAY OF FEBRUARY, 2022

B. O. M. MANANI

JUDGE

IN THE PRESENCE OF:

KAINGU FOR THE CLAIMANT

NYONGESA FOR THE RESPONDENT

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE