



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 621 OF 2017

JOYCE NYABOKE MAINA.....CLAIMANT

VERSUS

NAPENDA KUISHI TRUST.....RESPONDENT

JUDGEMENT

1. The suit herein revolves around the nature of the parties' employment relationship. The claimant has averred through her claim dated 27th March, 2017, that she was unfairly dismissed by the respondent from employment and was not afforded procedural fairness. Consequently, she has sought the sum of Kshs 400,800.00 being notice pay, compensatory damages, leave and severance pay.

2. The claim was opposed with the respondent stating that the claimant was engaged as a cook on a casual basis as opposed to full time basis hence, was only required to work on Saturdays and over the school holidays when there was need for extra help in the kitchen. That hence, she was never a full-time employee of the respondent. The respondent thus prayed that the claim be dismissed for lack of merit.

3. The matter proceeded for hearing on 28th October, 2021 and both sides called oral evidence.

Claimant's case

4. The claimant testified as CW1 and at the outset, she adopted her witness statement to constitute part of her evidence in chief.

5. It is the claimant's testimony that she was employed as a cook by the respondent at its Boma Rescue Centre sometimes in January, 1999 until sometimes in December, 2015, when she was unlawfully terminated. That she was ordered to vacate her occupation at about noon while she was on lawful duty. That throughout her employment, she was never issued with any warning whether verbal or writing. She termed her termination as oppressive, malicious and a bad labour practice.

Respondent's case

6. The respondent called oral evidence through 3 witnesses. Ms. Jane Karira testified as RW1. She also adopted her witness statement to constitute part of her evidence in chief. It was her testimony that when she joined the respondent in 2007, and that she found the claimant who was working as a cook on a casual basis. That the claimant only used to work at the respondent centre on Saturdays and during the school holidays. That during the week days, the respondent centre would rely on its school for food and thus, the claimant's services were not required fulltime. She stated that at the time, she was working as an administrator hence she would go to the centre to prepare the budget and track the number of days the employees, including the claimant, had worked. That the claimant's work was limited to the kitchen and upon completion of her tasks, she would be paid her wages.

7. Ms. Catherine Tina, testified as RW2. She also adopted her witness statement to constitute part of her evidence in chief. It was her testimony that she joined the respondent centre in 2008 and by then, the claimant was working as a casual labourer hence would only come during the school holidays and on Saturdays. She further stated that at the time, she was in charge of the kitchen and the feeding programme at the centre, hence would take note of the number of days the claimant had worked so as to facilitate processing of her pay. That the claimant was to be paid daily but she had requested that the respondent retains the money so that she is paid everything at a go.

8. Father Maurizio Binaghi testified as RW3. He also adopted his witness statement to constitute part of his evidence in chief. He identified himself as the Executive Director of the respondent centre. He stated that the claimant worked as a cook at the centre on a casual basis. That on average, the claimant would not work for more than 4 days a month. That the claimant never attempted to contact him in 2015, when the respondent hired a full time cook and stopped employing her services. He denied ever stating that the claimant was a fulltime employee of the respondent.

Submissions

9. The claimant submitted that her employment was converted from casual employment pursuant to **sections 35 (1) (c) and 37(2)** of the Employment Act. On this issue, it placed reliance on the case of **Mary Kitsao Ngowa & 37 others vs Krystalline Slat Limited (2014) eKLR**. The claimant has further submitted that the respondent was bound to produced her employment records pursuant to **section 10(6) & (7) and 74** of the Employment Act. She buttressed her submissions on the case of **Gilbert Kasumali Kithi vs Nyali Beach Holiday Resort (2015) eKLR** and **Abigael Jepkosgei Yator & another vs China Hanan International Co. Limited ELRC Cause No. 136 of 2018 as consolidated with ELRC Cause No. 137 of 2018**. The claimant further submitted that she was verbally terminated by RW1 upon instructions from RW3 and that the same was not backed by any reasons nor was she granted an opportunity to be heard.

10. The respondent did not tender any submissions for consideration by court despite being granted an opportunity to do so.

Analysis and Determination

11. Arising from the pleadings, evidence and submissions on record, the issues falling for resolution by this court are;

i. What was the nature of the employment relationship between the claimant and the respondent?

ii. Was the claimant unfairly and unlawfully terminated?

iii. What reliefs if any, are available to the claimant?

Nature of the employment relationship

12. At the outset, I must admit that this is one of the most problematic cases to resolve on the basis that there is barely any evidence to assist the court arrive at a reasoned determination. In the circumstances, the resolution will be largely based on the oral evidence presented by both parties.

13. What is common between the parties is that there was an employment relationship, whose terms are the subject of the dispute herein. It is also common ground that the claimant served as a cook at the respondent's Boma Rescue Centre, which was a home to several children some of who were in boarding school.

14. The claimant has alleged that she worked for the respondent since 1999 till 2015, on a fulltime basis and was earning the sum of Kshs 400/= per day, by the time she left. The respondent has denied this assertion by the claimant and maintained that she was employed on a fulltime basis.

15. To support her case, the claimant produced a letter of recommendation which was authored by RW3 and which she avers is a confirmation that she was a fulltime employee. The respondent has disputed this fact and asserted that the letter was only authored upon the claimant's request and was done in a bid to assist her secure employment elsewhere.

16. The Employment Act recognizes various types of employment, namely, contract of apprenticeship and learnership, probationary contract, fixed term contract and contract of casual employment. From the facts and circumstances relevant to this case, the type of employment that is the centre of the dispute herein is employment on a casual basis. Section 2 of the Employment Act defines a casual employee to mean *a person whose terms of engagement provide for payment of wages at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.*

17. The pertinent question now is whether the claimant was engaged on a casual basis and if so, whether her employment was converted to permanent basis, pursuant to the provisions of section 37(1) of the Employment Act.

18. The claimant has averred that she was in the employment of the respondent from 1999 till 2015. This position has been discounted by the respondent who contends that the claimant was employed intermittently on a casual basis.

19. The claimant admitted that she was being paid daily wages at the rate of Kshs 400/= and which she would collect at the end of every week. That she worked for the respondent every day for close, to 16 years, hence her employment was subsequently converted to full time pursuant to the provisions of section 37(1) and 35(1) (c) of the Act.

20. Section 37 (1) and (4) of the Act provides as follows;

(1) Notwithstanding any provisions of this Act, where a casual employee-

(a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month;

(b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

(2).....

(3).....

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

21. It is not in dispute that the claimant worked as a cook at the respondent's Boma Rescue Centre. What is in dispute is whether she worked continuously throughout the period of her engagement.

22. While the claimant avers that she worked at the centre every day, the respondent has denied this claim and contends that the claimant was only engaged on Saturdays and over the school holidays. That as such, during the week days, the respondent would rely on its school for food, hence the claimant's services were not required.

23. The respondent's 3 witnesses were all consistent in their evidence that the claimant was engaged on a casual basis as most of the children at the centre were in boarding school. There was no evidence that the claimant worked for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month. There was no evidence to dispute the assertion by the respondent, that there was no work for the claimant over the weekdays.

24. From the evidence by all the respondent's witnesses, it is probable that the work the claimant was tasked to undertake, was reasonably expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more.

25. The claimant has submitted that the respondent was duty bound to produce her employment records. On this issue, she placed reliance on the provisions of sections 10 (6) and (7) and 74 of the Employment Act.

26. Section 10 (6) and (7) of the Act provides as follows;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

27. In this respect, subsection (1) of section 10 is in respect of a written contract of service, while section 74 requires an employer to maintain certain records listed thereunder.

28. Firstly, it is notable that the respondent has not denied the existence of the records under section 74 hence it will be presumptuous to find that the said records are non-existent. Secondly, there is no claim of existence of a written contract of service, as the respondent's defence has been that the employment relationship was casual in nature hence there was no contract of service. Therefore, in my considered view, the foregoing provisions are not relevant herein.

29. Further, in his written statement dated 5th May, 2012, RW3 stated that the claimant's employment status could be verified from its "audited financial records" where she is listed as a casual worker. Notably, the said financial records were not produced before court.

30. The claimant has submitted that failure by the respondent to produce the audited accounts, duty rota and payment schedules amounted to concealment of material facts.

31. Pursuant to **Section 69** read together with **section 68 (a) of the Evidence Act**, a party may require production of specific documents that are in the possession of the other party whom the document is sought to be proved. Such production is normally preceded by a Notice to Produce.

32. In this case, the claimant was aware of the existence of the audited financial accounts through the written statement RW3, but never issued any notice to the respondent to produce the same before court. In the event the claimant felt that the respondent was concealing certain documents and which were of great assistance to her claim, nothing stopped her from issuing the "Notice to Produce" or making the appropriate application before court.

33. Besides the letter of recommendation from the respondent, there is no other evidence to prove that the claimant was employed by the respondent on a fulltime basis.

34. In this regard, the claimant, was required to prove on a balance of probability, that she was a fulltime employee of the respondent.

35. The question then is what amounts to proof on a balance of probabilities. In determining what amounts to a balance of probability, **Kimaru, J** in the case of **William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526** had this to say;

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has

pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

36. This principle is also drawn from the age long principle of law of “*he who alleges must prove*” and **section 107 of the Evidence Act**. In this case, it was not sufficient for the claimant to claim that she was engaged on a fulltime basis, then blame the respondent for not producing evidence to rebut her assertion.

37. In the circumstances, I am not persuaded that the claimant has proved her case to the requisite threshold.

38. Having found that the claimant has failed to prove that she was engaged on a fulltime basis, by the respondent, the other issues for determination fall by the wayside and logically, cannot be determined.

39. In the final analysis I dismiss the instant claim in its entirety.

40. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

Ms. Oketch for the Claimant

Ms. Odemo 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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE