



REPUBLIC OF KENYA



**Khahukani v Oburu (Cause 227 of 2016)
[2022] KEELRC 12703 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12703 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 227 OF 2016**

**M MBARŪ, J
JUNE 30, 2022**

BETWEEN

SUSANA KHAHUKANI CLAIMANT

AND

JOAN RISPA OBURU RESPONDENT

JUDGMENT

1. On 2nd November, 2007 the respondent employed the claimant as a domestic worker at a monthly wage of Ksh.12, 000.
2. The claim is that the claimant would be engaged as a part time servant at the respondent's sisters and mother's houses for no pay.
3. On 27th November, 2015 the claimant was directed to attend chores at the mother's house and when she refused because the work was too much and she was not being paid for such duties. The respondent threw her out and paid ksh.12, 000 the wage for November, 2015. This resulted in termination of employment which was without notice or proper procedures and the claiming is seeking payment of the following dues;
 - a) Notice pay Ksh.12,000;
 - b) Leave for 14 days in every year for 9 years ksh.50,400;
 - c) Severance pay for 9 years worked Ksh.144,000;
 - d) 12 months compensation; and
 - e) Costs.



4. The claimant testified that in the year 2007 she was employed by the respondent and in November, 2012 she got pregnant and was allowed maternity leave for 3 months. She resumed duty after 6 months and was allowed to bring her child to work since housing was provided for by the respondent.
5. The claimant testified that she as accused of stealing from the hose which was not true and this arose since she refused to work at the respondent's mother's house without pay. She was then paid her wages and told to immediately leave the house in November, 2015 without payment of her terminal dues.
6. The claimant's case was also that she was not allowed annual leave for 9 years. She would only be allowed a break over Christmas from 20th December and return in the New Year.
7. In response, the respondent's case is that the claimant was her employee from 2nd November, 2007 at a wage of Ksh.4, 000 per month which she increased to Ksh.6, 000 after realising that she was a mother of 3 children and by 2015 the wage had been increased to ksh.10, 000.
8. Between the years 2007 to 2012 the respondent did shopping for the claimant amounting to Ksh.20, 000 when taking annual leave, on school holidays and December. The claimant would receive gifts for self and family. The respondent secured employment for the claimant's relatives.
9. On 30th November, 2012 the claimant left work for marriage and to take her maternity leave. This was without notice.
10. In March, 2013 the claimant called the respondent and informed that she had been delivered her daughter. She requested for financial help since the father was no longer interested with the child and marriage. The claimant then visited the respondent in August, 2013 when the respondent learnt that the claimant was living with her children in Kibra informal settlement and working for two different employers and that she needed a secure job. The respondent accepted to take her back as a house help in September, 2013 together with her small child to reside in the allocated accommodation.
11. The claimant was therefore under new employment from September, 2013 until November, 2014 when she became rude, disrespectful and constantly reporting to work late after weekends off. On 29th November, 2015 the respondent confronted the claimant about her conduct and the claimant protested that she was rude because the respondent had called her a thief and immediately wanted to terminate employment and be paid her wages which the respondent did and the claimant left employment out of her own will.

The respondent testified in support of her case.

12. At the close of the hearing, both parties filed written submissions which have been put into account.

Determination

13. From the pleadings, evidence and written submissions it is clear to the court that the claimant was under different phases of employment with the respondent. The first phase was the year 2007 to November, 2012 when she was pregnant and was allowed time off. The second phase was September, 2013 to November, 2015.

The claim was filed on 18th February, 2016.

14. Claims going back to November, 2012 in the first phase of employment are time barred by virtue of Section 90 of the *Employment Act*, 2007 (the Act). Any claim that is not addressed within 3 years from the date such accrued, employment having been broken in the two phases, such cannot be revived under the second phase of employment. The claimant ought to have filed any grievance and claims thereof on or before November, 2015.



15. What stand out in this case are the personal relations between the parties. The claimant as a domestic worker was employed and treated with generosity by the respondent. Allowed to work with her small child, given gifts for self and family, shopping when going home on leave and holidays, access to employment for her relatives and a well-paid wage which was over and above the minimum wage noting there was accommodation provided. However, the major lapse for the respondent, there are no records of her good deeds. There is also no employment contract. No work records to confirm that indeed the claimant was an employee and the terms of employment particularly the wages paid and the benefits allocated.
16. Such lapse on the part of the respondent is contrary to the provisions of Section 10(6) and (7) of the Act. An employer is under a legal duty to keep work records and produce them when suit is filed with the court. Such should include notice terminating employment, if any, and where the employee opts to leave employment without notice, the employer has the right to report such matter to the Labour officer as a protection mechanism against claims such as herein that there was unfair termination of employment.
17. Failure to keep work records constitutes a labour offence pursuant to Section 16 of the Act. Section 16(4) directs that;
 - (4) A person who fails to give to an employee a statement as required by section 10, 12, 13 or 20 commits an offence and shall, on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.
18. So severe and serious is the lapse and failure to keep work records as the court is left with the word of the employee against the employer. The court is bound to believe the employee.
19. Without any letter terminating employment, the court takes it that the action arose from the respondent on 29th November, 2015 and such was without notice or the due process. Where indeed the claimant was found to be rude, disrespectful or of gross misconduct, the respondent had the right to terminate employment through summary dismissal and issue notice in this regard. No notice or the protections under Section 41 of the Act were applied. The claimant's employment terminated without due process and this is unfair pursuant to the provisions of Section 45 of the Act.

Notice pay and compensation are due.
20. At the time the claimant was earning ksh.10, 000 according to the respondent. Such is due in notice pay.
21. Compensation is due in terms of Section 45 and 49 of the Act. However, under Section 45(5) of the Act the court is directed to take into account the conduct of the employee. In this case, the claimant felt justified to be rude to her employer on the grounds that she had been accused of being a thief. Such conduct is unbecoming and warrant summary dismissal. The respondent opted to be lenient and terminate employment. To award any compensation would therefore to reward gross misconduct. No award is allocated.
22. On the claim for 14 days leave for 9 years, as noted above, employment commenced in September, 2013 to November, 2015 a period of 14 months only.
23. In terms of Section 28(2) of the Act, the claimant was entitled to 23 days of annual leave only. The claimant was allowed time off during school holidays and from 20th December to the New Year. Such time in employment must be taken account of and which has not been addressed. To claim outside such allocations is to seek unjust enrichment.



24. On the claim for severance pay, such is only due under the provisions of Section 40 of the Act and this case did not relate to a redundancy.
25. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a) Notice pay ksh.10,000;
 - b) Each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

