



**Gitau v Delamere Estate Limited (Cause 404 of 2017)
[2022] KEELRC 1193 (KLR) (5 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1193 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 404 OF 2017**

**HS WASILWA, J
JULY 5, 2022**

BETWEEN

GLADYS WANJIKU GITAU CLAIMANT

AND

DELAMERE ESTATE LIMITED RESPONDENT

JUDGMENT

1. By an amended claim dated November 5, 2018 and filed on even date, the claimant sought for the following reliefs;-
 - a. A declaration that the constitutional rights of the claimant as enshrined under articles 30(1) & (2), 41(1) and 42(2) of the Constitution of Kenya has been violated and claim for general damages for such breach.
 - b. General damages for claimant's breach of constitutional rights and injuries sustained.
 - c. Damages as per breakdown in paragraph 17 above totaling to Kshs 12,520,550.
 - d. Costs and interests.
 - e. Any other relief this honorable Court deems fit and just to grant.
2. The background leading to the filling of this case is that the Claimant was employed by the respondent on November 21, 2012 as a casual Nurse Aide and worked till June 1, 2014 when she was offered employment on contract for six months earning a salary of Kshs 2100 per days. On the lapse of the contract the claimant continued working for the respondent on casual basis till March 1, 2015 when her services were converted to permanent terms vide the letter of employment dated March 11, 2015.
3. In the said letter, the claimant was tasked with, providing professional and supportive home care nursing services designed for short and long skilled care, nursing aide role to Lord Delamere and Lady



- Delamare, perform massage therapy, provide support and from medical appointment, provide support with daily living, dressing and foot care, keeping Lady Anne Delamere room clean and tidy, Helping Lord Delamere in using the bath room and moving around in his wheel chair, changing Lord Delamere pampers, routinely taking both Lord and lady Delamere for physical therapy and undertaking any other duty that the respondent could assign her.
4. The claimant avers that she used to report to work by 6:30 am and leave by 11 pm clocking 16 hours a day when the respondent only paid her for the 8 hours worked and left the 8 hours overtime unpaid. She avers that she never took her leave days as provided by law neither was she paid for the same.
 5. It is the claimant's case that, when her employment was converted to permanent terms, she was offered a house about 100 meters from the main house and was on call 24 hours as their house was connected by an electric bell for emergency calls. However, the respondent did not provide security for her while moving from the main house to her house when mostly she left the main house at 11pm at night was and exposed to wild animals that would roam freely within the respondent's compound.
 6. The claimant also took issue with the amount of work she carried out in the said house and avers that the said work was enough for 3 personnel but she was forced to work by herself for long hours causing her to be fatigued by the end of each day. Moreover, that the claimant used to sleep for only 5 hours a day causing her to develop stress, hypertension, severe back pain, mid prolapsed inter-vertebral disc, severe hand pain which she attributes to the excess work at the respondent that she did over 16 hours a day.
 7. The claimant avers that as a result of her ailing body the respondent unlawfully and unprocedurally terminated her services on the August 30, 2017 on allegation of redundancy based on the fact that the said Lady Anne Delamere had healed from her hip surgery which was not the true position as she was not only taking care of the Lady Anne Delamere but also Lord Delamere who are both elderly persons and still in need of support.
 8. It was also stated that the alleged redundancy was not carried out in accordance with section 40 of the [Employment Act](#) as she was not given Notice of the said Redundancy.
 9. She contends that due to excess work at the respondent she is now under monthly medication of at least Kshs 5,000 for treatment and has already used Kshs. 36,550 for treatment while at the respondent's employee which she prays to be reimbursed.
 10. The respondent entered appearance on the September 29, 2017 and filed a response to claim on the October 23, 2017.
 11. According to the respondent, the claimant was first employed on the November 21, 2012 on consultancy basis and paid per visit with the respondent paying withholding tax to Kenya Revenue Authority.
 12. Due to the deteriorating health of Lord and Lady Delamere, the claimant was retained on regular basis starting on the June 1, 2014 and granted six months' contract under daily pay of Kshs.1680. On July 16, 2014 the Respondent review the claimant's daily pay to Kshs 2100. The amount paid to the claimant during this period was clearly indicated to include withholding tax as such the services was that of consultancy and not a regular employee.
 13. On the March 11, 2015, the claimant was formally offered employment on permanent terms and now paid monthly salary of Kshs. 88,500, a sum which the claimant continued earning throughout her employment at the respondent.



14. Sometimes in July, 2017 the respondent resolved to terminate the services of the claimant as a result of redundancy occasioned by the fact that Lady Delamere had fully recovered from her Hip surgery and no longer in need of full time aid. Further that, the Respondent bought a motorized wheelchair for Lord Delamere who no longer needed to be wheeled by the claimant and the fact that the respondent installed automated bathroom that could continue to hoist lord Delamere in and out of the bathroom with minimal assistance. The respondent also outsourced physiotherapy and massage services from Nakuru Annex Hospital negating the need for home assistance.
15. The claimant and the labour officer in line with section 40 of the *Employment Act*, were duly informed of the redundancy vide the letter of July 25, 2017 which were served on the same date and duly received by the labour officer.
16. With regard to the working hours, it was stated that the claimant was working for 8 hours a day and any overtime worked was duly paid for as reflected in her payslips.
17. The respondent also avers that the claimant was offered housing, a cottage that was indeed 100 meters from the main house but inside the main house compound which had a perimeter wall and was guarded 24 hours a day rendering the allegation of the claimant's security malicious.
18. The respondent also avers that it was never made aware of any illness the clamant was battling and only learned of the same when this suit was filed.
19. The respondent admits having the claimant terminal dues being salary for August, 2017, one-month salary in lieu of Notice, severance pay at 15 days for each year worked for two years since her formal employment began on March 11, 2015 and 10 days leave, less any monies owed to the respondent, which money will be paid to the claimant upon clearance with the Respondent.
20. Save for the admitted terminal dues, the respondent urged this court to dismiss the claim with costs to it.

Hearing.

21. During hearing the claimant testified as CW-1 and adopted her witness statement dated September 20, 2017 and a further statement dated November 15, 2018. She adopted her 10 documents as her exhibits. In addition, she testified that she was not a consultant for the respondent from 2012 rather that she worked full time both day and night. She avers that she was not served with the termination letter. She also stated that there was no redundancy to necessitate her termination as the clients were old and sickly and still needed her services.
22. She testified that upon her termination, she cleared with the Respondent through Grace Maina and was paid her terminal dues as indicated by the respondent in their defence. She however prayed for leave between 2012 and 2015 together with the claim save for the Kshs 36,000.
23. Upon cross examination by Okoth Advocate, the claimant testified that she does not have evidence of paying PAYE between 2012 and 2015, neither does she have evidence of the untaken leave within that period. She affirmed that the patients she was taking care had not healed as she knew their conditions.
24. The respondent called their Human Resource Manager, Grace Muthoni Maina, as RW-1. She adopted her witness statement dated March 23, 2022 and produced the 10 documents in their list of documents as the respondent's Exhibits.
25. Upon cross-examination by Alwala advocate, RW-1 testified that they terminated the claimant's services due to redundancy as the patients, the claimant was taking care of, no longer needed around



the clock assistance. She testified that she does not have leave records for the year 2012 to 2015 because the claimant was working on need basis and that leave was properly earned when the claimant worked on full time basis commencing in 2015.

Claimant's submissions.

26. The claimant submitted that she was terminated on account of redundancy and served with a termination notice on August 21, 2017 informing the claimant that the termination was to take effect from August 30, 2017, giving her a notice of 9 days contrary to provision of section 40 of the Employment Act as such the termination was unfair in the circumstances.
27. It was her submissions that the reason given for the termination was on allegations that the patients she was taking care of were healed when indeed they were at 83 and 79 of age and needed her services more than before. It was argued that the respondent did not produce a medical report to affirm their allegation as such the termination on the basis of redundancy was not justified.
28. The claimant in conclusion urged this court to allow the claim as prayed.
29. I have examined the evidence and submissions of the parties herein. As seen from the letter that terminated the services of the claimant, she was terminated for reason of redundancy. The letter was dated 21/8/2017 and the termination was to take effect with effect from August 30, 2017.
30. This notice was in disregard of the law where she was expected to be given at least 1 month redundancy notice as per section 40 of the Employment Act 2007 which states as follows;

“Termination on account of redundancy

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions —
 - (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;



- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service”.

2 Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

3 The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary.

31. The failure to adhere to the law makes the termination unfair and unlawful.

32. In terms of remedies, I find that the claimant worked and was paid 88,500/= per month as per her payslip annexed herein. She was also paid what is called special bonus which I attribute to overtime pay.

33. The claimant indicated she was paid her terminal dues and therefore she is only entitled to damages for the unfair termination which I grant at 8 months salary

$$= 8 \times 88,500 = 708,000/=$$

Less statutory deductions

34. The respondent to pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 5TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Alwala for Claimant – present

Okoth for Respondent – present

Court Assistant - Fred

