



REPUBLIC OF KENYA



KENYA LAW
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Opondo v Kizito (Cause 1254 of 2016)
[2022] KEELRC 3933 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3933 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1254 OF 2016
L NDOLO, J
SEPTEMBER 22, 2022

BETWEEN

INVOLATA ATIENO OPONDO CLAIMANT

AND

PAUL KIZITO RESPONDENT

JUDGMENT

Introduction

1. This dispute is between Inviolata Atieno Opondo as the Claimant and Paul Kizito as the Respondent. The Claimant states her case in a Memorandum of Claim dated 27th June 2016 and filed in court on even date. The Respondent filed a Response on 15th September 2017.
2. At the trial, the parties testified on their own and thereafter filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 29th March 2010 as a house help. She gives her monthly salary as Kshs. 4,000 which she claims was an underpayment.
4. The Claimant further states that on 27th October 2015, as she was undertaking her usual duties, the Respondent and his wife told her to leave the house as her services were no longer required.
5. The Claimant claims that she was not allowed to collect her personal belongings from the Respondent's house prompting her to seek assistance from Membley Police Station. The Claimant adds that she was not paid her terminal dues.
6. The Claimant presents a claim of unlawful summary dismissal and now seeks the following remedies:
 - a. One month's salary in lieu of notice..... Kshs. 10,952



- b. Salary for the month of October 2015..... 10,952
- c. Underpayment from 2010 to 2015..... 283,680
- d. Leave pay for 5 years..... 54,760
- e. Public holidays worked..... 20,078
- f. Service gratuity for 5 years..... 27,380
- g. 12 months' salary in compensation..... 131,424
- h. Costs plus interest

The Respondent's Case

- 7. In his Response dated 13th September 2017 and filed in court on 15th September 2017, the Respondent contends that the contract of service with the Claimant was properly and legally terminated.
- 8. The Respondent states that it is the Claimant who without notice, provocation or reasonable cause, walked out of the place of employment thus abandoning her work.
- 9. The Respondent further states that the Claimant constructively terminated her employment by willfully neglecting to perform her duties and absenting herself from the Respondent's home.
- 10. The Respondent denies owing the Claimant any money and states that any dues payable to the claimant have been duly paid to her.

Findings and Determination

- 11. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

- 12. In countering the Claimant's claim of unlawful and unfair termination, the Respondent asserts that the Claimant herself deserted duty. Settled jurisprudence on desertion is that an employer alleging that an employee has deserted duty is required to demonstrate the efforts made to reach out to the employee.
- 13. In her final submissions, the Claimant made reference to the decision in *Felistas Achecha Ikatwa v Charles Peter Otieno* [2018] eKLR where this Court held that:

“...an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
- 14. Apart from his uncorroborated word, the Respondent did not adduce any evidence to support his allegation that the Claimant had deserted duty. Moreover, the Respondent did not demonstrate any efforts made to allow the Claimant an opportunity to defend herself against any allegations raised against her.



15. In *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited* [2020] eKLR Onyango J found that in the absence of proof of desertion of duty or fair termination, a case of substantive and procedural unfair termination is established. This is what transpired in this case and I therefore find and hold that the Respondent terminated the Claimant's employment without a valid reason and in violation of due procedure.

Remedies

16. As a result, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service in addition to the Respondent's unlawful conduct in the termination transaction.
17. I further award the Claimant one (1) month's salary in lieu of notice as well as her salary for October 2015.
18. In the absence of leave records to the contrary, the claim for leave pay is allowed. Similarly, because there was no evidence of the Respondent having remitted any dues to the National Social Security Fund in favour of the Claimant, the claim for service pay is also allowed.
19. The Claimant did not prove her claim for underpayment. However, in his testimony before the Court, the Respondent gave the Claimant's final salary as Kshs. 10,000. I will therefore adopt this figure for purposes of tabulating the Claimant's award.
20. The claim for public holidays worked was not proved and is dismissed.
21. Finally, I enter judgment in favour of the Claimant in the following terms:
- a. 10 months' salary in compensation..... Kshs. 100,000
 - b. 1 month's salary in lieu of notice..... 10,000
 - c. Salary for October 2015..... 10,000
 - d. Leave pay for 5 years $(10,000/30*21*5)$ 35,000
 - e. Service pay for 5 years $(10,000/30*15*5)$ 25,000
- Total..... 180,000
22. This amount will attract interest at court rates from the date of judgment until payment in full.
23. The Claimant will have the costs of the case.
24. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022

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JUDGE

Appearance:

Miss Omamo for the Claimant

Mr. Thuku for the Respondent

