



Chege v Mburu (Cause 665 of 2017) [2022] KEELRC 13038 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13038 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 665 OF 2017
JK GAKERI, J
OCTOBER 31, 2022

BETWEEN

MARY WANGUI CHEGE CLAIMANT

AND

KENNETH KARIUKI MBURU RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on April 7, 2017 alleging wrongful dismissal from employment by the Respondent.
2. It is Claimant's case that she was employed by the Respondent as a house help pursuant to a verbal agreement on October 4, 2010 at a monthly salary of Kshs.4,000/= and rendered services dutifully, honestly and diligently.
3. That she received a salary increment of Kshs.1,000/= and was earning Kshs.6,000/= per month as at the date of termination of employment.
4. The Claimant avers that she served the Respondent for 5 years when on December 18, 2016 she was summarily dismissed for no reason.
5. It is the Claimant's case that according to various legal notices, the Claimant was underpaid by Kshs.213,736/= as follows;

2010 Kshs.13,226, 2011 Kshs.35,988, 2012 Kshs.34,990, 2013 Kshs.96,576, 2014
Kshs.32,856

Service pay of Kshs.25,267.50

50 public holidays Kshs.20,000/=
6. The Claimant pray for;



- i. Order that termination of the employment contract by the Respondent was unlawful and unfair.
- ii. Sum of Kshs.259,008.70.
- iii. Costs of this suit.
- iv. Interest at court rate.

Respondent's case

7. The Respondent filed a Statement of Response on March 4, 2019 denying that the Claimant was its employee. The Respondent avers that the Claimant was staying in his house as a relative during the period mentioned by the Claimant but not as a house help and denies that the Claimant is entitled to compensation.
8. That any services the Claimant offered during her stay in the Respondents house were voluntary and not compensatable as she was not an employee.
9. The Respondent prays for dismissal of the suit.

Claimant's evidence

10. The Claimant's evidence-in-chief is that she was employed by the Respondent as a house help on October 4, 2010 at his house in Nairobi, South C at Kshs.4,000/= which progressed to Kshs.6,000/= by the date of dismissal and worked for 5 years.
11. The written statement makes no reference to the date of termination.
12. In her oral testimony, the Claimant stated that she applied for leave for 2 weeks and proceeded but was not paid and did not report back to work.
13. The written statement makes no reference to her work schedule or type or days of work.
14. On cross-examination, the witness stated that she was taken to the Respondent's house by the Respondent's mother-in-law and did not live with the wife's family.
15. That the Respondent told her that she was an employee.
16. That the Respondent paid the Claimant's salary in cash or by *MPESA* but she had no evidence of such payment.
17. That she had one child who had been to the Respondent's house and the child was not unwell. The witness admitted that she was a relative to the Respondent's wife and had no relative who was a Pastor or Vicar at the *AIC* Church Pumwani. That she was loved by the family.
18. It was her testimony that she had a good relationship with the Respondent's wife. That she had never called the Respondent's wife's relatives or met them.
19. On re-examination, the Claimant stated that she was employed by the Respondent who used to pay her and was treated like an employee and had no written contract.

Respondent's evidence

20. RWI, Peninah Muthoni Karongo, the Respondent's wife testified that the Claimant was not their employee but stayed in their house as a relative as opposed to a house help.



21. That the Respondent accommodated her when she came begging for help and had no source of income and had a sick child who was also accommodated there.
22. That any services she offered in the house were voluntary and not meant for remuneration.
23. RWI testified that the Claimant got annoyed when she was requested to leave after the child's health stabilised. The witness testified that the Respondent assisted her with the child's fees and hosted him during the school holidays all in the name of helping a relative.
24. On cross-examination, the witness confirmed that the Claimant was a relative on her father's side though distant.
25. That she used to cook, wash clothes and took care of the children in the course of the day and would wake up at 6 or 7 am and sleep at 9 – 9.30 pm as a matter of routine and the witness was not paying her anything but supported the Claimant's sick child.
26. That the Claimant stayed at their house for about 4 – 5 years and there was no annual leave.
27. The witness told the court that the Claimant's son would spend the school holidays with the Respondent's family. That the Claimant attended to house chores at the home and was being accommodated as a relative.
28. RWII, Mr. Samuel Karongo, the Respondent's father-in-law testified that the Claimant was not an employee of the Respondent but a relative of the family and had volunteered to live with the Respondent because she had a sick child in the village who at one point came to live with the Respondents. That the son in-law assisted with the treatment charges and gave the Claimant a token of appreciation.
29. The witness explained his relationship with the Claimant, that she was a cousin to his late mother and thus a grandmother to him. It was his testimony that a daughter could not employ her grandmother as a house-help.
30. That the Claimant was very close to the family since the 1990's having accommodated her in Umoja as she searched for employment in the City.
31. On cross-examination, the witness confirmed that he knew the Claimant. That his wife took the Claimant to the Respondent's house to assist the couple bring up their children but was unaware of any payment being made to the Claimant. However, he testified that he had pleaded with the Respondent that she be given some money and the Claimant did not complain that she was not being paid and often told the witness that she was having a good time at the Respondent's house.
32. The witness testified that the Claimant's father was Mr. Chege Wa Njoroge (or Guka Mugenyi) and had been to the Claimant's home.
33. The witness confirmed that he had not been to the Respondent's house but the Claimant had slept at their house in Umoja on several occasions.
34. On re-examination, the witness testified that the Claimant was not an employee of the Respondent and only stayed at the Respondent's house until she secured employment. The witness characterised the suit as a family dispute.
35. RWIII, Lucy Wanjiru Karongo testified that she was the Respondent's mother-in-law. It was her testimony that she came to know the Claimant from her husband who introduced her as a relative after which the Claimant frequented their house in Umoja in the 1990s and they became good friends. That



- the Claimant had health complications and she would assist her receive treatment at the clinic where she worked on credit terms.
36. That the Claimant came to her house whenever she had challenges at her place of work and stayed there when searching for a job.
 37. The witness testified that the Claimant was not an employee of the Respondent as according to the family, she was a grandmother to the Respondent's wife and had gone there as a member of the family as she had in the witness's house in Umoja.
 38. That the Claimant offered to assist the Respondent's family after having been in a frustrating job.
 39. The witness further testified that the Claimant had a sick child at the time, who moved into the Respondent's family at one point for medical facilitation until he recovered.
 40. On cross-examination, RWIII testified that she knew the Claimant as the aunt to her husband. That whenever the Claimant travelled, she would be left with the Respondent's children. That the Claimant had one child and the Respondents supported his education and he often visited and stayed at the Respondent's house.
 41. That the Claimant relied on the Respondent's family. It was her testimony that she knew the Claimant's mother and was alive.
 42. The witness further confirmed that the Claimant had a sister by the name Muthoni and had attended a funeral at their home in Kitale.
 43. It was her testimony that the Claimant travelled to Kitale every December and whenever she wanted to during public holidays.
 44. That she was unaware of how the Claimant left the Respondent's house. That the assistance she received was about Kshs.4,000/= or 5,000/=.
 45. On cross examination, the witness testified that the Claimant was not an employee of the Respondent. That she first met the Claimant at a wedding and she later came to her house for assistance.
 46. Finally, the witness testified that the Claimant was a relative and she helped her often having been mistreated at her previous work place.

Claimant's submissions

47. According to the Claimant, the issues for determination are; whether the Claimant was an employee of the Respondent, contract of employment, termination and the reliefs sought.
48. As regards their relationship, the Claimant relies on the Statement of Claim and the decision in *Emanuel v Rolling in Dough Inc.* on what courts consider in determining whether an employment relationship existed between the parties where the court stated as follows;

“Courts look to the totality of the circumstances . . . of the working relationship. Courts have considered a variety of factors when explaining the “economic reality” of a purported employment relationship though none are dispositive or controlling.”
49. Such factors include answering to a higher authority, compensation, period payments, dependency on engagement, specific job description, degree of permanency and duration of the relationship and performance.



50. The decision in *Brown v Newyork City Department of Education* is also relied upon as are the provisions of section 2 of the [Employment Act](#).
51. It is urged that since the Claimant took care of the Respondent's children and had a sick child she could not have agreed to work for free and often received some money in return and had therefore sought employment at the Respondent's house and was therefore an employee not a volunteer.
52. As regards the contract of employment, it is urged that the contract links the employer and the employee and creates rights and imposes obligations on the parties.
53. Reliance is made on the Report of the General Conference of the International Labour Organization (ILO) General in 2006 on the features relevant to the determination of an employment relationship such as integration of the worker's work to be performed, for the benefit of the person and by the worker at specific times duration, continuity, availability of the worker, provision of tools, periodic payments as the principal source of income, lodging and transport.
54. Reliance is also made on Order 2 of the [Regulation of Wages \(Domestic Servants Waged Council Establishment\) Order 2018](#) for a definition of a domestic worker.
55. The sentiments of Mbaru J. in [Robai Musinzi v Safdar Muhamed Khan](#) (2012) eKLR on the failure by employers to provide written contracts of service and the challenges they occasion are relied upon to urge that the Respondent engaged the Claimant as a house help to take care of his children and was paying her Kshs.4,000/= and later Kshs.6,000/= per month.
56. It is submitted that the Claimant was an employee of the Respondent.
57. As to whether termination of employment was fair, reliance is made on the provisions of section 43 of the [Employment Act](#) on the obligation of the employer to prove the reason(s) for termination of employment as well as the decisions in [Walter Ogal Anuro v Teachers Service Commission](#) (2013) eKLR, [James Kabengi Mugo v Sygenta East Africa Ltd](#) Cause No. 1476 of 2011 and [Kenfreight \(EA\) Ltd v Benson K. Nguti](#) (2016) eKLR to urge that termination of employment must be substantially justifiable and procedurally fair as ordained by the provisions of the [Employments Act, 2007](#).
58. It is submitted that the Claimant's employment was terminated without notice, no reasons were given and there was no hearing.
59. As regards the reliefs claimed, it is urged that the Claimant is entitled to the reliefs particularised in the Statement of Claim.

Respondent's submissions

60. The Respondent submitted that he did not engage the Claimant as an employee as confirmed by the evidence of the three witnesses. That the Claimant was a relative to RWI, a fact the Claimant denied on oath as well as the fact that she was sourced from an Employment Bureau which was not the case.
61. That the Claimant was never enlisted as a house help and cannot therefore claim remuneration and other entitlements of an employee.
62. The Respondent submitted that he did not make periodic payments to the Claimant and all money transfers were at request of the Claimant and were not of a specified sum.
63. The Respondent further submitted that he was a victim of circumstances, having been kind to support the Claimant on the request of RWI and parents in law, in her time of need, illness and distress.
64. That the Claimant did not approach the family before filing the suit.



65. That the Claimant was making the claims herein to harass and intimidate the Respondent.

Analysis and determination

66. Having considered the pleadings, evidence on record and submissions by the parties, the issues that command themselves for determination are;
- i. Whether there was an employment relationship between the Claimant and the Respondent.
 - ii. Depending on the answer to (i) whether termination of employment was fair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
67. This case turns on whether the Claimant was an employee of the Respondent. An opportune starting point is the evidence on record.
68. There is no dispute that the Claimant stayed at the Respondent's house for a duration of about 4 to 5 years. It is also not in contest that she was taken there by the Respondent's mother in-law, RWIII. Equally not in dispute is that the Claimant is a relative of the Respondent's in laws. Other facts that are not in contest are that the Claimant had a sick child and frequented the Respondent's mother in-law's house in Umoja.
69. In her written statement April 16, 2017, which she adopted as her evidence in chief, the Claimant makes reference to the dates of employment, as house help, salary, diligence and honesty at the workplace, duration worked 5 years and that she was wrongly dismissed.
70. For unexplained reasons, the statement makes no reference to the type of work she was doing, waking up and sleeping time, days of work, public holidays, weekends and date of termination and the circumstance that culminated in the dismissal from employment.
71. These are essential elements of contracts of employment.
72. In oral evidence, attempts were made to revamp the statement by including waking up and sleeping time, work week, holidays in December, date of termination, NHIF and NSSF contributions, minimum wage etc.
73. It is unclear why such core ingredients were not incorporated in the statement when the statement was written and the issues were fresh in the Claimant's memory having occurred less than 4 months earlier.
74. The Claimant denied having met the Respondent before she was taken to his house by the mother in-law. That that was the date of employment, a claim contradicted by RWIII who took her to the sons in laws house.
75. RWI, RWII and RWIII were all in agreement that the Claimant was not living in the Respondent's house as an employee. Their testimony is that the Claimant was taken there as a relative to assist them as they assisted her with her sick child and was jobless and agreed to do so.
76. RWII who appeared truthful explained that the Claimant was customarily his aunt being a first cousin of his mother and had been taken to the Respondent's house to assist the family with the children but had to be assisted as she had a sick child. He was emphatic that it would not be in order for a granddaughter to employ the grandmother as a house help. He was categorical that his auntie was not an employee of the Respondent.
77. According to the Respondent, the Claimant was brought to his house by the mother in-law to assist them with the child and he agreed as the Claimant had no source of income and had a sick child who



- at one point stayed in the Respondent's house until he got better and often spent his holidays at the Respondent's house.
78. Regrettably, where parties do not have tangible evidence, a court is guided by the persuasiveness or otherwise of the oral evidence in addition to reliability of the witness and cogency of the evidence adduced. The demeanour of the witness is key as are their responses to questions put to them.
79. More profoundly, it is trite law that he who alleges must prove his or her allegations. Section 107 and 109 of the *Evidence Act* are explicit on the burden of proof of facts or particular circumstances alleged to exist.
80. The Claimant testified that she had no written agreement as it was the Respondent's duty to draw and supply one. Secondly, she had no evidence of any payment having been made to her by *MPESA* as admitted.
81. The court also guided by the sentiments of Abuodha J., in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR where the learned Judge stated as follows;
- “The settled rule in all civil claims is that a party who intends a court to find or decide any matter in his or her favour must prove the allegations to the required standard of proof in civil claims which is on a balance of probability. Further, under section 47(5) of the *Employment Act* in any complaint of unfair termination or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination or wrongful dismissal shall rest on the employer . . .”
82. In this case, it is the duty of the Claimant to establish that she was an employee of the Respondent.
83. The Claimant's evidence is that she was brought to the Respondent's house as an employee, a claim controverted by the Respondent's mother-in-law who took her there. RWIII testified that the Claimant would be assisted financially as she assisted the family with the children and was assisted in relation to the sick child who lived with her at the Respondent's place for some time and spend his school holidays there. Why would the Respondent go to such length to accommodate an employee if the Claimant was one?
84. The Claimant admitted being a relative of the Respondent's wife but the relationship was brought home by RWII and RWIII who knew the Claimant well and had stayed with her in their house a fact the Claimant unsuccessfully denied on cross-examination.
85. RWIII traced their friendship to the 1990s and understood her situation well and actually took her to the Respondent's house as adverted to elsewhere.
86. The Claimant grudgingly admitted that her son had been to the Respondent's house on one occasion and denied that the boy was sick a fact confirmed by RWIII.
87. As regards the Claimant's demeanour, the court found her evasive and untruthful in relation to her son, family relations and dealing with family members. She exhibited palpable anger and combativeness something a kin to fighting back.
88. Section 2 of the *Employment Act*, 2007 defines an employee to mean “a person employed for wages or a salary and includes an apprenticeship and indentured learner.”



89. Similarly, section 2 provides that;

Employer means “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”

90. It also defines a contract of service as “an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.”

91. The court has evaluated and re-evaluated the Claimant’s evidence in an attempt to decipher what could unlock the stalemate created by the absence of material evidence and the highly persuasive oral evidence from both parties.

92. From the evidence on record, it is clear that the Respondent did not search for the Claimant as an employee and she was brought to his house by the mother in-law who testified that whenever the Claimant travelled, she would take care of the Respondent’s children. According to her, she did not take the Claimant to the Respondent’s house for employment but to assist the family as she searched for another job after losing the one she had. RWII’s evidence confirmed as much.

93. What is discernible from the evidence on record is that the Claimant’s initial entry into the Respondent’s house was not for purposes of employment as she alleges. This would explain why her sick child, a fact she denies, stayed with her there and subsequently visited during school holidays, something a typical in an employment relationship.

94. From the evidence on record, it is unclear when the Claimant became an employee.

95. Relatedly, the Claimant’s inability to adduce tangible evidence of a relationship other than family relations does not ameliorate the situation and weakens her case considerably.

96. The evidence of the Claimant’s benefactors RWII and RWIII is clear that they could not have fathomed or contemplated an employment relationship between the Claimant who was a relative and their son in law and throughout her stay at the Respondent’s house the Claimant had no complaint and had intimated to them that she was treated well by the host.

97. As RWII summed it up on re-examination, ‘this is a family dispute’ as opposed to an “employment dispute”.

98. In as much as it is the duty of the court to guard against exploitation of employees in situations disguised as local or family arrangements, a court of law will be hesitant to confer rights and impose legal obligations on relatives where the arrangement appears not to have been intended to be an employment relationship entered into will and there is no cogent evidence to prove otherwise, as was the situation in the instant case.

99. Weighing the evidence before the court, it is clear to this court that the Respondent’s evidence outweighs that of the Claimant and rebuts her assertions credibly.

100. For the foregoing reasons, it is the finding of this court that the Claimant has on balance of probabilities failed to establish that there was an employment relationship between herself and the Respondent.

101. Having found that there was no evidence of an employment relationship between the parties to the suit herein, the issue of termination and the reliefs sought fall by the way side.



102. In light of the foregoing finding, the Claimant's suit against the Respondent is unsustainable accordingly dismissed.
103. Parties to bear own costs.
104. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF OCTOBER 2022

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

