



REPUBLIC OF KENYA



Samson v Mohan & another (Cause 52 of 2018)
[2022] KEELRC 13372 (KLR) (1 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13372 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 52 OF 2018
JW KELI, J
DECEMBER 1, 2022

BETWEEN

BEVERLY OMARI SAMSON CLAIMANT

AND

SAGA MOHAN 1ST RESPONDENT

CHAIRMAN PILI PILI VILA LTD 2ND RESPONDENT

JUDGMENT

1. The claimant filed a claim against the respondents dated July 4, 2018 seeking the following reliefs:-
 - a. That the dismissal of employment contract of the claimant was unfair, unlawful and illegal hence null and void
 - b. That the respondent pays the claimant herein the matter sum of Kshs 389,730.72 as tabulated in the statement of claim paragraph 12(1) and (6)
 - c. That the respondent pays interest on the total amount at court rates
 - d. That the cost of this caused be provided by the respondents.
 - e. Any other relief the Honourable Court may deem just and fit to grant in the circumstances of the case.
2. Together with the claim as a bundle the Claimant filed her verifying affidavit sworn on the June 26, 2018, her witness statement dated July 4, 2018, list of witnesses, list of documents being background to the claimant personal statement, Legal Notice No 1675 of 2016 and copy of her National Identity Card.
3. The Claimant appointed the Kenya National Union of Domestic Workers to represent her in the suit by notice of appointment dated October 12, 2021.



4. The Respondent did not enter appearance despite service. The matter proceeded to formal proof. The court while writing the decision noted notice of appointment of advocate and reply to memorandum of claim received in court on October 27, 2022 while the hearing occurred on September 29, 2022. The said response was not admitted having been filed after on close of pleadings and on close of defense case for not attendance.

The Hearing

5. The court issued hearing date of September 29, 2022 with notice to issue to the respondents. On the September 29, 2022 the respondents were absent. Affidavit of return of service by Jairus Katere Shamalla, court process server, was filed which demonstrated service of the hearing notice physically on residence of the 1st respondent Nairobi at Pili Pili Villas House No 4B1. The court being satisfied of service of the Hearing date upon the respondent proceeded with the hearing. The claimant testified on oath as the sole witness of fact and the claimant's case was closed. The defence case was also marked as closed for non – attendance.

Claimant's Case in Summary

6. The Claimant adopted her written witness statement dated July 4, 2018 as her evidence. Produced her documents filed in court under list of documents of July 4, 2018 as exhibits 1,2 and 3. The claimant told the court she relied on her claim as filed.

Defence Case

7. The Respondent did not attend the hearing to produce their evidence. The memorandum of response was filed after the hearing and without leave of the court. The reply to memorandum of claim dated October 26, 2022 was not admitted on record of the court. The claim stood unopposed.
8. After the hearing the court directed on filing of submissions granting leave to the Respondent to also file submissions. Submissions are not pleadings hence the court was of the opinion the opportunity be extended to the respondent. In place they filed reply to the claim which was not admissible and was not admitted on record. The Claimant filed her written submissions received in court on the October 15, 2022.

Determination

Issues For Determination

9. The Claimant in her submissions reiterated her case under memorandum of claim dated July 4, 2022 which she submitted was not defended and prayed the reliefs sought be granted as prayed.
10. The court considers that this being a case challenging the summary dismissal the issues for determination of the dispute as follows:-
 - a. Whether the summary dismissal of the claimant by the respondent was lawful and fair
 - b. Whether the claimant is entitled to reliefs sought.

Whether the Termination of Employment of the Claimant By The Respondent was Lawful and Fair

11. It is considered position of the court that for termination of employment to be said to be lawful and fair it must comply with the requirements of section 43,45 and 41 of the [Employment Act](#). Section 43



of the Act requires proof of reason for termination. Section 43(2) guides the court on the prove of reasons by providing as follows,

"43(2) the reasons or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee".

The termination is unfair if the reasons did not exist.

12. Section 45 further expounds on the reasons by providing as follows:

-(2)A termination of employment by an employer is unfair if the employer fails to prove:-

- a. That the reason for the termination is valid
- b. That the reason for the termination is a fair reason - (i) related to the employee's conduct, capacity and capability or (ii) based on the operational requirements of the employer
- c. That the employment in termination is in accordance with fair procedure".

13. The criteria of fair procedure is provided under section 41 of the *Employment Act* and the court finds that three ingredients are to be met namely:-

- a. The employer, before the termination explains to the employee in a language they understand , the reason the employer is considering termination. The court considers issuance of a letter to show cause giving reasonable time and in a language the employee understands sufficient compliance with condition.
- b. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation. The court considers that this right must be reflected in the letter of invitation to the disciplinary hearing and in the minutes of the proceedings of the hearing.
- c. Thirdly the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation on the grounds in its finding. The court considers the minutes of the hearing meeting reflecting the hearing of the representatives and consideration of their representation to meet this condition.

14. Applying the foregoing requirements of the law the Court then considers whether there were valid and justified reasons for summary dismissal of the Claimant. The claimant in her witness statement adopted as evidence in court stated she was employed verbally by the respondents as a gardener/ cleaner on March 1, 2015 earning Kshs 10,000/- per month. The claimant in her witness statement stated that the respondent decided to terminate her services without any further notice.

Decision On Fairness Of The Termination

15. The court finds that the standard of proof of justification of reasons for termination of employment is on balance of probabilities. The claimant stated she was gardener/ cleaner of the respondents at their residence Pili Pili Villas, same place she effected service of hearing notice. She had been employed verbally. The court on a balance of probabilities found it was likely to be true than not the claimant was an employee of the respondents.



16. The court in determination of the validity of the reasons and fairness of the dismissal is guided by 45(2) of the Employment Act to wit -

“(2)A termination of employment by an employer is unfair if the employer fails to prove:-

- d. That the reason for the termination is valid
- e. That the reason for the termination is a fair reason -
 - (i) related to the employee’s conduct, capacity and capability or
 - (ii) based on the operational requirements of the employer
- f. That the employment in termination is in accordance with fair procedure”.

17. The Claimant stated in her witnesses statement dated July 4, 2018 that the respondent decided to terminate her services without any further notice.

18. The Court finds that no reasons were issued for the termination.

Whether The Procedure Adopted In The Termination Was Lawful

19. Applying the criteria under Section 41, found no evidence of hearing of the claimant before the termination. The claimant assertion that she was wrongfully terminate met the requirement of section 47(5) and it was the employer to prove validity of the reasons for the termination and fairness of the procedure. The defence did not enter their defence or produce evidence.

20. The Court determines that there was no fairness in dismissal of the Claimant from employment by the Respondents.

Whether the Claimant is entitled to reliefs sought.

a. Claim for Salary Underpayment

21. The Claimant a gardener /cleaner employed in Nairobi as per affidavit of service, produced Legal Notice No 1675 of 2016 which stated the minimum wages for that category of workers in Nairobi was Kshs 12,926.55/-. The claimant in her witness statement said she worked for 3 years from employment date of March 1, 2015 to date of termination of employment of February 28, 2018. She sought payment of the difference. Section 90 of the Employment Act limits claims of employment to 3 years. The court finds the claimants claim to be within the 3 years and grants the same as sought Kshs 12,926.55/- 10,000/- x 36 months total sum of Kshs 105,355.80/-.

Notice Pay

22. The Claimant stated she was terminated without further notice. The employer ought to issue notice under section 35 of the Employment Act .

The claimant is awarded one month notice pay in lieu under the minimum wage order for KSHS. 12,926.55/-



Unpaid Housing Allowance

23. The Claimant stated in her statement that she was not given housing allowance. In her claim she stated she was not provided with accommodation. Section 31 of the *Employment act* provides for housing as follows:

- "(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service— (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;"

The claimant having not been accommodated ought to have been paid housing allowance at minimum of 15 % of basic wages. The claimant is awarded housing allowance for 3 years as prayed thus 15/100x12926.55x36 months total sum of Kshs 69,803.37/- awarded.

Leave pay

24. The Claimant in her statement stated that she was not given leave with full pay. In her statement of claim she admitted to have been granted leave of 7 days every year which was deducted from her salary. The Claimant discharged her burden and the burden shifted to the employer to prove the grant of leave with full pay. On annual leave section of the *Employment Act* Provides:-

- "(1) An employee shall be entitled—
- (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;"

The claimant is awarded leave pay for 21 days annually for the 3 years as prayed for total sum of Kshs 27,140.40/-.

Service Pay

25. Section 35 of the *Employment Act* provides for service pay on termination of employment where the employee is not under any type of pension scheme under 35(6) as follows:-

- "(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed."

The Claimant prays for service pay for 45 days being 15 days of each year worked. The claim is granted as prayed for Kshs 19,386.00/- as there was no evidence of payment of NSSF.



Compensation for Unfair Termination

26. The Court found unfair dismissal. The Claimant stated she expected to continue working and is now suffering at home. The court considered that work of gardener/cleaner does not require specialist skills and no reason was given why the claimant was unable to secure an equivalent job. The court considered the length of period worked of 3 years. The court finds and determines award of sum equivalent of 6 months salary adequate compensation as adequate in the circumstances. Thus sum of Kshs 77,559.30 /- (12926.55 x 6 months)

Certificate of Service

27. It is the right of employee to be issued with certificate of service by employer under section 51 of the *Employment Act*. The same to issue.

Conclusion And Disposition.

28. The court enters judgment for the claimant against the respondents jointly and severally in the following terms:-
- a. Declaration that the termination of employment of the claimant was unlawful and unfair
 - b. Award Notice pay for one month salary in lieu Kshs 12,926.55/-
 - c. Award salary underpayment for period of 3 years for total sum of Kshs 105,355.80/-.
 - d. Award of unpaid housing allowance for 3 years Kshs 69,803.37/-
 - e. Award of leave pay for sum of Kshs 27,140.40/.
 - f. Award of Service pay for sum of Kshs 19,386.00/-.
 - g. Award of compensation pay for unlawful and unfair termination at equivalent of 6 months minimum wage for the total sum of Kshs 77,559.30 /- .
(Above awards total sum Kshs 312,171.42/- of subject to statutory deductions).
 - h. Interest on the total award sum at court rates from date of judgment until payment in full.
 - i. Costs to the claimant.
 - j. Respondents to issue claimant with certificate of service pursuant to section 51 of the *Employment Act*.
29. Stay of 30 days.
30. It is so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 1ST DAY OF DECEMBER 2022.

J. W KELI,

JUDGE.

In the Presence of:-

Court Assistant: Brenda

Claimant:-Shamalla (Union Representative)



Respondent:-Lugano.

