



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1163 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

CONSOLATA WELEGA LUSENO.....CLAIMANT

VERSUS

DENNIS W. GOULD MUSGRAVE..... RESPONDENT

JUDGMENT

The Claimant’s suit is contained in the Complaint dated the 6th April 2006 and filed on the same date.

The Complaint seeks the following reliefs as against the Respondent:

- a.. Payment in lieu of notice
(3 months’ salary)..... Kshs.28,500.00
 - b.. Payment in lieu of leave
(2 years – 2 months’ salary)..... Kshs.19,000.00
 - c.. Salary for the month of July 2003..... Kshs.9,500.00
 - d.. Unlawful and illegal salary deductions of Kshs.1,000 per month for two years refund.....
Kshs.24,000.00
 - e.. Gratuity (18 days pay per year worked
for 15 years)..... Kshs.67,500.00
- TOTAL..... Kshs.148,500.00**

The claimant avers that she was employed by the Respondent as a domestic house-help from the year 1988 until 6th July 2003 when her services were verbally terminated. She avers that she was initially employed for a salary of Kshs.1,000 per month but which was later increased to Kshs.6,750/ per month. She avers that at the time of her termination she was being paid Kshs.9,500/=. She contends that the termination of her services was unfair as it was done without any warning, reasonable cause and or notice.

The Respondent in the statement of defence dated the 14th of July 2006 and filed on the 17th of July 2006 has denied the alleged unfair dismissal. In particular, the Respondent at paragraph 3 of the defence denies employing the claimant. And in paragraph 7 he avers in the alternative that the claimant resigned from her work in 1996 and was paid all her terminal dues. He says she was later on re-employed on the 1st July 1999 but only worked until April 2000. That the claimant after a period of 20 days absence returned to the Defendant to say that she was resigning on the grounds of an alleged pregnancy. He prayed that the suit be dismissed with costs.

Evidence by the Claimant

The claimant testified on the 19th January 2021 that she worked as a house help for the Respondent which work involved cooking, washing clothes, cleaning the house and doing all the household work.

That she is no longer doing the work as her employment was terminated. That she was employed by Dennis W Gould Musgrave. That she worked from the year 1998 to 6th July 2003.

She relied on her witness statement as her evidence in chief and list of documents filed.

She testified that she went to the Labour Officer and was given a letter to take to her employer. That the Respondent asked her to accept KShs.10,000 as full and final settlement but she did not agree.

She asks the Court to order the Respondent to pay her for the years worked as claimed in the Complaint dated 6th July 2006.

Respondent's Case

The case proceeded in the absence of the Respondent who despite being served with hearing notice never attended Court for the hearing.

Analysis and Determination

I have considered the pleadings and evidence adduced, the submissions of the claimant and the authorities quoted. At issue is whether or not the termination of the employment of the claimant was unlawful.

According to the evidence on record, the Claimant's employment was terminated on 6th July 2003. Although the Claimant has premised her claim on the Employment Act, 2007, the said Act had not been enacted at the time her employment is alleged to have been terminated. It is the repealed Employment Act (1976) that is applicable to her case.

The claimant in the witness statement dated 2nd November 2019 adopted as part of her evidence stated in paragraph 11 that the Respondent had informed her that he had completed the construction of the house he was building in Gilgil and her services were no longer required. He then informed her that he would get her another job. She maintained that there was no notice served before her termination. In the Complaint filed on the 6th April 2006, it is simply stated that the Respondent had informed her that her services were no longer required.

Under the Employment Act, 1976 (repealed), an employer was under no obligation to give reasons for the termination of employment. All that an employer was obliged to do was to give notice or pay in lieu of notice.

Section 15(5) of the repealed Act provided as follows –

(5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be-

(i) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

(ii) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing;

(iii) where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing;

Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

Section 16 of the repealed Act provides as follows –

16. Payment of wages in lieu of notice.

Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.

The issue of lawful termination therefore relates only to whether or not the Claimant was given notice or pay in lieu of notice.

In this case the Claimant testified that she was informed that her services were no longer required after the Respondent completed building his home in Gilgil.

From the handwritten payment documents submitted by the Claimant with the bundle of documents, it is evident that she was paid for days

worked at Kshs.250/- per day. She was also paid for nights spent in Gilgil at Kshs.50/- per day, for holidays at Kshs.250/- per day in addition to the daily rate of pay. She was also paid bus fare to Gilgil at the rate of Kshs.300/-.

There is no evidence of continuous employment from the records submitted by the Claimant. There is further no record of a monthly rate of pay as the Claimant received different payments every month in accordance with the number of days worked and nights spent in Gilgil.

From the foregoing, the Claimant is not entitled to 3 months' pay in lieu of notice. In view of the fact that the Respondent did not controvert her evidence that she was not given notice before the termination of her employment, I award her one month's salary in lieu of notice at Kshs.250 x 30 at Kshs.7,500/=.

The Claimant is awarded annual leave for the period January 2002 to June 2003 (18 months) at 1.75 days per month being 31.5 days. Based on a daily rate of pay of Kshs.250/-, I award the Claimant Kshs.7,875/-.

The Claimant is awarded 6 days' pay for July 2003 at Kshs.1,500.

The Claimant did not prove illegal deduction of Kshs.1,000/- from her salary. From the handwritten salary payment records, she was repaying a loan and/or salary advance at the rate of Kshs.1,000/- per month.

The Claimant is not entitled to gratuity as it was not a term of her employment and was not provided for in the law that governed her employment.

Conclusion

In conclusion, judgment is entered for the Claimant against the Respondent as follows –

- 1.. Pay in lieu of notice..... Kshs.7,500.00
- 2.. Pay in lieu of annual leave..... Kshs.7,875.00
- 3.. Pay for 6 days worked..... Kshs.1,500.00

Total amount.... Kshs.16,875.00

The Respondent shall pay Claimant's costs and interest shall accrue from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE