



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 32 OF 2018

LILIAN AMONDI AMBWAYA.....CLAIMANT

v

DIVS CHOTAI.....RESPONDENT

JUDGMENT

1. Lilian Amondi Ambwaya (the Claimant) sued Divs Chotai (the Respondent) on 6 February 2018, alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Response to the Memorandum of Claim on 3 April 2018, and the Cause was heard on 21 January 2020 when the Claimant testified.
3. When the Respondent's case came up for hearing on 14 December 2020, the Respondent's advocate sought an adjournment, and the Court rescheduled the hearing to 4 March 2021.
4. On 4 March 2021, the Respondent made another application for adjournment, which the Court declined for the reason that the Respondent had not shown any intention to testify because he had failed to file and serve a witness statement despite being directed by the Court.
5. The Claimant filed her submissions on 22 March 2021, whilst the Respondent filed his submissions on 19 April 2021.
6. The Court has considered the pleadings, evidence on record and the submissions and identified the Issues for determination as addressed hereunder.

Whether Respondent was denied a right to be heard?

7. In his submissions, the Respondent blamed the Court for denying him a chance to be heard.
8. Rules 13 and 25 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires parties to file and serve witness statements with their pleadings.
9. The Respondent did not file or serve a witness statement with the Response.
10. On 21 January 2020, the Court granted the Respondent leave to file and serve a witness statement within 21-days. The Respondent did not comply.
11. When the Respondent's case next came up for hearing on 14 December 2020, the Court indulged him and directed him to file and serve a witness statement before 30 December 2020. The order was not complied with.
12. It is therefore unfortunate and cheeky of the Respondent to allege that the Court denied him an opportunity to be heard when he snubbed the requirement by the Rules to file a witness statement, and two opportunities by the Court to file the witness statements.

Employment relationship

13. The Respondent had denied that he had an employment relationship with the Claimant.

14. The Claimant testified that she was not issued a written contract.

15. By virtue of sections 9 and 10(7) of the Employment Act, 2007, the Court finds that the Claimant was employed by the Respondent as a house help.

Unfair termination of employment

16. Section 35(1)(c) of the Employment Act, 2007 envisages the employer issuing a written notice of termination of employment (unless it is a case of summary dismissal).

17. Apart from the written notice, the employer is required to afford the employee an opportunity to make representations before terminating the contract.

18. The Claimant testified that she was employed as a house help by the Respondent in 2010 and that in October 2017, she was arrested by the Police on allegations of having stolen money from the Respondent's wife.

19. The Claimant stated that upon investigations, the Police released her without any charges, but the Respondent terminated her employment unfairly.

20. The Respondent did not rebut or controvert the Claimant's testimony. He did not prove that he issued a written notice of termination as contemplated by section 35(1)(c) of the Employment Act, 2007.

21. The Court is satisfied that the Claimant has demonstrated as demanded by section 47(5) of the Employment Act, 2007 that an unfair termination of employment occurred.

22. Since the Respondent failed to discharge the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007, the Court concludes that the termination of the Claimant's employment was not for valid and fair reasons.

Compensation

23. The Claimant served the Respondent for 7-years. The Respondent did not cooperate with the Court to ensure an expeditious and proportionate resolution of the dispute.

24. In consideration of these factors, the Court is of the view that maximum compensation equivalent of 12-months gross salary would be appropriate (gross salary was Kshs 9,000/- per month).

Breach of contract

3-months' salary

25. The Claimant sought Kshs 27,000/- which she pleaded as outstanding salary for the remainder of the contract.

26. The Claimant did not lay an evidential or contractual foundation as to the length of her contract to be entitled to this of relief. Relief is declined.

Conclusion and Orders

27. The Court finds and declares that the Claimant was an employee of the Respondent and that the Respondent unfairly terminated her employment.

28. The Claimant is awarded:

(i) Compensation Kshs 108,000/-

29. The Claimant to interest on the decretal sum as well as costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 30TH DAY OF JUNE 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ngala Awino & Co. Advocates

For Respondent Siganga & Co. Advocates

Court Assistant Chrispo Aura