



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 2453 OF 2016

REBECCA N. NYANGOLO.....CLAIMANT

-VERSUS-

PRASHANT RAVAL.....RESPONDENT

JUDGMENT

INTRODUCTION

1. At all material times the Claimant was an employee of the Respondent having been employed as a house help from the month of November 2005 until March 2016, when she exited the employment. The manner of the exit, and the import thereof is in controversy in this matter. The Claimant asserts that she was wrongfully and unfairly terminated and therefore entitled to the couple of reliefs that she has sought in her statement of claim. The Respondent wholly denies the claim, contending that the Claimant voluntarily exited from her employment, and therefore the characterization of the separation as unfair and wrongful termination is with no basis. Further the Claimant is not entitled to any of the reliefs she has sought.

THE

CLAIMANT'S

CASE

2. The Claimant's case is encompassed in her statement of claim herein filed, the witness statement dated 25th November 2016, her witness statement that was contemporaneously filed therewith, and the brief oral testimony in Court that was for purposes of clarifying contents of the witness statement that the Court adopted as her evidence in chief, by consent of the parties.

3. The documents namely, a demand letter dated 13th April 2016, the Claimant's Copy of National Identity Card, a letter to the Ministry of Labour Social Security and Services dated 23rd March 2016, and a petty cash voucher dated 11th February 2016, were all produced as CEXH.1-4 in that order.

4. The Claimant stated that she got into the employment of the Respondent sometimes in the November of 2005 as a house help, and that at the time of separating with the Respondent she was earning a salary of Khs. 13,000 per a month.

5. The Claimant contended that her employee-employer relationship with the Respondent was one that was harmonious till on or about the 21st March, 2016 when it got into head winds. The Respondent terminated it without proper notice. She contends that the manner in which the termination occurred cannot be seen in any other manner other than it being a summary dismissal from employment which was unlawful, unfair and inhuman.

6. She stated that she used to work throughout the week, save for Sundays which was her off day.

7. She remembers that on 19th March 2016, her employer warned her that if she were to report to work late any time even for a second, she will suffer a deduction of her salary. She further recalls that on the Easter Monday of that year, she had gone to church, and on leaving church, she realised that the Respondent had tried to call her, but since she was headed for her home, she did not "return".

8. That when she eventually reported, she worked as normal until the evening, when the Respondent told her that she should not report to work. She concluded that she had been terminated. She got prompted to go to the Labour Officer who summoned the Respondent, but he declined to heed them.

9. She states that later on her boss called her, and forced her to sign for dues amounting to Kshs. 13,000 which amount she declined as too insufficient as she had worked for 10 years without proceeding for leave and that her services were terminated without reason and or explanation.

10. The Claimant stated that her employment was terminated unlawfully and unfairly, citing the reasons that she was not issued with a show cause letter requiring her to answer any charges. She had not committed any misconduct that would warrant the summary dismissal, that she

was not given a hearing before the decision to terminate was arrived at by the Respondent and due process was absent.

11. That at all material times during the currency of the employment, she worked diligently, without a single warning against her, on an indiscipline conduct.

12. In her brief oral testimony in chief, the witness, stated that the Respondent gave her a loan totalling to Kshs. 30,000, first, Kshs. 20,000 and thereafter Kshs. 10,000. The loans were taken in the years 2008, and 2015. The Respondent would recover the same by deducting her salary. She asserted that the Respondent didn't give her any loan in 2016.

13. She remembers that her son had sat and passed her Standard Eight examination, and was set to proceed to Form One. At that time, she was financially constrained, prompting her to approach the Respondent for a loan, the Respondent declined to grant her. She then demanded that he pays her "service pay", he too declined, and ordered her to leave his place.

14. She stated in court that as at the time she was leaving employment, she was earning Kshs. 10,000. In 2016, this was an underpay. She further stated that the claimant started paying for her NSSF in 2011.

15. Cross examined by Mr. Nyakundi, the Claimant stated that her salary rose over the years. That a salary of Kshs. 10,000 was first paid in 2016. She maintained that she was only given the two loans, amounting to Kshs. 30,000. Referred to the petty cash voucher, in her bundle of documents filed in court, she still insisted that she only knows of the two loans.

16. She stated that she left employment, because the Respondent told her to leave his compound. She was staying in the compound. She asserted that she was not being paid as per the Government regulations.

17. When she was leaving, the Respondent did not pay her any money, and she declined none.

The Claimant's Submissions

18. In his written submissions, counsel for Claimant has crafted the following questions as those that should be answered in the court's determination of the claim herein, thus;

[i]. Whether the Claimant's employment was unlawfully and unfairly terminated.

[ii]. Whether she was denied her annual leave.

[iii]. Whether the Claimant took a loan from the Respondent.

[iv]. Whether she is entitled to the prayers sought.

19. It was submitted by counsel that there are two different accounts on how the separation of the parties herein occurred, on the one side, the Claimant contending that the Respondent asked her to leave his residence, while on the other, the Respondent contended that the Claimant left out of her own will after she discovered that the Respondent was not owing her anything, after a computation on her dues was done. That there are all indicators that the Claimant was not accorded a hearing before her employment was terminated.

20. It was further submitted that the Respondent failed totally to prove that he had a valid reason to terminate the Claimant's employment.

21. On the reliefs, it was submitted that the termination was unfair, and therefore the Claimant should be granted a compensatory relief to an extent of 12 months' gross salary, computed at Kshs. 131,456.4.

22. On the claim for unpaid leave, counsel submitted that the Claimant's evidence that she never at any time proceeded for leave was uncontroverted. That the Respondent had an obligation on his shoulders to by way of production of records, demonstrate that the Claimant used to proceed for leave as by law required. That this, the Respondent failed to do. An award in favour of the Claimant should consequently be made. Section 10[6] and [7] of the Employment Act requires employers to keep records of their employees and produce them in court whenever there is controversy.

23. He cited the holding in ABIGAEL JEPKOSGEI YATOR & ANOTHER V CHINA HANAN INTERNATIONAL CO. LTD [2018] eKLR, thus:

"..... an employer shall keep all work records for a period of 5 years even where employment has ceased as such records may become necessary and important particularly in proceedings such as these. Also, where legal proceedings are initiated by an employee, the law places the duty to produce the work records upon the employer.

[9]. Where work records are not produced, any claim mated by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.

[20]. The requirement to keep work records and produce them in court once a claim has been filed is given emphasis in the case of Gilbert Kasumali Kithi versus Nyali Beach Holiday Resort [2015] eKLR....."

24. That therefore, the Claimant should be compensated for unpaid leave for a period of 10 years that she served the Respondent, Kshs. 88,480.26.

25. That there was no notice issued to the claimant before termination, an award of one month's salary in lieu of notice is imperative therefore under the law.

26. It was contended that there was no evidence placed before this court to demonstrate that the Claimant was ever advanced any loan, or if she was, what the balance was as at the time of separation.

27. The Claimant submits that though it was not pleaded, the court should find that throughout her employment, she suffered salary underpayments, and direct the Respondent to make good the underpayment.

The Respondent's Case

28. Subsequent to the service of the Claimant's pleadings on him, the Respondent filed a reply to the statement of claim, a bundle of documents, a witness statement, and at the hearing presented a brief oral testimony in regard to some areas of his defence. He was cross examined on the material that he had placed before court, by counsel for the Claimant. His case resides here.

29. The Respondent stated that the Claimant indeed used to work for them as a house help. She enjoyed a one day off every week, that is on Sundays.

30. That their employer-employee relationship, ran smooth until when the Claimant started reporting back on Mondays late, and being arrogant to him and his wife. That sometimes he would call her and she declines to pick his calls.

31. The Respondent stated that because of the manner in which the Claimant was conducting herself, he told her that she had an option to leave if she was unwilling to change. He stated that the Claimant opted to leave. He computed her dues, he informed her that he was to deduct the outstanding loan amounts from the dues, the Claimant refused to sign for the amounts. He testified that he expressly told her, that in default of her signing for the amounts, he would not give her the money.

32. At the time they were separating, she was earning Kshs. 13000, per a month. She had Kshs. 13,500 outstanding on the loan[s]. Every year, the Claimant enjoyed her 21 days annual leave. She had only 3 months leave outstanding, for January, February and March 2016.

33. At the time she was leaving, he did not pay her.

34. According to the Respondent, the Claimant was not entitled to service pay, because he was contributing to her NSSF scheme.

35. The Respondent produced, NSSF records, Payment vouchers and a voucher in respect of the KShs. 29,000 loan, as Exhibits.

36. Cross examined by counsel for the claimant, Mr. wafula, the Respondent reiterated the employment period, that the claimant used to be accorded leave, and that at the time she was leaving, she was earning Kshs.13000. The documents to prove that she used to proceed for leave were with his counsel.

37. She started being arrogant in the last two years of her service. He condoned her for the two years, for otherwise she was a good worker. He had three other house helps. He gave the Claimant loans totalling to Kshs. 29,000. He stated he could not however recall the specific dates when this happened.

38. The loan was not given once to the Claimant. He relies on the petty cash voucher of 2016, to prove the issuance of the two loans [the last document in the claimant's bundle of documents] He admitted that this document was not signed by the Claimant. That it was prepared by his wife. She used to go for leave every year, but he had no documents to prove that.

39. On Mondays after her Sunday offs, she was supposed to report at 8.50 am, but she habitually reported as she wished, caring little about this time. He warned her severally, but she never changed. This happened over a period of seven months.

40. In re-examination, the respondent stated that the Claimant became difficult to deal with, she could not pick calls from him, and she continued reporting to work as she wanted. This behaviour was unacceptable. He told her that she was at liberty to leave if she did not want to change. After the last warning she stayed on for three days and when she realised that she had no dues outstanding for payment because of the loans, she left.

41. He never caused her to sign for every payment because his wife and him trusted the Claimant. However, after this incident, they have become smarter.

The Respondent's Submissions.

42. The Respondent proposes two issues for determination by this Court:

a) Whether the Claimant was unfairly terminated by the respondent

b) Whether the Claimant is entitled to the orders sought?

43. Addressing the first issue, counsel for the Respondent submits, that Section 45[2] of the Employment Act defines unfair termination. The Claimant left her employment on her own will, therefore the provisions in this section does not apply to the Claimant's case. He submits further that the Claimant failed to discharge the burden of proof, placed upon her by Section 47[5] of the Act, proving that a termination occurred.

44. Section 107 of the Evidence Act, which provides; "Whosoever desires any court to give judgment as to any Legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" Was cited in fortification of this submission.

45. On the reliefs sought by the Claimant, Counsel submits that she is not entitled to one month's salary in lieu of notice, conversely, she is the one who is under an obligation to pay the Respondent, pursuant to the provisions of section 36 of the Act, having caused the separation the way she did.

46. Section 36[5] of the Employment Act stipulates that service pay is not payable at termination where an employee was a member of the NSSF scheme, during the currency of the employment relationship. The Respondent proved by way of documentary evidence that the claimant was, she is therefore not entitled to the relief.

47. Counsel submits that in any event, the push for the relief has been abandoned expressly through her submissions filed dated 20th September 2021.

48. On the prayer for unpaid leave, it was submitted, that her own testimony to the effect that she used to go for leaves during December holidays, militates against her assertion that she never proceeded for leave at any time during the life of the employment relationship. That on the 26th March 2016 as the claimant was being paid her terminal benefits, she was paid Kshs. 11,000 as pending one year leave and a further Kshs.1,835 as leave calculated from the month of January to March 2016 as days worked for the 2016.

49. As regards the compensatory relief of 12 months' gross salary sought by the Claimant, counsel submits that an award of the same is not mandatory but discretionary, awarded dependant on the peculiar circumstances of each case. He cites, the holding in Co-operative Bank of Kenya Ltd vs. Banking Insurance and Finance Union CA No. 188 of 2014 thus;

"Our understanding of the Act is that the prescribed remedies..... are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies are not mandatory remedies, is made even clearer by section 49[4] which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by above comprehensive list of considerations."

50. To award the Claimant the compensatory award will be tantamount to enriching her unjustifiably.

51. Concerning the claim for underpayments, it was submitted that this wasn't pleaded for by the Claimant and it should not be considered therefore. This legal position was reaffirmed by the Court of Appeal in the case of David Sirona Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR.

52. The Claim should be dismissed with costs. She wants to make a lottery out of the court process. This is exemplified by the fact that in her submissions you find a radical departure from what she has stated and sought in her pleadings.

Determinations

53. From the material placed before me, the following issues emerge as issues for determination in this matter:

[I]. Whether there was a dismissal of the Claimant from her employment.

[II]. If the answer to [I] above is in the affirmative, was the dismissal procedurally and substantively fair?

[III]. Is the Claimant entitled to the reliefs sought in the statement of Claim?

[IV]. Who should bear the costs of this suit.

Was the Claimant dismissed from her employment?

54. The common denominator in all forms of dismissal is that all of them are ultimately caused by the employer. Dismissal, by its definition, is not initiated by the employee, nor is it something which merely happens- *Schmahnn v Concept Communications Natal [pty] Ltd [1997] 8 BLLR 1092[LC]*. In essence some overt action by the employer must be present to bring the employment into termination.

55. The Claimant did allege that the Respondent ordered her to leave his compound causing her employment to come to an end. On the other hand, the Respondent contended that after the several incidents by the Claimant, including a habitual late reporting to duty on Mondays, behaving arrogantly and failing to pick calls, and the several warnings that he gave her trying to bring her back to track, he got constrained to shoot a last warning, expressing to the Claimant that she had a choice to change for the better or leave. The Claimant decided to leave her job.

56. This court is faced with a situation where parties have taken a position which is a world apart, on an issue whose determination is vital the disposal of this matter. I am therefore call upon to believe one party and disbelieve the other, on their respective accounts on the issue. In this situation, I am not hapless, the pleadings, the totality of the evidence placed before the court, the consistency in the contents of the pleadings with the evidence adduced thereon, the consistency of the oral testimony in court, with the factual contents of the parties' respective witness statements, and the demeanour of the parties, come in handy as a gauge for the position the court should take.

57. The claimant in her oral testimony in Court mentioned that on the 17th February,2016, her child had passed her Standard Eight examinations and was poised to Join Form one. The Claimant was financially constrained, she approached the respondent for a loan, he declined the request. This prompted her to demand for her service pay. Service pay is the amount of money paid to an employee by an employer whose contract of service is in the nature where wages or salary are paid periodically at intervals of or exceeding one month, has been terminated. Section 35[5] speaks to this. Termination, here refers to a situation where the employee has been dismissed or resigned from his/her job.

58. Therefore, the issue of service pay comes in after termination. I am convinced that the Claimant was demanding for payment of her service pay after she had expressed to the Respondent that She was quitting. It is imperative to point out that she testified to the effect that, it is after the Respondent refused to pay her 'the service pay' that he told her to leave.

59. In her witness statement, turned her evidence in chief, the claimant states, that non-19th March 2016, the respondent calls her warning her that if she were to be late even for a second, her salary will be deducted. She remembers that this was an Easter Monday. Doesn't this support the Respondent's contention that the Claimant had become a habitual late comer on Mondays? Yes, it does. In her pleadings, she asserts that she had not received any warning[s] from the Respondent. This contradicts her statement.

60. The Claimant in her witness statement states that she on the material day worked normally until evening when the Respondent told her not to report to work. This contradicts what she orally stated in court, in her evidence in chief. That she was ordered to leave the compound and dared to take the respondent wherever she wanted, at the point when the Respondent declined to give her "service pay".

61. With all the foregoing premises, and having observed the parties while testifying, I am swayed not to believe the account given by the Claimant. I believe the account given by Whether the termination was procedurally and substantively fair.

62. Having found that the Claimant quit her employment wilfully out of her own volition, there cannot be said to be a termination, circumstances of which, this court should subject to measure using the weights provided for in Sections 41, 43, and 45, of the Employment Act, 2007. Whether the reliefs sought can be availed to the Claimant.

63. The Claimant passionately submits and urges this Court to consider and award the Claimant compensation for what she terms underpayments in salary, notwithstanding that the same was not pleaded in her statement of Claim. I am not persuaded that this I can do. In ELRC Cause No. 94 of 2016, *Aristide Marege Nyang'au =vs= Lavingtone Security Limited*, faced with a similar situation like the instant one I held:

"69. No doubt, numerous judicial attention has been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In *Adetoun Oladeji [NIG]Ltd vs- Nigeria Breweries PLC S.C 91/2002*, Judge Pius Aderemi J.S.C expressed himself; " It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

70. Sir Jack Jacob in his article entitled "The present importance of pleadings" cited with approval by the learned Judges of the Malawi Supreme Court in *Malawi Railways Ltd V- Nyasulu [1998] MWSC*, aptly captures it thus;

"As the parties are adversaries, it is left to each one of them to formulate his own case, subject to the basic rules of pleadings..... for the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part on the duty of the court to enter upon any inquiry into the case before it, other than to adjudicate upon specific matters in dispute which the parties themselves have raised by way of pleadings. To do so would be to enter upon the realm of speculation. Moreover, such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or a defence not made or raised by or against a party is equivalent not to hearing him at all and thus be a denial of justice..... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is not strictly adhered to. In such an agenda there is no room for an item called

“any other business” in the sense that points other than those raised may be raised without notice.’”

64. Section 49[1][c] of the Employment Act, bestows upon the courts authority to grant a compensatory relief in favour of an employee, where it is found that the termination or dismissal of the employee was unjustified. The precondition to availability of this relief to a claimant, is the finding. In this matter, the precondition is absent. The court has found that there was no dismissal of the Claimant from employment by the Respondent.

65. Section 90 of the Employment Act provides for a limitation of time, providing: “Notwithstanding the provisions of section 4 [1] of the Limitation of Actions Act [cap.22], no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect of default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” By dint of this provision, some causes of action cannot have a life three years after they arise. They cannot even be resurrected.

66. The claimant makes a further claim for “terminal dues” for 10 years. What are these terminal dues? It is not clear, either from the pleadings or the evidence by the claimant. This claim cannot survive in the face of the provision in. I consequently decline to grant the same.

67. As regards, the relief sought for unpaid and untaken leave, the Respondent was under an obligation to prove that indeed the Claimant at all material times proceeded for her leave as and when it fell due. This court finds that this burden was not discharged by the Respondent, he did not provide any documentary evidence or any evidence at all to the satisfaction of the court, that the leaves were taken, and that there were payments in regard thereto made. To make matters worse for him on this point, he candidly testified that the matters leave and loans, were being handled by his wife. To my mind, she was the most appropriate person to testify to this. She never did.

68. By reason of the above premise, I am inclined to award the Claimant, compensation for unpaid and untaken leave, for the years, 2013, 2014, and 2015 not for the 11 years as sought by her. The period outside the three years, cannot be accommodated in view of the provision in section 90 of the Employment Act. Therefore Kshs. 27,300.

69. The Respondent was clear, at the time the Claimant was exiting from her employment, she was not paid any money. I get an impression from this statement that she did not earn for the 19 days she worked in the month of February 2016, therefore. I award her Kshs. 8,233.30. 70. The court though convinced that the Claimant used to take loans from her employer, I am unable to state whether or not at the separation, there was any unpaid loan outstanding. The evidence by the respondent on this was unclear.

71. It is imperative to state for clarity of record that there are actions based or arising out of the Act, or contract of service, that are justiciable independent of an action for unfair termination or dismissal. Reason why I have made the awards I have hereinabove, notwithstanding, the fact that the court finds that there was no dismissal.

72. In the upshot Judgement is made in this matter in the following terms;

- a) The Court hereby declines to find that there was a dismissal of the Claimant from her employment of service.
- b) The claimant is awarded Kshs. 27,300 as compensation for untaken and unpaid leave.
- c) The Claimant is awarded Kshs. 8,233.30, salary for the period worked in the February, 2016.
- d) Costs of this suit, only limited to the figures awarded in [b] and [c] above, shall be in favour of the Claimant.
- e) Interest on [b] and [c] at court rates with effect, 19th February, 2016.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in the presence of

Wanyonyi for the claimant

Nyalendi for the respondent