



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 216 OF 2017

GRACE NANZALA KORIL.....CLAIMANT

-VERSUS-

EMMA KHAYANZI AMBANI.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant through her statement of claim dated 6th February 2017 sued the Respondent herein, seeking for the reliefs put forth in paragraph 7 thereof in details and summarised in its reliefs section. The Claimant seeks: -

- a) A declaration that her dismissal from employment was unfair, unlawful and illegal.
- b) That the Respondent be condemned to pay her Kshs. 592,260.82.
- c) Interest at Court rates.
- d) Costs of the cause.

2. The Respondent did not enter appearance, or file a response to the claim herein. Therefore, this matter proceeded as an undefended cause. When the matter came up for hearing on the 22nd September 2021 the Claimant adopted the contents of her witness statement as her evidence in chief. However, the Court allowed her to give a brief oral testimony highlighting a few aspects of that statement, where it was felt necessary, she does.

3. The Claimant contended that on the 1st May 2010, the Respondent verbally employed her as a house help, earning a salary of Kshs. 5,000 per a month. She diligently, dutifully and honestly executed her duties to the expectation of the Respondent, throughout her employment.

4. That throughout her employment at such house help for the Respondent, she worked from 7.50 a.m. to 8.00 a.m. even during public holidays. This amounted to overtime for which she ought to have been compensated but she wasn't.

5. She stated that her salary remained the same – Kshs. 5000 without an increment till 8th May 2016, when her employment was terminated by the Respondent.

6. As regards the termination, the Claimant stated that the same occurred on the 8th May 2016, when the Respondent without any notice, verbal or written abruptly terminated her services. On this date the Respondent told her to handover the house keys and phone. She released her telling her that she could call her so that they will get into a fresh agreement, concerning their future dealings as employer and employee. When she got back, she did not get the Respondent.

7. The Claimant stated that despite not staying with her employer- the Respondent, she was not paid any house allowance, during the period of her employment.

The Claimant's submissions

8. In the written submissions that were filed by counsel for the Claimant, two issues are identified as the issues for determination in this claim, namely, was the termination fair; and is the Claimant entitled to the prayers sought.

9. On the first issue counsel submitted that the Claimant was neither informed of the reasons for termination of her employment nor given a termination letter. This amounting to an unfair procedure.

10. Counsel submitted that as regards termination procedure, Radido J. aptly captures it in *Anthony Mkala Chitavi vs= Malindi Water & Sewerage Company Ltd. [2013] eKLR*, as follows:-

The ingredients of procedural fairness as I understand it within the Kenya situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or a shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

11. He concludes that the Respondent did not observe this procedure. That in terms of section 74 of the Employment Act, 2007, the Respondent was the custodian of the employment records. She did not produce any in Court to controvert the evidence of the Claimant. Therefore, the Claimant's evidence on the procedure was not rebutted.

12. On the reliefs sought in the Claimant's statement of claim, the submissions were made on the reasons heads as hereunder:-

a) Underpayments

13. That the Claimant's testimony was to the effect that the Kshs. 5000 was below the relevant minimum wages at the various material times within her period of employment with the Respondent. The relevant legal orders and the minimum wages thereof were put forth in the submissions thus;

(i) Legal Notice No. 98 of 18th June, 2010, the Regulation of Wages (General) Amendment Order, 2010 which provided the minimum wage payable as Kshs. 6,743 for a house servant;

(ii) Legal Notice No. 64 of 10th June, 2011 the Regulation of Wages (General) (Amendment) Order, 2011 which provided the minimum payable as Kshs. 7,586 for a house servant;

(iii) Legal Notice No. 70 of 2nd July, 2012 the Regulation of Wages (General) (Amendment) Order, 2012 which provided the minimum payable as Kshs. 8,579 for a house servant;

(iv) Legal Notice No. 197 of 2013 the Regulation of Wages (General) (Amendment) Order, 2013 which provided the minimum payable as Kshs. 9,780 for a house servant; and

(v) Legal Notice No. 116 of 26th June, 2015 the Regulation of Wages (General) (Amendment) Order, 2010 which provided the minimum payable as Kshs. 10,954 for a house servant.

The Claimant has proved that she is entitled to be compensated to an extent of the difference between what she ought to have earned under the minimum Wage Orders, and what she actually earned.

(b) Annual leave

14. Counsel submitted that the claim for leave days compensation was not challenged either. That for the period she worked for the Claimant she did not proceed for leave. At the time she was leaving she had an accumulated leave 126 days untaken. Court is urged to make an award under this head as specifically put forth in the statement of claim.

(c) Service pay

15. Putting reliance on the provision of section 35 (5) of the Employment Act, counsel submits that the Claimant falls under the category of the persons who are entitled to a benefit thereunder.

(d) House allowance

16. Counsel submits that the Claimant was able to establish that throughout her employment, she was not paid house allowance. That section 31 of the Employment Act places an obligation on the employer to provide an employee with accommodation. There is no evidence in this matter that the employer (Respondent) did this. House allowance is set at 15% of the basic salary by Regulation 4 of the Regulation of Wage (General) Order. An award should be granted, computed on the percentage.

(e) Compensation for unfair termination

17. It is submitted that having proved that the termination was unfair, the Claimant is entitled to compensation to an extent of 12 months' gross salary. This Court is urged to consider that the Respondent treated the Claimant cruelly including changing her place of residence.

(f) Salary in lieu of notice

18. On this it is submitted that since the Claimant's employment was terminated without notice the law requires the Respondent to pay the Claimant salary in lieu of notice. This is what section 35 of the Employment Act dictates.

(g) Costs

19. Costs follow the event. They should be awarded to the Claimant.

(h) Determination

20. Looking at the Claimant's statement of claim and the submissions by counsel for the Claimant, the following issues can be identified as the issues for determination in this matter: -

- a) Whether the employment of the Claimant was fairly terminated.
- b) What remedies are available to the Claimant if any.

21. The Claimant stated and it was not controverted by way of any evidence that she was an employee of the Respondent, and that the Respondent terminated her employment without any reason and without following a procedure that she was expected to, legally.

22. The total unit of fair termination has two components, procedural and substantive fairness. Procedural fairness looks at the procedure adopted by the employer to effect the termination as the Court stated in **Walter Ogal Anura vs Teachers Service Commission [2013] eKLR**. Section 45 (2) (c) of the Employment Act insists on procedural fairness in the whole process of termination of employment and absence of it results into the termination being deemed unfair, handing the aggrieved employer a platform to claim entitlement to all or any of those remedies provided for by the law.

23. In **Samuel Onderi Choi vs Absolute Security Limited [2021] eKLR** this Court held that section 41 of the Employment Act, 2007 supplies the structure for procedural fairness.

24. Section 41 of the said Act provides: -

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, explain to the employee, in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person if any, chosen by the employee within subsection (1), make.”

25. The section clearly imports into the contract of employment applicability of the tenets of natural justice.

26. In **Anthony Makala Chitavi vs Malindi Water & Sewerage Company Ltd. [2013] eKLR** The Court expounded on the principle of procedural fairness as follows: -

“The ingredients of procedural fairness as I understood it within the Kenya situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives of committant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence /state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representation by the employee before making the decision to dismiss or give other sanction.”

27. The circumstances of the matter as brought out by the Claimant clearly indicate that the procedure was not followed at all. consequently, I conclude that the termination was not procedurally fair.

28. Section 45 (1) & (2) (A) & (B) of the Act stipulates: -

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment is unfair if the employer fails to prove;

a) That the reason for termination is valid;

b) That the reason for termination is a fair reason”.

The burden is on the employer to prove the validity and fairness of the reason for the termination.

29. The Respondent did not present any evidence before this Court, evidence demonstrating the reasons for the termination and that the same was valid and fair. The conclusion here being therefore, that the Respondent did not discharge the burden envisioned by the aforesaid provision of the law.

30. In the upshot, the termination was not substantively fair, I so find.

What reliefs are available to the Claimant?

31. Before I delve into the specific reliefs sought in the Claimant’s statement of claim, it is imperative to consider one vital aspect of the Claimant’s claim, the aspect of the alleged under payment, upon the reason that it has an implication of the figures that can be available under those heads, should the Court find merit to grant an award thereunder.

32. Section 48 of the Labour Institution Act, 2007, provides that wage orders constitute minimum terms of conditions of employment, subsection 1 thereof provides: -

“Notwithstanding anything in this Act or any other written law-

a) The minimum rates of remuneration or conditions of employment established in a wages order constitutes a term of employment of any employee to whom the wages order applies and may not be varied by agreement.

b) If the contract of an employment to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration or does not provide for the conditions of employment prescribed in the wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order or provides for less favourable conditions of employment established by the wages order shall be inserted in the contract for those terms.”

33. These provisions are to the effect that the wage orders cannot be out contracted by the parties to an employment contract. The provisions are largely in appreciation of the fact of the imbalanced power between employers and employees. As a rider to the general principle that contracts cannot be rewritten for parties, they can be by the operation of the law.

34. It is through this lens that I will consider the salary of the Claimant vis-avis the minimum wages that were provided for by the wage orders, at all material times.

35. Section 90 of the Employment Act provides for a limitation of time for filing matters, thus: -

“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 be or be instituted unless it is commenced within three years never after the act of neglect or default complained of or in case of continuing injury or damage within twelve months next after the cessation thereof.”

Subject to the exception mentioned in the provision, causes of action in matters arising out of the Act or a contract of service cannot have a life of three years after they arise. They cannot even be resurrected.

36. The Claimant has made a claim for several reliefs in his pleadings. It is clear that for a couple of them she expresses that her entitlement thereto should be found to take effect as from May 2010. This is not possible taking into account the limitation of time put forth in the section. The nature of the reliefs sought do not fall under the category mentioned as an exception in the provision.

37. It is by reason of the premises foregoing that I should consider the reliefs sought taking into account a period of three years before 7th of February 2017. Therefore February 6th 2014, to 6th February 2017. Imperative to state that the Claimant’s case was that her employment was terminated on 8th May 2016. Therefore, the applicable period for purpose of this matter shall be 6th February 2014 to 8th May 2016.

38. Having said this, I now turn to the specific reliefs sought by the Claimant and make a decision thereon.

(a) One month’s salary in lieu of notice

39. There is no doubt in the circumstances of this matter, that the termination was abrupt and without notice. In a situation like this the provisions of section 36 & 49 (1) could set in, entitling the Claimant to one month’s salary in lieu of notice. At the time of the termination the Regulation of wages (General) (Amendment) order, 2015, that were courtesy of legal notice No. 116 of 26th June, 2015, was effective. The minimum wage that it provided as payable for house servants was KShs. 10, 594. I award this sum in favour of the Claimant under this head.

Compensation pursuant to the provisions of section 49 (1) (c) of the Employment Act.

40. Having found that the termination was unfair, I find that the circumstances of this matter, including the length of time the Claimant had been with the Respondent, the nature of tasks she was undertaking in the course of the said employment, and the manner in which the termination occurred, incline me to make an award under this head for the Claimant. I award Kshs. 54,770 being 5 (five) months' gross salary.

41. On the unpaid annual leave, I can only award compensation for a period that falls within the three years period I have mentioned hereinabove. Therefore, for the years 2014, 2015 and 2016. Therefore, 2014 – Kshs. 6,846, 2015 – Kshs. 6,846, and 2016 – Kshs. – 7,667.80. cumulatively therefore, Kshs. 21,361.80.

42. I agree with the Claimant that she is entitled to service pay under the provisions of section 35 (5) of the Act, therefore, Kshs. 32,863.50. I have invoked 15 days for each year worked.

43. The Claimant unpaid house allowance can only be awarded for the years hereinabove mentioned. Therefore, three years. For the year 2014, I will therefore award, Kshs. 1,467, year 2015, Kshs. 1,467 and 2016, Kshs. 1,643. These being 15% of the minimum wages that were relevant during the years, the total here being, Kshs. 4,577.10.

44. Looking at the wage order I have put forth hereinabove, I have no hesitation to conclude that the Claimant was being underpaid. However, I hasten to state that the benefit under this limb can only be to an extent of the underpayments within the 3 years. The underpayments could be the difference between the minimum wages that were provided for and the figure of Kshs. 5,000 that the Claimant was earning. Therefore, Kshs. 4,780 + 4,780 + 5,954= Kshs. 75,514.

45. In the upshot Judgment is hereby entered for the Claimant for: -

a) One month's salary in lieu of notice -

Kshs. 10,594.00

b) Compensation pursuant to the provisions of section 49 (1) (c) of the Employment Act – Kshs. 54,770.00

c) Unpaid house allowance – Kshs. 4,577.0

d) Unpaid leave allowance – Kshs. 32,863.00

e) Underpayments – Kshs. 15,514.00

f) Interest at Court rates with effect from the date of filing this suit till full payment.

g) Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of

Mr. Ondigi for the Claimant.

No appearance for the Respondent.