



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 419 OF 2017

ANN WANJIKU MWANGI.....CLAIMANT

VERSUS

FAITH HOMES OF KENYARESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent as a kitchen assistant and cleaner with effect from 25th January, 1994 until 11th May, 2012. The circumstances under which the employment relationship terminated and the benefits payable thereunder is what constitutes the claim herein. The claimant seeks various reliefs including compensatory damages for wrongful termination, 3 months salary in lieu of notice, leave pay for 18 years, unpaid house allowance, gratuity, salary underpayment and overtime.

2. The respondent opposed the claim and stated that the claimant resigned on her own volition and that she was not unfairly terminated as alleged hence is not entitled to any of the reliefs sought. The respondent thus prayed that the suit be dismissed with costs.

Claimant's case

3. The claimant testified as CW1 and sought to rely on her witness statement which she adopted as part of her evidence in chief. She also produced the bundle of documents filed together with her claim, as exhibits before Court.

4. The claimant reiterated the averments contained in her witness statement. It was her testimony that in the course of her employment with the respondent, she started experiencing acute backaches whenever she performed strenuous activities. That the doctor recommended that she undertakes light duties but the respondent failed to heed the said recommendation and did not assign her light duties, hence her condition worsened. That the respondent also issued her with warning letters, an act she termed as harassment. She averred that her physician Dr. Mwaura, eventually recommended vide a letter dated 3rd May, 2012, that she retires on medical grounds.

5. She averred that when she presented the medical report to the respondent's Administrative Secretary, by the name Ms. Joyce Kariuki, she was asked to write a resignation letter on medical grounds. That the respondent refused to pay her terminal dues and any attempts for conciliation did not materialize hence the instant claim.

6. In cross examination, the claimant admitted that prior to being employed by the respondent, she had delivered all her 5 children via caesarean section, but denied the same as being the result of her backaches.

Respondent's case

7. The respondent's Managing Director, Dr. Frida Nillon testified as RW1. He also sought to rely on his witness statement, which he adopted as part of his evidence in chief. He also relied on the bundle of documents filed on behalf of the respondent and which he produced as exhibits before court.

8. RW1 told court that the claimant was not a good employee and had had been issued with warning letters in respect of her conduct at work. He averred that the claimant having been employed as a kitchen assistant could not be redesignated to work elsewhere in another capacity. That nonetheless, she could perform lighter duties at the kitchen and which she actually did.

9. It was also the testimony of RW 1 that the claimant resigned on her own volition citing medical grounds and that she was paid all her terminal dues. He told court that the transfer of the claimant to the nursery school section was in order, given that she would not be engaged in strenuous activities. He further disputed the assertions that the claimant was underpaid.

10. In cross examination, RW1 admitted not seeing the medical report recommending the claimant to resign on medical grounds, since the Administrative Secretary of the respondent handled such kind of issues.

Submissions

11. Upon close of the hearing, both parties filed written submissions. On her part, the claimant submitted that the respondent did not reasonably accommodate her, despite her medical situation. She referred the court to the case of **Kenya Planation and Agricultural Workers Union vs Rea Vipingo Limited & Anor (2015) eKLR**. She further submitted that she did not resign voluntarily from employment but instead, was constructively dismissed. To buttress her submissions, she relied on the case of **Christina Sigowa Wadulo vs Solimpexs Africa limited (2016) eKLR**. The claimant further submitted that her employment was terminated at the behest of the respondent in a cunning manner hence maintained that she ought to have been given notice prior to the said termination but the same was not done.

12. On its part, the respondent urged the court to find that the claimant voluntarily resigned from employment and that she was not constructively dismissed nor terminated as she has alleged. It further submitted that the claimant had not discharged its burden under **section 47(5) of the Employment Act** by proving termination. To fortify its submissions, the respondent invited the court to consider the case of **Herbert Wafula Waswa vs Kenya wildlife Services (2020) eLKR**.

Analysis and Determination

13. Having considered the evidence on record and the rival submissions, I find that this court is being invited to determine the following issues;

i. Whether the respondent reasonably accommodated the claimant?

ii. In what manner was the employment relationship severed?

iii. What reliefs if any, are available to the claimant?

Whether the respondent reasonably accommodated the claimant?

14. The claimant has alleged that she was not given light duties despite the doctor's recommendation. RW1 told court that the claimant was already performing light duties at the kitchen and she was not exposed to any strenuous work.

15. The term "light duties" is very relative and varies from case to case depending on the nature of work undertaken. RW1 further informed court that the claimant's duties entailed washing utensils, cleaning vegetables, peeling potatoes and carrots. He further stated that in discharging her duties, the claimant could adopt different postures from standing, sitting and sometimes bending hence was not confined to one posture.

16. RW1 further averred during his testimony before court, that the claimant was hired as a kitchen assistant and cleaner hence could not be redesignated in a different capacity but in any event, her duties were not strenuous at all.

17. The claimant did not indicate the kind of light duty she expected to be allocated by the respondent. Further, the doctor's report did not recommend the type of work to be undertaken or specific posture to be adopted and/or avoided by the claimant. This would have at least guided the respondent on the scope of work to be assigned to the claimant. In absence of such specific guidance, the respondent cannot be faulted.

18. Besides, if any time the claimant felt strained with the kind of work she was undertaking, nothing stopped her from raising the issue with the respondent. She did not produce any evidence to this end and in the circumstances, it cannot be determined that the respondent did not reasonably accommodate her.

In what manner was the employment relationship severed?

19. The claimant has denied voluntarily resigning from employment. She avers that upon presenting the medical report from Dr. Mwaura, the respondent's Administrative Secretary, Ms. Joyce Kariuki, forced her to resign on medical grounds. She averred that the said Ms. Joyce refused to retire her on medical grounds. That the said resignation was therefore not unilateral as it is the respondent which forced her to tender her resignation.

20. The respondent maintains that the claimant voluntarily left employment. It has also denied constructively dismissing the claimant.

21. The genesis of the dispute herein is a medical report from Dr. Mwaura dated 3rd May, 2012, which reads as follows;

"RE: ANN WANJIKU MWANGI AGE 54 YEARS

DIAGNOSIS: REDUCABLE UMBILICAL HERNIA WITH HYPERTENSION

The above-named client is due for surgical hernia operation at clinic no. 24 at Kenyatta National Hospital. The same patient has malignant hypertension that makes her incapacitated to work on medical grounds. It is advisable to retire on medical grounds to concentrate on follow up clinic at KNH.

Yours faithfully,

Dr. Mwaura E. Karume...

22. The recommendation from the doctor is very explicit to the effect that it recommended retirement of the claimant on medical grounds, in that she was incapacitated to work. It was on that account that the claimant wrote a letter dated 11th May, 2012 through which she sought to retire on medical grounds. Prior to the claimant writing the said letter of 11th May, 2012, it was apparent that she had presented the medical report to the respondent who advised her as follows;

“Dear Anne Wanjiku Mwangi,

RE: RECOMMENDATION TO RETIRE

In reference to the doctor’s recommendation to retire on medical grounds duly delivered by you to our office through madam Lucy Adoyo- Sunflower Nursery School Headteacher, we kindly request you to write us a letter addressed to the Director Faith Homes of Kenya acknowledging the recommendation in person.

Also note that Faith Homes of Kenya is not in recognition of the KUDHEIHA WORKERS UNION a fact well known by you. Therefore, the directions the Union is asking us to give cannot be addressed to them but to you directly. This direction is none other what you were advised when you delivered the medical recommendation letter-that you do a letter in person acknowledging the same.

Your cooperation and the right use of proper machinery to communicate will be highly be appreciated.

Your faithfully,

JOYCE KARIUKI

ADMINISTRATIVE SECRETARY,

FAITH HOMES OF KENYA.”

23. Presumably, it is upon the receipt of that letter that the claimant wrote the letter requesting to be retired on medical grounds. The said letter which is at the heart of the dispute herein, is dated 11th May, 2012 and I will reproduce the same as follows;

“The Director,

Faith Homes of Kenya,

P.O Box 14507,

NAIROBI

11th May, 2012

RE: RETIREMENT ON MEDICAL GROUNDS

I make reference to the doctor’s report on about (sic) my health and the recommendation that you consider my retire (sic) services on medical grounds as from 2nd may, 2012. I here now ask you to terminate my services on medical grounds.

Yours faithfully,

Anne Wanjiku Mwangi”

24. A plain reading of the claimant’s letter of resignation clearly indicates that her intention was to retire from employment on medical grounds. Indeed, the request to retire the claimant was acknowledged and accepted by RW1.

25. The claimant contends that the respondent used the letter against her and that it deemed her to have resigned voluntarily. This does not appear to be the case, since the letter from the Administrative Secretary reads in part *“In reference to the doctor’s recommendation to retire on medical grounds...”*. Therefore, the respondent’s letter takes cognizance of the doctor’s report and advises the claimant on the way forward, which is to acknowledge the recommendation in person.

26. The interpretation I get from the letter by the said Ms. Joyce is the fact that the claimant was being asked to acknowledge the letter from the medical practitioner. I don’t see any directive in that letter asking her to resign. She was merely asked to personally acknowledge the recommendation by the doctor.

27. Indeed, the claimant has not stated how she would have preferred the respondent to handle the matter, after she presented the doctor’s

medical report which contained an express recommendation, “to retire on medical grounds”. In the event the claimant did not wish to retire or resign as per the doctor’s recommendation, she may have as well kept the letter to herself. It defeats logic why she would present the medical report to the respondent in the first place, then come to challenge the consequences thereafter.

28. As a matter of fact, the claimant’s contention in this regard is not clear. She argues that she was told to write a resignation letter on medical grounds as opposed to being retired on medical grounds. To my mind, the end result would still have been the same. In any event, she does not state in her letter that she was “resigning” but rather, she states that she is “retiring”. I therefore do not find any contradiction or source of disagreement in that respect.

29. The claimant has also averred that since she was forced to resign, the same amounted to termination. In this regard, **section 47(5)** of the Employment Act places the burden of proving termination on an employee. It reads as follows;

“(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee...”

30. In addressing itself to the foregoing provision, the Court of Appeal in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, had this say;

“So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

31. The claimant in this case did not prove that her services were terminated by the respondent. There was no termination letter or any such evidence in whatever form or manner to suggest as much. Accordingly, she did not discharge this burden as by law required.

32. It was also the claimant’s argument that she did not resign voluntarily but rather, was constructively dismissed. This question was extensively addressed by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR** where it was held as follows; **“The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee.”**

33. In following with the holding in the above case, the claimant has not singled out the instance of breach of contract from the respondent’s end. Further, her letter of 11th May, 2012, through which she tendered her retirement on medical grounds did not give any such indication. If anything, her letter was referenced “*Retirement on medical grounds*”. Besides the body of that letter do not point to any breach from the respondent’s end. In the event, there was some sort of breach, nothing would have been as easy as putting it in black and white in that very same letter. The claimant’s letter only referred to the recommendation contained in the medical report.

34. In the circumstances, I find that the claimant was not constructively dismissed from employment.

35. The total sum of the foregoing is that it is apparent that the claimant’s employment was severed in only one manner, and that was retirement on medical grounds and I find as such.

Reliefs

36. The claimant has sought various reliefs which I will proceed to consider hereunder.

Three (3) months’ salary

37. I have found that the claimant’s employment was not terminated, but rather, she retired on medical grounds. This relief is therefore unavailable in the circumstances. Similarly, the claim for compensatory damages which is ordinarily awarded in instances where there has been unfair termination, is denied.

Untaken leave days

38. The claimant seeks this relief for the entire period she was in the employment of the respondent. It is notable that the employment contract has not provided for the carrying over of leave days to the subsequent year. Besides, the claimant has not adduced evidence to prove that she applied for leave in any particular period and that the same was denied. In absence of such evidence, I will only address myself to the annual leave of 2012.

39. From the evidence adduced by the respondent, the claimant had taken 8 days leave in the year 2012. She was entitled to 21 days leave per year and she retired in the month of May, 2012. Upto that point, her leave entitlement when prorated, is 8.75 days. It is therefore apparent that she had exhausted her leave entitlement for that year, hence the claim for the same is declined.

House Allowance

40. The claimant’s contract of employment expressly provides that her salary was consolidated hence was inclusive of house allowance. In the premises, the claim under this head is denied.

Unpaid off days and overtime

41. The claimant has prayed for the sum of Kshs 461,089/= being unpaid off days and Kshs 339,192/= during the entire duration she worked for the respondent. She told court that she worked overtime but was never compensated for the same. She did not furnish evidence to prove that she worked during the said days when she was supposed to be off duty and was not compensated appropriately. Similarly, this prayer fails for lack of evidence.

Underpayment

42. It is undoubted that the claimant left employment in May, 2012 and by then, was earning the sum of Kshs 9,422/=. Therefore, the relevant Regulation of Wages (General) Order is in respect of May, 2010. Under the said Order, the minimum wage for a cleaner, sweeper etc which category covers the claimant, is Kshs 6,743 exclusive of house allowance. When the house allowance is included at the rate of 15%, it comes to Kshs 1,011.45. Therefore, the total monthly minimum wage rate is Kshs 7,754.45 which is above what the claimant was earning hence there was no underpayment in this regard. This prayer is therefore denied.

43. In light of the foregoing findings, I dismiss the claim in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Muchiri

For the Respondent Ms. Ochieng

Court assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE