



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 72 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

FAITH ONDISA EBOYL.....CLAIMANT

VERSUS

MR. AND MRS. LACTY DE SOUSA.....RESPONDENTS

JUDGMENT

INTRODUCTION

1. The Claimant came to court by her statement of claim dated 18th January, 2017.
2. The Respondent filed a response dated 27th January, 2017.

CLAIMANT'S EVIDENCE

3. The Claimant's testimony is that she was employed by Mr. and Mrs. Lacty Desousa as their servant in their house on 5th October, 2012. Her final salary was Kshs.12,600/= per month, house allowance included.
4. She further states that it was agreed all conditions contained in the Employer Act 2007 shall be followed by both parties.
5. The Claimant further states that on 4th November, 2016 the Respondent unfairly terminated her services without any reason.
6. She says that he failed to pay her for the 4 days worked in November, 2016 as well as salary equivalent to one month in lieu of notice as well as accrued leave of 4 years and one month amounting to Kshs.85.75 per day.
7. The Claimant also claims for severance pay for 4 years served for 15 days a year which is 60 days. She also prays for 12 months compensation. The total amount she is demanding therefore is Kshs.236,371.15/=.

RESPONDENT'S EVIDENCE

8. The Respondent admitted they had employed the Claimant from October 2012 to 4th November, 2016 when the Claimant refused to obey lawful order of a G4S guard and she said she would not continue to be in employment. He admits her salary was Kshs.12,600/=.
9. The Respondent says that the Claimant was paid one month salary even though she deserved to be summarily dismissed. He also says she took more leave days than more leave days that she was entitled. i.e. 56 excess leave days.
10. He says Claimant has refused to collect her dues being Kshs.32,955/=.

THE ISSUES FOR DETERMINATION

- 11 (a) First issues for determination is whether the Respondent terminated Claimant's employment unlawfully.
- (b) Whether the Claimant has any claims against the Respondent.

DETERMINATION

The court has carefully considered the evidence adduced by the respective parties and the pleadings as well. The Claimant filed his submission on 11th November, 2021. The Respondent did not file their submissions.

12. The mandatory requirement in employment matter is whether the employer has a valid reason to terminate the employment of the employee.

Indeed Section 45(1) of the Employment Act emphasis that no employer shall terminate the employment of an employee unfairly. Subsection 2 defines that a termination of an employee is unfair where the employer fails to prove that the reason for the termination is valid and secondly that the reason for termination is fair reason.

13. The relationship of an employee and employer is very personal and is almost next to a relationship of a husband and wife. It is even more so for a person who works in the house who is usually referenced as a house servant.

These are people who live and literary know everything about each other. In every household where there are house servants the parties must have rules of operation. The rules must be adhered to if parties are to co-exist amicably.

14. The Respondents had one rule that their staff leave their bags in a locker at the gate. The Claimant for some reason did not seem comfortable with that requirement and decided not to comply.

15. In her evidence she claims she carried her tea to the place of work. The Respondent claims they used to provide their employees with tea and bread. It is the Respondent's testimony that when the Claimant was confronted by the security guard about her refuse to leave the bag in her locker she became hostile and announced she was leaving the employment.

16. The Respondent says he tried to talk to her but she stormed out. He even says he called her the following day and she said she wanted to leave her employment and wanted to be paid her dues.

17. The Respondent then wrote to her a letter dated 4th November when he informed her that since Claimant had indicated she did not wish to continue with the employment he was terminating her employment. He advised her to collect her dues.

18. On 12th January, 2017 the advocate of the Respondent also wrote a letter to the Claimant's advocate asking him to ask her to collect her dues from the Respondent's office.

19. Considering the evidence by both parties and the Claimant's submissions and all the list of documents. I find that the Respondent has satisfied the test proffered in Section 43 of the Employment Act. Section 43 (1) provides

“in any claim arising out of termination of a contract the employer shall be required 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”.

20. In Section 43 (2) it is provided that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. In this matter the question to ask is if the Claimant was dismissed or she resigned.

The evidence before me make it abundant clear that the Claimant left her employment in a huff as she was not ready to comply with the rules of operation in her employer's premises. She was not ready to leave her bag in the assigned locker and for that reason she opted to leave the employment.

22. She did not write a resignation letter but nevertheless she informed her employer she wanted to leave her employment.

23. The Respondent went ahead and consulted the labour office and was advised to pay her terminal dues including one month salary in lieu of notice, and service pay as three days salary upto November 3rd 2016.

24. The Respondent produced records which demonstrated that Claimant used to go on leave all the time she was in employment and from the records she even exceeded the leave days.

25. She had also been advanced Kshs.10,000/= and the proof of the same was produced in court.

26. In the case of **CATHERINE KINYANG VS MCL SAATCHI & SAATCHI CAUSE NO.1795 OF 2011** which was for a claim of constructive dismissal the court hears that if the employee resigned voluntarily, he would not be entitled to compensation for constructive dismissal.

27. Similarly in this case the Claimant voluntarily left her place of work and demanded her dues. When called to collect her dues, she did not do so.

28. In summary the court finds the Claimant was not summarily dismissed but instead left her employment voluntarily.

CONCLUSION

29. Having pronounced myself on the issue that the Claimant was not unlawfully terminated she is not entitled to general damages.

30. The Claimant is however still entitled to collect her dues which the Respondent has always been willing to pay her. The same are: -

(i) One month salary in lieu of notice Kshs.12,600/=

(ii) 4 days in November, 2016 Kshs.1,938.50/=

(iii) 4 years severance pay Kshs.29,076.90/=

Leave days is declined as is clear from documents produced and evidence adduced that the Claimant took her leave days even exceeded the leave days.

CONCLUSION

The Claimant is entitled to her dues to the region of Kshs.43,611/=.

Each party will meet its costs.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE