



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 625 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

ANGELA OKUTOTO OTEO..... CLAIMANT

VERSUS

MARGARET MAINA WANJIRU..... RESPONDENT

JUDGMENT

Angelina Okutoto Oteo, the claimant filed this suit vide memorandum of claim dated 23rd March 2012 alleging that the respondent Margaret Maina Wanjiru terminated her employment verbally and failed to pay her terminal dues. She prays for the following remedies –

- | | |
|---|--------------------------|
| 1. One month's salary in lieu of notice..... | Kshs.7,581.00 |
| 2. Accrued leave for three years 21 x 3 x 291.60..... | Kshs.18,370.80 |
| 3. Underpayment for twenty (20) years 7,581 – 5,000 = 2,581 x 240 months..... | Kshs. 619,440.00 |
| 4. Severance pay 15 x 20 x 2,581..... | Kshs.775,300 |
| 5. Full compensation of loss of employment 12 x 8,718.15..... | <u>Kshs. 104,717.80</u> |
| Total | Kshs.1,524,309.60 |

6. Certificate of service

7. The respondent to pay the climate the days she is out of employment to date at 7,581 per month.

8. The respondent to pay the costs of the suit.

The respondent filed a memorandum of reply on 2nd May 2012 denying the averments in the memorandum of claim.

At the hearing of the suit both the claimant and the respondent adopted their witness statements.

In the witness statement dated 8th May 2017 and filed on 8th May 2017, the claimant states that she was employed by the respondent in August 1998 and dismissed in January 2012. Her duties included household chores, taking care of cows and the shamba and cleaning the compound. Her starting salary was Kshs.2,000/= per month and her last salary was Kshs.5,000/= per month.

The claimant testified that occasionally she also went to the respondent sister's home in Karen where she took care of chicken and garden although this was not part of her employment contract with the respondent.

She states that the respondent did not issue her with termination notice, or pay in lieu thereof. She further states that she was underpaid, worked overtime for which she was not paid, and was not paid terminal dues. She further states she was not allowed to take annual leave and was not paid for forfeiture of the annual leave.

In the witness statement the claimant lists her prayers as follows–

1. One month's notice in lieu of notice
2. Accrued leave for three years
3. Underpayment as per the statement of claim.
4. Gratuity (not severance) pay as per the statement of claim
5. 12 months' pay as compensation for wrongful dismissal.
6. Certificate of service.
7. Costs of this suit.

Upon cross examination the claimant stated that she was employed in 1990 at a salary of Kshs.3,000/= per month but could not recall when she left employment as it was "*long ago*". She testified that the respondent got sick and the claimant took her to hospital. That while the respondent was in hospital the claimant called the respondent's daughter and asked her to send the claimant money as the respondent did not pay her salary while in hospital. That after she asked for money the respondent sent word through a fellow worker by the name Karago that she did not require the claimant's services.

The claimant stated that she had not talked to the respondent since then, and that she filed suit after she was told her services were no longer required.

In her witness statement dated 23rd May and filed on 31st May 2017, Margaret Maina Wanjiru, the respondent states that she employed the claimant as a house help on dates she could not recall. That they had a very good working relationship and she treated the claimant as her daughter.

That on 4th January 2012 she fell ill and the claimant helped her to reach Karen Hospital where she was admitted for more than one week. That while in hospital she expected the claimant who was the only person in her house to take good care of the house. That she was astonished that the claimant did not visit her in hospital.

That upon discharge from hospital she went home and was dumbfounded to discover that after taking her to hospital, the claimant had returned home, packed her belongings and left her home, leaving nobody to take care of the home. That the claimant also took the respondent's personal items and goods. She tried to reach the claimant on phone but her calls were not responded to. She waited but the claimant did not report back. She denied ever dismissing the claimant.

At the hearing, the respondent who is very advanced in age and a bit incoherent, stated that she employed the claimant long ago but released her when she left the country for 2 years. Upon getting back to the country she looked for the claimant with whom she had parted amicably and the claimant agreed to go back to work for her.

She testified that the claimant had one child who was living with the claimant's mother. Upon her mother's death, the respondent took in both the claimant and her child. The claimant bore another child while living with the respondent. The respondent built for her a two bedroomed house to live with her children and took care of all their needs. That the second child was given the name Peter Kamau by the respondent, a sign of the good relationship between them.

That when she fell in her bathroom on 4th January 2012, the claimant assisted her and took her to hospital where she was hospitalised for 11 days. That while in hospital the claimant stole her money Kshs.30,000, her clothes and many other items and left. When she was discharged she tried to get in touch with the claimant but realised the claimant had blocked her number.

The respondent reiterated that she had not seen the claimant since the day the claimant took her to hospital and that she did not dismiss the claimant.

She testified that after hearing about this suit, she tried getting in touch with the claimant to reconcile but was unable to get through to her.

Determination

There is no disagreement on the main facts of this case. The parties are in agreement that the claimant was employed by the respondent as a domestic worker in her home in Nkoroi where the claimant took care of both the domestic chores, the cows and the Shamba. There is further no disagreement that the respondent was hospitalised on 4th January 2011 after a fall in her bathroom and was taken to hospital by the claimant.

The point of departure is on how the claimant left employment. She alleges that the respondent sent another worker, Mr. Karago, whom the respondent talked to on phone, to inform the claimant that her services were no longer required by the respondent. That the said Karago communicated to the claimant by phone.

On her part, the respondent states that all along while she was in hospital she believed the claimant was at home and was shocked when she arrived home after discharge from the hospital to find that the claimant had left.

When she testified in court, the claimant could not recall when she left employment. The respondent having denied dismissing the claimant, it was the claimant's responsibility to prove the same. She did not explain who the mysterious Mr. Karago who was allegedly sent to tell her that her services were no longer required came from. This person is not mentioned in the memorandum of claim or in the claimant's witness statement. In the memorandum of claim she states at paragraph 5 that she was told by the respondent that her services were no longer required. In the witness statement she merely states that she was dismissed verbally.

The claimant does not deny that the respondent was admitted in hospital at the time she alleges to have been dismissed. She does not explain why the respondent would choose to talk on phone to another person who in turn informed her on telephone about her alleged dismissal. It is not conceivable that after receiving such information from a 3rd party the claimant would not as much as call the respondent to verify if she indeed sent the said Mr. Karago to tell the claimant that her services were no longer required.

I do find the version of the respondent more logical, that she came from hospital and found that the claimant had left with her money and other personal and household items, and that the claimant had refused to answer her calls. The claimant admitted that she has never talked to the respondent since she left employment.

Section 47(5) of the Employment Act provides that –

(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, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

I find that the claimant has not discharged her burden of proving that the respondent terminated her employment. I thus find that there is no proof of termination of the claimant's employment by the respondent at all.

On the remedies, the claimant did not prove that she is entitled to pay in lieu of notice, having not proved that the respondent terminated her employment. She further did not prove that she is entitled to leave, or that she was underpaid. She is not entitled to severance pay which is only payable to an employee declared redundant, which she was not. She is also not entitled to compensation which is only payable upon proof of unfair termination.

The consequence of the foregoing is that the entire claim fails and is dismissed with costs on grounds that it is a vexatious claim.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE