



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. ELRC. 2367 OF 2017

NANCY WANJIRU.....CLAIMANT

-VERSUS-

ROSE WAMBUI NUM.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 29.11.2017 alleging that his employment was unfairly terminated by the respondent and her benefits withheld. She therefore prayed for Kshs. 393,466.60 made up of compensation for unfair termination of her services plus terminal dues.

2. The respondent admitted that she employed the claimant for 11 years as a househelp until 18.12.2014, when the claimant resigned after serving 3 months' notice from 18.9.2014. She further contended that after the resignation she paid the claimant all her rightful dues. She therefore denied the alleged unfair termination and prayed for the suit to be dismissed with costs.

Evidence

3. The claimant testified that she was employed by the respondent as a household on 1.12.2003 at a gross salary of Kshs. 13000 per month. She further testified that the salary remained the same until 18.12.2014 when her services were terminated. She was working 7 days a week except on Sundays and Public Holidays when she used to work half day. Her working hours were from 5.30 a.m. to 11 p.m. but she was paid for the overtime worked.

4. The claimant further testified that while trying to amicably settle the issue of her final dues, the respondent became very arrogant and uncooperative. As a result she lodged a complaint at the labour office but again the labour officers failed to assist her. Hence the present suit to recover Kshs. 393,466.60 for her over 11 years service to the respondent.

5. The claimant admitted that she used to get loans from the respondent to pay school fees and repaid all of it through salary deductions.

6. In cross-examination the claimant maintained that she used to start work at 5.30 a.m. by preparing breakfast for the family and after the family left for school and work, she did other chores. She further contended that on Sundays she used to prepare breakfast for the family and thereafter go to church and return at 6 p.m to prepare super and wash dishes at 9 p.m. She also contended that in every December, she was being paid half salary for her leave days but that did not exclude Sundays and Public holidays.

7. The claimant disowned the resignation letter dated 18.9.2014 and maintained that she was dismissed by the respondent and went to report to the Labour Office. She admitted that she used to be paid her salary in cash and that on the day she was dismissed she was paid for the days worked in December 2014. However, she denied knowledge of the amount she received that day.

8. The respondent testified that she employed the claimant as a domestic worker for a monthly salary of Kshs. 13500 way above the minimum salary of Kshs. 9780 as gazetted vide the 2013 General Wage Order. She denied that the claimant was working from 5.30 a.m. to 1000 pm. and demanded strict proof. She testified that she treated the claimant as a family member and gave her full leave plus more days to visit her children in school, and even assisted her with shopping of personal effect and with loans for school fees repayable though salary deductions. She further paid for medical bill for the claimant's brother and further contributed towards his burial.

9. The respondent further testified that the claimant served her with resignation notice of 3 months dated 18.9.2014 and on 18.12.2014, she calculated and paid the claimant her full terminal dues including service pay for 11 years, salary for days worked in December 2014 plus annual leave of 21 days. Thereafter she received a demand letter from the labour office and responded to the satisfaction of the Labour Officer and the matter rested. She therefore maintained that the suit is malicious and it should be dismissed with costs because the claimant voluntarily agreed to the terminal dues paid.

Issues for determination

10. There is no dispute arising from the pleadings, evidence and submissions that the claimant was employed by the respondent as a househelp for 11 years until 18.12.2014. The issues for determination are:

(a) Whether the claimant resigned or she was unfairly dismissed by the respondent.

(b) Whether the claimant is entitled to the reliefs sought.

Unfair termination or resignation

11. The respondent contended that the claimant resigned by the letter dated 18.9.2014 by which she served 3 months notice. The claimant disowned the said termination notice and averred that she saw it for the first time when she was served with the defence papers by the respondent.

12. I have considered the letter dated 18.9.2014 and find that it is indeed a termination notice of 3 months by the claimant to the respondent. No effort was made by either party to prove or disprove that the handwriting was by the claimant. However, the claimant did not dispute the resignation letter by way of a reply to defence or written statement. She only disowned it during her oral testimony in court. On the other hand the respondent contended that she relied on the resignation letter when she sat with the claimant to agree on her terminal dues and she never disowned it.

13. The foregoing contention is corroborated by the claimant's written statement where she stated that:

“When I was trying to find out whether to settle the issue amicably with the respondent pertaining to my final dues the respondent was very arrogant and not cooperative. When I decided to report the complaint in the Ministry of Labour it was also very difficult for me to be assisted by the Labour Officers.”

14. The foregoing paragraph from the claimant's written statement is clear that the dispute that led to her lodging the complaint to the labour office was the quantum of terminal dues and not the issue of unfair dismissal. Although the Labour Officer served a demand letter based on alleged termination of employment without lawful cause, the Labour Officer only demanded payment of service pay, leave and any other terminal dues. It is further clear that after response to the demand letter indicating that the claimant resigned and that she was paid the demanded terminal dues, the labour officer was satisfied that the claimant's claim was unfounded and refused to entertain it further. The foregoing view is corroborated by the fact that the claimant does not pray for the alleged termination to be declared unfair but rather the failure to pay the terminal dues by the respondent.

15. After considering the evidence and the submissions presented by the parties I find that the respondent has proved on a balance of probability that the claimant resigned from her employment voluntarily by the notice dated 18.9.2014 which took effect on 18.12.2014. On the other hand, I find that the claimant has failed to prove on a balance of probability that she was unfairly dismissed by the respondent as alleged.

Relief

16. The claimant was paid service pay for 11 years of service at the rate of half salary per year of service. She was also paid salary for the 18 days worked upto 18.12.2014 plus 21 leave days. However, the

calculation by the respondent seems not to be accurate. I, therefore recalculate the same as follows:

Service pay	Kshs. $13500 \times 1/3 \times 11 = 74250$
Salary	Kshs. $13500 \times 18/30 = 8100$
Leave	Kshs $1300 \times 21/30 = 9450$
Total	<u>Kshs. 91800</u>

17. Accordingly, I hold that paying Kshs. 67000 instead of Kshs. 91800 was unfair. The claim for overtime is dismissed because there is no evidence that the claimant was working for all the 16 hours she was awake daily.

18. Finally the claim for salary in lieu of notice and compensation for 12 months is dismissed since the claimant resigned voluntarily by serving (3) three months notice.

19. In conclusion, I return that the claimant voluntarily resigned from employment. I also return the respondent unlawfully underpaid the rightful terminal dues by paying Kshs. 67,000 instead of Kshs. 91,800. Consequently, I enter judgment for the claimant against the respondent in the sum of Kshs. 24,800 plus interest at court rate from the date of filing suit. The claimant will also have a quarter costs because the bigger part of her claim has failed.

Dated, signed and delivered in open court at Nairobi this 14th day of February, 2020.

ONESMUS . MAKAU

JUDGE