



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2120 OF 2015

JEDIDAH WANGUI.....CLAIMANT

-VERSUS-

ELDON VILLAS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant filed the statement of claim on 02.12.2015 through Njiiri Kariu & Njau Advocates. The amended statement of claim was filed on 17.02.2017 through Kibebo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration the termination was wrongful and unfair.
- b. Compensation for loss of employment Kshs.12,000.00.
- c. Unused leave days for 5 years Kshs.60,000.00.
- d. Salary for May 2015 Kshs.12,000.00.
- e. One month notice pay Kshs.12,000.00.
- f. Service pay at 15 days for each year served Kshs.30,000.00.
- g. Total claim Kshs.126,000.00.
- h. General damages for unfair termination.
- i. Certificate of service.
- j. Costs of the suit and interest.
- k. Any other relief that the Honourable Court deems just and expedient.

The response to the claim was dated 18.02.2016 and filed through Omari Muumbi & Kiragu Advocates. The respondent prayed that the claimant's suit be dismissed with costs and counter-claimed for notice pay of Kshs.12,000.00 plus costs and interest. The reply to response and defence to counterclaim was filed on 17.02.2017. The claimant denied absconding duty and prayed that the counterclaim be dismissed with costs.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service. The respondent employed the claimant on 05.03.2010 as a Housekeeper at the respondent's apartment at Kshs.12,000.00 per month.

The **2nd issue** is whether the respondent terminated the claimant's employment or the claimant absconded duty without notice to the respondent. The claimant's account is that on the night of 27.04.2015 her little child fell sick and she stayed at the hospital until after midnight. On 28.04.2015 she reported at work to handover the key and to seek permission to be away to attend to the sick child. In the

process her husband called to say the child was critically ill. Thus she asked and the Housekeeping Supervisor one Lucy Kimotho allowed her to attend to the child. The instructions were that she gets back to work after 2 hours. At the hospital the doctor required her to stay with the child longer because the child was very sick and she informed the supervisor. The supervisor refused to grant her permission to continue attending to the child, advised her to get a friend or neighbour to do that and she reports on duty; and she cut the phone conversation. The claimant recalled that on 27.07.2012 she had been denied permission to take her 7 months' old boy to hospital and had arrived home at 7.20pm but it was belated and the boy succumbed and passed on. The respondent gave her one week leave for the boy's funeral arrangements. Recalling that event, she decided to stay in hospital with the child. She left hospital at 6pm and when she called the supervisor, the supervisor informed her that the owner of the business did not want her back as an employee. She called three times and nobody picked.

The respondent's witness (RW) was Agnes Githinji the respondent's Director in Administration and House Keeping. Her evidence was that in May 2014 prior to renewal of the claimant's contract that had lapsed (the contracts being renewable on annual basis) the claimant absconded duty and returned in September 2014 and reported she had gone to work at Weston Apartments but was later discovered to have been a lie. The claimant's husband intervened and she was given another contract of employment dated 26.09.2014. In May 2015 before the contract lapsed, the claimant absconded duty and never returned. She filed the present suit. The respondent has since learned that the claimant had secured employment at Bidwood Suites, a subsidiary of Bidwood Apartments Limited where she worked since May 2015.

In cross examination the claimant admitted that she started working for Bidwood Apartments Limited on 05.05.2015. The claimant testified that she was claiming salary for May 2015 but also admitted that she did not work for the respondent in May 2015.

The Court has carefully considered the evidence. The Court returns that there is no reason to doubt the employer's evidence. The claimant left employment on 28.04.2015 to take up new employment with Bidwood Apartment Limited. In any event the claimant provided no medical reports to verify the alleged serious illness of her little child. The allegations of unfair termination will immediately collapse and the respondent's counterclaim is hereby allowed in the sum of **Kshs.12,000.00** as prayed for.

The **3rd issue** is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

- a. The evidence is that while the claimant worked for the respondent she was given leave as per the leave forms on record. The claims for leave will therefore fail.
- b. The claimant admitted she never worked for the respondent in May 2015 and the prayer for May 2015 salary was dishonest.
- c. The claimant was a member of NSSF and the prayer for service pay is not available under section 35 of the Employment Act, 2007.
- d. The claimant's prayer for notice pay is found to have been a venture in unjust enrichment.

In conclusion judgment is hereby entered for the respondent against the claimant for:

- a. The claimant to pay the respondent Kshs.12,000.00 by 01.05.2020 failing interest to be payable thereon at court rates from the date of filing the suit till full payment.
- b. The claimant to pay the respondent's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020.**

BYRAM
JUDGE

ONGAYA