



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 297 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MARY AMBOGO ODANDO.....CLAIMANT

VERSUS

ADAM SINGINDURA MARJAN.....1ST RESPONDENT

SINGINDURA IBRAHIM ADAM.....2ND RESPONDENT

JUDGMENT

The Claimant filed a Memorandum of Claim on 29th February 2016 alleging unfair termination by the Respondents and their failure to pay her terminal dues. She avers that she was employed as a domestic worker/house help on 7th April 1982. That in March 2015, she was told to proceed on leave and would be called back but she was never called back to work. She avers that in February 2015, she was asked to open a bank account where the Respondents deposited Kshs.80,000.

She avers that she worked diligently for 33 years but was terminated without due process being followed.

The Claimant seeks the following reliefs:

1. A declaration that the termination of the Claimant by the Respondent in September 2015 was unfair and unlawful.
2. An order compelling the Respondent to pay the Claimant her terminal benefits amounting to Kshs.844,413.40/- and compensation for unfair termination amounting to Kshs.232,848/- the total amount coming to Kshs.1,096,655.40/-.
3. Costs and interest of this cause.

The Respondents filed a Memorandum of Reply on 26th September 2016. They deny that the Claimant was employed in their household. According to them, the Claimant was a good friend of the 1st Respondent's wife who was the 2nd Respondent's mother, Zeitun Hussein Adam.

They aver that the Claimant started helping in household chores when Ms. Zeitun fell ill in June 2010 and was eventually requested to remain in their house after Ms. Zeitun's demise.

They admit having paid her Kshs. 80,000 on diverse dates in 2015 as upkeep and handouts following her requests. They aver that the Claimant's prayers are outrageous and not based on law or fact.

The Respondent did not attend court for hearing and neither did they file submissions.

Claimant's Case

The Claimant adopted her witness statement as her evidence in chief. She further testified that she was employed by the Respondent to do housework in 1982. That her first salary was Kshs.300 while her last salary was Kshs.5,000.

She testified that she did not take leave for all the years worked and was not paid her January salary. She testified that she did not make

NSSF contributions. She further testified that she worked from 5 am to 11 pm and was never paid overtime. She testified that her employment was terminated in March 2015 and she was not given any notice. It was her testimony that she did not commit any acts of misconduct.

She testified that it is untrue that she was not employed by the Respondents as alleged by the respondents and stated that she was employed by the 1st Respondent and Ms. Zeitun. She testified that she was paid a monthly salary in cash and from 2012 she was paid via M-pesa. She testified that she was paid Kshs.80,000 after leaving service which was paid into her bank account.

She testified that she took care of the 2nd Respondent whose mother died in the year 2000. She contended that the 2nd Respondent was not her employer.

Claimant's Submissions

The Claimant submits that the Respondent having not attended Court her testimony and evidence was not challenged.

She submits that in the response to the demand letter dated 22nd January 2015, the 2nd Respondent admits that she was employed by the Respondents. She therefore submits that the statement contradicts the Respondents' averment in the response to the claim that she was never employed by them but was a visitor.

She submits that in the absence of any written document as proof of her employment the Court should be guided by Section 10(7) of the Employment Act.

She relies on the decision in **Charles Wanjala Watima v Nyali Golf & Country Club Ltd [2013] eKLR** where the Court held that the burden of justifying the grounds for termination of employment, under Section 47 (5) of the Employment Act rests on the employer.

She submits that she was on a term contract and having been terminated unfairly, she is entitled to one month's salary in lieu of notice in the sum of Kshs.10,964.00/-. She submits that she is entitled to her unpaid salary for the month of January to September 2015.

She submits that she is entitled to accrued leave allowance in the sum of Kshs.69,101.90. She relies on the General Wages Order for the years 1998 to 2015 and submits that she was underpaid.

She avers that she worked for 33 years and the Respondent was not deducting and remitting her statutory dues thus she is entitled to Kshs.180,739,53 as service pay. She submits that she used to work from 4.00 am to 11 pm daily being 6 hours' overtime. She therefore submits she is entitled to Kshs.1,193,692 for overtime.

She submits that she seeks 12 months' compensation for unfair termination in the sum of Kshs.131,448. She relies on the case of **Mary Nafula Ingati v Ruth Hankel Martha & Another [2014] eKLR** where the Court awarded the Claimants, both employed as domestic house helps 10 months' salary for unlawful and unfair summary dismissal which was based on mere suspicion.

Determination

The issues for determination are –

- a) Date of employment of claimant and by whom.
- b) Whether the Claimant's employment was unfairly terminated
- c) Whether the Claimant is entitled to the reliefs sought

Date of Employment of the Claimant and by whom

In the witness statement dated 20th January 2016 filed with the claim, the claimant avers that she was employed by the 1st respondent – Adams Singindura Marijan and his deceased wife. The 2nd respondent however in his response to the demand letter states that after the death of his mother who was a close friend of the claimant, he took over the services of the claimant. That the 1st respondent was unaware of the terms of engagement of the claimant by his late wife.

Although the claimant testified that the 1st respondent's wife passed on in 2000, the 2nd respondent stated that she died in 2010 and produced a copy of the death certificate to prove the same. The death certificate states the date of death of Zeitun Hussein Adams is 24th December 2010.

From the evidence on record, I find that the claimant was employed by Zeitun Hussein Adams (deceased) and that upon her demise, the 2nd respondent took over the services of the claimant from 24th December 2010. She was therefore an employee of the 2nd respondent at the time of termination of her employment.

Whether the claimant's employment was unfairly terminated

The claimant alleges she was unfairly terminated for no valid reason or any reason at all. The 2nd respondent in the defence states that the claimant absconded duty.

In the witness statement, the claimant states that the 2nd respondent told her to go and rest, and told her to open an account into which the 2nd respondent deposited a total of Kshs.80,000 in three instalments being Kshs.30,000 on 2nd March 2015, Kshs.30,000 on 31st March 2015 and Kshs.20,000 on 28th September 2015.

In his witness statement, the 2nd respondent stated that the claimant was of advanced age and did not have the strength to discharge her duties of house help in a busy house as theirs.

From the record, what is evident is that the claimant left employment in December 2014. It is however not clear from the evidence whether the claimant's employment was terminated by the 2nd respondent or she absconded duty. None of the two versions makes sense as it is clear that after the separation, there was contact between the parties which was not hostile. The 2nd respondent asked the claimant to open an account in Equity Bank and he made three (3) deposits into the claimant's account in the total sum of Kshs.80,000 after she left employment.

In a domestic employment relationship, the court is aware that the provisions of the Employment Act may not be practical in all circumstances. For example, it is hard to imagine the kind of disciplinary hearing envisaged under Section 41 taking place under such circumstances. From the evidence on record, I do not see evidence of an unfair termination. It looks more like a mutual separation due to the advanced age of the claimant. It is not clear why the claimant sued a former employer who seems to have been willing to pay her upkeep even after she stopped working. She did not give evidence of a misunderstanding. What she states in the witness statement is more like a retirement as she states that the 2nd respondent called and told her to go and rest on 1st December 2014. He did so again on 3rd December 2014, in mid-January 2015, in February 2015 and again in March 2015.

I thus find no evidence of unfair termination of employment as envisaged in Section 45 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

(i) One Month's salary in lieu of notice and unpaid salary: January-September 2015

The Claimant testified that she did not go to work after December 2014 as she was called by the 2nd respondent on 1st December 2014 while on off duty and told not to report back to work. She thus did not work after 1st December 2014. She however has only sought payment of salary for January to December 2015 and it must therefore be presumed that she was paid in December 2014 when she did not work and which therefore serves as notice.

(ii) Salary arrears and underpayment: 1982-2015

The Claimant avers that her last salary was Kshs.5,000. She testified that from the year 2012, she was paid via M-Pesa. The Claimant did not produce her M-Pesa Statement to demonstrate that her last pay was indeed Kshs.5,000 to allow the Court determine the amount owed to her as underpayment. I thus find no proof of underpayment and dismiss the prayer.

(iii) Accrued leave

The Claimant avers that she never proceeded on leave. The 1st Respondent did not disprove this allegation. The claimant is therefore entitled to leave but only for the period she was employed by the 2nd respondent from January 2010 to December 2014. The 2nd respondent could therefore not account for the claimant's leave before he took her over after his mother's demise. Going by the minimum rate of pay for All Other Areas under the General Order as the claimant worked in Ongata Rongai, I award her **Kshs.18,880.60** based on a minimum wage of Kshs.5,844.20 per month for 84 leave days.

(iv) Service Charge

The Claimant stated that she worked for the 1st Respondent from 1982 and that she did not make any NSSF contribution. She is therefore entitled to service pay under Section 35(5) of the Employment Act. I award her the same at **Kshs.111,265** based on a minimum wage of Kshs.5,844.00 per month for 33 years. I have awarded her service pay for 33 years on the basis that the 2nd respondent took over her services after the death of his mother Zeitun.

(v) Overtime

The Claimant seeks Kshs.730,000 for overtime hours worked. She testified that she started working at 5 a.m. until 11 p.m. In paragraph 3 of her Witness Statement, she avers that she started working at 4 a.m. until 11 p.m. I find that the claim for overtime has not been proved as the Claimant's testimony and her witness statement were contradictory as to when she began working. It is also difficult to prove overtime in a situation where the employee lives in the premises where she works as there are no specific working hours in such cases. The prayer for overtime is thus dismissed.

(vi) 12 months' compensation

Having not proved that her employment was unfairly terminated, the prayer for compensation fails.

The final award is as follows: -

(i.)... Accrued leave..... Kshs.18,880.60

(ii.)... Service pay..... Kshs.111,265.00

Total award Kshs.130,145.60

The respondent will pay costs. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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 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.

MAUREEN ONYANGO

JUDGE