



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 40 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ZARIKA ADOYO OBONDO.....CLAIMANT

VERSUS

TAI SHUNJUN..... 1ST RESPONDENT

XIEHE GROUP (K) COMPANY LIMITED.....2ND RESPONDENT

JUDGMENT

The claim herein was filed by the claimant through the firm of Nyabena Nyakundi and Company Advocates on 20th January 2014. The claimant avers that she was employed by the respondents in or about November 2012 as a Messenger/Cleaner at a salary of Kshs.5,000 per month exclusive of house allowance. That the contract was oral and was never reduced into writing. She avers that she worked diligently and faithfully until on or about 15th August 2013 when the respondent unlawfully and unfairly terminated her services on allegations that she had a bad body odour. That she was not given notice or paid in lieu thereof. Further that she was not issued with a letter of termination.

The claimant prays for the following remedies –

1. A declaration that the Claimant’s dismissal from her employment was unfair.
2. The Claimant be paid her terminal benefits as set out in paragraph 10 hereinabove totalling to Kshs.201,994 as tabulated below;-

- (i) Salary for 15 days worked in August, 2013
 $x 112 \times 7.....$ Kshs.6,489
- (ii) One month’s salary in lieu of notice..... Kshs.11,247
- (iii) Prorata leave..... Kshs.8,227
- (iv)..... Salary underpayment for 6 months in 2012
 $8,580 - 5,500 = 3,080 \times 6.....$ Kshs.18,480
- (v)..... Salary underpayment for 3½ months in 2013
 $9,780 - 7,000 = 2,780 \times 3\frac{1}{2}.....$ Kshs.9,730
- (vi)..... House allowance for 6 months 2012
 $1,287 \times 6.....$ Kshs.7,722
- (vii)..... House allowance for 3½ months in 2013
 $4,401 + 734.....$ Kshs.5,135

(viii)..... 12 months' compensation due to wrongful termination

1,247 x 12..... Kshs.134,964

Total amount due Kshs.201,994

(ix)..... Certificate of service

3. The Respondent be ordered to compensate the Claimant for unfair dismissal at the equivalent of twelve (12) months gross salary.
4. The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
5. The Respondent to pay the costs of this claim Interest on the above at Court rates.
6. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act, 2007.

The respondent filed a Response to the Memorandum of Claim on 12th February 2014. It denies all the averments in the memorandum of claim except the descriptive paragraphs 1,2 and 3. It specifically denies employing the claimant as a Messenger/Cleaner, but states that she was engaged as a casual worker as and when need arose.

When the matter came up for hearing on 9th July 2019, the claimant's counsel opted to proceed by way of written submissions. The respondents though served directly by way of registered mail after its Counsel was granted leave to withdraw from acting for the respondent on 14th November 2018, did not attend court for the hearing.

In the written submissions filed on behalf of the claimant, it is submitted that she was unfairly and unlawfully terminated from her employment on allegations that she had bad odour. That on 5th July 2013, the claimant requested the Respondent to increase her salary and the Respondent responded in abusive language and informed her that they would employ someone else.

The Claimant further stated that on 15th August, 2013, the Respondent came to the office and said that something was smelling and informed the Claimant that she has a bad odour. The Respondent dragged the Claimant out of office and informed her that she does not fit in the Respondent's office and that she can go. That prior to this, the Claimant was not given any notice or given a notice to show cause why her services should not be terminated contrary to the provisions of Section 41 of the Employment Act, 2007.

The Claimant submitted that she was not paid her dues by the Respondent. It is the Claimant's case that there existed no valid reason for her termination and that the manner in which her services were terminated was unfair and unlawful.

The respondents did not file any submissions.

Determination

The issues for determination are thus whether there was any employment relationship between the claimant and the respondent, and if there was, whether the employment was terminated unfairly and if the claimant is entitled to the remedies sought.

The claimant did not submit on the first issue on whether or not there was an employment relationship between the claimant and the respondent. Although the claimant pleaded that she was employed by the respondent as a messenger/cleaner, the respondent avers in the defence to the claim that she was engaged on casual basis as and when the need arose.

It has been stated time and again by this court that where the respondent does not participate in the hearing and has not admitted the employment relationship, the claimant must prove the same as a preliminary point as without proof, the whole claim is anchored on quicksand.

In the case of **Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited (2016) eKLR**, the court stated;-

"8. The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further.

11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice."

Further in the case of **Transport Workers Union v Euro Petroleum Products & Another [2019] eKLR**, the court stated that –

The Respondents on their part did not produce any documents to prove that the grievants were neither their employees nor engaged on casual basis. However, the Claimant ought to have at the least established that there was an employment relationship between the grievants and the Respondent(s) before the respondent would be called upon to produce records.

...

The Claimant herein has failed to prove the existence of an employment relationship between the grievants and the Respondents. In the absence of an employer-employee relationship the Court is not in a position to consider the issue of termination of employment under the Employment Act.”

In the case of **Joseph Munene Murage v Salome Ndung’u [2019] eKLR** the court held that –

The determination of the other heads of claims advanced by the Claimant will depend on whether the Court finds that there was an employment relationship.

Regrettably, this is one of those cases where it is purely the word of the Claimant as against that of the Respondent. The Respondent opted to include an additional witness RW2 with a view of corroborating and strengthening her case as against the Claimant.

The Claimant testified that he was employed by the Respondent on 17th May 2011 as a caretaker, gardener cum security guard at the Respondent’s plot number 15(b) earning a monthly salary of Kshs.8,200.

The Claimant further stated that he met the Respondent through a bureau where he had left his number in the event someone would be interested to hire him. The Claimant however failed to secure the attendance of any witness from the bureau to ascertain the fact that he was referred to the Respondent by the agency, or to submit any other evidence to corroborate his evidence.

The Claimant also stated that prior to his termination he sought leave for three days to attend to his mother’s burial and that during this time the night guard took over his duties. Similarly, the Claimant failed to call the said night guard as a witness in this matter.

Section 47(5) of the Employment Act provides as follows –

(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.

It was thus the burden of the claimant to prove the existence of an employment relationship and the unfair termination thereof. Having failed to prove the existence of an employment relationship the claim has no leg to stand and must thus fail....”

In the case of **Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited [2013] eKLR** the court

held that:-

That settled, I will now deal with the status of the Claimant vis a vis Charles Asiaba. The Claimant did not produce a single document to prove an employment relationship between the grievant and the Respondent, not even the letter of resignation which the grievant claimed to have written to the Respondent.

An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists. A Claimant claiming employment rights must prove the existence of an employment relationship.

*In the case of **Mary Mmbone Mbayi v Chandubhai Patel & Another (Industrial Cause No. 761 of 2011)** this Court stated that:*

“Even in cases where there may be no documentary proof of an employment relationship or termination thereof, the Claimant retains the burden of proving their case through viva voce evidence.”

The Claimant did not adduce any evidence to prove the existence of an employment relationship between the grievant and the Respondent. The Claimant’s entire claim therefore fails and is hereby dismissed.”

In this claim the claimant did not testify. Counsel for the claimant opted to proceed by way of written submissions. There is further no witness statement filed by the claimant. The averments about the circumstances under which her alleged employment was terminated have been brought up in the submissions.

It is trite law that submissions are not evidence. Facts cannot be pleaded in submissions.

Further, there is no proof that even if there was an employment relationship between the claimant and the respondents, the claimant was paid a salary of Kshs.5,000 per months or of any other averments of fact in the memorandum of claim. In the circumstances there would be no basis for making any finding in favour of the claimant.

Having found no proof of existence of an employment relationship, the entire claim cannot hold and must fall apart. I accordingly dismiss the same with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

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, the 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 the 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