



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 363 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

TABITHA TIMOTHY KIMANYI....CLAIMANT

VERSUS

STUDIO 62 LIMITED.....RESPONDENT

JUDGMENT

Vide her Memorandum of Claim filed on 11th March 2015, the Claimant avers that she was unfairly dismissed by the Respondent when she was to proceed on maternity leave. She prays for orders against the Respondent as follows:

- a. A declaration that the termination was unfair and unlawful;
- b. Accrued annual leave days, Kshs.56,000 less Kshs.43,868 already paid..... Kshs.12,132;
- c. Damages for wrongful dismissal..... Kshs.288,000.00
- d. Severance Pay..... Kshs.120,000.00;
- e. Overtime Pay..... Kshs.677,580.06
- f. Interest on (b), (c), (d) and (e) above from the date the same became due until payment in full;
- g. Costs of the suit; and
- h. Any other relief this Court may deem fit to award under the circumstances.

The Respondent filed a Memorandum of Response on 21st April 2015 in which it denies terminating the Claimant's employment. It avers that the Claimant verbally resigned in June 2014 and was issued with an acknowledgment receipt which she declined to sign. It avers that the claimant was paid all her dues up to the month of September 2014 despite resigning in June 2014.

Evidence

The Claimant testified that she was employed by the Respondent on 23rd August 2004 as a house help/cleaner and tea girl. She testified that she reported to work at 6.15 am had a break for 2 hours until 3 pm then continued working until 7 pm or later. She testified that on Saturdays she reported to work at 8 am and worked until 4 pm or 5 pm.

She denied resigning and stated that on 7th June 2014 she was to go on maternity leave. She testified that they discussed how they would handle the period during which she would have been on maternity leave. She testified that she was issued with a letter of resignation which tabulated her dues but she did not sign it as she had not resigned. She testified that she did not report to work because of the letter of resignation.

In cross-examination, she testified that while discussing maternity leave they did not agree on the reporting time. She testified that she did not report to work from June 2014 but she received her salary up to September 2014. It was her testimony that she was expected to report

back to work in October 2014 but she had been issued with a resignation letter. She stated that in October 2014 she received Kshs.43,868 which was service pay. She testified that at the end of every year they were paid annual leave and gratuity.

ROSE MAUREEN NGUGI KINYUA, the Respondent's Administrator testified as RW1. She testified that on 7th June 2014, she received a call from the Director who informed her that the claimant had verbally resigned. She testified that she was instructed to pay her maternity leave and all her dues. She testified that the dues were tabulated but the Claimant refused to sign the letter.

She testified that employees are entitled to 21 days leave and that they took some of the leave days during the year while the remainder was utilised in December during which time the office was closed. She testified that any leave balance is carried forward to the next year.

In cross-examination, she testified that she did not receive a resignation letter from the Claimant. She testified that unutilised leave is not compensated. She testified that she did not know the time the Claimant reported to work.

Claimant's Submissions

The Claimant submitted that she was dismissed and offered 3 months' salary during which period she was on leave. She submitted that she was constructively dismissed but the Respondent did not follow the procedure set out in **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**.

She submitted that the overtime hours worked were 21 hours every week. That the Respondent did not produce leave records thus she is entitled to accrued leave days of Kshs.12,132. She submitted that she should be awarded 12 months' salary as compensation for wrongful dismissal. She further submitted that she is entitled to costs of the suit.

The respondent did not file submissions.

Determination

The uncontested facts are that the Claimant worked for the Respondent for 10 years until 9th June 2014 when she proceeded on maternity leave. It is further uncontested that the Claimant received her salary until the month of September 2014 and her terminal dues in October 2014.

The issues for determination are whether the Claimant was dismissed and whether she is entitled to the reliefs sought.

The Claimant denies having resigned and avers that she declined to sign the resignation letter issued to her. RW1 testified that she did not receive a resignation letter from the Claimant and that it is the Respondent's Director who instructed her to draft the resignation letter. None of the parties produced the resignation letter.

She testified that she did not report back to work because she had received a resignation letter. The claimant could not have been dismissed in June 2014 as she earned salary up to September 2014. From the evidence on record, it would appear that either the claimant wilfully resigned when she failed to agree with the Respondent's Director on resumption of duty after maternity leave or the resignation was mutual as the respondent paid the claimant her salary up to September 2014, presumably the 3 months' maternity leave and then here terminal dues were paid in October.

The Claimant submitted that she was constructively dismissed. I do not find the circumstances leading to the separation herein suggestive of constructive dismissal even though the claimant denies having resigned. Further, she did not plead that she left employment as a result of the Respondent's unreasonable conduct or repudiatory breach.

With respect to terminal dues, having found that the Claimant was not dismissed, the Claimant is not entitled to compensation for wrongful dismissal.

On accrued leave the Claimant submitted that she is entitled to Kshs.12,132 as she had received Kshs.43,868. From the tabulation of dues produced by the Claimant the Kshs.43,868 paid to the Claimant constituted 19 days leave being Kshs.18,000 and service pay. RW1 testified that unutilised leave was carried forward to the following year while in cross-examination the Claimant testified that at the end of the year they received leave pay. I find that this prayer has not been proved and the same is dismissed.

On overtime, the Claimant testified that she reported to work at 6.15 am, rested for 2 hours until 3 pm and then continued working until 7 pm. Considering the nature of the Claimant's work and the fact that she was housed at the Respondent's premises, it would be difficult to compute the overtime hours worked. In so finding, I consider that the Claimant stated that during the day she did take 2 hour breaks.

The claim for severance pay fails as the Claimant's termination was not on account of redundancy.

For the foregoing reasons, the claim fails in its entirety and is accordingly dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH 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, 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