



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

ANZI NAIROBI

CAUSE NO. 1107 OF 2013

ADAN MAALIM SALA..... CLAIMANT

VERSUS

MAMA DAR..... RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 16.7.2013 claiming that he was unlawful dismissed from employment by the respondent on 28.12.2012 and denied his terminal benefits. He therefore prayed for the following reliefs.

- (i) A declaration that the said termination was unlawful/unfair
- (ii) The sum of **Kshs.468,803.40** as particularized in paragraph 5 of the claim
- (iii) An order directing the Respondent to issue a Certificate of Service to the Claimant.
- (iv) Compensation for unlawful termination being
Kshs.84,000.00
- (v) The costs of this suit with interest thereon court rates
- (vi) Any other relief as the Court would deem just and expedient.

2. The respondent filed her defence on 22.8.2013 denying all the averments by the claimant in his statement of claim. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 23.10.2018 and 1.11.2018 when the claimant testified and called one witness while the respondent called her daughter as a witness. Thereafter both parties filed written submissions.

Claimant's Case

4. The claimant testified as Cw1. He stated that he was employed by the respondent in April 1991 as a Security Officer/House Help under an oral contract. That he started with a salary of Kshs.1,500 per month but later it was increased to Kshs.7,000 per month. That he used to work from 6 a.m to 6 p.m without any overtime pay or off day. That the salary was below the minimum statutory salary published by the wage order. He however used to go for his annual leave.

5. Cw1 further stated that he worked diligently until 12.12.2012 when he was dismissed unlawfully and his terminal benefits withheld. He contended that before the dismissal, he had received the salary of Kshs.7,000 for 2 years.

6. On cross examination Cw1 contended that he started with salary of kshs.1,500 per month which was later increased to Kshs.2,500. That thereafter, the salary was increased by Kshs.500 after every 2 or 3 years. That he worked for 7 days per week for 15 years. That he was working at the respondents Galana Lodge and was signing for his salary. He admitted signing the payment schedule filed by respondent as exhibit. He further admitted that there are days he went on leave or fell sick and as such failed to work overtime. He however denied ever

resigning and maintained that he was dismissed.

7. Mr. Muhamed Isaac testified as Cw2. He stated that he worked as a Night Security Guard for the respondent from 1995 to 2000 while the claimant was the day guard. He contended that he found the claimant there but left him there after he resigned due to poor working conditions including low pay of Kshs.2,500 per month and no off days or public holidays.

Defence case

8. Miss Talat Parpin Dar, respondents' daughter testified as Rw1. She stated that the respondent was over 90 years and sickly. She contended that the claimant was employed as a Watchman by her brother from April 1991 till 2010 when he died. That after her brother's demise, the claimant was taken over by the respondent as a General labourer working from 9.00 a.m to 2 p.m. and he was housed in her family house.

9. Rw1 further testified that on 18.12.2012 she heard commotion and screaming from the Kitchen. That she rushed there and found the new maid saying that she was being killed by the claimant. That the Security guards also came to see who was killing who. That from that day the claimant disappeared and started calling the respondent to the labour office.

10. Rw1 denied that the claimant was dismissed and maintained that he disappeared. She further denied that the claimant's salary was underpaid and contended that he was treated as a family member. She contended that in 2012, the claimant was being paid Kshs.7,000 per month, more than the statutory minimum wage of Kshs.4,917.60.

11. On cross examination, Rw1 admitted that the claimant was employed in the respondent's family by her late brother and his salary was paid by her and other family members. She further stated that the claimant signed for all his salary and terminal dues. She also stated that after the claimant disappeared on 18.12.2012, he reappeared on 31.12.2012 when she was paid him terminal dues.

12. Rw1 further contended that from 1991, the salaries for guards was increased every year during the Labour Day. She however denied that Cw2 was employed by her family as he alleged. She however admitted that the claimant was not a member of the NSSF during his employment by her family.

13. Rw1 admitted that the allegation that the claimant fought with the new maid was not pleaded in the defence. She further admitted that the General Wage Order for 2012 provided for a minimum salary of Kshs.8,579.80 per month. She however denied the claimant's claim and prayed for the suit to be dismissed with costs.

Analysis and Determination

14. There is no dispute from the evidence that the claimant was employed by the respondent's family from April 1991 to December 2012. The issues for determination are:-

- (a) Whether the claimant was unlawfully terminated or he deserted his employment;
- (b) Whether the reliefs sought should be granted.

Unfair dismissal or desertion

15. The claimant pleaded that he was dismissed from employment by the respondent on 28.12.2012 unlawfully. However, in his evidence in chief, he stated that he was dismissed on 12.12.2012 while on cross examination he stated that he was dismissed on 18.12.2012. In both the pleadings and testimony, he never narrated the circumstances of how the dismissal occurred. I therefore find that he was not discharged his burden of proving that he was unfairly and unlawfully dismissed as required by section 47(5) of the Employment Act. The said section provides that the burden of proving unfair termination shall be on the employee who alleges that he was so dismissed while the burden of justifying the dismissal lies with the employer.

16. On a balance of probability, I find that the claimant resigned or deserted his job. As correctly submitted by the defence counsel, the claimant admitted on page 10 of the defence documents (settlement agreement) that it is him who left employment. The foregoing submission corroborates the testimony by the Rw1 that on 18.12.2012, she heard commotion and screams from her new maid saying that she is being killed by the claimant and rushed there with the Security Guards. That from that time the claimant disappeared until 31.12.2012 when they went to collect his terminal dues as indicated in the settlement agreement on page 10 of the defence bundle of documents.

Reliefs sought

17. In view of the foregoing finding that it is the claimant who deserted his employment, I decline to make a declaration that he was unlawfully/ unfairly terminated. Flowing from the foregoing, I dismiss the claim for salary in lieu of notice and compensation for unfair termination under section 49 of the Employment Act.

18. I further dismiss the claim for House Allowance because the evidence by Rw1 that the claimant was housed by the employer as House help was not contested and rebutted.

19. As regards the claim for service pay, page 1, 2 and 3 of the defence documents filed on 22.12.2014 shows that a sum of Kshs.54,000 was fully paid to the claimant as service pay for the period from 1991 to 2008 at the rate of 15 days' pay per year using a salary of Kshs.6,000 per month. Thereafter the claimant was paid his service pay plus leave at the end of every year as shown by 6, 8 and 10 of the said defence

documents. Consequently, I dismiss the claim for service pay because it was paid during and after the dismissal.

20. The claim for overtime is also dismissed for lack of particular and evidence. The claimant admitted during cross examination that he never worked through out all the days he is claiming overtime pay. He admitted that in computing the overtime worked he never took into account the days he was on annual leave or sick off. Such admission means that the claim for overtime pay is exaggerated and if allowed could lead to unjust enrichment to the claimant at the expense of the respondent.

21. I however grant the claim for under payment for the period between May 2011 and December 2012 as prayed. Under the 2011 General wage order the basic salary for House Help in Nairobi was Kshs.7,586 per month but the claimant was being paid Kshs.7,000. The under payment was therefore by Kshs.586 per month equaling to Kshs.7,032 for 12 months upto April 2012. From May 2012, the basic salary was increased by the 2012 General Wage Order to Kshs.8,579.80 per month but the claimant was paid Kshs.7,000 resulting to an under payment of Kshs.1,579.80 per month from May to December 2012 the claimant's basic salary was under paid by a total of Kshs.12,638.40.

Conclusion and Disposition

22. I have found that the clamant was not unlawfully dismissed by the respondent but he is the one who deserted his employment on 18.12.2012. I have further found that he is not entitled to the terminal dues sought except the arrears in salary for the period between May 2011 and December 2012 occasioned by salary underpayment. Consequently I enter judgment for him in the sum of Kshs19,670.40 plus half costs and interest at court rate from date of filing suit. The award is subject to statutory deductions.

The said sum will be paid less statutory deductions. I also award the claimant costs and interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE