



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1627 OF 2013

CATHERINE MORAA OMWANSA.....CLAIMANT

VERSUS

MR. & MRS. HUSSEIN DADO.....RESPONDENTS

JUDGMENT

Introduction

1. The claimant brought this suit on 9.10.2013 alleging that her employment was unfairly terminated by the respondents on 6.10.2012 and prayed the following monetary reliefs in addition to certificate of service:-

- (a) Underpayments of wages = Ksh.164,149.10
- (b) One month's salary pay in lieu of notice = Ksh . 10,149.25
- (c) 6 days salary worked in October 2012 = Ksh. 2,459.00
- (d) Annual leave for 3 years (63) days = Ksh. 25,820.00
- (e) Severance pay for 3 years (45) days = Ksh. 16,037.80
- (f) 12 months salary compensation @10,656.25 per month = Ksh.125,875.00

Total amount claimed Ksh.344,998.25

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2. The respondents filed their defence on 22.11.2013 denying the alleged unfair termination and averred that it is the claimant who deserted work without prior notice. They further denied the reliefs sought and prayed for the suit to be dismissed with costs. In addition they contended that the claimant was over paid in her salary and counterclaimed for refund of Kshs.43,353 plus one month salary in lieu of notice form the claimant.

3. The suit was heard on 14.6.2018 and 8.11.2018 when the claimant testified as Cw1 and the first respondent testified as Rw1. Thereafter both parties filed written bus missions, which I have carefully considered herein.

Claimant's Case

4. Cw1 testified that she was employed by the first respondent from 23.9.2009 as a House Help. She stated with a monthly salary of Kshs.4,000 per month but from 1.10.2010 it was increased to Kshs.4,500 per month. She contended that the salary was below the statutory minimum salary vide the General Wage Orders for 2009 to 2011.

5. She further testified that she was working during the day, and go home at 5.30 p.m. or 6 p.m, and denied the allegation by the respondents that she had been allocated a house at their home. That she used to work from Monday to Saturday and rested on Sunday and Public holidays but never went for any leave or paid cash in lieu. She was also not a member of NHIF and NSSF and the employer never remitted any

contributions.

6. Cw1 further testified that she kept on requesting for salary increase until 6.10.2012 when the first respondent told her to go and look for a job where there is a better pay. He denied the respondent's allegation that she was being paid Ksh.8,900 per month plus a bonus of Ksh.5,000 every Christmas. She denied ever being paid any free money and contended that whenever she requested for any money, it was deducted from her salary.

7. Cw1 further testified that she served for 3 years and no written contract was ever given to him or any document for signing to acknowledge payment. He therefore prayed for reliefs set out in her claim.

8. On cross examination, Cw1 contended that she was taking one of the respondents' 5 children to school where he was reporting at 8.30 a.m. she denied the allegation that she was given leave during school vacation in April, August and December every year and maintained that she worked daily except on Sundays and public holidays. She further denied being housed by the employer and maintained that she used to work during the day and go home in the evening. She however admitted that she had a good relationship with the employer except that she was mistreated on the issue of salary. That when she asked for salary increment, she was dismissed on 6.10.2012, a Thursday at 5.30 p.m.

Defence Case

9. Rw1 testified that he employed the claimant as a House help in 2009 for a monthly salary of Kshs.8,900 but from January 2011 it was increased to Kshs.9,500. That other benefits included Housing, meals, medical expenses, rest on Sunday, annual leave every December, bonus of Kshs.5,000 every Christmas holiday and financial assistance in case of family emergencies. That the contract was verbal.

10. Rw1 further testified that in October 2012 he was in Tana River with his wife (2nd Respondent) campaigning for election to the position of Governor when the claimant deserted her employment without prior notice. That when contacted over the phone, she stated that she left the job because she feared that she would lose her job after he joined politics.

11. Rw1 further testified that the claimant was a good employee in taking care of his family but blamed her for abandoning him at the hour of need when he was away with his wife campaigning. That his persuasions including over of a salary increase to the claimant was rejected rudely forcing him to bring in friends and relative to take care of his children.

12. He contended that the claimant is using the case to extort money from him and that is why she is using the press to malign him. He further contended that his religion does not allow him from mistreating his employees. He further stated that he is a long serving senior public officer whose name is being tarnished through the press and that is why he had come to clear himself from the alleged mistreatment.

13. Rw1 finally contended that he was overpaying the claimant's salary and prayed for his counter claim to be granted and the claimant's suit be dismissed with costs.

14. On cross-examination, Rw1 admitted that he never gave written contract to the claimant and that he used to pay her salary in cash without any written evidence. He further admitted that he never remitted NSSF and NHIF for the claimant. He further maintained that he used to pay the claimant more than the minimum wage and had provided her with a servant quarter to live in but sometimes she used to go away as she pleased. He stated that he would not stop her from going away.

15. He further maintained that he used to spent school vacation with his family at Tana River and as such, he used to give the claimant leave every April, August and December. He contended that he was the sole employer of the claimant and contended that the claimant is trying to extort money from his wife by joining her to the suit. He concluded by admitting that he did not keep employment records for the claimant.

Analysis and determination

16. There is no dispute that the claimant was employed by the first respondent herein as House Help from 2009 to 6.10.2012. the issues for determination are:-

- a. Whether the claimant deserted her employment without notice or she was unfairly dismissed by the respondents.
- b. Whether the reliefs sought by the claimant should be granted.
- c. Whether the counterclaim should allowed.

Desertion or unfair termination

17. Under section 47(5) of Employment Act, the burden of proving unfair termination lies with the employee who alleges that she was so terminated. In this case, the respondents have denied the alleged unfair termination of the claimant's employment and averred that it is the claimant who deserted them at the hour of need.

18. I have carefully considered the evidence tendered. The claimant's written statement is to the effect that she was dismissed and frog marched out of the premises by the second respondent. In her sworn testimony in chief, she stated that she was dismissed by the first respondent for demanding a salary increment and during cross examination she stated that she was dismissed on Thursday 6.10.2012 at 5.30 p.m.

19. The said contradiction regarding the person who dismissed the claimant can only lead to the inference that the claimant is not telling the truth. The foregoing view is fortified by the fact that 6.10.2012 was not on a Thursday but Saturday. Consequently, I find and hold that the claimant has not proved on a balance of probability that she was dismissed by the respondents on 6.10.2012 but she deserted without notice.

Relief

20. In view of the foregoing, I dismiss the claim for salary in lieu of notice and compensation for unfair termination.

21. I however award her salary for the 6 day worked in October 2012. The minimum basic wage under the 2012 General Wage order was Kshs.8,579.80. Consequently, 6 days salary was $Kshs.8,579.80 \times 6/26 = 1,979.95$ less housing for reasons stated below.

22. The claim for severance pay is dismissed because the termination was not through redundancy.

23. The claim for leave has been carefully considered. The claimant contended that she only went away on Sunday and public holidays. Rw1 contradicted himself in his evidence on the leave. He stated he said that he claimant went for leave during every school holiday in April, August, and December. He further stated that the claimant went for leave every December after 12th day. Of the two I will go by the latter position that the claimant went for leave between 12th – 31st December every year. During that period there were two public holidays and at least 2 Sundays leave only 15 leave days taken per year. The claimant was entitled to 21 leave days under section 28 of the Employment Act every year but she took only 15 days leaving 6 days unutilized. The accrued leave granted is therefore 18 for the 3 years served equaling to $Kshs.9,866.77 \times 18/26 = Kshs.6,830.85$.

24. The claim for underpayment is granted. The claimant testified that from 2009 to 1.10.2010 she was paid Kshs.4,000 per month and thereafter Kshs.4,500 until September 2012. The Rw1 contended that he was paying the claimant Kshs.8,900 from 2009 until January 2011 when he increased it to Kshs.9,500 per month. He however did not produce any written contract or employment records to disprove the claimant's allegations.

25. Under section 10 of the Employment Act, the employer has the obligation to cause the contract of service to be written down and produced as exhibits in court to disprove any verbally alleged terms of the contract in any legal proceedings brought by his employee.

26. In default by the employer to disprove the verbally alleged terms by the employment records, the court is entitled to presume that the employee is right. That is what I have done herein after the Rw1 admitted that he never put the contract in writing and he never kept any records of employment for the claimant. Consequently, I find and hold that the claimant's contention that she was paid Kshs.4,000 upto 1.10.2010 and Kshs.4,500 thereafter until she left on 6.10.2012 has not been disproved by the respondent using employment records and a written contract.

27. The said payment was below the Gazetted minimum wage. Under the General Wage Orders published in May 2009, 2010, 2011 and 2012, the minimum basic monthly salary for a House Help was Kshs.6,130, 6,743, 7,586 and 8,579.80 respectively. The claimant alleged that she was not provided with housing by the respondent. Rw1 contended that he allocated the claimant a Servant Quarter in his home but the claim used to go away at her will and he could not stop her. The evidence by Rw1 is corroborated by the fact that he wanted the claimant to care for his children while he and his wife were away campaigning. She could not have been expected to care for the children while spending the nights away from the respondent's home. Consequently, I have excluded house allowance while computing the underpaid salary.

28. The claimant worked from 23.9.2009 till 6.10.2012. I have already awarded the salary for the 6 worked in October 2012. I will therefore award the salary underpayment for October 2009 to September 2012. From October 2009 to April 2010, she was wanting Kshs.4,000 as opposed to the said Kshs.6,130 representing an underpayment of Kshs.2,130 per month equaling to Kshs.14,910 for the 7 months.

29. From May 2010 to September 2010 the claimant was earning Kshs.4,000 as opposed to Kshs.6,743 representing an underpayment of Kshs.2,743 per month and equaling to Kshs.13,715 for the 5 months.

30. From October 2010 to April 2011, the claimant was paid Ksh.4,500 per month as opposed to Kshs.6,743 representing an underpayment of Kshs.2,243 per month equaling to Kshs.15,701 for the 7 months.

31. From May 2011 to April 2012, the claimant was paid Kshs.4,500 per month instead of Kshs.7,586 representing an underpayment of Kshs.3,086 equaling to Kshs.37,032 for the 12 months.

32. Finally from May to September 2012 the claimant was paid Kshs.4,500 per month as opposed to Kshs.8,579.80 representing an underpayment of Kshs.4,079.80 per month equaling to Kshs.20,399 for the 5 months.

Counter Claim

33. Rw1 admitted that he did not have any documentary evidence to support the claim for overpayment and as such, the claim for refund of the overpaid salary must fail. Even if there was such evidence of overpayment, I doubt whether an order for refund would obtain unless the employer is able to prove that the payment was made through mistake or fraud. All what the Wage Order does is to provide for the irreducible minimum wage and put no ceiling.

34. The claim for one month salary in lieu of notice must however succeed because the claimant deserted employment without serving notice to the employer. I therefore allow the claim for Kshs.9,866.77 being salary in lieu of notice made up of $Kshs.8,579.80 + (15\% \times 8,579.80)$

Conclusion and Disposition

35. I have found that the contract of service herein was done by the claimant through desertion without prior notice. I have also found that the claimant's salary was under paid and he did not utilize 18 leave days. I have finally found that the respondent is entitled to one month salary in lieu of notice because the claimant deserted employment without prior notice. Consequently, I enter judgment for the claimant in the following terms:-

a. Salary underpaymentKshs.101,757.00

b. 18 days leave.....Kshs. 6,830.85

c Salary for 6 days.....Kshs. 1,979.95

Kshs.110,567.80

d. Less salary in lieu of notice.....Kshs. 9,866.77

Kshs.100,701.03

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The claimant will also get certificate of service as required by section 51 of the Employment Act. The claimant will also have half costs plus interest because both the suit and the counter claim have partially succeeded. The decreed sum will be subject to statutory deductions.

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

ONESMUS N. MAKAU

JUDGE