



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 3 OF 2017

IMMACULATE SAWENE.....CLAIMANT

VS

DAYANG INTERNATIONAL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Immaculate Sawene against Dayang International Limited. The claim is contained in a Memorandum of Claim dated 29th March 2017 and filed in court on 30th March 2017.

2. The Respondent filed a Memorandum of Response on 21st April 2017 but did not call any witness despite adequate opportunity to do so. The Claimant testified on her own behalf and thereafter called David Mwangi Muiruri.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent on 1st January 2016 first as a Supervisor and subsequently, effective 1st May 2016, in the higher position of Managing Director. She earned a monthly salary of Kshs. 20,000 paid in cash. She was not issued with a written contract of employment or payslip.

4. The Claimant avers that she was in charge of all responsibilities/duties of the company including hiring an Advocate to represent the Respondent in criminal case No. 406 of 2016.

5. The Claimant claims that she was only paid salary for 4 months leaving 7 months unpaid.

6. The Claimant states that on 15th November 2016, the Respondent through its Director, Zhang Ruming, terminated her employment unlawfully and unfairly.

7. Following the termination of her employment, the Claimant reported a dispute at the Labour Office in Malindi but the Respondent failed to respond to correspondence from the Labour Office. A demand letter from the Claimant’s Advocate did not elicit any response either.

8. The Claimant now claims the following:

- a) 7 months’ unpaid salary.....Kshs. 140,000
- b) 2 months’ pay in lieu of notice.....40,000
- c) Leave.....20,214
- d) 1 year service.....40,000
- e) Holidays.....10,500
- f) Underpayment.....90,568
- g) General damages for loss of employment

h) Certificate of service

i) Costs plus interest

The Respondent's Case

9. In its Memorandum of Response dated 20th April 2017 and filed in court on even date, the Respondent denies the Claimant's entire claim and states that the Claimant was a lover of one of its directors and not an employee of the Company.

Findings and Determination

10. The first issue for determination in this case is whether there was an employment relationship between the parties capable of enforcement by the Court. This is an important question because the jurisdiction of this Court as conferred by Article 162(2) of the Constitution as read together with Section 12 of the Employment and Labour Relations Court Act, being specialized in nature, is dependent on the existence of an employment relationship.

11. Section 2 of the Employment Act defines an employee as:

“a person employed for wages or a salary and includes an apprentice or indentured learner”

12. The same section defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

13. A person laying a claim based on employment bears the burden of establishing the existence of an employment relationship in the first place.

The Claimant maintains that she was an employee of the Respondent, initially as a Supervisor and later as Managing Director.

14. On its part, the Respondent states that the Claimant was a lover to one of its directors, Ruming Zhang. The Claimant admitted that Zhang was her lover but added that this did not derogate from her employment with the Respondent.

15. In support of her case, the Claimant produced her mpesa statements showing several cash transfers from Zhang to her. She also called David Mwangi Muiruri who at the material time served as a Legal Assistant in the firm of Katsole and Co Advocates. Muiruri told the Court that the Claimant had been mandated by Zhang to follow up on a criminal case involving the Respondent. Muiruri therefore concluded that the Claimant was an employee of the Respondent.

16. It is now well settled that the mere fact that parties work together does not automatically give rise to an employment relationship (see ***John Kamau Mburu v Program for Appropriate Technology in Health (PATH) & another [2015] eKLR***). In other words, parties may engage in a common venture without necessarily creating an employer/employee relationship. Looking at the mpesa statements produced by the Claimant, between July and November 2016 there were varying cash amounts transferred by Zhang to her. These amounts were however not consistent in value and timing to acquire the character of salary from an employer to an employee.

17. Additionally, the fact that the Claimant was engaged in giving instructions to an Advocate with respect to a criminal case involving the Respondent is not proof that she was an employee. I say so because the Claimant herself told the Court that she had a romantic relationship with one of the Respondent's directors. It is therefore reasonable to conclude that in following up the criminal case, she was assisting her lover.

18. Overall, the Court finds and holds that there was no employment relationship between the Claimant and the Respondent capable of enforcement by this Court. As a result, the Claimant's entire case fails and is dismissed.

19. Each party will bear their own costs.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Otara for the Claimant

Miss Marubu for the Respondent