



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 436 OF 2017**

**ELIZABETH MUTHONI MURIITHI.....CLAIMANT**

**VERSUS**

**1. JOSEPH MUCHINA MURIUKI**

**2. MARY WAIRIMU MUCHINA.....RESPONDENTS**

**JUDGMENT**

1. The Claimant sued the Respondents averring that she was employed by the Respondents as a house help from 17<sup>th</sup> March 2014 earning Kshs. 11,470/- a month. She stated that on or about 3<sup>rd</sup> May 2016 while in the course of her employment the Respondents assaulted her at the workplace causing her actual bodily harm. She averred that the conduct created a hostile work environment and created an unbearable fear for the Respondents. She asserts that the environment created was similar to that of servitude and she thus resigned from employment on 4<sup>th</sup> May 2016. She sought overtime payment for working from 6.00am to midnight each day Kshs. 132,165/- for period between 17<sup>th</sup> March 2014 and May 2014, Kshs. 643,203/- for the period between June 2014 and May 2015 and Kshs. 593,861.4 for the period between June 2015 and 3<sup>rd</sup> May 2016, payment for working on 23 holidays – Kshs. 24,246.60, accrued leave Kshs. 28,971.43, severance pay of Kshs. 11,700/-. She sought a declaration that her dismissal was unfair constructive dismissal, damages for unfair dismissal equal to 12 month's salary – Kshs. 140,400. She also sought costs of the suit.

2. The Respondents denied employing the Claimant averring that they were aware that she was paid Kshs. 8,000/- a month and Kshs. 8,800/- a month from October 2014 till May 2016. The Respondents denied assaulting the Claimant and averred that the investigations revealed the allegations by the Claimant as baseless and frivolous. They averred that they were aware that the Claimant absconded her place of work and that she did not resign. They averred that the Claimant took 43 days leave in the course of her employment.

3. The Claimant and the 2<sup>nd</sup> Respondent as well as Monica Nduta Ugi for testified for the Respondents. The Claimant stated that she was employed as a househelp and worked for the Respondents. She stated that she used to wake up at 5.00am and begin cleaning then make breakfast for the family and continue working until late in the evening. She testified that she was assaulted by the 2<sup>nd</sup> Respondent and an AP officer Zablon Karanga. She stated that that the assault took place at the rural residence of the Respondents and that she reported the incident and was issued with a P3 form but the investigations stalled leading to her complaints about it. She was cross-examined by counsel for the Respondents and stated that she did not know why the investigations found her allegations baseless. She stated that she would make breakfast for 4 people but the 2 Respondents were the only residents at the home as the others came and went. She testified that the children worked at the office which was near the home and she would make tea and take it to the office. She said she did not have off days except for an hour long break on Sundays and the time she would be permitted to see her children during the school holidays for a day or so. She admitted being given assistance by the 2<sup>nd</sup> Respondent which was recovered through deductions. She denied signing the leave form the Respondents had exhibited.

4. The 2<sup>nd</sup> Respondent testified and stated that she was the managing director of Zocom Ltd and that the company dealt with security and protective wear and training where need arises. She stated that the 1<sup>st</sup> Respondent was her husband and the chairman of the company. She stated that one of the benefits she was entitled to as managing director of the company was the services of a cook, gardener and a security guard at the home. She stated that the Claimant was employed and her duties were to make breakfast and clean the house, and in the evening she would prepare the ingredients for supper for the 2<sup>nd</sup> Respondent to cook. She stated that the Claimant resided in the servant quarters and that the clothes were cleaned by the laundryman. She testified that it was totally untrue that the Claimant worked from 6.00am till midnight and that the Claimant never requested for overtime pay. She stated that the Claimant went on leave and that the Claimant was the one who signed the leave form before the court. She was cross-examined by the counsel for the Claimant and she testified that she did not give the Claimant any duties in the rural home. She stated that on 2<sup>nd</sup> and 3<sup>rd</sup> May the Claimant had been sent to the rural home to help with cleaning and that she cleaned dishes on 2<sup>nd</sup> and 3<sup>rd</sup> May 2016. She stated that the company's business was not cleaning her matrimonial home and that part of the benefits she received are the services the Claimant gave. She stated her children are grown up and that she used to receive visitors.

She said that there was a standing resolution that the company directors would get the benefit. She stated that she supervised the Claimant at home as the wife of the 1<sup>st</sup> Respondent. She stated that the HR manager never came to see for herself whether the house was clean. The Claimant would seek permission from her and finally from HR.

5. The 2<sup>nd</sup> witness for the Respondents, Moniaca Nduta Ugi testified that she was the HR and Administration manager and that she knew the 2 Respondents as her bosses. She stated that they were directors and shareholders of the company. She stated that the Claimant was employed at the Respondents' residence and that the Claimant was paid Kshs. 8,000/- a month by Zocom for providing services at the residence. She stated that the immediate supervisor of the Claimant was the 2<sup>nd</sup> Respondent and that the Claimant would get instructions from her supervisor. On leave, the Claimant would seek the permission of her supervisor and thereafter the form would be taken to HR for processing of leave. She stated that the Claimant went on leave. She testified that the Claimant was not dismissed. She stated that the Claimant did not have a contract and that the Claimant had stated that she did not need a contract. In cross-examination she stated that her roles included staff welfare and that she would follow up where employees work. She admitted that she never went to supervise the Claimant and that the directives to the Claimant were issued by the 2<sup>nd</sup> Respondent. She stated that the directors have a matrimonial home and that the company has no business at the matrimonial home.

6. The parties filed submissions and the Claimant submitted that the real questions in the matter were whether the Respondents were the employers of the Claimant or whether she was employed by Zocom Limited and secondly who terminated the contract of employment. The Claimant submitted that there was no economic benefit her work brought to the company and that the work was for the benefit of the Respondents in the matrimonial set up. She submitted that on the basis of the case of **Dynasystems For Trade and General Consulting & Others v Moseley [2018] UKEAT/0091/17/BA** the application of the test as to whose benefit she discharged her duties and the contractual proximity between her and the Respondents would reveal her employment by the Respondents. The Claimant submitted that the constructive dismissal was at the instigation of the employer. She cited the case of **Western Excavating Ltd v Sharp [1978] 1 ALL ER 713** for the arguments on the constructive dismissal. The Claimant submitted that she did not abscond duties but resigned and that her resignation was immediate upon the breach which was the assault. She relied on the case of **British Home Stores Ltd v Burchell [1980] ICR 303** on the issue of the allegations made. She sought the grant of relief in respect to the overtime citing Section 10 of the Employment Act which obligates the employer to give employment particulars including hours of work and the Claimant argued that the Respondents by failing to provide such evidence did not dislodge her testimony on the issue. She thus sought an entry of judgment as claimed in her suit.

7. The Respondents in their submissions stated that the suit instituted against the Respondents is materially defective for being instituted against the wrong parties. The case of **Felistus K. Masai v Kask Investments Ltd [2018] eKLR** was cited for the proposition that the suit was instituted against the wrong party. The Respondents stated the issues for determination were

- i. Who is the Claimant's employer,
- ii. Was the Claimant's employ terminated by way of constructive dismissal or at all and is she entitled to the relief sought?
- iii. Who is to bear the costs of the suit?

The Respondents submit that the issue of who her employer was has to be considered on the basis of **Salmon v Salmon & Co. Limited [1897] AC 22** which held that the directors of Zocom Limited were distinct and separate legal persons in law from the company. The Respondents submitted that the Claimant had therefore sued the wrong parties. As to the second issue, the Respondents submitted that even assuming that the Claimant was employed by the Respondents, the Claimant was never terminated by way of constructive dismissal or at all. The Respondents submit that the version of events the Claimant gave were denied by the 2 witnesses for the Respondent. The Respondents cited Section 107(1) of the Evidence Act as well as Section 3(4) on the burden of proof and when a fact is not proved. The Respondents urged the dismissal of the claims for overtime as the Claimant could not work for 18 hours on house chores for a house with only two people living in it. The Respondents cited the case of **George Ogwen v Autolitho Limited [2018] eKLR** for the argument that the Claimant could only claim what was in breach within 3 years and no claim was made or request for payment sought in respect of the overtime. The case of **Ragoli Ole Manadiagi v General Cargo Services Limited [2016] eKLR** was also cited for the same proposition on overtime. The Respondents submitted that the Claimant did not identify the specific holidays she worked and no evidence was adduced on the days worked. The cases of **Moses Agugo v Metric Annex Hotel [2014] eKLR** and **Pius Kipruot Keter v Fanikiwa Limited [2014] eKLR** were cited for the overtime claims. The Respondents submit that the claim for leave was also untenable since she went on leave and was not entitled to severance pay as she was a contributor to NSSF.

8. The Claimant was employed by the Respondents. Applying the control test and Section 2 of the Employment Act, the Respondents were the employer of the Claimant. The leave form the Claimant is shown to have filled is not a contract of employment and therefore was not the proof of employment as the Respondents sought to display. The Claimant seeks to recover for overtime and severance pay which are not payable as she was not able to prove she was at work from 6.00am till midnight. It is highly unlikely that she worked for 18 hours in a house occupied by 2 people who were away at work on weekdays. In the claim, she sought leave and there being evidence on her part that she went on leave to sort out issues to do with her children during the school holidays, the only inference is that she went on leave from time to time. Regarding her dismissal, it is clear that she was assaulted sometime between 2<sup>nd</sup> and 3<sup>rd</sup> May 2016. This was confirmed in testimony and via the P3 form filled. She accuses the 2<sup>nd</sup> Respondent and an AP officer one Zablon Mahinga with the offence. Though the investigations stated the allegations to have been baseless, the P3 form and the narrative the Claimant and the 2<sup>nd</sup> Respondent give indicate there was something untoward that took place in the rural home of the Respondents. It was there that she was cleaning dishes on 2<sup>nd</sup> and 3<sup>rd</sup> May. It is where she says she was assaulted by the 2<sup>nd</sup> Respondent. As the assault preceded her disappearance from the workplace, it is clear this was classic constructive dismissal. The Claimant would therefore be entitled to recover damages for the dismissal. As the claims for unpaid leave, overtime and severance pay failed, the Claimant will have judgment as follows:-

- i. Damages for unlawful dismissal at 6 months – Kshs. 70,200/-
- ii. One month's salary in lieu of notice – Kshs. 11,700/-

iii. Costs of the suit.

iv. Interest on i) and ii) at court rates from date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 8<sup>th</sup> day of April 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

Deputy Registrar