



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 196 OF 2017

HILDAH MWANGALE.....CLAIMANT

VERSUS

RIJABI RISIQUOT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 03.02.2017 through Nyabena Nyakundi & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) A declaration that the termination of the claimant's services was unfair, devoid of procedure and unlawful.
- 2) That the claimant be paid the terminal benefits as enumerated above totalling to Kshs. 260, 815.39 (being one month salary in lieu of notice Kshs. 13, 800.00; leave for 2 years Kshs. 22, 292.31; house allowance for 2 years 15% of 12, 000 x 24 months Kshs. 43, 200.00; service gratuity 15/26 x 13, 800 x 2 Kshs. 15, 923.00; 12 months compensation for unfair loss of employment 12 x 13, 800.00 Kshs. 165, 600.00).
- 3) A certificate of service.
- 4) The Honourable Court do issue such orders and directions as it may deem fit to meet the ends of justice.
- 5) The respondent to pay costs of the suit.
- 6) Interest at Court rates for the above.

The claimant has pleaded and alleged as follows in the memorandum of claim:

- a) The respondent is a Nigerian adult of sound mind working for gain in Nairobi.
- b) On or about 02.10.2010 the respondent orally offered the claimant employment as a house help with a basic salary of Kshs.12, 000.00.
- c) The claimant worked with due diligence and faithfulness for the respondent until on or about 31.10.2016 when the respondent's wife verbally terminated her services with immediate effect.
- d) The termination was unfair for want of notice,, due procedure and valid reason.
- e) The claimant has severally tried to meet the respondent for agreement on terminal dues but unsuccessfully so. The respondent has failed to give her audience.
- f) She worked without annual leave being given or paid for, no housing accommodation and no house allowance.

The matter had proceeded for hearing ex-parte and judgment delivered by the Court on 08.06.2017. By an application dated 31.10.2017 the respondent applied that the judgment be reviewed and by the ruling delivered on 18.05.2018 the Court ordered:

- a) Judgment herein is set aside to allow for the call of the defence and its case.
- b) The claim and the evidence by the claimant is hereby preserved as part of the Court record.
- c) The respondent shall make a copy of the filed reply to the statement of claim available to the Court as part of its formal records.
- d) Costs herein awarded to the claimant.

The reply to the statement of claim on record appears to have been filed on 10.04.2017(as exhibited as HM3 on the replying affidavit of Hildah Mwangale filed on 04.07.2017) through Okoth Okwemba & S.M & Associates Advocates.

The respondent pleaded and alleged as follows:

- a) She is a housewife and denied employing the claimant.
- b) She denied that she was a man and therefore she could not be having a wife as alleged in the memorandum of claim or be a man as alleged in the memorandum of claim.
- c) She denied employing the claimant and denied the claimant's account on circumstances of termination and the prayers made for the claimant.

The respondent prayed that the suit be dismissed with costs with interest on costs.

After the ruling of 18.05.2018 the suit was severally fixed for hearing but did not proceed and the parties' respective cases were closed without the claimant being cross-examined and the respondent attending Court to testify. Parties were directed to file final submissions and they complied.

The only evidence on record is therefore the claimant's evidence that was preserved by the ruling of 18.05.2018.

The **1st issue** for determination is whether the parties were in a contract of service. The claimant testified on 06.06.2017 starting at 04.00pm. The claimant testified as follows:

- a) She was employed as a house help by the respondent effective 02.10.2014 at Kshs. 12, 000.00 per month and she was paid in cash.
- b) On 31.10.2016 her employment was stopped. It was on Friday 28.10.2016 when the respondent told the claimant to explain why the claimant had allowed the respondent's husband to touch the claimant. Further, when the claimant reported on Monday 31.10.2016 she was terminated from her job. There was no notice or hearing. The respondent was in the store while her husband was eating at the kitchen.
- c) The claimant testified that the respondent employed her, gave her duties and paid her salaries.
- d) She prayed for notice pay, leave pay, house allowance because she was not resident, and service pay because no NSSF was remitted.

The Court has considered the evidence and returns that the claimant has established on a balance of probability that the respondent employed her. It is submitted for the respondent that she is a woman and the claimant pleaded that the respondent's wife terminated her employment suggesting that the respondent was a man. The Court has considered the respondent's replying affidavit sworn on 14.05.2017. She does not deny her identity and the Court returns that the claimant as stated sufficiently identified the respondent as the wife and husband who used the same name and the suit will not be defeated merely by reason of the alleged improper party before the Court. The pleadings and the evidence sufficiently identify the respondent as the employer and the parties were in employment contract. In evidence the claimant identified the respondent as a "**she**". In any event the Court considers that the wife and husband would be equally and jointly or severally liable as employers in the instant case. There was no evidence to defeat the marriage relationship as per the claimant's evidence and pleadings. The Court returns that parties were in employment relationship.

The **2nd issue** is whether the termination was unfair. The evidence is that the termination was without due notice and a hearing per section 41 of the Employment Act, 2007. The reason for termination namely touching the husband was not established and if it happened it was not established if it was inherently a misconduct and relating to the respondent's operational requirements as envisaged in section 45 of the Act. The termination was unfair in substance and procedure.

The **3rd issue** for determination is whether the claimant is entitled to payment as prayed for. The Court has considered the period served with a clean record. The Court has considered that the service had no definite tenure. Taking all circumstances into account and the respondent having not established any mitigating factor, the claimant is awarded 6 months compensation under section 49 of the Act at Kshs.12, 000.00 per month making **Kshs.72, 000.00**. The claimant is entitled to a certificate of service under section 51 of the Act. She is awarded pay in lieu of annual leave under section 28 of the Act at **Kshs. 22, 292.31** as prayed for. There was no termination notice and she is awarded **Kshs.12, 000.00** being one month pay in lieu thereof and under section 35 and 36 of the Act. The claimant prayed for house allowance. Whereas she was not housed, her case was that the agreed consolidated pay was Kshs.12, 000.00 per month as envisaged in section 31(2) of the Act. There was no contractual or statutory justification for the claim and it will fail. As submitted for the claimant there being no NSSF contribution or

alternative pension arrangements the claimant is entitled to service pay or gratuity as prayed for making **Kshs. 15, 923.08** as reasonable under section 35(1) (c) of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The termination of the claimant's employment was unfair.
- 2) The respondent to pay the claimant **Kshs. 122, 215.39** by 01.07.2019 failing interest at Court rates to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to deliver to the claimant the certificate of service by 15.06.2019; and the respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 24th May, 2019**.

BYRAM ONGAYA

JUDGE