



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1559 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

SILVIA ANYESI.....CLAIMANT

VERSUS

RAHMA MOHAMMED.....RESPONDENT

JUDGMENT

The claimant was employed by the respondent as a domestic worker from 29th July 2009. According to the claimant she worked diligently for the respondent until December 2015 when she took maternity leave. While on maternity leave she looked for a reliever for the respondent and resumed duty on 4th January and continued working until 27th May 2016 when the respondent terminated her employment.

The respondent however states that the claimant was working for her while she was living in Nairobi South C and the claimant was living in Kibera, reporting to work every morning. That she moved houses from South C to Langata in December 2015 with full knowledge of the claimant. That the claimant did not report for duty from January 2016 despite the respondent's persistent calls. That the claimant resurfaced in May 2016 with her demands.

When the case came up for pre-trial on 19th December 2017, the court referred the parties to the County Labour Officer, Nyayo House, Nairobi, for conciliation.

According to the report of the Conciliator, the claimant appeared before her in person while the respondent sent her lawyer, who made submissions on her behalf.

After hearing the parties the County Labour Officer, J. K. Katama made the following findings –

From the above submissions, there is no doubt that there existed a contract of employment between the Respondent and the Claimant. The contract of employment was verbal and therefore, binding as per the Provisions of Section 8 of the Employment Act 2007. Under Section 74(1) of the said Act it was the Respondent's duty to keep and maintain a written record of her employee which she did not.

It is my observation that in December 2015 the Claimant delivered her baby on 23rd and the Respondent was aware of the same. Further, the Respondent paid the Claimant Kshs.8,600.00 via M-pesa transfer on 28th May 2016. This therefore, confirms that the Claimant was in active employment from January 2016 to May 2016 respectively. This also confirms to the fact that the Claimant did not abscond duties as alleged by the Respondent, as it is a requirement that either party to a contract of employment that such contract shall be terminable by not less than one month's notice to be given by either party in writing or otherwise by the payment by either party in lieu of notice of not less than one month's wages. It is clear from the above that the Respondent would have retained the May 2016 wages as her legal entitlement in respect of notice pay. She proceeded to pay the same, thus Respondent's action confirms clearly that she terminated the Claimant from employment in May 2016.

It is my observation that, in the absence of records, the payment made for Kshs.8,600 via M-pesa was the actual monthly wages that was made to the Claimant to which wages was less than the Statutory Minimum Wage Guideline Legal Notice No. 197/2013 which came into effect from 1st May 2013, and Legal Notice No. 117/2015 respectively which came into effect from 1st May 2015. The same applied to her as follows:-

Legal Notice No. 197/2013

Basis pay Kshs.9,780.00

Housing allowance 15% of basic pay Kshs.1,467.00

Gross pay Kshs.11,247.95

Legal Notice No. 117/2015

Basis pay Kshs.10,954.00

Housing allowance 15% of basic pay Kshs.1,643.00

Gross pay Kshs.12,597.10

Based on the findings the County Labour Officer made the following conclusions and recommendations –

“In view of the above observations, it is my considered opinion that the Claimant’s service were unfairly dispensed with on the 27th May 2016,

contrary to Section 41 of Employment Act 2007.

I would therefore proceed to recommend as follows:-

- 1. One month’s salary in lieu of notice Kshs.12,597.10*
- 2. Underpayment arrears as follows –*
 - i. Kshs.4,597.10 (Kshs.12,597.10 – 8,000.00) x 13 months*
that is June 2015 to May 2016 Kshs.59,762.30
 - ii. Kshs.3,247.95 (Kshs.11,247.95 – 8,000.00) x 23 months*
that is June 2013 to April 2015 Kshs.74,702.85
- 3. 18 months accrued leave pay at 1.75 per*
- 4. each complete month Kshs.13,226.95*
- 5. 3 months’ maternity leave pay at Kshs.37,791.30*
- 6. 8 months’ compensation for unfair termination Kshs.100,776,80*

Grand Total Kshs.298,857.30”

The claimant accepted the County Labour Officer’s recommendations while the respondent did not. The respondent filed written submissions in which it is submitted that the respondent was denied a right to be heard, that numerous family issues made attendance by the respondent impossible. On whether termination of the claimant was unfair it is submitted for the respondent that there was no proof. The respondent cites Section 47(5) of the Employment Act, which provides that –

47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The respondent further relies on the case of *Mary Kitsao Ngowa and 36 Others –VS- Krystalline Limited* in which the court stated –

“..we must also appreciate the fact that..... court cannot be said to have erred on an issue that was never argued before it..”

The respondent argues that lack of documentation by the claimant meant that her case was not proved.

Determination

As observed in the report of the County Labour Officer, the employment contract between the claimant and the respondent is not denied. The contract was verbal. Under Section 9 of the Employment Act, it is the duty of the employer to prepare a written contract and ensure it is

signed by the employee after the contents therein have been explained to the employee in a language the employee understands. It is further the duty of the employer to keep records of the particulars set out in Section 10(2) and (3) and Section 74(1) of the Employment Act and to produce the records where required.

Section 10(7) provides that the burden of proof shifts to the employer in any proceedings where the employer fails to produce the prescribed records.

In this case therefore the respondent cannot bemoan the lack of records to prove the claimant's case as the burden of proof was the respondent's. The Labour Officer was entitled to make the presumptions as provided in Section 10(7) that the claimant's averments were true as the respondent failed to rebut the same.

Section 48(1) of the Labours Institutions Act provides as follows –

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

The Labour Officer was therefore under a statutory obligation, as is the court, to apply the statutory minimum terms in tabulating the terminal dues payable to the claimant hence the application of the statutory minimum wages applicable to the claimant.

I note that the respondent in its submissions has not offered anything even on items it is not contesting.

The respondent has not denied that the claimant took maternity leave in December 2015. The respondent has not commented on claimant's averments that she looked for a replacement for her while on maternity leave but because the respondent was not satisfied with the work of the two relievers she recommended, the claimant had to resume duty on 4th January 2016.

The respondent has not even confirmed the salary that was paid to the claimant or denied that the claimant never took leave for the entire period she worked for the respondent.

The foregoing being the case, I confirm the recommendations of the County Labour Officer with the expectation of compensation. I note that the Labour Officer did not include service pay which the claimant is entitled to under Section 35(5) of the Act, but I will not add the same either as the claimant has accepted the tabulation of the Labour Officer.

I am giving the respondent the benefit of doubt on the question of unfair termination thus only awarding statutory benefits as follows –

1. One month's salary in lieu of notice Kshs.12,597.10
2. Underpayment arrears as follows –
 - i. Kshs.4,597.10 (Kshs.12,597.10 – 8,000.00) x 13 months
that is June 2015 to May 2016 Kshs.59,762.30
 - ii. Kshs.3,247.95 (Kshs.11,247.95 – 8,000.00) x 23 months
that is June 2013 to April 2015 Kshs.74,702.85
3. 18 months accrued leave pay at 1.75 per
each complete month Kshs.13,226.95
4. 3 months' maternity leave pay at Kshs.37,791.30
5. 8 months' compensation for unfair termination Kshs.100,776,80

Since the claimant was in person, the respondent will pay her Kshs.10,000 costs to cover her reasonable expenses and disbursements in respect of the case. I thus award the claimant a total of **Kshs.208,080.50**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE