



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1181 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**CAROLINE KHAMASI SIRIGOI.....CLAIMANT**

**VERSUS**

**JENIFFER NZAMBI MUNUVE.....RESPONDENT**

**JUDGMENT**

The claim herein is for Caroline Khamasi Sirigoi who alleges that she was employed by the respondent as a house help on 13<sup>th</sup> February 2004 at her residence in Sun-View Estate and was unfairly dismissed from employment on 15<sup>th</sup> November 2011. She prays for the following remedies –

1. Kshs.1,045,1121- from the Respondent as particularized below:-

- (i) Underpayment of Kshs.1,835 per month from 13<sup>th</sup> February 2004 to 31<sup>st</sup> April 2006 for 14.5 months..... Kshs.26,607.50
- (ii) Underpayment of Kshs.2,695 per month from 15<sup>th</sup> May 2006 to 31<sup>st</sup> December 2007 for 20 months..... Kshs.53,900
- (iii) Underpayment of Kshs.1,695 per month from 15<sup>th</sup> January 2008 to April 2009 for 16 months..... Kshs.27,120
- (iv) Underpayment of Kshs.2,630 per month from 1<sup>st</sup> May 2009 to 31<sup>st</sup> December 2009 for 8 months..... Kshs.21,040
- (v) Underpayment of Kshs.1,130 per month from 1<sup>st</sup> January 2010 to April 2010 for 4 months..... Kshs.4,520
- (vi) Underpayment of Kshs.17,431 per month from 15<sup>th</sup> May 2010 to 15<sup>th</sup> November 2011 for 18.5 months..... Kshs.32,254.50

Total underpayments    Kshs.11,218

- 2... Leave due for 164.5 days x 6,743..... Ksh36974.12
- 3... Leave Travelling Allowance for 8 years x 6,743..... Kshs.4,800
- 4... Public Holidays for 7 x 8= 56 x 6,743..... Kshs.12,586.93
- 5... Overtime 3 hours per day for 2,444 days x 1.5 x 6742/30 Kshs.823,994.60
- 6... Termination Notice..... Kshs.6,743

7... Severance Pay-15 x 8 x 6,743..... Kshs.26.972

8... Gratuity for 8 years- 18/30 x 6,773..... Kshs.32,366.40

**Total claim Kshs.1,055.112**

9... Costs

10. Interest thereon

11. Any further orders the Court shall deem fit to award.

The respondent filed response to the statement of claim in which she denies employing the claimant on 13<sup>th</sup> February 2004. The respondent states that she occasionally engaged the claimant on casual piece rate basis and paid her in full upon completion of any work assigned to her. She denied that the claimant worked for her daily from 7.30 am to 6.45 pm from Monday to Saturday every week as alleged. She states that she never engaged the claimant on permanent terms nor even paid her a monthly salary. She prays that the claim be dismissed with costs.

At the hearing the claimant testified on her behalf and called two witnesses.

The claimant CW1 testified that she started working for the respondent as a domestic worker on 3<sup>rd</sup> February 2004. Her work entailed washing clothes, utensils, house cleaning, gardening and cooking. That she reported for work at 7.30 am and worked until 6.45 pm for 6 days a week from Monday to Saturday. She rested on Sunday. She did not go on leave for the entire period she worked for the respondent.

She testified that on 8<sup>th</sup> November 2011, she asked for permission to travel home. When she came back after one week, she found that she had been replaced. That the respondent promised to pay her terminal benefits but did not do so, prompting her to file this suit. She stated her claim against the respondent was as set out in her statement of claim being underpayments, leave, public holidays and notice.

She stated she knew the respondent, her husband Dr. Timothy King'ondy and the whole family as she became part of the family while she was working for the respondent.

CW2 ALICE ASANDI testified that she knew the claimant who lives in Kibera. That she worked in Sunview Estate between 2003 and 2005 for a lady by the name Janet. She knew the claimant also worked for a lady by the name Mama Jeniffer at Sunview Estate from morning to evening as they went to work together in the morning but she left work before the claimant. That the claimant worked till 2008. When she met the claimant in 2011, the claimant told her she had a problem with the employer, that when the claimant was sick, the employer told her there was no work and she was not paid her benefits.

Under cross examination she stated she worked in Sunview for 2½ years and with the claimant for one year.

CW3 ALICE MUSIMBI testified that she was employed in 2006 and met the claimant in Sunview Estate in 2009. That the claimant worked in House No. 97 while she worked in House No. 162. That she had to pass House No. 97 while going to House No. 162. She testified that there were casuals at the gate but the claimant and herself were not casuals.

### **The Respondent's Case**

The respondent testified that she has lived in Sunview Estate Nairobi since 1992, in her own house. She lives with her husband. Her two sons are grown up, one being 33 years and the other 29 years old. That she retired in 2013, then went to work at the County Assembly of Kitui until 2017. Now she runs her own business.

The respondent testified that the claimant used to do some piecework for her after she stopped having a live-in house help in 2001 when her children were big. That she met the claimant in 2004 among people who used to sit outside the gate of the estate waiting for work. The work she engaged the claimant for was ironing clothes which was done once a week. She also engaged the claimant once a week to Hoover the house which has a wall-to-wall carpet and cleaning the compound both in front and the back. She testified that the claimant was never employed by her on a daily basis or weekly or monthly basis. She only looked for the claimant whenever she had work to be done. She also engaged other casual workers, including Alice Musimbi (CW3) from time to time. She testified that her clothes are machine washed and dried so she only needs a person to do the ironing which was done mainly on weekends when she was not going to work, or on weekdays when she was on leave. She also had a few plants which were watered.

The respondent testified that while she was working she left the house for work at 7 am so it was not true that the claimant reported to work at 7.30 am and left at 6.30 pm. That there was nobody in her house at 7.00 am. That she left with her husband who was working at Kenyatta National Hospital while she worked at Treasury. She testified that she never left the claimant in her house. She only called the claimant when she needed her and when the claimant was not available she would get somebody else to do the work. The claimant was however the one whom she called regularly as she trusted her.

She testified that she did not pay the claimant monthly, but upon completion of the piecework, usually Kshs.200 or Kshs.250 depending on the work. The claimant took about one hour to do the ironing while hoovering took her about 30 minutes.

She stated that there was no time she accumulated the claimant's money as she always paid upon completion of the work. She further testified that the claimant did not work on public holidays, unless it was piece work she was doing on a particular public holiday for which

she was paid.

She testified that the reasons she stopped engaging the claimant was because the claimant informed her that she was committed elsewhere. This was around 2011. That around that time she was not able to find the claimant at the gate. That after a while she was served with summons. She denied that the claimant asked for sick off on 5<sup>th</sup> November 2011 as alleged.

The respondent testified that she did not owe the claimant anything.

She testified that she knew Alice Musimbi who also worked for her occasionally as a casual. She however did not know Alice Kasandi and the evidence of Alice Kasandi that she could see the respondent's house was not true because the estate has 3 rows of houses and her house is in the middle row and not visible from the gate.

She urged the court to dismiss the claim.

RW2 TIMOTHY MUOKI KING'ONDU testified that he is the husband to the respondent and is a medical doctor. He used to work in the public service but is retired. He currently practices privately at Nairobi Hospital.

He testified that he lives in Sunview House No. 97 with his wife, the respondent. RW2 testified that he used to be a Director at Kenya Medical Training College, Nairobi.

He testified that initially when this matter came up he could not remember who the claimant was but he recognised her when he saw her in court. His wife used to engage the claimant to help with housework. That sometimes the claimant came alone and other times she came with other persons. That it was not only the claimant who worked for them. That the claimant was paid upon completing the work she was doing and was never engaged continuously.

He reiterated the respondent's averments that they have a washing machine which washes and dries clothes so they only engage casuals to do the ironing and to Hoover the house which are both done once a week and to clean the concrete part of the compound which is done once every two weeks. He stated that they only had a live-in house help until 2001. That after the children were grown they did not need a permanent person. That the respondent and himself did all the cooking. That both of them took breakfast at the house before 7 am and did not go home for lunch.

He testified that the claimant only worked when they were at home as they left the house at 7 am and returned at 6.30 pm. That the house has a fence and a gate and nobody can get in when the gate is locked.

He denied that the claimant took care of his deceased father while living with them. He testified his father had a live-in nurse. He testified that he was not aware if the claimant attended his father's funeral in 2008.

### **Determination**

I have considered the pleadings evidence and submissions of the parties. The issues for determination are whether the claimant was employed by the respondent on regular or casual terms, whether she was unfairly terminated and if she is entitled to the prayers sought.

Section 47(5) of the Employment Act, 2007 provides that –

**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.**

In this case, it is not contested that the claimant worked for the respondent. The only contested fact is whether the claimant was a regular or what is commonly referred to as a "*permanent*" employee of the respondent or she was employed on piece rate whenever the respondent needed her services.

Both the respondent and her husband RW2 testified that they left home every morning at 7 am and did not return until 6.30 pm. Their eldest child was in university while the younger child was picked at 6.30 pm. It is their evidence that there was no one at home between 7.00 am and 6.30 pm.

The claimant on the other hand testified that she reported for work daily at 7.30 am and left at 6.30 pm after cooking dinner. The claimant however agreed with the respondent that the only work in the house was ironing clothes, hoovering the carpet and cleaning both the front and backyard. I would agree with the respondent that the nature of work was such that there would be no need to have a worker permanently as that kind of work would not be done daily.

The evidence of the claimant's witnesses also did not seem to be logical. Alice Kasandi testified that she worked in Highview between 2003 and 2005 and would therefore only have been with the claimant for between one and two years. She testified that the claimant worked till 2008 and when they met in 2011 the claimant told her she had a problem with the employer. Under cross examination she stated she met the claimant in 2008, which would mean that she did not work with her in 2004 – 2005.

She also gave conflicting evidence about the time of reporting to and leaving work. Under cross-examination, she stated that she reported at work at 8 am while the claimant reported at 7.30 am. This would mean that they did not go to work together as she testified in her evidence

in chief. She also testified that she did not know what time the respondent reported for work.

CW3 Alice Musimbi testified that she met the claimant in Sunview Estate in 2009. She again testified that she started working in 2006 when she was invited by the claimant to go and work in House No. 162. She testified that she reported for work at 7.30 and left at 4 pm. Again, she testified that she left work at 5 pm.

From the evidence on record, I am not persuaded that the claimant worked for the respondent on a daily basis from 7.30 am to 6.30 pm. I therefore find that she has not proved that she was engaged on "*permanent*" terms by the respondent.

The claimant further did not prove her prayers for underpayments, leave, leave travelling allowance, public holidays, overtime, notice severance and gratuity.

The result is that the entire claim is dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**