



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1437 OF 2015

MARGARET LIHABI NGAIRA.....CLAIMANT

VERSUS

NICK KARIUKI.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a house help around January 2015 and she served the Respondent in that capacity until around 29 July 2015 when her services were terminated.
2. On 8 September 2015, the Claimant instituted these proceedings alleging unfair termination of employment and breach of contract.
3. In the meantime and without serving the Respondent with the Court papers, the Claimant sought for and was employed afresh in December 2016.
4. The Claimant served the Respondent under the new contract up to April 2017.
5. When the Cause came up for hearing for the first time on 25 January 2018, there was no affidavit of service on record, and the Court directed the Claimant to file one before further directions could be issued.
6. On 21 February 2018, the Respondent filed his *Response* and the Cause was eventually heard on 17 October 2019.
7. The Claimant and the Respondent testified and both adopted their filed witness statements. The Claimant filed her submissions on 14 November 2019, long after the agreed timelines agreed with the Court (the Court will disregard them).
8. The Court has considered the pleadings and evidence on record and has adopted the Issues as were proposed by the Claimant.

Employment relationship

9. Although identified by the Claimant as an Issue, the fact that the Claimant was employed by the Respondent from January to July 2015 and later from December 2016 to April 2017 was not denied.

Whether there was unfair termination of employment

10. The Claimant and the Respondent separated around 29 July 2015. In contending that the termination of her employment was unfair, the Claimant testified that on the material day, the Respondent's wife called her on the phone around midday and instructed her to pack and leave as her services were no longer required.
11. The Claimant asserted that the termination of her employment was unfair because she was not issued with a notice nor given reasons.
12. The Respondent, on the other hand, testified that the Claimant's employment was terminated on the ground of misconduct the particulars being that the Claimant had fought with a gardener, and caused the gardener to be arrested.
13. The Respondent also testified that the Claimant had previously fought with a watchman in April 2015.
14. On the process preceding the dismissal, the Respondent testified that he had summoned the Claimant around 26 July 2015 to give her side of the story, and that he was not satisfied with the explanation.

15. The Claimant denied fighting with the gardener and insisted that it is the gardener who beat her up.
16. The Court is satisfied from the evidence on record that the Claimant fought with a gardener and caused his arrest, and that this precipitated the dismissal by the Respondent.
17. The Court is also satisfied that the Claimant had been involved in a previous fight, with a watchman.
18. The conduct of the Claimant warranted summary dismissal, and the Court finds that this was a case of summary dismissal not requiring notice.
19. The Court also finds the Claimant lacked candour for having instituted legal proceedings against the Respondent for unfair termination of employment but hid that fact from him for over a year, and even went ahead to secure fresh employment from him. This conduct of the Claimant show lack of honesty.
20. The Court finds that the summary dismissal of the Claimant was fair.
21. *Compensation and pay in lieu of notice*, therefore, are not available as remedies.

Breach of contract

Underpayments

22. The Claimant sought Kshs 22,987/- on account of salary underpayments. Her evidence was that she was earning Kshs 7,000/- per month.
23. The Respondent maintained that the Claimant was earning Kshs 11,000/- per month. He did not produce any pay records for the period.
24. Legal Notice No. 197 of 2013 was the one applicable in 2015 until it was amended by Legal Notice No. 117 of 2015. The prescribed wage for a house servant was Kshs 9,780/-.
25. The Court in effect finds that the Claimant was underpaid and allows the head of the claim.

Overtime

26. The Claimant alleged that she used to work from 5.00 am to 10.00 pm every day and that she also worked during public holidays. She testified that she started work that early to prepare breakfast.
27. The Respondent denied that the Claimant worked from 5.00 am to 10.00 pm. He testified that together with the wife they would take breakfast at 9.00 am before heading out to work. During public holidays, he testified that the wife used to do the household chores.
28. The Claimant did not interrogate in any useful way the Respondent's testimony.
29. The Court finds that the Claimant failed to lay sufficient evidential foundation for this head of the claim.

Pro-rata leave

30. The Claimant sought Kshs 5,161/- being *pro-rated* leave.
31. The Respondent did not challenge this evidence and because leave is a statutory entitlement, the Court will allow this head of the claim.

Certificate of Service

32. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant.

Conclusion and Orders

33. The Court finds and holds that although the Claimant failed to establish unfair termination of employment, she proved that there was a breach of contract, and awards her

(a) <i>Pro-rata</i> leave	Kshs 5,161/-
(b) Underpayments	Kshs 22,987/-
TOTAL	Kshs 28,148/-

34. Respondent to issue a certificate of service.

35. No order as to costs.

Delivered, dated and signed in Nairobi on this 15th day of November 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Khalwale instructed by Khalwale & Co. Advocates

For Respondent Ms. Muema instructed by J.N. Muema & Co. Advocates

Court Assistant Lindsey