



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1957 OF 2017**

**ELIZABETH KADALI CHUNGA.....CLAIMANT**

**VERSUS**

**ZAHRA RASHID T/A**

**MUTHAIGA EYE CLINIC.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the Statement of Claim dated 29/09/2017 contending that she was employed by the respondent as a house help (Nanny) from 14.12.2011 earning Kshs.14,117 per month. She further averred that she worked diligently until 14.7.2017 when the respondent terminated her employment and refused to pay her terminal dues. She contended that the termination was unlawful and unfair because there was no lawful reason cited and no prior notice or hearing was accorded to her. She therefore prayed for the following reliefs:

**a) A declaration that the Claimant's termination from her employment was unfair and unlawful.**

**b) One month's salary in**

**lieu of notice (14,117+4,000).....Kshs. 18,117**

**c) Salary for June 2017**

**(18,117 less 4,431 paid).....Kshs. 13,686**

**d) 14 days worked in July**

**2017 (14/26 x 18,117).....Kshs. 9,755.31**

**e) Leave for the year 2012**

**(21/26 x 14,117).....Kshs. 11,402.19**

**f) Overtime 2 hours daily for the**

**entire duration @ Kshs.87.1 hourly**

**rate (2 hours x 6 days x 4 weeks x**

**12 months x 6 years x 87.10 x 1.5).....Kshs. 451,526.4**

**g) Homework + tuition pay for**

**2 years (4,000 x 12 x 2).....Kshs. 96,000**

**h) 12 months' salary compensation**

*due to unfair termination and*

*loss of employment (12 x 18,117).....Kshs. 217,404*

*TOTAL.....Kshs.817,890.9*

*i) Certificate of service*

*j) Costs and interest at court rates.*

2. The Respondent filed her Response to Claim dated 13.11.2017 admitting that she summarily dismissed the Claimant for gross misconduct but averred the dismissal was on 14.6.2017 and it was lawfully done in accordance with the Employment Act. She further averred that the Claim herein is based on falsehoods and misrepresentation of facts and is not supported by any evidence. Finally, she averred that after the separation, she paid the claimant all her terminal dues and consequently prayed for the suit to be dismissed with costs.

3. The main issues arising from the pleadings are whether the termination of the claimant's employment was unfair and unlawful and whether the claimant is entitled to the reliefs sought. To answer the said questions both parties tendered evidence and filed written submissions.

#### **Claimant's case**

4. The claimant testified as Cw1 and basically adopted his written statement and produced documents as her exhibits. In brief she stated that she was employed by the respondent on 14.12.2011 as a nanny earning Kshs.14,117 per month under an oral contract but from 2015, a further agreement was verbally made whereby she was to assist the respondent's children with tuition and be paid an extra pay of Kshs.4,000. The said extra pay was however not paid but she continued to coach the children as agreed.

5. She further testified that on 14.7.2017, a Friday, she fell sick and went home with the keys to the respondent's house. The following day, the respondent called her to enquire why she went away with the keys to her house and caused her children to remain outside. She then fired her over the phone by directing her to leave the keys with Agnes, the other house help and not to report to work the following day. She contended that the termination was unfair because that was her first mistake and she was not called to any disciplinary hearing. She however admitted that on 14.6.2017, she left work before time and went away with the house keys but the respondent forgave her and the matter was resolved.

6. She further testified that, on 17.7.2017, the respondent's husband took her to the Accountants office, Alibahi & Associates where she was kept waiting at the reception for two hours before being given papers to sign for her terminal dues totalling to Kshs.4,043. She signed the papers and received Kshs.4,050. She admitted that there are some days she never signed the attendance register because she found the guard had left.

7. In cross examination, she admitted that she was not given an appointment letter for the work of giving tuition to the respondent's children but contended that she was told to assist the children to do homework. She however changed to state that she was given a small book to guide the children with their homework for two years from 2012 to 2013 when they were in kindergarten. She contended that she was working overtime sometimes up to 8pm but on being shown a copy of Attendance Register, she admitted that there are some days she arrived at 11 am. After being shown SMS correspondences between her and the respondent, she admitted that the agreed working hours was 10 am and 5 pm. She however contended that sometimes the respondent used to notify her to report as early as 8.30 am.

#### **Defence case**

8. The respondent testified as Rw1 and basically adopted her written statement dated 27.12.2017 in which she admitted that she employed the claimant from 14.12.2011 as House help. The working hours for the claimant was from 10.30 am to 6.30 pm and her duties included housekeeping, and ensuring that after the children returned from school between 3.30 pm and 4.30 pm, they took a bath. Rw1 further contended that the claimant was taking the children to their grandmother within the same compound at 6.30 pm before leaving for the day. She denied that the claimant was working overtime and contended that sometimes, she used to leave at 5 pm or even earlier. She further produced gate pass records to prove that the claimant was reporting between 10 am and 11 am, and leaving between 6 pm to 7 pm.

9. She testified that on 14.6.2017, the claimant locked the house and left with the key at 3.37 pm before the children arrived from school. As result, the children were stranded outside the house until she sent a taxi to bring them to the hospital where she works after the claimant failed to pick her calls or respond to SMS. Rw1 further contended that the claimant had left the house without cooking any food for the children. She contended that the claimant left without time before notice or explanation.

10. Rw1 further testified that the claimant reported to work the following day, 15.6.2017 at 10.30 am as usual and at noon, she called the claimant over the phone to enquire why she absconded work the previous day. In response the claimant denied any wrong doing and shouted back to her rudely. Sensing danger for her children who were 9 and 12 years old, Rw1 directed the claimant to leave her home and report back on 17.6.2017 for hearing in company of a colleague. Rw1 further contended that the hearing was done as scheduled on 17.6.2017 at her Auditor's office and despite the claimant's written apology letter dated 15.6.2017, she decided to dismiss the claimant on ground of absconding duty and insubordination. She also considered the welfare and security of her young children.

11. Rw1 denied the alleged tuition of her children by the claimant and contended that the claimant lacked the capacity to undertake the said task because the children were doing British Curriculum. She further denied that the children were in Nursery school in 2015 as alleged by the claimant. She contended that she only organised tuition for the children between November and December 2015, with respect to music,

French, and English language tuition by paid qualified tutors between 4 pm and 6 pm.

12. Rw1 also testified that she had advanced loans to the claimant to the tune of Kshs.25,000 from 2014 which was still outstanding as at the time of the separation. She further contended that she used to help the claimant with school fees for her children and also gift her with money during Christmas and also for transport while going for leave. She also contended as a result of alleged financial needs, the claimant refused to have her salary subjected to statutory deductions.

13. Finally, Rw1 denied the claim for the reliefs sought and contended that the claimant received all her dues and executed an agreement attesting that her dues had been paid. The dues paid included leave for one year, three months' salary in lieu of notice, service pay for 6 years and salary up to 14<sup>th</sup> June 2017 less PAYE, NSSF, NHIF and loan advance of Kshs.37,000 leaving a net of Kshs.4431.66.

14. She contended that the claimant exhausted her annual leave days and she produced leave records as proof. She further contended that she remitted NSSF contributions for the claimant from August 2013 till the separation but still paid her service pay for 6 1/2 years totalling to Kshs.51,500. She denied the claim for unpaid salary and contended that she paid the salary for 14 days in July although she never worked. She prayed for the suit to be dismissed with costs.

15. In cross examination, she maintained that the claimant absconded work on 14.6.2017 and she did an apology on 15.6.2017 after being suspended but she delivered the letter to the Auditor Alibahi on 17.6.2017. She denied knowledge whether the apology was written at the Auditor's office because she did not go there for the hearing on 17.6.2017. She admitted that the claimant never locked the children out during the 6 years' period except on 14.6.2017. However, she maintained that she dismissed the claimant for absconding and neglect of work. She contended that she explained the reasons for the termination to the claimant over the phone and also during the hearing at Alibahi's office.

16. She admitted that there some days she requested the claimant to report at 8 am but contended that it only happened on need basis and the claimant was released from work early. She further admitted she never issued the claimant with appointment letter or payslips. She stated that she advanced the claimant Kshs.10,000 in June 2014, Kshs.5,000 in December 2014, and Kshs.5,000 in September 2015. She further contended that the loan was recoverable by Kshs.1,000 per month from November 2015 but after some repayments, the claimant got more loans.

#### **Claimant's Submissions**

17. The Claimant submitted that she was dismissed on 14.7.2017 and not 14.6.2017 as alleged by the respondent. She contended that the Respondent withheld the gate records for 14/06/2017 to 14/07/2017 conveniently from the court in order to mislead the Court to believe that she was dismissed on 14/06/2017 and as opposed to 17/07/2017.

18. She further submitted that there was no valid reason to warrant the termination of her services as required by **Section 43(1) of the Employment Act**. She contended that the offence she committed on 14.6.2017 was forgiven by the respondent and as such there was no justification for the termination. She therefore urged that the failure to prove the reasons for termination rendered the termination unfair within the meaning of **section 45 of the Act**.

19. The claimant submitted further that, the Respondent did not produce any evidence to prove that she followed the mandatory requirement under **Section 41 of the Act** by according her a hearing before her services were terminated. She relies on Walter Anuro vs. Teachers Service Commission [2013] eKLR where the court observed that:

*“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness...”*

20. She also relied on Alphonse Machanga Mwachanya vs. Operation 680 Limited [2013]eKLR to urge that the employer is required to prove by evidence that the termination of his employee's services meets the legal requirements of procedural fairness set out under section 41 of the Employment Act.

21. As regards the claim for tuition allowance, the Claimant submits that her appointment was never reduced into writing contrary to **Sections 9 and 10 of the Employment Act** and as such under **Section 10(7) of the Act** the burden of proving or disproving an alleged term of employment stipulated in the contract is on the employer. She relied on Martin Ireri Ndwiga -v- Olerai Management Company [2017]eKLR where Mbaru J held that:

*“Therefore, where an employer fails to issue an employee with a written contract of service, the word of the employee is to be believed. The contract of service is not only useful to the employee but also protects the rights of both the employer and employee in the employment relationship...”*

22. Applying the foregoing holding and the statutory provision to the facts of this case, the claimant urged this Court to find that she was at some period during her employment tasked to assist the Respondent's two children with homework and award her the additional pay for tuition, which was never paid among other prayers sought in her Claim.

#### **Respondent's submissions**

23. The Respondent submitted that she has demonstrated by evidence that the Claimant's employment ended on 14/06/2017 and invited the court to look at Time Log In on 14/06/2017 at **page 58 of the Respondent's Bundle of Documents**; Claimant's letter dated 15/06/2017 at **page 19 of the Claimant's bundle**; and the Time Log In on 15/06/2017 at **page 60 of the Respondent's Bundle**. She averred that the

Claimant has not at all proved that her employment ended on 14/07/2017 as alleged and urged the court to hold that the Claimant's employment ended on 14/06/2017.

24. As regards the termination of the employment, the respondent submitted that the Claimant's absconding of duty was a lawful reason for dismissal as provided in **Section 44(4) of the Employment Act** as it amounts to gross misconduct. She contended that the Claimant's allegation in her testimony that the reason for leaving work at 3.37 pm on 14/06/2017 was due to sickness was not true because it was not pleaded in her Memorandum of Claim, and also because she never presented any doctor's certificate to prove the same. The Respondent further contended that the Claimant did not notify her that she was sick and even when she appeared at work on 15/06/2017, she never talked about the sickness.

25. The respondent submitted that she accorded the Claimant a disciplinary meeting on 17/06/2017 and after hearing her and not being satisfied with the explanation and apology, she dismissed her and issued her with a letter to that effect before paying her terminal benefits. She relied on ***Sotik Highlands Tea Estates Limited v Kenya Agricultural & Plantation Workers Union, Civil Appeal No. 23 of 2017*** where the Court of Appeal held that courts should avoid the temptation of imposing a higher burden of proof as regards due process.

26. As regards the reliefs sought, the Respondent submitted, that the Claimant did not adduce any documentary to prove her claim for overtime and that the said allegation is thus exaggerated and over-generalised. She however contended she has produced several communications to prove that the Claimant left her work place before 6:30 pm. She relied on ***Patrick Lumumba Kimuyu v Prime Fuels (K) Limited, Civil Appeal No. 18 of 2018*** where the Court of Appeal upheld my decision that an employee has the burden of proving the days he worked overtime or on public holidays and thereby departed from the position adopted by Mbaru J in the ***Martin Ileri case*** on that issue.

27. The respondent further submitted that the Claimant did not produce any evidence to prove that she offered any tuition to her children. She contended that she rightfully deducted the outstanding loan of Kshs.25,000/- advanced to the Claimant in the course of her employment from her exit pay/final dues and that **appendix 9 at page 73 of the Respondent's bundle of documents** details the account of the said loan.

28. As regards the claim for compensation, the respondent submitted she has demonstrated that the Claimant was fairly dismissed, and urged that the Claimant is not entitled to compensation for unfair termination. She relied on ***Miss Nduta Mbile v John Gachau Civil Appeal No. 299 of 2015*** where the court ruled that compensation should only be awarded where it merits and with reasons and that it is not automatic that a claimant will be awarded 12 months' compensation in damages.

29. Finally, she prayed for the suit to be with costs.

#### **Analysis and determination**

30. After considering the pleadings, evidence and submissions, it is clear that the claimant was employed by the respondent as a house help. The issues for determination are:

- a) Whether the Claimant's employment was terminated by the Respondent on 14/06/2017 or on 14/07/2017.
- b) Whether the Claimant was unfairly terminated from her employment by the Respondent.
- c) Whether the Claimant is entitled to the reliefs as prayed in the Memorandum of Claim.

#### **The Date of termination**

31. The termination letter issued to the Claimant upon dismissal is annexed at **page 62 of the Respondent's Bundle of Documents**, and it is dated 17/06/2017 and was duly signed and received by the Claimant. The claimant did not produce any other evidence or call any witness to prove that the termination occurred on 14.7.2017, or that she continued working for the respondent after she received the said termination letter. Consequently, I return that the Claimant was dismissed on 17/06/2017.

#### **Was the termination unfair**

32. Section 45(2) of the **Employment Act** provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) related to the employees conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed.

33. According to the termination letter dated 17.6.2017, the reasons for the termination of the claimant's employment were absconding duty and failure to perform work. She admitted to the said offence by the letter dated 15.6.2017 whereby she tendered an apology and also in her evidence when she stated that the said offence was the first one during her whole period of employment. The court finds that the respondent has proved a valid and fair reason for terminating the claimant employment because under section 44(4) of the Act the misconduct by the claimant on 14.6.2017, entitled her to summarily dismiss her.

34. Turning to the procedure followed, the claimant contended that she was not accorded any hearing on 17.6.2017 and instead she was kept at the Auditor's reception for 2 hours until the Auditor's secretary gave her papers to sign and thereafter paid her some money as terminal dues. The said contention was not rebutted by the respondent because the respondent's husband and the Auditor who allegedly conducted the said hearing were not called to give evidence for the defence. Consequently, I return that even though there was substantive justification for terminating the Claimant's employment, the Respondent has not proved that she followed a fair procedure as envisaged under section 41 of the Act which provides thus:

***“41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make.”***

#### **Reliefs**

35. In view of the finding, that the termination of the claimant was unfair within the meaning of **section 45 of the Employment Act**, I award the claimant two months' salary as compensation for unfair termination under **Section 49(1)(c) of the Act**. In granting the said damages, I have considered the fact that the claimant contributed to her dismissal through misconduct. I have also considered the fact that she was paid *ex-gratia* service pay when indeed she was disqualified from the same by section 35(6) of the Act since the respondent had contributed NSSF for her. Finally, the claimant was paid salary in lieu of notice upon termination.

36. The claim for overtime is dismissed because the claimant did not prove the said claim. There is also evidence in the form of Gate Pass register showing that she used to report to work late and also leave before time. Likewise, the claim for leave is dismissed because the respondent produced employment records to prove that the claimant took her leave except the days paid for upon termination. The claim for salary for July 2017 is also dismissed because she was already out of employment from 17.6.2017. I further dismiss the claim for tuition allowance for lack of evidence.

37. Finally, the claim for a Certificate of Service is granted since it is her right under **Section 51 of the Act**.

38. In conclusion, I enter judgment for the claimant in sum of **Kshs.14,117 x 2 = Kshs.28,234** less statutory deductions. Each party shall bear his own costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 8th day of November, 2019**

**ONESMUS N. MAKAU**

**JUDGE**