



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 2 OF 2017

BETWEEN

FRANCIS MWERI JEFA.....CLAIMANT

VERSUS

ROSSELA CANTORI.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kaluki Muriu Ndiritu & Co. Advocates for the Claimant

Gicharu Kimani & Associates Advocates for the Respondent

JUDGMENT

1. The Claimant filed his statement of Claim on 27th March 2017. He avers he was employed by the Respondent as a Gardener, at her residential premises known as Plot No. 64, situate at Turtle Bay Area in Watamu, Kenya. His salary was Kshs. 9,000 monthly.
2. He was later assigned the role of Caretaker and Security Guard.
3. The Respondent terminated Claimant's contract on 18th September 2016. The Claimant did not have the benefit of notice, warning or any form of a disciplinary hearing before termination. He was paid upon termination Kshs. 10,000 only, as salary for days worked.
4. He prays the Court to find termination was unfair, and grant him the following Orders against the Respondent:-
 - a) 3 months' salary in lieu of notice at Kshs. 27,000.
 - b) N.S.S.F contributions at Kshs. 9,600.
 - c) N.H.I.F contributions at Kshs. 9,600
 - d) House allowance at Kshs. 40,000
 - e) Leave allowance at Kshs. 36,000
 - f) Service fees at Kshs. 216,00
 - g) Underpayment at Kshs. 432,000
 - h) Damages for unfair termination at Kshs. 108,600

Total.....Kshs. 878,200

- i) Interest
- j) Costs.

5. The Respondent filed her Statement of Response on 29th May 2017. She states the Claimant was employed by Respondent's Husband, to work temporarily as a Gardener, at Respondent's home in Watamu. His salary was Kshs. 9,000 per month. He neglected and/or refused to tend to the Garden, and was hostile to Co-Employees. He spat on the Watchman and his Wife. He threatened the House girl. He threatened Respondent's family friend with a metal bar, causing a lot of tension in the premises. He was provided with a 2-bedroom Servant Quarter, with utilities paid for by the Respondent. He lived there with his family. He rested every Sunday. He took 1 month leave every year. He does not merit 3 months' salary in lieu of notice.

6. The Claimant testified, and rested his case, on 26th November 2018. He called one Witness, Thomas Kazungu, who gave evidence on the same date. The Claimant adopted as his evidence, his Witness Statement and Documents. He worked for 4 years without taking annual leave. The Respondent called him on 17th September 2016, and told him there was no more work. The Claimant denied that he accosted or threatened any of his Co-Employees, or his Employer's Guests.

7. He conceded on cross-examination that he lived in Respondent's residence. The Respondent paid his utilities. He performed his gardening role diligently. He was paid Kshs. 10,000 and told to leave. Redirected, the Claimant told the Court that the Respondent and her husband did not live at the residence full time. They visited sparingly. The Claimant was the only Employee living at the residence.

8. Kazungu's evidence was sketchy. He was a friend of the Claimant. He was Claimant's neighbor. He saw the Claimant work in continuity, at the Respondent's as a Gardener and Security Guard. The Claimant told Kazungu he left employment, because the Respondent told the Claimant there was no more work.

9. Rosella Cantori testified on 24th June 2019, as did her Husband Kipkoskei Dalton, bringing the hearing to a close. She told the Court that the Claimant was employed by the Respondent's Husband as a Gardener. She terminated his contract on her Husband's advice. The Claimant was rude to his Colleagues. No one at the residence was safe. Cross-examined, Rosella told the Court that the Property belonged to her Husband. The couple had a Watchman. The Respondent was entrusted money by her Husband to pay to the Claimant as monthly salary. Threats against Co-employees were not recorded.

10. Kipkoskei Dalton confirmed, the Respondent is his Wife. Dalton employed the Claimant as a Gardener in 2012. He paid the Claimant a salary of Kshs. 9,000 monthly. Dalton was away most of the time, and paid the Claimant's salary, through the Respondent. Dalton asked the Respondent to release the Claimant in 2016. Other Employees were complaining about the Claimant. Dalton had issued warning before, to the Claimant.

11. Cross-examined, Dalton told the Court he lived in Watamu, and later, moved to Mombasa. He could not recall when this happened. He was informed by his Wife about the problems the Claimant was causing to his Colleagues back at Watamu. At one time, the Claimant worked alone. The Watchman and the Housegirl joined him in 2016. The Claimant lived with his Wife and Child.

The Court Finds:-

12. It is agreed that the Claimant worked for the Respondent, at her residence in Watamu, from 2012 to 2016. He worked principally, as a Gardener.

13. It is not material to the dispute, whether the Respondent, or her Husband employed the Claimant. The Claimant was employed by the Couple and worked for one family. In domestic set-up, unless the Wife and the Husband are living separately, it cannot be accepted that the Couple's domestic servants are exclusively employed by either the Wife or the Husband. Either Rosella Cantori or Kipkoskei Dalton, singly or jointly, can shoulder employment liability for their domestic servants. Rosella paid Claimant's salary, given to her by her Husband; she controlled the Claimant; and it was her, who terminated Claimant's contract, in agreement with her Husband.

14. According to the Respondent, the Claimant's contract was terminated because he was hostile and violent to Co-Employees; he spat on the Watchman and his Wife; he threatened the Housegirl; and insulted Respondent's family friend with a metal bar, at the residence. Dalton, having considered these accusations, advised the Respondent to release the Claimant.

15. Sections 41 and 45 of the Employment Act 2007, require that the Employee is given a fair hearing before termination. Section 43, 45 and 47(5) require the Employer to prove valid reason justifying termination.

16. The Respondent and her Husband did not give the Claimant a hearing, before termination. The Claimant is not recorded to have been called upon to show cause why, he should not face disciplinary proceedings. There is no record of disciplinary proceedings.

17. The Co-Employees and Guest the Claimant is alleged to have acted violently against did not present any evidence before the Court.

18. The Respondent did not satisfy the requirements of the Employment Act on substantive and procedural justice, in the process of termination of employment.

19. Termination was unfair, and the Claimant merits notice pay and compensation for unfair termination.

20. **Notice pay is allowed at equivalent of 1 month salary, at Kshs. 9,000.**

21. The Claimant pleads 3 months' notice, but gave no evidence to support this.

22. He worked as a Gardener for 4 years. His employment record was not shown to have stains. He took general care of the Respondent's residence from 2012 – 2016. He did so, single-handedly for most of the time, the Housegirl and the Watchman having arrived in 2016. The Respondent and her Husband were not full-time residents at the home. He performed other peripheral roles. **He is granted compensation for unfair termination, equivalent of 7 months' salary at Kshs. 63,000.**

23. The prayers for N.S.S.F and N.H.I.F contributions are not clear. They are not supported by documents. The Claimant has not justified why statutory contributions, due to the respective bodies, should revert to him. There is no evidence of deduction and non-remittance. These prayers are declined.

24. It was shown through the evidence of the Claimant and the Respondent, that the Claimant was provided by the Respondent with reasonable housing accommodation at the residence. He is not entitled to house allowance under Section 31 of the Employment Act.

25. The Claimant has not established his prayer for leave allowance. Leave travelling allowance is ordinarily given when an Employee goes on annual leave, to facilitate the Employee in his travels during the period of annual leave. It is not the same benefit as pay in lieu of annual leave (annual leave pay) which is the sum paid to an Employee who opts to sell his annual leave entitlement to the Employer, and continues working during the period the Employee would have been away on annual leave. The Claimant seeks leave allowance, but does not say this is with regard to which period, or show that indeed, the benefit was allowed to him by his contract or other wage instrument. The item is rejected.

26. Underpayment is not specified to be in relation to the salary or other benefits. It is simply shown as 'underpayment.' Even if the Court were to presume that underpayment relates to salary, what is the basis for the computation given at paragraph 10(g) of the Statement of Claim? The Claimant takes his monthly salary of Kshs. 9,000 and multiplies it by 48 months worked, resulting in a sum of Kshs. 432,000. What is the logic in this? The item is declined.

27. **No order of the costs.**

28. **Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.**

IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 9,000 and equivalent of 7 months' salary in compensation for unfair termination at Kshs. 63,000 – total Kshs. 72,000.

c) No Order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and signed at Mombasa this 1st day of November 2019.

James Rika

Judge