



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT MOMBASA

CAUSE NO. 681 OF 2016

BETWEEN

FELISTUS K. MASAI.....CLAIMANT

VERSUS

KASK INVESTMENTS LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Claimant in Person

L.A. Oketch & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on 15th September 2016. She states she was employed by the Respondent as a Cook, on 29th August 2009. The Respondent terminated Claimant’s contract of employment on 25th January 2016. The Claimant avers termination was not based on valid reason, and was without notice. She was not paid her terminal benefits. She prays for judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs.14,000.
- b. 6 years’ leave allowance at Kshs.84,000.
- c. 12 months’ salary in compensation for unfair termination, at Kshs. 168,000.
- d. Public holidays.
- e. Rest days. _____
- Total Kshs.308,000**
- f. Costs.
- g. Interest.
- h. Certificate of service.

2. In her Statement of Claim, there is a paragraph titled ‘Reliefs Sought’. The prayer for the sum of Kshs.308,000, is pleaded as an alternative to an order compelling the Respondent to immediately release Claimant’s dues; order directing the Respondent to pay the Claimant all the terminal dues pending; and an award for damages for unlawful and/or unfair termination. Although acting in Person, the

Claimant needed to avoid mixing up and repeating her prayers. Why should the sum of Kshs.308,000 be presented as an alternative to terminal benefits and compensation, while this sum is made up of terminal benefits and compensation?

3. The Respondent filed its Statement of Response on 28th October 2016. Its position is that the Claimant was initially employed by the Respondent as a Househelp, on casual basis. She later was employed as a Cook on full time basis, effective from 1st September 2013 to 20th January 2016. She was issued 1 month notice of termination. She had become bad-tempered, and was reluctant to discharge her role. She was paid all terminal dues, except service pay, which the Respondent is ready and willing to pay. The Respondent is ready to issue Certificate of Service. The Respondent states that the Claim is defective. The Claim should be dismissed with costs.

4. The Claimant testified, and closed her Case, on 29th September 2017. Respondent's business Proprietor Kabirdin Kassam Khimji and Respondent's Construction Supervisor Geoffrey Alwodo Lihanda, both testified for the Respondent on 22nd November 2017, bringing the hearing to a close. The dispute was last mentioned on 20th February 2018, when Parties confirmed the filing of their Submissions.

5. The Claimant testified that she was employed by the Respondent on casual terms, on 28th August 2009. She became a regular Employee, on 1st September 2013. Her contact was terminated on 25th January 2016. There was no notice, or valid reason communicated to her preceding termination. There was no warning. The Respondent told the Claimant to go and look for a job elsewhere. The Claimant is a Mother and had financial obligations to her Family. The Respondent told her she would be paid terminal benefits. None has been paid.

6. Cross-examined, the Claimant restated she was just told by the Respondent to look for a job elsewhere. Termination was by word of mouth.

7. She communicated with one of the Respondent's Directors Shamin, as shown in the call logs from Safaricom Ltd, exhibited by the Respondent. She asked the Claimant if the Claimant had found another interesting job. Nowhere was the Claimant told not to return to work.

8. The Directors, Khimji and Shamin used to travel to Nairobi regularly. Shamin travelled around 20th January 2016. The Directors did not call the Claimant back when they returned from their journey. They used to release the Claimant whenever they travelled. The Claimant never went on annual leave, but was released whenever the Directors travelled.

9. The Respondent paid to the Claimant a monthly salary of Kshs.14,000. She was paid without fail. The Respondent did not deduct anything from the Claimant's salary, even on days the Claimant did not work.

10. The Claimant met her Employer after termination. She was given an offer of Kshs.60,000 in settlement. The Labour Office had recommended she is paid Kshs.109,000. The Respondent insisted the Claimant was not entitled to the claim for rest days.

11. Kassam Khimji testified he and his wife, are the Directors of the Respondent Company. The Company employed the Claimant. She worked in the Directors' residence, at Diani. She was employed on casual terms in 2009. She became regular in 2013. The Respondent had 4 other regular Employees, working at the Respondent's construction business.

12. A time came when the Directors felt Claimant's attitude in her work had changed. Khimji testified that Claimant's heart was not in it. Khimji's wife in particular talked to the Claimant, and gave the Claimant an opportunity to look for an alternative job. The Respondent did not terminate her contract of employment.

13. The Claimant did not report to work after this conversation with Shamin. After some days, she informed the Respondent she wished to be paid her terminal dues. She reported the dispute to the Labour office. The Respondent offered to settle the Claim at Kshs.60,000, which the Respondent thought was fair. The Respondent kept engaging the Claimant even when the Claim was already filed and on-going in Court, proposing settlement. Khimji testified the Respondent is ready to pay Claimant notice pay, and service pay.

14. The Claimant had taken over 100 off-duty days, over the period served. This is shown in Duty Register for 2009-2016, exhibited by the Respondent. She is not entitled to the prayer for annual leave. The offer made by the Respondent to the Claimant, was a reasonable offer. Cross-examined, Khimji testified that the Respondent employed the Claimant on regular basis, in 2013. SMS communication between the Claimant and Shamin, did not say the Claimant looks for another job. The Respondent encouraged her to look for another job. By implication, the Claimant was still an Employee of the Respondent.

15. Geoffrey Alwodo Lihanda, had at the time of testifying, worked as a Supervisor, with the Respondent for 20 years. The Claimant was employed by the Respondent in 2009 on casual terms, becoming regular Employee in 2013. She would take off when the Directors were away. Lihanda maintained the duty Register, which shows Claimant's attendance history. The Claimant was paid her salary for January 2016 through Supervisor Lihanda. She did not return to work. She later came to the workplace with a letter from Labour Office. Cross-examined, Lihanda testified he did not know if the Claimant was notified to look for another job by the Directors. He confirmed on redirection that whenever the Directors were away, the Claimant was away.

The Court Finds:-

16. The Claimant was employed by the Respondent in the year 2009. She was assigned domestic work, as a Househelp, in Respondent Directors' residence. The Respondent is a company belonging to a Man and his Wife, Khimji and Shamin. The two are Directors of the Respondent, a company involved in construction business, with offices within the Directors' residence at Diani, South Coast of Kenya. The Claimant was employed on regular terms in 2013, becoming a Cook.

17. There is an overabundance of evidence, contained in the duty Registers for the period 2009-2016, exhibited by the Respondent, showing the Claimant was off duty, for over 100 days. She concedes when the Directors were away, she was released from her duty. She continued to earn her full salary, even when she was away. The Court does not think her claim for unspecified Rest and Public Holidays, is reasonable. Similarly her claim for annual leave pay, over a period of 6 years, which she wrongly pleads as leave allowance, cannot have merit. She was released from her duties whenever Mr. and Mrs. Khimji were away. They were away frequently, and the Claimant was away with full pay, frequently.

18. The Claimant testified, and this is not in dispute, that she in any event, was employed on casual terms in 2009, and only became a regular Employee in 2013. Before 2013, there was no continuity of service. Yet, she claims annual leave entitlement, based on 6 years, including the years on casual employment.

19. The prayer for leave allowance, or annual leave pay, has no foundation and is rejected.

20. The Respondent testified it is willing to meet the prayer for notice pay. ***The Claimant is granted 1 month salary in lieu of notice, at Kshs.14,000.***

21. Khimji told the Court the Respondent is willing to meet the prayer of years of service. He suggested a figure of Kshs.60,000 in settlement. It was not clear in his evidence if this proposal included notice pay and service pay. The Court finds, based on the creditable years the Claimant served the Respondent, and based on her monthly rate of Kshs.14,000, that the sum offered of Kshs.60,000, adequately recognized and rewarded the Claimant's years of service. ***The Claimant is granted the sum of Kshs.60,000 as offered by the Respondent in service pay.***

22. From the SMS communication between the Claimant and Shamin, the Court is of the view that Parties seem to have reached an understanding, that the employment relationship, should come to an end.

23. Shamin informs the Claimant that she had tried calling the Claimant. She enquires how the Claimant is doing, and also if she has any luck with an interesting job. Shamin offers to assist the Claimant in her pursuit of new horizons. Shamin and her husband would work out Claimant's dues, as soon as they returned from their journey.

24. The Claimant writes on 10th February 2016, that she hopes Shamin is sorting out Claimant's Dues and Certificate of Service, to enable the Claimant move on. There was mutual understanding that the employment contract had come to a point of no return. Both Parties agreed they had crossed the Rubicon.

25. There is no suggestion of involuntary termination in the messages. The Claimant does not say that she had been forced out of employment, or ask that she is allowed to continue working.

26. The conversation between the Claimant and Shamin, shows however, that Respondent's Directors delayed in releasing to the Claimant her Certificate of Service, and in communicating their computation of terminal dues. Delay, understandably, angered the Claimant as she wished to be facilitated to move on. It is this delay, which led the Claimant to feel she had been unfairly treated, making filing of the Claim necessary.

27. While the Parties were in agreement that their relationship is ended, the Respondent did not treat the Claimant fairly by delaying release of Certificate of Service, and by failing to communicate early, on Claimant's terminal benefits. To this extent, termination was rendered unfair, though in principle, there was agreement that Claimant's contract is terminated. The Respondent in the end did not deal with the Claimant fairly. The employment relationship is based on a covenant of good faith and fair dealing.

28. ***The Respondent shall pay to the Claimant general damages, the equivalent of 2 months' salary at Kshs.28,000, for breach of good faith and fair dealing.***

IN SUM, IT IS ORDERED:-

a. The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs.14,000; Kshs.60,000 in service pay; and Kshs.28,000 in general damages – total Kshs.102,000.

b. Certificate of service shall be released to the Claimant forthwith.

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 delivered at Mombasa this 20th day of March 2018.

James Rika

Judge