



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 222 OF 2010

MERCY MORAN VIJEDI CLAIMANT

V

WAHEEDA DADANI RESPONDENT

JUDGMENT

1. Mercy Moran Vijedi (Claimant) commenced legal action against Waheeda Dadani (Respondent) on 16 March 2010 alleging unfair termination of employment. The Claimant quantified her claim at Kshs 549,150/-.
 2. The Respondent filed an Answer to the Memorandum of Claim on 30 June 2010.
 3. Hearing commenced on 15 September 2010 before Madzayo J (as then was) when the Claimant testified, but the hearing was not concluded.
 4. On 7 May 2015, hearing commenced *de novo* before Nzioki wa Makau J. Hearing proceeded on 26 January 2016 and was adjourned after testimony of the Claimant's brother and examination in chief of the Respondent.
 5. On 28 September 2017, the Court directed that the Respondent's case be deemed as closed because the Respondent failed to attend Court to continue with her case. Mention to set judgment date was scheduled.
 6. The Respondent challenged the ruling, and on 18 December 2017, the Judge allowed the Respondent to continue with her testimony.
 7. On 16 January 2018, Onyango PJ directed that the Cause be placed before me for further hearing and determination as Nzioki wa Makau J had been transferred from the station.
 8. The Respondent was cross examined and re-examined on 15 February 2018 after which she closed her case.
 9. The Claimant filed submissions on 2 March 2018 (outside the agreed timeliness), while the Respondent filed her submissions on 15 March 2018.
 10. The Court has considered the pleadings, evidence and submissions and identified the Issues for Determination as, *whether there was an employment relationship*, if so, *whether there was unfair termination of employment* and appropriate remedies including entitlements accruing from the employment relationship.
- Was there an employment relationship?**
11. The Claimant's case was that she was employed by the Respondent on 1 January 2004 as a domestic help cum shop attendant and was initially on a salary of Kshs 2,000/- which was increased in 2006 to Kshs 4,000/- per month.
 12. The Claimant stated that she was introduced to the Respondent by her mother, Elizabeth.
 13. During cross examination, the Claimant stated that she was 28 years old and that she cleared Standard 8 in 2002 and completed Form IV in 2010 (she was 17 in 2004).
 14. The Respondent on the other hand contended that the Claimant was brought to her by her father who was then serving as a security guard and that upon request, the Claimant was given allowances to help her meet college fees among other expenses. The Claimant was a member of her household and only used to help in the shop after her classes.

15. The Claimant and Respondent gave diametrically inconsistent accounts as to what was the arrangement between the parties.
16. If the Claimant had called her mother to shed light on how she secured *employment* for her, it would have been easier for the Court to determine whether there was a contractual relationship.
17. Had the Respondent, or the Claimant called the father, it would have made the determination of the question of employment relationship even easier.
18. The parties did not call any of the 2 to shed light on what agreement had been reached in so far as the Claimant was to engage with the Respondent while attending college.
19. At the time the Claimant asserted she was employed, she was around 17 years and had not even completed secondary school. She had just cleared primary school about 2 years earlier.
20. The Respondent's testimony that there was an arrangement for the Claimant to live with her and earn an allowance to allow her to go to college appears more probable. The Claimant, though not blood kin, was more of a householder helping in a family enterprise.
21. The Court therefore finds that there was no employer/employee relationship between the parties and that the Claimant was a dependent of the Respondent by dint of section 3(2)(d) of the Employment Act, 2007.

Unfair termination of employment

22. Having come to the conclusion that there was no employer/employee relationship between the parties, the questions of breach of contract (leave, unpaid salaries and service pay) and of unfair termination of employment becomes superfluous.
23. But just in case the Court is wrong in the conclusion(s) on these 2 Issues, it would have found that the Respondent had valid and fair reasons to bring the relationship to end and that it has proved the reasons.
24. The Claimant had more than Kshs 250,000/- in her account at the bank, which she claimed were her savings and contributions from her siblings.
25. The allowance or salary the Claimant was receiving from 2006 amounted to about Kshs 48,000/- yearly. Even if she was saving the whole amount, she could have saved at most Kshs 144,000/- up to 2009.
26. Her sibling who testified indicated that he would contribute about Kshs 3,000/- per week towards the saving, but he did not disclose from when he started making the contributions.
27. Even the complete bank statement was not produced to demonstrate the frequency of deposits from the siblings.
28. The evidence on record, according to the Court lead to the conclusion that the Claimant misappropriated funds which came into her custody.

Conclusion and Orders

29. Arising from the foregoing, the Court finds no merit in the Cause herein and orders that it be dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 20th day of March 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Namada/Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent Mr. Mengich instructed by Mengich & Co. Advocates

Court Assistant Lindsey