



**REPUBLIC OF KENYA**

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

**CAUSE NO. 421 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**EDDAH INGALIA.....CLAIMANT**

**VERSUS**

**SENATOR DR. AGNES ZANI.....RESPONDENT**

**J U D G M E N T**

1. The suit commenced by a Statement of Claim dated 18<sup>th</sup> March, 2015 filed on 19<sup>th</sup> March, 2015. The Claimant seeks payment of compensation for unlawful and unfair dismissal and terminal benefits including –

- (i) One month salary in lieu of notice, Kshs.20,000.
- (ii) Arrear salary for 19 days worked in December, 2014 Kshs.17, 000.
- (iii) Prorata leave 44,000.
- (iv) House Allowance for 24 months Kshs.72,000 and
- (v) Unpaid public holidays Kshs.27,125.83.

**Facts of the Case**

2. The Claimant averred in the Statement of Claim and in her sworn testimony that she was employed by the Respondent as a house help on 19<sup>th</sup> October, 2012. That she doubled up as a messenger. She was paid a monthly salary of Kshs.20,000. The Claimant had no written contract and worked continuously on a daily basis from 6.00 am in the morning until 6.30 pm in the evening. She worked from Monday to Saturday. She was not paid overtime. The Claimant was not housed by the Respondent and was not paid house allowance.

3. On 19<sup>th</sup> December, 2014 the Claimant reported to work as usual. At 2pm in the afternoon, Lesley Zani, the son of the Respondent who was 21 years old, and was addicted to drugs, confronted the claimant with a kitchen knife and said “Eddah, I have a surprise for you” he then left the house.

4. The Claimant had been tasked to ensure that Lesley did not leave the house. She telephoned the Respondent and informed her that Lesley had left. The Respondent got annoyed and sacked the Respondent. He sent her Kshs.500 to buy meat and give Lesley Kshs.200. That was her last day at work.

5. The Claimant stated that she was caught by surprise and was very shocked therefore. She was a Single mother with children in school. She was unable to pay her rent and was evicted from her house. She was not paid salary for the days worked and was not paid in lieu of leave days not taken for the 26 months period she had served.

6. That on many occasions she was asked to wait for the Respondent’s husband to arrive home, and hence left the house at 9pm in the evening. The Claimant was given off, during public holidays.

7. The claimant states that the dismissal was not for a valid reason and she is entitled to compensation in respect thereof.

8. The Claimant seeks payment of terminal benefits as set out in the amended statement of claim. The Claimant was a union member. The Claimant was not registered with NSSF and no statutory dues were paid by the Respondent on her behalf. In addition to the house chores,

the Claimant delivered letters for the Respondent who became a senator in 2013. Prior she was a Lecturer at Nairobi University. She used boda boda to do these errands.

### **Response**

9. The Respondent filed Memorandum of Reply to the Claim on 30<sup>th</sup> April, 2015 in which she denied having ever engaged the Claimant as a messenger. The Respondent admitted having engaged the Claimant as a house help as and when she needed her services to clean the house and not on daily basis. The Respondent called one Carolyne Cherop to testify in support of the Respondent's case. RW1 was a personal assistant to Senator Zani. She testified that she knew the Claimant and that the Claimant provided services at the Senator's house as and when required. That the Claimant cleaned the house and was paid Kshs.500. That the amount was never standard and it varied depending on the engagements of the day. That payments were made through Mpesa. That she requested to be paid lump sum so as to manage her finances.

10. That the Claimant provided services to other people in the neighborhood. That is why her services were terminated because she was taking many assignments outside and hence she was not available when required.

11. That she was offered Kshs.20,000, upon termination on a gratuitous basis, but she refused to collect the same.

12. The Respondent prays that the suit has no basis and it be dismissed with costs.

13. In the Memorandum of Response however, the Respondent averred that, the Claimant only worked for an average of six hours per day on the days when she was engaged by the Respondent and she was not entitled to be housed by the Respondent.

14. The Respondent concluded that the Claimant was an independent service holder and her claim lacked basis.

15. The terminal benefits claimed by the Respondent were denied by the Respondent stating that the Claimant did not work in the first week of December, it was her responsibility to make statutory contribution and she was not entitled to Leave as she never worked continuously for the Respondent.

### **Determination**

16. The issues for determination are as follows –

(i) Whether the Claimant worked continuously for the Respondent or was an independent service provider as and when her services were required?

(ii) If the answer to (i) above is in the affirmative, whether the employment of the Claimant was terminated for a valid reason.

(iii) Whether the Claimant is entitled to the reliefs sought.

### **Issue i & ii**

17. As to whether or not the Claimant worked continuously for the Respondent for 26 months, the testimony by the Claimant and that by RW1 is mutually destructive. The finding of the court depends much on the relative credibility of the witnesses. The court has also carefully considered the pleadings by the parties vis a vis testimony under oath and has come to the following conclusion of fact and law.

(i) The Claimant started working for the Respondent long before RW1 was employed by Respondent as a personal assistant after August 2013 elections. RW1 is clearly not in a position to know and credibly testify about the working relationship between the Claimant and the Respondent.

(ii) The Claimant gave a candid and consistent testimony regarding the time, period and manner of her employment by the Respondent. She withstood very close cross examination by counsel for the Respondent and the court believed her testimony reflects the truth of the issues raised in this case. This cannot be said of RW1 who had scanty knowledge of the employment relationship and failed to respond to the questions asked by the claimant on the reason for the termination of her employment by the Respondent.

(iii) The documentary evidence regarding various payments made by RW1 to the Claimant did not reflect the Kshs.500 allegedly paid to the Claimant or any consistent lump sums paid regularly to the Claimant given that the Claimant was required to be regularly available to provide service to the Respondent. These documents served to discredit the testimony by RW1 to the contrary.

(iv) The court is satisfied that the Claimant served the Respondent continuously for 26 months. That she was paid a monthly salary of Kshs.20,000, was not housed by the Respondent, did not go on leave during the 26 months period but was given off duty during public holidays and when the Respondent had travelled.

18. The Claimant was not an independent provider of services and provided in addition to her daily house chores, personal attention to the son of the Respondent.

19. The circumstances of termination as narrated by the Claimant are credible and reflection of what actually happened. The court believes the same and finds that the Respondent had no valid reason to terminate the services of the Claimant and the termination was wrongful and unfair hence in violation of sections 41, 43 and 45 of the Employment Act, 2007.

20. Nothing would have been easier than for the Respondent to appear in person and testify in support of her case but chose not to, to the detriment of the respondent's case.

### **Issue iii**

21. RW1 was not able to rebut the Claimant's testimony with regard to the Claims for leave pay, arrear salary for 19 days served in December 2014, failure to contribute to NSSF and failure to give notice of termination to the Claimant.

22. The court finds therefore that the Claimant is entitled to payment in lieu of leave days not taken during the 26 months of service; one month salary in lieu of notice; 19 days arrear salary for December, 2014 and payment of service gratuity at the rate of 15 days salary for the two years served for failure by the Respondent to contribute NSSF for the benefit of the Claimant in terms of section 35(5) & (6) of the Employment Act.

23. The Claims for House Allowance and Public Holidays were not sufficiently proved and are dismissed for want of proof.

### **Compensation**

24. The Claimant served for about two years, was treated badly by her employer to her loss and detriment. She was evicted from her house, due to the failure by the Respondent to give her notice of termination and the failure to pay her any terminal benefits lawfully due to her. The Claimant wished to continue serving the Respondent and did not contribute to her loss of employment. The above are aggravating circumstances in terms of section 49(4) of the Employment Act, 2007 and the court awards the Claimant equivalent of four (4) months salary as compensation for the wrongful and unfair termination of employment in the sum of Kshs.80,000.

25. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows –

(a) Kshs.80,000 compensation.

(b) Kshs.20,000 in lieu of one month notice.

(c) Kshs.17,000 being 19 days arrear salary.

(d) Kshs.44,000 in lieu of untaken leave for 26 months.

(e) Kshs.40,000 gratuity.

Total award 201,000.

(f) The award in (a) above is payable with interest at court rates from date of judgement whereas the rest of the award is payable with interest at court rates from date of filing suit till payment in full.

(g) Costs to follow the outcome.

**Dated and Signed in Kisumu this 23rd day of February, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 2nd day of March, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Khalwale for Claimant

Mr. Ochieng Oginga for Respondent

Anne Njung'e – Court Clerk