



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 726 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> May, 2018)**

**MILLY VOLEMI ICHENI.....CLAIMANT**

**VERSUS**

**ALLAN FRANCIS RUSSEL.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit through the firm of Mwangi and Partners Advocates claiming damages for non-payment of employee's terminal dues and accrued rights, wrongful termination and unlawful dismissal arising out of an employment relationship with the Respondent.
2. He avers that, on 8<sup>th</sup> June, 2012, he was employed by the Respondent through a verbal contract to take care of his two children at a salary of Kshs. 9,000 per month. The Claimant states that from the onset, she offered the Respondent diligent and faithful services but that in few months, the Respondent breached the terms of employment by increasing the duties of the Claimant to include such duties as cooking, tending the flower garden, taking care of and feeding the Respondent's dogs and cleaning the Respondent's cars. This was despite the Respondent having employed a full time gardener for those duties.
3. The Claimant further avers that despite the extra duties, the Respondent did not pay the Claimant any extra money or in any way compensate her for the extra workload. The Claimant avers that during the employment duration, the Respondent constantly blamed the Claimant of stealing items and goods from his house and on that basis repeatedly deducted her monthly pay allegedly to cover for the lost items.
4. On 9<sup>th</sup> March 2014, while the Claimant was on her way to work, she received a mobile phone text from the Respondent dismissing her from employment. The text further stated that the Respondent would pay for overtime worked and for holidays worked which were due. When the Claimant reached her place of work she was denied access by the security guards manning the gate. Consequently she left without collecting her personal effects.
5. The Claimant avers that she was not given notice or payments of salary in lieu thereof nor did the Respondent invite her to show cause why she should not be terminated from her employment in contravention of the provisions of Section 41 of the Employment Act, 2007 or the principles of natural justice. On 29<sup>th</sup> March 2014, the Claimant received another text message from the Respondent alleging that he had found that many things were missing from his house and that the same were stolen by the Claimant and on that ground the Respondent said that he was not going to pay the Claimant and told her never to contact him again.
6. The Respondent filed a Replying Memorandum wherein he admits the employment relationship but he avers that the employment contract was not between him and the Claimant but with one Winnie Mwawasi (who was the Respondent's fiancée) and the Claimant.
7. The Respondent avers that the Claimant had occasionally been confronted by the employer on the issue of missing household goods and on a number of occasions apologized to her employer over the missing items and promised to change or face the consequences of her actions. The Claimant was then issued with two warning letters containing the issue of the missing items.
8. The Respondent further avers that he did not make any deductions to the Claimant's salary and puts the Claimant to strict proof thereof. The Respondent states that the Claimant is not entitled to severance pay as prayed for in the statement of claim as she was not declared redundant in accordance with Section 40 of the Employment Act of 2007.
9. The Respondent further avers that the Claimant is not entitled to any accrued leave payment as prayed for in the Statement of Claim as the Claimant opted to forfeit her leave days and instead get paid for the same. The Claimant was thus paid Kshs. 6,500 on 28<sup>th</sup> June 2013 in lieu

of leave and utilized 6 of her leave days in August 2013.

### **Submissions**

10. The Respondent's Counsel submits that Winnie Mwawasi was the employer of the Claimant and not the Respondent. Winnie testified that the Claimant was okay but she had noticed several instances of missing items, improper accounting of the petty cash in the house and work negligence.

11. Further avers that she also noticed that the Claimant would assault and beat the kids and she cautioned her against it. Later on, Winnie learnt that the Claimant would abuse the young child, for instance by locking the child in the dog kennel. This she learnt from the neighbour and decided to call the Claimant for a hearing and decided to terminate her employment.

12. She also avers that she took into account the Claimant's past conduct and the warning letters given and she asked the Claimant to come for her termination letter but the Claimant declined to. Winnie also indicated that she was willing to pay the Claimant the 9 days she had worked in March 2014. She also denied having treated the Claimant unfairly.

13. I have examined all evidence on record from both parties plus the Respondent's submission filed. The parties admitted the existence of an employment contract but the Respondent told Court that he never employed the Claimant at all but that she was employed by his fiancée the RW2 who testified as such.

14. In cross-examination, the Claimant told Court that when she started the employment, she was picked at Kasuku Centre by Winnie the Respondent's wife. She told Court that she was introduced to Winnie by a friend called Judy. It is however not clear why the Claimant decided to sue the Respondent who never directly contracted her.

15. In fact, it is the Respondent's wife Winnie who terminated the services of the Claimant as per the Respondent's Appendix A.

16. The Claimant alluded to some texts sent to her by the Respondent indicating that she had sacked her. Such texts were however not produced in Court. The averments by the Claimant are therefore not proved as to whether the Respondent had actually employed her.

17. In the absence of establishing an employment contract between Claimant and Respondent, it will be a waste of valuable judicial time to go on and determine any other issue.

18. I find the claim not proved and I dismiss it accordingly. Each party will bear its own costs.

**Dated and delivered in open Court this 30<sup>th</sup> day of May, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odunga holding brief for Enonda for Respondent – Present

Mwangi and Partners for Claimants – Absent