



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1915 OF 2013

CATHERINE MINAYO MUSULWA.....CLAIMANT

- VERSUS -

ROSE AKINYI NDEGWA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th June, 2018)

JUDGMENT

The claimant testified that she was employed by the respondent as a house help on 09.09.2005. She was paid on monthly basis and she signed cash vouchers upon payment but she was not given a copy for her records. She worked from Monday to Saturday from 8.00am to 5.00pm. She was terminated on 02.08.2013 and the area labour officer failed to amicably resolve the dispute.

The claimant filed the memorandum of claim on 29.11.2013 through Nyabena & Company Advocates. She prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination from her employment was unfair, unlawful and wrongful.
- b) The claimant be paid her terminal benefits of Kshs. 2, 022, 571.00.
- c) The Court to issue such directions as may deem fit to meet the ends of justice.
- d) The respondent to pay costs of the suit.
- e) Interest on the above at Court rates.
- f) The respondent to issue a certificate of service per section 51 of the Employment Act, 2007.

The response to the claim was filed on 14.02.2014 through Charles Comba & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The respondent pleaded that she employed the claimant in 2006 and not 2005 as alleged by the claimant. Further, the claimant left employment between 2009 and 2010 when she was expectant. When she worked, she served only 3 days per week. Thus there was a break in service. The labour officer resolved the dispute and the claimant should be bound accordingly.

The Court has considered the evidence, the pleadings and the submissions on record. The Court makes the following findings on the matters in dispute:

- 1) There is no dispute that the parties were in employment relationship and the Court finds as much.
- 2) As per the respondent's evidence the claimant was employed from May 2006 to end of July 2013 and her last monthly pay was Kshs.7, 000.00. As per findings by the labour officer, there were numerous breaks in the claimant's service.
- 3) The respondent housed the claimant until she moved out of her own volition to join her boy friend. In that regard, the prayer for house allowance will fail as the claimant declined to use the housing accommodation provided by the respondent.
- 4) There is no reason to doubt the respondent's evidence that the claimant took leave in December during the festive Christmas holidays for 15 to 18 days and other days as per the vouchers and on other occasions when she was paid advance payment per

vouchers. The vouchers show days when claimant had been away but fully paid. The Court returns that on a balance of probability she took leave. The prayer for pay in lieu of leave will fail.

5) The respondent's evidence was that on 02.08.2013 the claimant left employment. She was paid salary for end of July 2013. She walked away and stated that she would not continue in employment. She did not give reasons for leaving. The respondent testified that she begged her to continue in employment but she insisted on leaving. Later the respondent called her on phone and suggested to work out some terminal dues. The claimant filed a dispute with the labour officer. The broken service history is coherently documented in the report by the labour officer. The Court finds that the claimant verbally resigned from employment on 02.08.2013 and the respondent was constrained to accept that turn of events. The Court returns that there was no unfair termination of the contract of service between the parties.

6) After a break in service, the claimant resumed employment from August 2012 to August 2, 2013. She is awarded one year gratuity or service pay under section 35 of the Act at one month salary making **Kshs.7, 000.00**, the last monthly pay. She is also awarded 3 months underpayment for 2013 as claimed **Kshs. 8, 343.00** and 9 months for remainder of the service period beginning the resumption in August 2012 making Kshs.2, 267 per month times 9 being **Kshs.20, 403.00**. The claims for underpayment prior to resumption in August 2012 and the gratuity in that regard are found time barred under the 12 months' period of limitation in section 90 of the Act for continuing injuries or in alternative, the stated prayer on gratuity or service pay is found unjustified in view of the many breaks in service, the claimant having failed to acknowledge the otherwise established numerous breaks and therefore, having failed to effectively compute and justify the service period. In that consideration she is awarded service pay for one year being the last year served after the reemployment at one month pay making **Kshs.7, 000.00**.

7) The court finds that the overtime prior to resumption in August 2012 was time barred under section 90 of the Act as a continuing injury and for the period thereafter, no evidence or agreement was provided about the overtime as claimed. There was no evidence of a grievance about overtime prior to the termination of the contract of service. The prayer in that regard will therefore fail.

8) The claimant is entitled to a certificate of service in accordance with section 51 of the Employment Act, 2007.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant **Kshs. 42, 746.00** by 01.09.2018 failing interest to run at Court rates from the date of this judgment till full payment.
- b) The respondent to deliver a certificate of service as per section 51 of the Employment Act, 2007 and to do so by 01.09.2018.
- c) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 29th June, 2018.

BYRAM ONGAYA

JUDGE