



**REPUBLIC OF KENYA**

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

**CAUSE NO. 290 OF 2014**

***(Before D. K. N. Marete)***

**ELIZABETH KIOKO.....CLAIMANT**

**VERSUS**

**BEYENE HAIRE WARDE.....1ST RESPONDENT**

**SALINA TRANSPORTERS LIMITED.....2ND RESPONDENT**

**JUDGEMENT**

This matter was originated by a Re-Amended Claimant’s Claim dated 17th May, 2018. It does not disclose any issue in dispute on its face.

The respondent’s in an Amended 1st and 2nd Respondent’s Statement of Response dated 24th April, 2018 denies the claim and prays that this be dismissed with costs.

The claimant’s case is that on 2nd February, 1998 the respondent, Salina Transporters employed her to work as a house keeper for his house at a monthly salary of Kshs.8,000.00. This was later increased to Kshs.10,000.00 sometimes in 2010 when the workload increased.

The claimant’s further case is that on 9th November, 2012 the respondent terminated her services without pay or reason as hereunder;

- a. *Three months salary in lieu of notice*  $Kshs.10,000 \times 3 = Kshs.30,000.00$
  - b. *Years pending leaves @Kshs.10,000 x 14*  $=Kshs.140,000.00$
  - c. *14 years travelling allowance @4000*  $=Kshs.14 \times 4000=Kshs.56,000$
  - d. *12 months salary for unfair termination*  
 $[12 \times 10,000]$   $=Kshs.120,000.00$
  - e. *672 Sundays at double time*  $672 \times 46.29 \times 2 \times 17 = Kshs.1,057,633.00$
  - 140 public holidays at double time*  $140 \times 46.29 \times 2 \times 17 = Kshs.220,340.40.$
  - f. *14 years overtime worked not paid*  $46.29/2 \times 27 \times 12 \times 14 =Kshs.944,871.48$
  - g. *14 years overtime worked not paid*  $12 \times 14 \times 2 \times 83.50 =Kshs.220,340.40$
- TOTAL** **KSHS.2,789,184.88**

It is her contention that this termination was wrongful, unfair and a contravention of the Employment Act, 2007.

The claimant’s further case is that by reason of the aforesaid termination of employment by the respondent, she lost substantial amount in salary, allowance and other benefits she would otherwise have earned. This also occasioned mental and financial anguish to her. She is not able to seek alternative employment for lack of recommendation by the respondent.

She prays as follows;

a. Three months salary

In lieu of notice  $Kshs.10,000 \times 3 = Kshs.30,000.00$

b. Years pending leaves @  $Kshs.10,000 \times 14 = Kshs.140,000.00$

c. 14 years travelling allowance @  $4000 = Kshs.14 \times 4000 = Kshs.56,000$

d. 12 months salary compensation for unfair termination =  $[12 \times 10,000] = Kshs.120,000.00$

e. 672 Sundays at double time  $672 \times 46.29 \times 2 \times 17 = Kshs.1,057,633.00$

140 public holidays at double time  $140 \times 46.29 \times 2 \times 17 = Kshs.220,340.40$

f. Holidays and Sundays 14 years overtime not paid  $12 \times 14 \times 2 \times 83.50 = Kshs.220,340.00$

**TOTAL** **KSHS.2,789,184.88**

g. Interest from the date of dismissal the date of unlawful dismissal till payment in full.

h. Cost

i. Certificate of Service.

j. Service pay  $(Kshs.5000 \times 14) = Kshs.210,000$

The respondent's case is a denial of the claim.

The respondent's further case is that at no time did the claimant work in 1st respondent's house or the 2nd respondent's premises and request proof thereof. It is their further case that the claimant has not adduced any evidence to support her claim that she was indeed their employee.

The respondent's other case is a denial of the computation of claim per the re-amended claim. She avers that the claim is littered with various misstatements and deliberate omissions of material facts calculated to mislead this court. These are untenable against the respondents.

It is their ultimate averment that the amended claimant's statement of claim as framed is bad in law, defective and ambiguous in that it does not disclose any or sufficient cause of action and or reasonable claim against the respondents and that they shall at the earliest be applying that the entire amended claim be struck out.

The matter came to court variously until the 18th October, 2018 when it was heard *inter partes* with CW1 – Elizabeth Kanini Kioko, the claimant testifying in support of her case.

CW1- Elizabeth Kanini Kioko, opened her testimony by stating that she was employed as a househelp by the respondent on 2nd February, 1996. She further testified to have filed witness statement dated 20th March, 2017 and 17th May, 2018 and wished that these be adopted as her evidence in court.

The claimant further testified that she worked from 500 hours to 2300 hours and at times this would delay to later hours for breaking out. Further, she was terminated from employment when she requested that she be put on non full time duties so that she could get married and tend a family. She was chased away and told that she would not have a place to take her employer/respondent.

On cross-examination, CW1 testified that the name of the wife of the 1st respondent is not in the claim and in any event, she (claimant) did not work for the 2nd respondent.

She further reiterated her case as pleaded that she started on a salary of Kshs.8,000.00 but this was raised to Kshs.10,000.00 in April, 2010. She was paid cash by the 1st respondent's wife and worked full time. She did not even go for Christmas.

CW1 on cross-examination further testified that she got married in June, 2011. She was dismissed orally and reported to the labour office. The respondent did not wish to call witness(es) and chose to rely on written submission to buttress their case.

The respondent did not call any witness(es.)

The issues for determination therefore are;

1. Whether the claimant was an employee of the respondents?

2. Was termination of the employment of claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of the claim?

The 1st issue for determination is whether the claimant was an employee of the respondent. The claimant in her written submissions dated filed on 24th October, 2018 submits a case of employment by the respondents. In this, she submits that she was employed by the respondent in February, 1996 at a salary of Kshs.8,000.00 and this rose to Kshs.10,000.00. She further submits that started at Juja then Park Road and by the time of termination of employment, they lived at Runda.

The claimant further submits that she worked for 14 years and 8 months and was dismissed when she asked that she be made a day scholar (engaged in day work only) to allow her start a family. Then, the 1st respondent's wife got mad and threw her out in addition to uttering the Kiswahili words "Hakuna pahali utanipeleka." She was denied the fundamentals of a fair hearing in accordance with the law. This to me points out to a case of unfair termination of employment. This is because the claimant comes out clearly and fluently in her expression of a case of employment by the respondent in his various homes across Nairobi for a period tending to fifteen years.

The 1st respondent denies the claim on grounds that he and the 2nd respondent company cannot have employed the claimant. If at all, the claimant can only have been employed by his wife with whom he is now separated. This is clearly splitting heirs. The 1st respondent is hiding behind the facet of joinder of parties

and incorporation to run away from his pertinent responsibility. The most probable situation is that he employed the claimant and his family, his separated wife included, and the company, the brain child of the same family enjoyed the fruits of her employment and labour. They cannot now be heard to evade responsibility for their co-joined actions against the claimant. Substantive justice must withstand the rigmarole of process and other technicalities. I therefore find a case of unlawful termination of employment of the claimant by the respondent.

The 2nd issue for determination is whether there was termination of the employment of claimant wrongful, unfair and unlawful. The claimant in her written submissions dated 24th October, 2018 submits as follows;

- *The claimant worked for the respondent for a period of 14 years and 8 months as a hardworking, diligent and honest in her work but the Respondent decided to unlawfully and unfairly decided to terminate her employment when she asked to be a day scholar to allow her to be able to start a family. The 1<sup>st</sup> Respondent's wife got mad and told her to go and in fact added the word "HAKUNA MAHALI UTANIPELEKA" to add salt to the injury.*
- *The claimant was not given a fair hearing if there was any issue as the Respondent did not call her for a hearing and her right to be heard was violated. She was not given any notice for termination of her employment and that the termination of her employment was without any legal basis or otherwise.*
- *During the hearing of the case, the Claimant adapted its witness statement dated 20<sup>th</sup> March 2017 and filed on 22<sup>nd</sup> of March 2017 as well as the further witness statement dated 17<sup>th</sup> of May 2018 and filed on 22<sup>nd</sup> May 2018. She was cross examined and she stated that she did not put the wife of the 1<sup>st</sup> Respondent in the pleadings since they are one unit. That she used to work in Christmas days.*

In support of her case, the claimant employed the provisions of section 45 of the Employment Act, 2007 as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

(a) *that the reason for the termination is valid;*

(b) *that the reason for the termination is a fair reason-*

(i) *related to the employees conduct, capacity or compatibility; or*

(ii) *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

(a) *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- (b) the conduct and capability of the employee up to the date of termination;
- (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- (e) the existence of any previous warning letters issued to the employee.

She also sought to rely on the authority of **Walter Anuro vs Teachers Service Commission [2013] Eklr** where the court observed thus;

*“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”*

Again, she relied on the authority of **Alphonse Machanga Mwachanya vs. Operation 680 Limited [2013]eKLR**, where the court observed as follows;

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.
- (b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- (c) That the employer has heard and considered any explanations by the employee or their representative.
- (d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The claimant further sought the support of Section 43 (1) of the Employment Act, 2007 as an indicator that there was no reason offered for her termination of employment. This is as follows;

*43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 under the corresponding provisions of that section.*

The respondent's in their written submissions dated 1st November, 2018 dispute the employment of the claimant by the respondent as claimed. It is their submission that the impression of the claim is that the 1st respondent is also called Salina Transporter and that he employed the claimant in 1996 as a house help. This is denied by the respondent.

The respondent further submits that the claimant did not work for the 2nd respondent as the 1st and 2nd respondents are two different persons. Again, the claimant under cross-examination admitted that she did not work for the 2nd respondent. She testified that it was the wife of the 1st respondent, one Zaid Teslase, who employed, deployed, paid and ultimately dismissed her.

The claimants witness statement is explicit and states her case as follows;

10. THAT in the year 2012 I requested to give a pay increase considering that the level of work had increased having accommodated some other two relatives. He refused to give a pay increase.
11. THAT in the same year that is 2012 at around November, I got married and I informed the respondent of the same and requested him to allow me work during the day and spent the night with my family or in alternative to allow me at least a day off. The respondent refused.
12. THAT it was during the said period November that the respondent illegally and unlawfully terminated me. The Respondent did not inform me of the reasons for the said termination neither was I paid for the said month.
13. THAT I believe that I was unfairly terminated by the Respondent.

#### **PARTICULARS OF BREACH AND LOSS**

- i Failing to give notice of termination of employment as provided under the contract.

ii. Failing to pay the Claimant her contractual entitlements.

iii. Terminating the contract without justifiable reasons.

iv. Underpaying the Claimant against the Government Wages Order prevailing at the time.

Again, the claimant in her further witness statement dated 17th May, 2018 affirmed her testimony that the respondent was her employer. She worked for him, his wife and their family. They are one household.

The 1st respondent by his witness statement dated 25th February, 2017 denies employment of the claimant. It is her evidence that, the employment, if at all, would be best explained by his wife, Zaid Teslase who used to employ all domestic workers. Due to their separation and divorce proceedings, she would not be called as witness. This is not tenable. The claimant overwhelmingly raises a case of employment and unlawful termination by the respondent. I therefore find a case of unlawful termination of the claimant by the respondents and hold as such. This answers the 2nd issue for determination.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and award a relief as follows;

i. One (1) months salary in lieu of notice .....Kshs.10,000.00

ii. Fourteen (14) years pending and untaken leave .....Kshs.140,000.00

iii. Twelve (12) months salary for unfair termination

of employment Kshs.10,000.00 x 12= .....Kshs.120,000.00

iv. 672 Sundays at double time 672 x 46.29 x 2 x 17.....Kshs.1,057,633.00

v. 140 public holidays at double time 140 x 46.29 x 2 x 17....Kshs.220,340.40

vi. 14 years overtime worked not paid 46.29/2 x 27 x 12 x 9  
x14= .....Kshs.944,871.48

vii. 14 years overtime worked but not paid 12 x 14 x 2 x  
83.50= .....Kshs.220,340.00

**Total costs of Claim.....Kshs.2,713,184.88**

viii. The respondent be and is hereby ordered to issue the claimant with a certificate of service within fourteen (14) days of this judgement of court.

ix. The costs of this claim shall be borne by the respondent.

**Dated and signed this 29<sup>th</sup> day of November 2018.**

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 3<sup>rd</sup> day of December 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Miss Ochieng holding brief for Prof. Ojienda instructed by Ojienda & Company Advocates for the claimant.

2. Mr. Rakoro instructed by Rakoro & Associates Advocates for the respondent.