



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 586 OF 2015

MARY NEKESA WANYONYI.....CLAIMANT

VERSUS

NAVIN SHAH.....RESPONDENT

Claimant in person

Mr. Nyaencha for respondent

JUDGMENT

1. It is not in dispute that the respondent employed the claimant as a house help from July 2009 at a salary of Kshs.10,000/= per month. The claimant worked continuously for five (5) years until the employment came to an end on 23rd March 2015. There was no written agreement of employment.
2. The claimant alleges that the Kshs.10,000/= did not constitute house allowance whereas the respondent states that her basic salary was Kshs.8,690/= and house allowance of Kshs.1,310/= making a total of Kshs.10,000/=.
3. The claimant claims;
 - a. 15 days arrear salary for the month of March 2015 Ksh.5,000/=
 - b. One month salary in lieu of notice Kshs.10,000/=
 - c. Severance pay for 5 years calculated at 15 days salary for each completed year Ksh.28,800/=
 - d. Payment in lieu of leave for 5 years Kshs.50,000/=
 - e. House allowance at 15% of the basic pay Kshs.98,000/=
 - f. Travelling allowance to and from work Kshs.182,500/=
 - g. Work during public holidays for 5 years Kshs.49,920/=
 - h. Compensation for unlawful dismissal

4. In the statement of defence, the respondent admits the fact of employment, salary paid and states that the claimant decided to leave work on 9th April 2015, when she was asked where she had been since 23rd March 2015. She had been absent without explanation. The respondent offered to pay the claimant her dues but she rejected the payment and left.
5. With respect to the claim for notice pay, it is incumbent on the claimant to show that she did not desert work as alleged or at all.
6. The claim for housing allowance is predicted on the General Wage order for period under review. The claimant must show that the payment of a gross pay of Kshs.10,000/= per month was below the minimum wage of a house help.
7. The claim for travelling allowance must be specifically proved as an agreed term of employment. Whereas, the claimant must also show on a balance of probability that she worked during all public holidays for five years without overtime payments. Similarly payment in lieu of leave and entitlement to gratuity must be justified by the claimant.
8. Both the claimant and respondent testified under oath. The claimant told the court that she lived at a rented house at Kangemi and commuted daily. That she was not registered with NSSF and so employer did not contribute to the fund on her behalf.
9. She worked daily from 8. a.m. to 5 p.m. doing house cleaning, washing and ironing cloths, etc. She worked Monday to Saturday and did not work on Sundays unless she was specifically called.
10. That on the day she stopped working, she reported to work and the employer stopped her from working and was not given any reason for the stoppage. That she asked for her dues and the employer told her to take him wherever she wanted to.
11. She says she was not paid salary arrears and was not given notice or paid in lieu. That she was not given leave for five years nor was she paid in lieu thereof.
12. She claimed that she got no house allowance, travelling allowance and worked during public holidays but was not paid overtime. During Christmas she left on 24th December and came back on 28th.
13. She said she had good work record, was unfairly terminated from employment and she seeks compensation. She said she stopped working on 15th March 2015 when she was informed to stop working.
14. She denied allegations by counsel for the respondent that she left work on 23rd March 2015 after disagreeing with the sister to the respondent. She explained that the sister asked her to clean the dog's pen but she refused since that was not part of her work. She did her duties and went home as usual and when she reported the following day she was told to go away.
15. She told the court that on the 9th April 2015, she had come to ask for her money for the 3rd time but respondent refused to pay.
16. She paid fare to and from work daily and same was not refunded in spite of constant requests.
17. Claimant insisted that she was not given annual leave at all. Only when a relative died, she got 7 days compassionate leave.
18. She denied that she was paid Kshs.6,500/= for leave in 2011 and signed for it. She said it was a loan given to her and she was repaying it.
19. She also denied receipt of Kshs.6,300/= in lieu of leave for 2010.

Defence

20. Mr. Navin Shah, the respondent told the court that the claimant started to work for him on 8th July 2009 up to 31st December 2009. That she was a daily worker and was paid as such.

21. That in the year 2010, she started work on 1st February 2010 up to 31st July 2010 and was paid in lieu of leave after 1 year.

22. That she was paid a daily rate of Kshs.295/= and she got leave after 12 months.

23. That she started working again on 11th August 2010 up to 27th December 2010 and from January 2011 to 30th January 2011 and was paid in lieu of leave.

24. That she was paid for work done during holidays on the same day. He gave an example of payment of Kshs.350/= done on 5th June 2011 and Kshs.370/= made on 26th June 2011.

25. That claimant did not always work continuously. That she would voluntarily leave and return after a period.

26. In 2012, she started on 1st January 2012 for 12 days and came back in July 2012 and worked up to 29th September 2012. She was paid Kshs.4,500/= for the 12 days on 31st October 2012 and came back on 2nd January 2013 up to December 2013. She was paid for leave days worked Kshs.6,700/= on 2nd April 2013.

27. Similarly in the year 2014, she came on 2nd January 2014 and was paid salary and in lieu of leave.

28. That in 2015, she started in January 2015 up to 24th March 2015. That he owed her Kshs.4,830/= salary at the time; and wanted to pay service pay for 2 years in the sum of Kshs.8,690/= and payment in lieu of 2 months' leave Kshs.1,170/=. That total terminal dues was Kshs.14,690/= but she declined to take.

29. That she joined NSSF on 1st June 2013 and payment was done for 2013 and 2014.

30. That the claimant left voluntarily and he did not dismiss her.

31. Furthermore, RW1 said claimant was not entitled to travelling allowance and her gross pay included house allowance. That only in 2013 and 2014 did the claimant work continuously.

Determination

32. From the testimony of the respondent on the pattern of work by the claimant from the time she left work and following the provisions of the Employment Act, No. 11 of 2007, Section 37 which reads;

“37 (1) notwithstanding any provisions of this Act, where a casual employee –

(a) works for a period or a number of continuous working days which amount in the aggregate for the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where, wages are paid monthly and Section 35 (1) (c) shall apply to the contract of service.

33. The import of this is that the respondent ought to have registered the claimant with NSSF and remitted

the statutory dues after the first month of continuous service and during the second month.

34. The court finds that the claimant was not a casual employee for the entire period of 5 years she served the respondent and since he only registered her with NSSF and made contributions for the last two years of service in 2013 and 2014, the claimant is entitled to service gratuity for the three (3) years of service she was not on social security, calculated at the equivalent of 15 days' salary for each completed year of service in the sum of Kshs.15,000/=

Underpayment

35. The claimant has failed to prove that she was underpaid during the five year period she served the respondent. In the circumstance, the court accepts the testimony by the respondent that the claimant was paid a gross salary of Kshs.10,000/= which comprised Kshs.8,690/= basic pay and Kshs.1,310/= house allowance.

Travelling Allowance

36. It is not in dispute that the claimant used Kshs.100/= daily to and from work and was not refunded by the respondent. The court awards her travel allowance for 26 days every month for five years that is (26 x 12 x 5 x 100) totalling Kshs.156,000/=. This expense eroded the value of the gross pay paid to the claimant on a monthly basis to below the minimum wage provided in the General Wage Order for the period of the employment and she is entitled to the compensation claimed, the respondent having not disputed the expense except to say that it was not a term of the employment.

37. The court is satisfied by the testimony of the respondent that he granted the claimant leave and or paid in lieu of leave after the claimant became permanent in 2009, 2010, 2011, 2013 and 2014. The claimant has failed to establish on a balance of probability that she is entitled to any further payment in lieu of leave. The claim is dismissed.

Notice Pay

38. The circumstances under which the claimant stopped working are disputed. However what came out of the oral testimony by both parties is that the claimant was asked to stop working by the respondent after she had refused to clean a dog's pen on the basis that it was not part of her duties. The respondent was not happy with the refusal and he decided to ask her to stop working.

39. The respondent was not candid on this matter in the court's view, taking into account the averments in the memorandum of defence that the claimant absconded work and was not dismissed from service, only for the respondent under cross examination to depart from that version.

40. The circumstances of the case leads the court to conclude that the employment of the claimant was stopped by the respondent without notice and for a reason that was not valid. Accordingly, the claimant was not only entitled to one month's salary in lieu of notice, she is also entitled to compensation for unlawful dismissal.

Compensation

41. The claimant had served the respondent for five years without any adverse record. She was summarily dismissed from work for no valid reason and without notice. She was not paid terminal benefits upon dismissal and was not given a certificate of service. She suffered loss and damage and is entitled to the equivalent of five (5) months' salary as compensation for the dismissal in the sum of Kshs.50,000/=.

Public Holidays

42. The claim for payment of double salary for work done during public holidays was not been sufficiently proved and same is dismissed.

Salary Arrears

43. The claimant is awarded salary arrears for the 15 days worked in March 2015, in the sum of Kshs.5,000/=.

44. In the final analysis, the court awards the claimant as against the respondent;

(a) Salary arrears of Kshs.5,000/=

(b) Payment in lieu of one month's notice Kshs.10,000/=

(c) Service gratuity (severance) for three years Kshs.15,000/=

(d) Equivalent of five months' salary being compensation for unlawful termination of employment Ksh.50,000/=

(e) Travelling allowance at Kshs.100/= per day for five (5) years Kshs.156,000/=

Total award Kshs.236,000/=

(f) Interest of court rate from date of judgment till payment in full.

(g) Costs to follow the outcome.

Dated and delivered at Nairobi this 28th Day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE