



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 196 OF 2017

HILDAH MWANGALECLAIMANT

VERSUS

FIYABI FISIQUOTRESPONDENT

JUDGEMENT

1. The Claimant filed the Memorandum of Claim on 3rd February, 2017 together with an application under Certificate of Urgency seeking urgent orders that the Respondent be ordered to deposit security of Kshs.260, 815.39 the equivalent to the terminal dues claimed. The Respondent entered appearance, filed a Replying Affidavit but failed to file defence or attend at the hearings. Upon the application coming up for hearing on 23rd March, 2017 the court directed the parties to address the main claim on priority basis. A heading date was allocated in court for 6th June, 2017.

2. On the hearing date, the Respondent despite being served with hearing notice and affidavit of service filed to confirm such service remained absent. The Claimant was heard on her evidence in the absence of the Respondent of the advocate served on 3rd March, 2017.

Claim

3. The Claimant is a female adult who was employed by the respondent, a Nigerian national for work as the house-help in Nairobi. Such employment commenced on 2nd October, 2019; no written contract was issued and the monthly wage was agreed at Kshs.12, 000.00.

4. The Claimant served diligently until 31st October, 2016 when she was verbally dismissed from her employment. There was no notice; hearing or any reasons given for the termination of employment. The Claimant made frantic efforts to seek to know the reasons for her termination but the Respondent instructed security at the residence not to give her access to the same.

5. The Claimant is seeking notice pay at Kshs.13, 800.00;

Leave pay for 2 years at Kshs.12, 292.31;

House allowance at 15% basic pay at Kshs.43, 200.00;

Service gratuity at Kshs.15, 923.08;

Compensation at 12 months Kshs.165, 600.00;

Certificate of service; and

Costs of the suit.

6. The Claimant testified in support of her case and stated that on 28th October, 2016 she was undertaking her duties at the residence of the Respondent and while in the kitchen, the Respondent accused her of touching her husband who was in the sitting room. That this was not true as at the time of such allegations the Claimant was in the kitchen while the Respondent was in the store and the husband having a meal in the sitting area. Subsequent to this incident, on 31st October, 2016 when the Claimant reported on duty she was verbally terminated from her employment without notice or any reasonable cause. She was never given a hearing and efforts to give an explanation to the Respondent were not given a hearing. She was sent away and security guards directed not to allow her into the residence.

7. The Claimant also testified that her termination of employment was unfair, unjustified and unlawful. She was never given any written contract, was not issued with a termination letter or given any reasons that were valid and fair to warrant the termination. The Claimant also confirmed her claims as set out in the Memorandum of claim.

Defence

8. As noted above, the Claimant commenced suit by filing claim and notice of motion. The Respondent only filed a Replying Affidavit to the application and no defence.

9. From the Replying Affidavit, the Respondent avers that she is a Nigerian national resident in Kenya and had employed the Claimant as a House-Help at a monthly wage of Kshs.12, 000.00. The Respondent is in Kenya on diplomatic status and not on transit or at flight risk so as evade the court jurisdiction. The requirement to deposit passport with the court is not necessary as such would hinder performance of work duty as a diplomat and there is no justification as to why security should be deposited for the due performance of any court orders.

10. There was no attendance by the Respondent or any defence to controvert the claim.

Determination

11. The claim is not opposed by any defence.

12. The averments by the Respondent in the affidavit that she enjoys diplomatic status in Kenya and should not be made to surrender her passport of deposit security with the court is not supported by any evidence at all. The Replying Affidavit filed on 14th March, 2017 is left bare.

13. One cannot claim diplomatic status and fail to attend court on that basis. The Respondent cannot also fail to pay the Claimant lawful dues arising out of a contract of employment or unfairly terminate employment of a person whose labours she has enjoyed and claim diplomatic status to avoid the sanction that go with non-adherence to legal provisions.

14. Section 8, 9, and 10 of the Employment Act read together with article 41 of the Constitution requires all employers to ensure fair labour practices and to issue an employment contract to any employee in their service. The Respondent admits that the Claimant was employed as a House-Help at a monthly wage of Kshs.12, 000.00. No written contract is submitted, there is no record that is submitted and where the Respondent enjoyed diplomatic status not requiring her to comply with local law, no contract was issued.

15. Section 10(6) and (7) of the Employment Act makes it mandatory for an employer to keep work records and submit the same when a claim such as this is filed and provides;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) *If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

16. The above set out, even where the Respondent were to be taken as enjoying diplomatic status, such status does not incorporate an exemption from meeting duty and responsibilities under private contract and particularly for service enjoyed from a domestic servant/help/or worker. I agree with findings in **Eugene Linyulu Isalambo versus Barbro Ekvall [2016] eKLR** in the assessment of Article 31(1)(c) of the Vienna Convention the court held that;

... While this exception covers for instance paid employment of a diplomat outside the mission or the provision of professional services for remuneration by a diplomat, the contract between a diplomat and a private domestic worker is generally considered not a “commercial activity”. Therefore, employment relationships between private domestic workers and diplomats are not exempted from a diplomat’s immunity. Diplomats are not obliged to give evidence as witnesses (Art. 31 (2)). Immunity also comprises immunity from execution, except for the three exceptions in regard to administrative and civil proceedings mentioned above and provided that the inviolability of the diplomat’s residence is respected (Art. 31 (3)). The Convention also specifies that immunity from the host state’s jurisdiction does not exempt diplomats from the jurisdiction of their sending state (Art. 31 (4)).

17. On the admission by the Respondent in the filed Replying Affidavit that the Claimant was employed as a House-Help at her residence, section 35 of the Employment Act read together with sections 41 and 43 of the Act requires that termination of employment must be with notice, there must be a hearing and reasons give which reasons must be valid, justified and fair. Without any work records being submitted with the Respondent’s Replying Affidavit or defence being filed to show that the respondent as alleged is a diplomat and that the employment of the Claimant was within the diplomatic status, on the facts at hand and by the application of the statutory provisions, the Respondent is at fault. The termination of the Claimant has no justification.

18. With regard to the claimant, I find no notice of termination and no reasons to justify the termination and as such, this is the court and forum before which her claim must be addressed. The failure by the Respondent to follow the law in addressing the claimant’s termination of employment renders that same procedurally and substantively unfair. Such cannot find justification mong civilised societies such as ours. I find the termination of the Claimant was unfair.

19. The Claimant is entitled to compensation on the finding that termination of employment was not justified in terms of section 45 and 49 of the Employment Act. The Claimant was not resident with the respondent. The minimum wage applicable under the Wage Guidelines for a domestic servant in Nairobi is Kshs.13, 800.00 and compensation is awarded at 10 months gross wage all being Kshs.138, 000.00.

20. There was no notice issued prior to termination as required under section 35 of the Employment Act. The Claimant is awarded Kshs.13, 800.00 being one month pay in lieu of notice.

21. There is no record of the Claimant having taken annual leave for the 2 year in service of the Respondent as required under section 28 of the Employment Act. Such leave is computed at kshs.22, 290.00.

22. The failure to comply with section 10 of the employment Act where the Claimant was not issued a written contract and there is no evidence that the Respondent complied with statutory requirement to deduct and pay statutory dues, the Claimant is entitled to service gratuity for the 2 years in service computed at 15 days’ pay for each year worked. The total service pay awarded is Kshs.15, 923.00.

23. The Employment Act requires an employee paid a minimum wage such as the Claimant also be accommodated or paid a house allowance in terms of section 31. Without work records to show such accommodation of payment in lieu thereof, the Claimant is entitled to a 15% house allowance on the due

minimum wage all assessed at Kshs.43, 200.00.

24. Section 51 of the Employment Act makes it mandatory to every employer to issue a Certificate of Service with termination the reasons for the same notwithstanding. The Claimant is therefore entitled to a Certificate of Service.

Accordingly, judgement is hereby entered for the Claimant for a declaration that termination was unfair; compensation awarded at Kshs.138,000.00; notice pay at Kshs.13,800.00; house allowance Kshs.43,200.00; service pay Kshs.15,923.00; leave due Kshs.22,290.00; and Certificate of Service.

Costs to the Claimant.

Dated and delivered in open court at Nairobi this 8th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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