



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1092 OF 2015

EVERLYNE MUSIMBI ENONDA.....CLAIMANT

VERSUS

JERIDA ANYONGA.....RESPONDENT

Claimant in person

Mr. Macharia for respondent

JUDGMENT

1. The suit is based on a statement of claim filed on 24th June 2015.
2. The claimant seeks compensation for unlawful termination of employment and payment of terminal benefits set out in the statement of claim as follows:-
 - a. Salary in lieu of notice Kshs.500.
 - b. Salary for nine (9) days worked in October 2014, Kshs.1,500.
 - c. Service pay for six (6) years Kshs.15,000; and
 - d. Unpaid leave for six (6) years Kshs.21,000.

Facts of the claim

The claim is based on the following facts;

3. That claimant was employed as a house help at the respondent's house from 20th October 2009 and worked diligently and continuously until the 9th November 2014 when the employment was terminated without notice, notice to show cause or disciplinary hearing.
4. That the termination was tainted with malice, bad faith and illegally.
5. The claimant suffered loss and damage as a result and was not paid terminal benefits that are due and owing and set out in the judgment above.
6. That claimant issued a demand for payment but the respondent has failed to heed the same.

Response

7. The respondent did not testify in this matter for reasons set out in the ruling delivered by the court on 26th February 2017 which has been appealed against.
8. The court will however consider the witness statement of the respondent filed on 23rd January 2017 and the written submissions filed on 4th August 2016.
9. The claimant was a relative of the respondent hence the respondent offered the claimant employment verbally at a monthly salary of Kshs.5,000 per month.
10. That the mother of the claimant visited the claimant regularly at the respondent's house.
11. That the claimant in September 2013, sought to terminate her employment upon notifying the respondent that she had found a better paying job in Mombasa and would be leaving.
12. That in the 1st week of October 2013, upon being paid her full salary, the claimant left for Mombasa. The respondent then hired a house-help who reported to work in the first weekend of October 2013.
13. That in November 2014, the respondent was shocked to be approached by the claimant for employment stating that the Mombasa job was a fraud. The respondent re-hired the claimant at Kshs.8,000 per month till the end of November 2014 when their relationship became sour due to the claimant's misbehavior.
14. The respondent urged the claimant to change her behavior but that did not happen and the respondent terminated the services of the claimant hence the suit.
15. This evidence by the respondent as contained in the written statement dated 19th January 2017, does not constitute sworn testimony and therefore carries less weight than the claimant's evidence under oath.

16. Determination

- i. Was the employment of the claimant terminated for a valid reason and in terms of a fair procedure?
- ii. Is the claimant entitled to the reliefs sought?

Issue i

17. It is not in dispute that the claimant worked for the respondent from 2009 until sometimes in November 2013.
18. There is a dispute as to whether the claimant voluntarily left the employment for a better job in Mombasa until she came back. The employment was then terminated on verbal notice on 9th November 2016.
19. It is also not in dispute that the claimant was a relative of the respondent and that for the better part she remained with the respondent the relationship was cordial.
20. The onus of presenting a *prima facie* case that the respondent voluntarily terminated the employment of the claimant in terms of section 47 (5) of the Employment Act, 2007 lies with the claimant. Once the claimant discharges this onus, and in terms of the same section 47 (5) as read with section 43 (1) & (2) of the Act, the respondent bears the onus of justifying the termination by showing that there was a valid reason for the termination and that the termination followed a fair procedure.

21. In the present case, the claimant has failed to discharge the initial onus of establishing a *prima facie* case that the respondent terminated her employment unlawfully.

22. Therefore, the respondent has raised sufficient doubt on the testimony of the claimant through her written statement and submissions that the employment of the claimant had voluntarily ended upon the claimant relocating to Mombasa and that the claimant was re-employed on different terms for a short period before the termination in November 2014.

23. To this end, the claimant's case for unlawful and unfair termination has not been proved on a balance of probability and is dismissed.

Terminal benefits

24. The claimant has shown on a balance of probability that she had continuously served the respondent from 20th October 2009 and that during the period, she was not granted annual leave, was not registered with NSSF nor did the respondent make any contributions on her behalf; was not paid salary for the nine (9) days worked in November 2014 and was not paid in lieu of notice upon termination.

25. The court therefore enters judgment in favour of the claimant for:

a. Kshs.5,000 in lieu of notice.

b. Kshs.1,500 for nine (9) days salary in November 2014.

c. The claimant is entitled to gratuity at fifteen (15) days salary for the five (5) years of service between 20th October 2009 to 9th November 2014 in the sum of Kshs. 12,500.

d. The claimant is also entitled to five (5) years salary in lieu of leave in the sum of Kshs.25,000.

Total award Kshs.44,000.

The court notes that the claimant's salary for the period of employment was below the statutory minimum wage, and had the same been claimed the court would have awarded it.

e. The award is payable with interest at court rates from date of filing suit till payment in full.

f. Costs to follow the outcome.

Dated and delivered at Nairobi this 21st day of July, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE