



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO.1325 OF 2013

NANCY LODENYO KILIVWA CLAIMANT

VERSUS

RESHPHAL NYOTA 1ST RESPONDENT

JASPAL NYOTA 2ND RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 19th August, 2013. Defence was filed on 25th September, 2013. When the matter came up for hearing on 13th September, 2016 the respondent's advocate applied to withdraw from acting for the respondent and 14 days were allowed for this purpose. No application was filed and the claimant was able to get another hearing date. At the hearing the respondent though served remained absent. The claimant was heard on the claim.

Claim

The claimant being an adult female was employed by the respondents in the family residence as a House help and or Domestic Worker from April, 2008. There was an oral contract of employment. The claimant was paid Kshs.8, 000.00 per month as her wage without any housing or an allowance in lieu thereof. The claimant worked continuously and during all public holidays without any extra pay or leave.

In December, 2012 the claimant was required to pay through her salary deduction a sum of Kshs.19, 000 on allegations that she had stolen two bottles of wine. The store where the wines were stored remained locked and only accessible to family members. There was no evidence that the claimant had stolen the wine bottles. At the gate, there were security guard to check on all incoming and outgoing employees and the claimant had her bag checked.

On 15th February, 2013 the claimant was dismissed from her employment by the respondent without notice, hearing or payment of her terminal dues. The claim is for payment of the minimum wage of Kshs.10,488.00 plus 15% house allowance; notice pay; service pay; leave pay; unfairly deducted Kshs.19,000.00; house allowance; pay for work on public holidays; and compensation.

The claimant testified in support of her claims.

Defence

In response, the respondents deny ever employing the claimant in 2008. In July 2009 the claimant was involved in theft of Kshs.10, 000.00 which went missing while she was on duty. In August, 2010 an amount of \$1000 went missing while the claimant was on duty. In December, 2012 an amount of £100 disappeared from the closet while the claimant was on duty. The claimant feigned ignorance in all these incidents but was issued with verbal warnings and she apologised.

In December, 2012 the claimant stole two bottles of wine from the respondents' closet and was caught with the stolen goods. She admitted to the theft in writing. The claimant agreed to pay for the wine bottles from her salary. To avoid further action, the claimant absconded duty only to appear with court summons.

The claimant wilfully paid the sum of Kshs.19, 000.00 for the stolen wine bottles. This was based on admission of theft. The claim has no basis and should be dismissed with costs.

Even though the respondent failed to attend at the hearing, the claimant does not challenge the defence as filed and particularly the attached documents setting out a deduction from her salary. The document further gives more evidence in the nature that the claimant was a part-time domestic and earned overtime. These records are for 9th December, 2012 and 24th December, 2012. Further the claimant is noted to having taken 11 days' pay, had a bonus and an advance pay. The claimant has dully singed for all these transactions.

My simple reading of the document attached to the defence of the respondent, the signatures in acknowledgement by the claimant and the signature which appears on her Verifying Affidavit are 100% similar in all fronts. I take the record filed by the respondent to be correct and true.

Was the claimant therefore in fulltime employment of the respondent? Was the claimant unfairly terminated from her employment?

Section 10(6) of the Employment Act, 2007 requires an employer to submit all work records of an employee once suit is filed. What the respondent has filed is with regard to denying the claims for terminal dues but not the entire work records with regard to the claimant's employment. Even though the document filed indicate the claimant was a *part-time domestic worker* this is not a work record in response to the entire period the respondent has averred the claimant was engaged with them from July, 2009. The lapse in submission of work records and failure to attend at the hearing only leaves the court with the claimant's evidence.

The offence of theft is singled out under the section 44(4) of the Employment Act, 2007 as warranting summary dismissal. The employer must however ensure the procedures of section 41(2) of the Act are followed. Without any evidence being called by the respondent to challenge the claim, I take it the claimant was employed by the respondent from 2008 to 2012 when she was dismissed following her payment of Kshs.19, 000.00 from stolen bottles of wine.

By the claimant paying for the wine allegedly stolen, though there is no witness of the respondent to confirm the same, the claimant cannot rely on a criminal act to allege that she should be compensated for unfair termination of employment. The dues owing in law at the time when the claimant paid for the wine bottles is payable but the end to her employment is largely contributory from her conduct.

In this case therefore, and without the respondent having submitted any work records, the claimant is only entitled to service pay and house allowance. The claim for leave is not due as the record submitted show the claimant had taken such leave. Claim for notice pay is declined in view of the circumstances leading to loss of employment. The consolidated minimum wage for a Domestic Worker in 2012 was Kshs.8, 580.00. The Claimant's wage then consolidated and not covering house allowance and related benefits by the Wage Orders is Kshs.8, 580.00 per month and 15 % thereof is Kshs.1, 287.00 per month in house pay and all being 33 months and the due amount is at Kshs.42, 471.00 in house allowances.

Judgement is entered for the claimant against the respondents for service pay for three completed years at Kshs.12, 870.00 and house allowance Kshs.42, 471.00. This is sufficient compensation. Each

party to bear own costs.

Delivered in open court at Nairobi this 30th day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants - David Muturi & Nancy Bor

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