



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1063 OF 2017

RACHEL AKOTH OCHOLA.....CLAIMANT

VERSUS

CAROLINE MAKANA.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 8th June 2017 and through the suit sought resolution of the issues she framed as unfair termination of employment. She averred that she was employed by the Respondent as a house help on 26th April 2008 and that her starting salary was Kshs. 20,000/- per month and that her last salary was Kshs. 30,000/- per month. It was averred that the Claimant dutifully and honestly performed her part of employment without any disciplinary action being meted out on her. She averred that she had tried to amicably settle the matter on 6th May 2017 but the Respondent was very arrogant and uncooperative. She averred that she used to work on public holidays apart from 25th and 26th of December each year and that she was denied leave and only had a 7 day leave in each year instead of the 21 days she was entitled to under the law. She averred that she sought her terminal dues and was told that only the salary for May 2017 would be paid. She pleaded that she was entitled to one month salary in lieu of notice, Kshs. 144,000/- representing 72 public holidays worked in the 9 years of service, Kshs. 126,000/- being the cash equivalent for 126 days leave balance, service pay for the 9 years of service Kshs. 135,000/- making a total of Kshs. 435,000/-. She thus sought a declaration that the termination of employment was null and void and that she is entitled to receive Kshs. 435,000/- being her terminal dues as pleaded, interest at court rates on the sums due, costs and any other relief this court may be deem fit to grant.

2. The Respondent filed a Statement of Defence and Counterclaim. The Respondent averred that when she employed the Claimant in 2008, the starting salary was Kshs. 6,000/- and not Kshs. 20,000/- as averred in the claim. She averred that the Claimant was not dutiful and honest in that during the period between 2016 and 2017 she was disrespectful, spiteful, argumentative, careless in her duties and in constant insubordination. She averred that discussions were held to explore alternative ways of engaging the Claimant and that the salary for May 2017 was paid. She averred that the Claimant was given leave days especially during the school holidays, that is, 3 weeks in April, 1 month in July and 2 weeks in December. She averred that the Claimant never worked on holidays or weekends and that whenever the Claimant worked on a holiday or weekend she was adequately compensated. She averred that the Claimant was not entitled to the orders sought in her claim and thus urged the court to dismiss the claim with costs. In respect to her counterclaim she pleaded that the Claimant approached her for a loan advancement of Kshs. 350,000/- for university fees the Claimant's daughter. She averred that the sum obtained as a loan was disbursed by way of a cheque in favour of the University for Kshs. 250,000/-, Kshs. 50,000 in cash and Kshs. 50,000/- through Mpesa to the Claimant. She averred that in addition to the fees loan the Claimant had sought the sum of Kshs. 105,000/- for construction of the Claimant's rural home. She averred that the Claimant was to repay the two loans through the deduction of Kshs. 10,000/- each month. The Respondent averred that the Claimant borrowed an additional sum of Kshs. 30,000/- which was unpaid as well as a sum of Kshs. 50,000/- for a fridge the Claimant obtained from the Respondent and was to pay for by instalment. The Respondent thus sought the sum of Kshs. 535,000/-, costs of the suit as well as interest on the sums claimed.

3. The hearing took place on 14th November 2017. The Claimant was representing herself and stated that she had sued the Respondent for unlawful dismissal. She stated that she had not been told of the reasons for the dismissal. She thus sought for her terminal dues and retirement funds be paid as she wished to retreat to her rural home as she did not have current employment or a residence in Nairobi.

4. She was cross examined by Mr. Thiong'o for the Respondent and she stated that she was hired on 26th April 2008 and was initially earning Kshs. 5,000/- and this was increased to Kshs. 20,000/- after 3 months. She testified that she used to clean the house, cook, care for the children and would take the child to school as well. She testified that she never had breaks and that she loved the child and that the work was good. She admitted that she would go on leave at the end of the year for one week and that she never went on rest days. She stated that on Saturday she would go on off and return on Sunday. She testified that it was only on Sundays that she never worked. She stated that she had a daughter in university and that the Respondent took the girl in university and helped her. She testified that the Respondent decided to help the girl as she was helping the Respondent's child. She was earning Kshs. 30,000/- and stated that the Respondent deducted Kshs. 10,000/- which was to be given to her as her retirement package. She stated that the deduction of Kshs. 10,000/- begun in 2014 which was the same year her daughter joined the university. She testified that even now she had not completed the construction of her home and that the

Respondent never gave her any funds to repair or construct the house. She denied getting the fridge as she did not need a fridge if she could not afford vegetables.

5. The Respondent testified and stated that she was a lawyer and was the employer of the Claimant. She testified that she employed the Claimant as a house help in 2008 and that the starting salary was Kshs. 5,000/- and that the pay was increased over time. She testified that the Claimant was earning Kshs. 30,000/- a month at the time of the dismissal. She testified that there were the usual problems between them and that the Claimant was given time to go home from 20th December and was to return on 2nd January as her child was to resume school in January. She testified that in January the Claimant did not return as expected and that her husband was away and that the child stayed at home. She called the Claimant who told her that she (Respondent) should not be limiting the days that she (Claimant) was on leave. She testified that the Claimant claimed she did not have fare to return and that she sent the Claimant about Kshs. 1,800/- to use as fare and that the Claimant returned on 11th January 2017 and stated there were many issues to resolve. She testified that she informed the Claimant that she was not happy with her performance and that they would sit and talk about it. She stated that she would often call her mother and her husband and have discussion with the Claimant and resolve issues but that the Claimant had a different attitude. She stated that there was the occasional lost item but that she gave the Claimant shoes, dresses for her children. She testified that the Claimant went on off every Saturday morning and returned on Sunday evening with groceries bought at Kangemi Market. She stated that she had recently discovered that the money she used to give for the groceries was in excess as she shopped at the market and found prices to be way cheaper than she had believed. She testified that the Claimant had 2 weeks off in April each year and that this year the Claimant was off for the entire month and was fully paid though she did not work. She testified that the Easter break was when the child would go to her parents and the Claimant would have her off and in July to September there was another break and the Claimant was allowed to go for a month or so. She testified that the Claimant went on leave and that there was no retirement plan for the Claimant. She stated that the sum deducted was to repay the loan taken on account of the Claimant's daughter in university. She testified that she gave her support as the girl was keen to study but the Claimant was not so keen. She testified that she gave the Claimant the funds in cash, Mpesa and paid a sum of Kshs. 250,000/- to the University. She stated that the Claimant was given Kshs. 30,000/- to settle a debt she had with a shylock and that the Claimant had purchased a fridge from her and was to pay 50,000/-. She testified that the Claimant also borrowed a sum of Kshs. 105,000/- for construction of the Claimant's rural home.

6. In cross examination by the Claimant she testified that the sum she advanced to the Claimant was a loan she took and that they had agreed that the Claimant was to repay the sum through the monthly deductions of Kshs. 10,000/-. She stated that the Claimant went home for two weeks each December and that she would give the Claimant money for Christmas, vouchers from Nakumatt for shopping and that the return was to be in early January. She stated that the Claimant would not leave on 24th December to go to Migori as that would not have been fair. She testified that her child had a 7 week break in the year and that the Claimant was allowed to go on leave then. She stated that the Claimant did not inform her of a visit in January by the Claimant's in-laws and that the Claimant did not report back to duty on 3rd January as expected. She testified that she never kept any money for the Claimant.

7. The second witness for the Respondent was her husband Elijah Oenga. He testified that the Claimant went on leave each year for extended periods and that he gave her cash for the payment of her daughter's university fees as well as the 30,000/- to clear the loan from a shylock. He stated that the Claimant was like a family member and was given money for shopping, cash and that he was shocked to see the suit filed against the Respondent. He testified that the Claimant was late in returning after the December break.

8. He was cross examined by the Claimant and stated that the Claimant sought the Kshs. 30,000/- cash for repayment of a loan she had taken. He stated that he had not stated that he would not seek a refund and that he did not want the Claimant to get used to borrowing. He testified that the Claimant had asked him not to inform the Respondent but he had told the Respondent of the loan though he asked that the request for the refund be deferred. He denied that they did not want the Claimant to return to work.

9. This is one of those sad tales of a relationship gone sour. It is apparent the Claimant and the Respondent were in a close setting as employer and employee and went beyond the bounds of an ordinary employment. From the pleadings and the testimony of the parties it is clear there was investment in the lives of the parties on either side. From the service to the Respondent, her family and especially her child, to the Respondent, her daughter in university and to the times they both shared. It was clear that there was effort to make things work with the employer giving some leeway here and there and the employee serving the family with dedication albeit with some emergent attitudes. The Claimant asserts that she was entitled to money at her retirement and to this end the employer deducted Kshs. 10,000/- each month from her salary. She seeks the payment of the money retained as well as notice, payment for holidays not taken and interest on the sums due as well as costs of the cause. The Respondent called two witnesses. She testified and called her husband Elijah Oenga who confirmed that the Claimant had sought help for the education of the daughter in university and a sum of Kshs. 250,000/- was paid by cheque and a further 100,000/- paid through Mpesa and cash. He also testified to other sums being advanced for purposes of a house and to offset a loan taken. He testified that the Claimant went on leave during the school holidays and was off each Saturday to Sunday without fail. The Respondent testified in similar vein.

10. The Claimant was dishonest in her testimony as she feigned ignorance as to the deductions made each month. She failed to prove that she did not go on leave as claimed or that she worked on public holidays and failed to go on weekly rest. She also did not prove her claim that she was entitled to payment of a lump sum on retirement. She was not dismissed from employment but abandoned her employment willingly in May 2017 when she declined to resume work. It would seem that she was not entirely diligent in her service to the Respondent and had occasion to report late to work in January 2017 after her December break.

11. On the counterclaim, while no defence was filed, the Claimant testified that if there was any debt due then her daughter should be pursued for the debt. The Respondent produced the copy of the cheque used to make payment and the Mpesa transaction to prove the payment made on 4th August 2016 of Kshs. 250,000/- and Kshs. 50,200/-. It is clear the Claimant owes the sum of Kshs. 300,200/-. The Mpesa statement did not have any other significant sum paid to the Claimant and it would therefore be assumed the balance of the counterclaim was made by cash. This is difficult to prove as it is the word of the Respondent versus the Claimant. I therefore find that the Respondent proves her counterclaim and accordingly enter judgment for the Respondent against the Claimant for the sum of Kshs. 210,200/- because of the 10,000/- deducted from the Claimant's salary since the loan was advanced in August 2016. The Claimant's claim is dismissed but I make no order as to costs. If the Respondent is minded she can forego the decretal sum now due to her as the relationship that soured was one that had helped her son grow up as he did with support and love. The final orders of the court are:-

(a) Claimant's claim is dismissed.

(b) Respondent's counterclaim allowed to the extent of Kshs. 210,200/- with no order as interest.

(c) Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 27th day of November 2017

Nzioki wa Makau

JUDGE