



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 76 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JUDITH ALUOCH NYANJE.....CLAIMANT

-Versus-

BHARAT BHUSAN THAKRAR.....RESPONDENT

J U D G E M E N T

By Memorandum of Claim dated 21st March 2014 filed on 10th April 2014 the Claimant alleges that she was employed by the Respondent as house help/servant from 25th November 2000 to 17th May 2013 when her employment was wrongfully and unlawfully terminated. She prays for the following remedies:

- a) One months pay in lieu of notice, overtime worked on public holidays, gratuity for years worked, severance allowance as per paragraph 14 of claim, leave allowance etc.
- b) General and/or exemplary damages
- c) Costs of the claim
- d) Interest on (c) and (b) above.
- e) Any other relief that the court may deem just and fit for grant.

The Respondent in addition filed a Response to the Memorandum of Claim in which he denies the Claim and avers that the Claimant deserted duty on 2nd May 2013 and reappeared in 17th May 2013 demanding terminal dues. The Respondent further avers that the Claimant reported the matter to the Labour Officer and her terminal dues were tabulated at Kshs. 14,885 which the Respondent deposited at the Labour Office. The Respondent denies owing the Claimant the sum claimed or any other sum at all.

The Respondent filed a list of documents containing Master Roll for the years 2005 to 2013 which contains all employment records of the Claimant including NSSF Statement from 2009 to 2013.

When the case came up for directions it was referred to the County Labour Officer Kisumu to investigate and either reconcile the parties or prepare a report with findings and recommendations. In the report filed in court on 6th January 2017 by Ms. HELLEN MANENO, County Labour Officer, Kisumu County, it is stated that:

REPORT ON JUDITH ALUOCH NYANJE – PETITIONER

VERSUS

BHARAT BHUSAN THAKRAR

Judith Aluoch Myanje was employed by Madam Asha Thakra (wife to the Respondent, Mr. Bharat Bhusan Thakrar) with effect from January 2006 as a househelp. It is instructive to note that the petitioner's father, Mr. Johanes Myanje is employed by the Thakrar family as a gardener. Infact Judith Aluoch Myanje was introduced to the Thakrar family by her father and that prior to her employment as the family househelp. She and her brothers and sisters used to come to the resident at Milimani during school holidays where they would help with work in the house, play with the children and in return, they would be given a small token as appreciation.

It was after Judith finished school that she was employed full time as a househelp in January 2006. As at the time Judith left employment in June 2013, she was earning a basic salary of 8,600 per month.

In April 2013, Judith requested for a loan of Kshs.8000/- (eight thousand) to enable her get medical treatment. She worker until May 2013. In early June she requested for ten (10) days off to enable her seek further treatment. Her employer granted her the days requested and also paid her the salary for the month of June 2013 even though she had not worked.

Judith did not report back to work instead she reported to the Labour Office that very month of June 2013 that the employer had refused to pay her dues. A joint meeting took place at the Labour Office on 28/6/2013 where the matter was discussed. The people present at the said meeting were the County Labour Officer, Madam Asha Thakrar (the employer), the complainant Judith Myanje and a witness Mr. Joseph Ondiek Ofweny (the clerk who was charged with the duties of keeping employee records and payment of salaries).

FINDINGS

Arising out of the statements from the meeting held at the Labour office on 28/06/2013 at 10.00 am the following was established.

- That indeed the petitioner was employed by the wife to the respondent as a househelp.*
- That she was not owed any leave dues as she used to be paid each year for her leave days.*
- That the petitioner's (Judith Myanje) father was and is still employed by the Thakrar family as a gardener.*
- That the petitioner's services were not terminated as she claims.*
- That she requested for ten (10) days off to seek medical treatment and never reported back to work.*
- That she did not qualify to be paid Notice by the employer since she is the one who absconded from her duties.*
- That she had been given a loan of Kshs.8,000/= (eight thousand only) which she had not paid to the employer as at the time she absconded from duty.*
- That the petitioner's employer started remitting her contributions to the National Social Security Fund with effect from November 2009 upto April 2013 (See Appendix A).*

In conclusion when the matter was brought before the Labour officer it was incumbent upon the officer to establish what was legally payable to the complainant. Therefore arising from the findings above, the Labour officer recommended that the employer pay the petitioner an ex-gratia payment considering the number of years that she had worked.

This was arrived at after it was established that the petitioner had no claim for leave as she was paid her leave in cash every year. Secondly she could not be paid salary in lieu of Notice because she had absconded duties.

Finally the Labour officer requested the employer to waive the loan amount of Kshs.8,000/- that the petitioner was owing to her employer. Section 35(5) of the Employment Act provides that an employee whose contract of service has been terminated shall be entitled to service pay for each year worked. However, this section shall not apply to an employee who is a member of the National Social Security Fund among other established schemes mentioned in the said section.

In arriving at an amicable solution to this dispute, the employer was advised by the Labour Officer to pay the petitioner service gratuity for the three years that her National Social Security Fund contributions were not paid i.e. the years 2006, 2007, 2008.

The employer agreed in good faith to pay the money as ex-gratia to the petitioner. Therefore the calculation was based on 15 days pay for each year, thereby amounting to Kshs.14,885/=.

The petitioner rejected the money therefore the employer deposited the total claim of 14,900/= (Fourteen thousand nine hundred only) on 28/06/2013 which was received by the Labour officer and acknowledged vide a certificate of receipt dated 28/06/2013 (see Appendix B) and which the petitioner has not collected to date as she opted to pursue the matter further with court. Her dues are therefore still available at the Labour office for collection.

The parties were invited to attend court on 16th October 2017 to comment on the Labour Officer's report. On the mention date only the Respondent attended court. The court decided to prepare judgment on the basis of the documents on record and the Report of the Labour Officer.

Determination

From the report of the County Labour Officer it is evident that the Claimant first reported a dispute to the County Labour Office Kisumu and a meeting was called by the county labour officer at which the Claimant's terminal dues were assessed at Kshs. 14,885 made up of gratuity at 15 days per year for 2006, 2007 and 2008 before the employer started remitting NSSF.

The Remedies sought by the Claimant are notice, overtime, public holidays and gratuity.

Of these gratuity is not payable as there is no provision for the same under the Employment Act or any other law. What would have been payable to the Claimant is service pay, but she was a member of NSSF so under section 35 of the Employment Act she is not entitled to the same. The Respondent in any event agreed to pay the claimant gratuity on request of the County Labour Officer and deposited the sum of Kshs. 14,885 at the County Labour Office on account of gratuity for 2006, 2007 and 2008.

The Claimant's prayer for notice is also not payable as the findings in the Labour Officer's Report is that she deserted duty. On the prayer for overtime worked on public holidays it is not specified which days the Claimant worked.

Based on the foregoing I find no merit in the claim and dismiss it with no orders for costs.

Dated and signed and delivered this 2nd day of November, 2017

MAUREEN ONYANGO

JUDGE