



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 514 OF 2014

BETWEEN

JOYCE ZAWADI.....CLAIMANT

VERSUS

MAHESHCHANDRA K. SHAH.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. F.M. Mwawasi instructed by F.M. Mwawasi & Company Advocates for the Claimant

Mr. Maheshchandra K. Shah in Person

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed her Statement of Claim, on the 23rd October 2014. She states she was employed by the Respondent as a Domestic Help on 10th January 2000. Her contract was terminated by the Respondent unfairly and unlawfully, on or about the 29th August 2014. She seeks the following orders against the Respondent:-

- a. A declaration that the Claimant was unfairly and unlawfully dismissed.
- b. 1 month salary in lieu of notice at Kshs. 14,250.
- c. Accrued annual leave of 15 years at Kshs. 149,625.
- d. Pending public holidays' allowances for 15 years at Kshs. 71,250.
- e. Severance pay for 15 years at Kshs. 53,437.
- f. Off-duty allowances at Kshs. 342,000.
- g. Overtime payment at Kshs. 1,887,401

Total Kshs. 2,589,652

h) Costs and Interest.

2. The Respondent filed his Statement of Response on 10th November 2014. He admits to have employed

the Claimant as his Domestic Help on the given date. She got tired with her duties and left. She was paid Kshs. 475 per day, which was all-inclusive. She is not entitled to notice pay; she was paid for work done during public holidays; she was registered with the N.S.S.F and not entitled to service pay; and she did not work overtime as claimed. Her Claim is without merit.

3. Ms. Zawadi and Mr. Shah gave their respective evidence, and closed their cases on the 4th December 2015.

4. The Claimant told the Court she was employed on 10th January 2000 and left on 29th August 2014. She was paid Kshs.470 daily. She reported to work at 8.00 a.m. and ordinarily left at 6.30 p.m. She rested on Sundays intermittently. She was paid cash for work done on Sundays. She worked every public holiday, but was paid a normal hourly rate. She disagreed with Shah over the laundry machine. She had been instructed to only wash Shah's clothes in the laundry machine, and wash her own clothes at the bare water pipe. She never went on leave. She was offered Kshs. 105,000 on termination by Shah which she found too little. She declined the amount. Cross –examined, the Claimant testified she took 2 or 3 days in a year as annual leave. She showered and ate at the Shah residence. She was paid commuter allowance. She did not make unnecessary calls to her Children while at work. She confirmed on redirection that she was paid commuter allowance; took 2 of 3 days of annual leave; and had an hour of lunch break.

5. Shah told the Court he employed the Claimant as his Domestic Help. She left in 2001 for 3 or 4 months. She claimed she was overworked, because the Respondent lived with his sick Brother who needed care. The Respondent provided the Claimant with meals and fare. She rested whenever she felt like. She would sometimes go away for 3 to 6 days a week. Shah advised the Claimant to rest on Sundays. She said she needed to work because she needed the extra money. She reported to work at 8.30 a.m. leaving at 5.45 p.m. Shah called her; the Claimant did not respond. She left work, and was reinstated, working up to 6th September 2014. The Claimant wrote to the Respondent, through her Advocates demanding Kshs. 5 million from the Respondent. This was later changed to Kshs. 2 million. The Respondent testified he is ready to pay the Claimant what is her rightful terminal dues.

6. He testified on cross-examination that he paid the Claimant daily, a sum of Kshs. 490 which included Kshs. 40 as commuter allowance. She left in 2001 for 3 to 4 months. She was free to work or not work on public holidays. The Respondent was annoyed, having called her 3 times without an answer. He is ready to pay her rightful terminal dues.

The Court Finds:-

7. The Claimant was engaged by the Respondent as his Domestic Help on the 10th January 2000. She earned a daily rate of Kshs. 475. She left work on 29th August 2014. Mr. Shah conceded there was a misunderstanding between him and the Claimant. He called her 3 times, she did not answer him. In his Witness Statement, he states he got irritated. He tried to resolve the dispute amicably. He reinstated her on 30th August 2014. She did not return to work up to 6th September 2014. He then received her Advocates' letter of demand before action.

8. The evidence on the circumstances leading to the Claimant's departure from the Shah employment is not clear. It can fairly be concluded however that the Employer was irritated by the conduct of the Employee and sent her away. When recalled, she seems to have made up her mind there was no going back and engaged Advocates who made demands on Shah for settlement at Kshs. 5 million. On the face of it, this demand looks extortionate.

9. Nonetheless the Employer had the obligation to justify termination and demonstrate he followed a fair procedure leading to termination, under Section 41, 43 and 45 of the Employment Act 2007. The Respondent did not show he had valid reason in the termination that followed his misunderstanding with the Claimant. He did not hear her out. He however made up for these shortcomings by recalling the Claimant. The Claimant declined to continue working and engaged Advocates.

10. In the circumstances the Court is not able to apportion wrongdoing on the part of Mr. Shah. The Claimant just appears to have become tired of her domestic duties, and the incessant misunderstandings with Shah took their toll. It was a relationship which was ended through an implicit consent. It should be treated as termination by consent, which exacts no compensation to the Employee from the Employer. ***The Court shall therefore treat the Claimant to have left employment under regular termination.***

11. ***She is granted 1 month salary in lieu of notice at Kshs. 14,250.***

12. It is impossible for the Court to conclude that she is owed annual leave and public holidays' pay for a period of 15 years. The Parties appear to have had a flexible working relationship, where the Employee could even be absent for 3 to 4 months, and return to fold without undergoing any disciplinary process. She worked on rest days, out of her own will, and was paid for such work. She was registered to the N.S.S.F and has no claim to service pay under Section 35 [6] of the Employment Act 2007. Off duty allowances and overtime payments which carry the bulk of the Claim were not established through the evidence of the Claimant. She was offered Kshs. 05,000 by Mr. Shah which though not broken down into specific items, appears to the Court to have been a reasonable settlement for an Employee who was registered with the N.S.S.F, and whose social security was not left dangling in the wind. Other demands made on Shah seem to this Court to have no factual or legal foundation. The Court does not take away from an Employee what has been offered by the Employer. This is a fundamental principle of employment law. ***The Respondent shall pay to the Claimant the sum of Kshs. 105,000 as offered.***

13. The other claims are rejected. In sum, IT IS ORDERED:

[a] The Respondent shall pay to the Claimant notice pay at Kshs. 14,250 and Kshs. 105,000 as offered prior to filing of the Claim.

[b] The total sum of Kshs. 119,250 shall be paid to the Claimant by the Respondent, within 30 days of the delivery of this Award.

[c] No order on the costs and interest.

Dated and delivered at Mombasa this 18th day of March, 2016

James Rika

Judge