



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 463 OF 2014

JAMES MUTISYA.....CLAIMANT

VERSUS

REZWAN SOHAILI.....RESPONDENT

JUDGMENT

1. The claimant in his memorandum of claim averred that he was employed by the respondent as a gardener on 3rd May, 2010. He was drawing a monthly salary of Kshs.8,500/=. The contract of employment was verbal.
2. According to the claimant, his exemplary performance led to allocation of more duties such as watchman without corresponding pay rise payment of overtime.
3. On 6th February, 2014 the respondent, called the security and caretaker of the estate and ordered the claimant evicted from her house without reason. This action according to the claimant was malicious and without any justifiable cause. It was contrary to the provisions of the Employment Act.
4. The respondent on her part averred that the claimant was employed as a gardener and gateman at a salary of Kshs.6,000/= per month. The claimant further drew a monthly allowance of Kshs.1,000/=.
5. According to the respondent, she travelled to Chile for a period of eleven months and left her home under her son's and claimant's care. The claimant fell ill and was hospitalized. His medical bill of approximately Kshs.120.000/= was paid for by her son.
6. According to the respondent, on resuming duties, the claimant's work became shoddy and unsatisfactory. Further, the claimant moved in with his wife to the small room which the respondent had allocated to the claimant on the oral agreement that the claimant will stay there alone if he had to see his wife he had to go to their house at Kangemi. As a result of breach of these conditions the respondent sought security services to evict the claimant from the house.
7. The parties to the suit agreed to dispense with oral evidence hence opted to file written submissions however only the claimants' counsel filed submissions.
8. In his submissions on behalf of the claimant, Mr. Kariuki submitted that the respondent did

not issue the claimant with an appointment letter as required by section 9(2) of the Employment Act. Counsel therefore submitted that in accordance with section 10(7) of the Act, an employer who fails to produce a written contract or the written particulars prescribed under subsection (1) shall have the burden of proving or disproving an alleged term of employment.

9. Counsel further submitted that under section 44(1) of the Employment Act an employer can summarily dismiss an employee however this can only be done if the employee has engaged in gross misconduct with regard to employment. This according to counsel was not the case with his client. Further even if his client engaged in any such conduct, he was entitled to a letter of summary dismissal giving the reasons for such dismissal. He argued that there were no charges, no letter to show cause or warning prior to dismissal.

10. Concerning the sum of Kshs.120,000/= allegedly spent on the claimant as medical expenses, counsel submitted that this amount was not expressed to be a loan or salary advance that the claimant was required to repay.

11. The respondent has clearly stated in her pleadings that she sought the help of security services to evict the claimant from her premises. Nowhere does she state that this happened after a hearing and decision reached that the claimant's services be terminated.

12. Domestic servants are in a vulnerable yet special relationship with their employers. On many occasions they handle sensitive and yet essential work. They therefore require more humane approach in dealing with issues concerning them. It may well be that the fact that the claimant allowed his wife to move in with him amounted to gross misconduct warranting summary dismissal, his forceful eviction was not necessary at all especially where it was not demonstrated that the claimant refused to move out upon termination of his services.

13. The respondent pleaded that the claimant became sick while she was away in Chile and a sum of Kshs.120,000/= was spent on his treatment. Thereafter she averred that the claimant's work became shoddy. It could be more probable than not that the claimant's illness had something to do with the deterioration in his performance.

14. The Court therefore finds that the procedure for terminating the claimant's services was most unfair and hereby award him eleven months salary as compensation for unfair termination of services.

15. The counter claim not having been proved, the same is hereby dismissed with costs.

16. The Court enters judgment against the respondent in favour of the claimant in the sum of Kshs.93,500/= together with costs.

17. It is so ordered.

Dated at Nairobi this 27th day of May 2016

Abuodha Jorum Nelson

Judge

Delivered this 27th day of May 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge