



REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR RELATIONS
 COURT AT MOMBASA
 CAUSE NUMBER 336 OF 2015

BETWEEN

SCHOLAR KATUVEE MULEI
 CLAIMANT

VERSUS

MARIA ZERMMLIN
 RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Chamwada Advocate instructed by Mogaka Omwenga & Company Advocates for the Claimant

Mr. Wafula Advocate instructed by Cootow & Associates, Advocates for the Respondent

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 21st May 2015. She states she was employed by the Respondent as a Domestic Help, from 8th March 2002 to September 2014 when her contract was terminated by her Employer. She fell ill sometime in 2014. She informed the Respondent about her illness. She took sick leave and availed a Reliever to the Respondent. After she got well, the Claimant returned to work. The Respondent declined to have her back. The Claimant’s contract was terminated, resulting in this Claim, in which the Claimant states termination was unfair and unlawful, and seeks against the Respondent, the following orders:-

- a. Underpayment of wages at Kshs. 4000 per month, for the entire period of employment, amounting

- to Kshs 600,000.
- b. 1 year salary at Kshs. 12,000 per month at Kshs. 144,000.
 - c. Overtime at Kshs. 3,000 per month for the period worked totaling Kshs. 432,000.
 - d. Leave allowance at Kshs. 12,000 per month for 12 years at Kshs. 144,000.
 - e. 3 months' salary in lieu of notice at Kshs. 36,000.
 - f. Salary for September 2014 at Kshs. 12,000 at Kshs. 12,000

Total Kshs. 1,364,000

The Claimant also prays for costs, interest and any other suitable reliefs the Court may deem it fit to grant.

2. The Respondent filed her Statement of Response on 19th July 2015. Her position is that the Claim is based on falsehoods and falsified documents. She concedes the Claimant was her Domestic Help, but denies to have unfairly and unlawfully terminated the Claimant's contract of employment. The Claimant took her annual leave beginning 5th September 2015. She purported to be sick on 16th September 2015. She was advised by the Respondent to see the Respondent's Family Doctor, at Aga Khan Hospital Mombasa. She declined and left employment. She informed the Respondent through a text message on the mobile phone that she would not be returning to work. Termination was not instigated by the Respondent. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant gave evidence, and rested her case, on the 22nd October 2015. The Respondent gave evidence, and closed her case, on the 23rd February 2016. The dispute was last mentioned in Court on 23rd March 2016, when Parties confirmed the filing of their Closing Submissions, and the date for delivery of the Court's decision reserved.

The Claimant's evidence

4. The Claimant told the Court she was employed through an oral contract. She was on probation for 3 months, ending May 2002. Her first salary was Kshs. 4,000, the last one being Kshs. 12,000 monthly.

5. She took her annual leave in August 2014. She returned to work in September 2014. She fell ill and informed the Respondent about her illness. The Respondent gave the Claimant Kshs. 3,000 for treatment. The Claimant was treated at Swiss Cottage Hospital in Mtwapa. She was diagnosed with malaria. She gave the treatment records to the Respondent. The Claimant was asked by the Doctor to continue with the medication for 3 months. In the meantime the Claimant found a Reliever to work for the Respondent in the Claimant's absence. The Reliever worked for the Respondent for 4 months before being summarily dismissed by the Respondent.

6. It is not true that the Claimant deserted employment. She did not issue any notice of termination on the Respondent. She returned to work in December 2014 and found the Respondent had engaged other Domestic Helps. The Claimant was underpaid and overworked. Every year, the Respondent increased the Claimant's salary by Kshs. 500. The Claimant worked from 7.00 a.m. If the Respondent was having a Party, the Claimant would be required to continue working, until the Party was over. The Claimant did not refuse to be attended to by the Respondent's Family Doctor.

7. Scholar told the Court on cross-examination that she earned Kshs. 5,000 as of May 2002, and Kshs. 12,000 as of September 2014. She did not know if the rates were below the applicable minimum wages. The Respondent lived with her husband. It was just the two of them. Overtime work was necessary because the couple entertained many visitors. The Claimant conceded she took annual leave of 30 days every year. She had just returned from annual leave on exit.

8. The Claimant had a mobile phone line number 0729221971. This phone was damaged at the time the Respondent alleged to have exchanged text messages with the Claimant. There was a text message

dated 17th October 2014. The Respondent invited the Claimant back to work in this message. There was a message dated 5th December 2014, which the Claimant conceded originated from the Claimant's mobile phone. It is not true that the Claimant informed the Respondent the Claimant did not wish to return to work. The Claimant cleaned and cooked for the dogs. She lived in the Respondent's Servant Quarters. She conceded she does not have a claim in annual leave pay. In law, the Claimant testified she was entitled to 3 months' salary in lieu of notice. She emphasized on redirection that the Respondent told her not to report back to work.

Respondent's Case

9. Maria told the Court she has been a resident of Mtwapa for 25 years. She employed the Claimant as her Domestic Help in March 2002.

10. On 16th September 2014, the Claimant's Sister reported to the Respondent's residence. She told the Respondent that the Claimant was sick. The Respondent called the Claimant on the Respondent's mobile phone. The Claimant did not answer the calls. She did not communicate for over 1 month. The Respondent wrote to the Labour Office Kilifi, appraising the Labour Office about the Claimant's absence.

11. The Claimant sent the Respondent short text messages through the mobile phone, telling the Respondent she would not come back to work. The messages were contained in Respondent's annexure 3. On 17th October 2014, the Respondent sent the Claimant a message asking the Claimant to return to work. The Respondent told the Claimant she was pained the Claimant had not returned. The Respondent did not at any time fire the Claimant. The Claimant went on annual leave in August 2014, returned in September, and a few days later, left for good.

12. The Respondent paid to the Claimant Kshs. 12,000 per month. The Claimant was not underpaid. Maria stayed with her husband only. The Claimant cooked for the couple and their dogs. She did the laundry. She stayed within the residence. She was provided with free water and electricity. The Respondent paid the Claimant's N.S.S.F and N.H.I.F contributions. She was not overworked.

13. The Respondent testified on cross-examination, she did not have the Claimant's employment records. The Claimant's salary was reviewed annually. She lived with the Respondent's Family all through save for 2 months, when the residence was under renovation. During these months the Respondent paid house rent allowance to the Claimant.

14. The Respondent knew the Claimant's mobile phone number for 6 years. The last message on this number was from Katuve Munyoki Mulei. This was the Claimant's name. The Respondent tried to reach the Claimant as seen in the text messages. The Claimant did not provide the Respondent with the treatment receipts from the Swiss Cottage Hospital. The Respondent was advised the letter produced by the Claimant, in support of her treatment record at the Hospital, was a forgery. It did not originate from the Hospital. The Respondent prays the Court to dismiss the Claim.

The Court Finds:-

15. It is accepted by all sides that the Claimant was employed by the Respondent in March 2002, as a Domestic Help. She left employment in September 2014. Her salary was Kshs. 12, 000 on departure.

16. The bulk of her claim comprises alleged underpayments at Kshs. 600,000; overtime pay at Kshs. 432,000; and leave allowance at Kshs. 144,000.

17. From the evidence, the pleadings and submissions on record, it is as clear as a pike staff that these claims are without foundation. There was no evidence or material availed to the Court to show what the correct rate of monthly pay to the Claimant, should have been. She did not focus the mind of the Court on any wage instrument, any contract of employment, collective agreement or wage order,

entitling her to any other rate, other than Kshs. 12,000 paid to her by the Respondent. A quick perusal of the applicable minimum wage orders over the period worked, supports the Respondent's position that, the Respondent paid above the wage floor. The claim for underpayment at Kshs. 600,000 is misplaced and without merit.

18. The prayer for overtime pay, at Kshs. 3,000 per month, is not supported in law and fact. Overtime pay is structured, as laid down in the General Wages Order. The daily rate must be shown, and the hours worked in excess known. An Employee cannot just apportion to herself an increment of Kshs. 3,000 per month, for the entire period worked, and seek the endorsement of the Court, without resort to the wage structure created under the law. The Claimant did not show that she worked overtime, or that such overtime work was approved and necessary, in a residence primarily occupied by a man, his wife, and their dogs only. The prayer for overtime pay is rejected.

19. The Claimant conceded she is not owed anything by way of annual leave pay, which she incorrectly pleads as leave allowance in her claim. The claim for annual leave pay shall be treated as withdrawn.

20. This leaves the Court with the claims for 1 year salary at Kshs 144,000; 3 months' salary in lieu of notice at Kshs. 36,000; salary for September 2014; costs; interest; and any other suitable reliefs.

21. The claim for 1 year salary presumably is intended to be compensation for unfair termination. Notice pay is similarly based on the assumption that the Respondent initiated termination. The question must therefore be whether termination was at the instance of the Respondent, and whether it was unfair and unlawful.

22. The Claimant went for annual leave in August 2014. She returned and was at work for a few days in September 2014. She left alleging to be unwell and was away up to December 2014, when she alleges to have gone back and found the Respondent had engaged other Domestic Helps.

23. The Claimant states she was unwell and sought treatment at Swiss Cottage Hospital. She provided the Respondent with a Reliever for the period she would be away mending her body. She was treated for malaria, and given drugs to take for 4 months. The Respondent disputes Claimant's treatment at the Swiss Cottage Hospital and alleges documents from this Hospital, availed to the Court by the Claimant were forged.

24. The Court is of the view that the Claimant was ill, but did not obtain proper sick leave from the Respondent, in accordance with Section 30 of the Employment Act. She ought to have asked for proper sick leave, and when requested to be seen by the Respondent's Family Doctor, acceded to the request. She gave no reason to the Respondent why she could not be seen by the Family Doctor.

25. The text messages between the Claimant and the Respondent [Respondent's annexure 3], diminishes the value of the evidence surrounding the Claimant's illness and treatment, in relation to her departure from employment. The Respondent constantly enquires into the Claimant's wellbeing. She tells the Claimant to go back to work when the Claimant heals. She signs off as 'Mami.' This suggests the Respondent was more of a Mother figure to the Claimant, not a mere, cold, unmindful Employer. The Claimant writes to the Respondent on 5th December 2014, where, referring to the Respondent as 'Mama,' reveals she had taken the initiative to end the employment relationship. She states categorically *'I saw Jessi, she asked me if I am coming back for job, I told her I am not coming back... bye Mama... I love you...and will still loving you like my Mama...'*

26. It is therefore strange that the Claimant should turn around and charge the Respondent terminated her contract of employment, unfairly and unlawfully. She made a decision not to work. Her illness, if at all there was an illness, did not have anything to do with the decision to terminate employment. Termination was not by the Respondent; it was at the instance of the Employee. The reason for termination was only known by the Employee. The Employer went out of her way to reasonably accommodate the Claimant in her illness and left the door open for her return. The Claimant shut that

door. She is not entitled to compensation and notice pay.

27. She was paid her salary for September 2014, as conceded in her evidence. There is no justification for costs and other suitable reliefs in favour of the Claimant.

28. The Court has stated that it is important for Domestic Workers to assert their employment rights. The Constitution of Kenya 2010, the Employment Act 2007, and the ILO Domestic Workers Convention 189 of June 2011, all call on the Courts to recognize, promote and protect the rights and freedoms of Domestic Workers. In **Zena Ibrahim v. Ebubekir Sahir** [Industrial Court at Nairobi, Cause Number 11 of 2011], the Court restated the need for this recognition, promotion and protection.

29. As a corollary, Domestic Workers must be discouraged from forwarding to the Court frivolous Claims, which seem to aim at nothing more than extracting money unreasonably, from Employers. The Respondent in this Claim seems to have acted reasonably at every turn. She employed the Claimant for 12 years, paid her above the minimum wage, and treated the Claimant like a daughter. She ensured the Claimant was enrolled with the N.S.S.F and the N.H.I.F. She accommodated the Claimant and met her utilities. When the residence was closed for renovation, the Respondent paid the Claimant's house rent. In the end the Claimant left employment voluntarily, then turned around in search of Kshs. 1.3 million from the Respondent. Cases where Domestic Workers sue their Employers for unfair termination, in particular White, Arab, or Asian Employers around the Coastal Region, are on the rise. The trend must be carefully examined, and genuine Claimants set apart from bounty hunters. IT IS ORDERED:-

[a] The Claim is dismissed.

[b] 30% of the costs of the Claim shall be paid by the Claimant to the Respondent.

Dated and delivered at Mombasa this 1st day of July 2016

James Rika

Judge