



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 134 OF 2014

EMILY ISIGI INYANJE

CLAIMANT

v

THE DIRECTOR,

MISSION IN ACTION CHILDREN'S HOME

RESPONDENT

JUDGMENT

1. Emily Isigi Inyanje (Claimant) was employed by Mission in Action Children's Home (Respondent) in January 2011 as a house servant. The Respondent though did not issue her with a written contract.
2. On or around 17 February 2014, the Respondent terminated her employment and being aggrieved she filed a Statement of Claim against the Respondent.
3. The Claimant stated the issues in dispute as
 1. Unfair termination
 2. Notice
 3. Housing allowance
 4. Leave
 5. Gratuity.
4. The Respondent was served and on 23 May 2014, it filed a Response together with Documents it sought to rely on. On 4 June 2014, the Claimant filed a Reply to the Response. On 25 June 2014, the Respondent filed other Documents.
5. The Cause was heard on 20 November 2014 and 21 January 2015. The Claimant filed her submissions on 3 February 2015, while the Respondent's submissions were filed on 11 February 2015.
6. The Court has considered the pleadings, evidence and submissions and identified the questions begging for answers as, *whether the termination of the Claimant's employment was unfair, whether the Claimant's remuneration was inclusive of house allowance, whether the Claimant has accrued leave and appropriate relief*

Whether termination of employment was unfair

The pleadings and evidence

7. The Claimant's pleaded case is that sometime in November 2013, a wife to the Director of the Respondent (Ivan Budulica) informed her and other employees that the Director had decided to terminate contracts of employees who were thought loyal to the wife (the wife later separated with the Director and went overseas).

8. The Claimant also pleaded that the Director got a new wife and the new wife informed her that the Director was not comfortable with her and that around 22 January 2014, after reporting to the Police as a follow up to an incident on 22 December 2013, the Director's new wife sent her away and instructed her to return for her dues after 2 weeks. She further pleaded that she was ordered to sign a termination of services letter on 17 February 2014. The termination, she contended was not in compliance with section 41 of the Employment Act, 2007.

9. In her testimony, the Claimant stated that there was an incident involving stolen flour which was reported to the Police in Njoro by the new wife to Respondent's Director (Damaris).

10. The Claimant stated that on 22 December 2013, she recorded a statement with the Police and when she reported back to work on 23 December 2013, the said Damaris told her that her husband Ivan did not want her to continue with work.

11. She also stated that she was not taken through a disciplinary hearing and that she was not issued with a termination letter.

12. During cross examination, the Claimant denied receiving or signing the termination letter dated 17 February 2014 which was shown to her. She stated that the only document she signed was one acknowledging receipt of her terminal dues.

13. She further stated that she did not work after 22 December 2013.

14. The Respondent on the other hand pleaded that after the flour theft incident, it held a meeting with the Claimant on 26 January 2014 and decided to reassign the Claimant to the post of a cleaner but she declined and requested to be paid her dues and she was paid Kshs 31,910/-.

15. The Respondent also pleaded that any termination of the Claimant's employment was well founded in law and she was paid one month wage in lieu of notice.

16. The Respondent called 2 witnesses. The first witness was its Accountant. He stated that the Claimant was paid one month wage in lieu of Notice and other dues.

17. He also stated that he wrote the Claimant's termination letter and she signed it in his presence.

18. Under cross examination, the witness stated that he wrote the termination letter after getting a briefing from the Director and that the Claimant had been caught stealing flour but refused to be moved to a different department.

19. The second witness was Mariam Yunia, a colleague of the Claimant at some point. She stated that the Director showed her the trail of the stolen flour and spaghetti from the store on 23 December 2013. The Claimant was in charge of the store and had the keys.

20. She further stated that the Director instructed her to make a report to the Police which she did and the Claimant recorded a statement before the staff broke for the December holidays and resumed in January 2014.

21. The witness further stated that on resumption in January 2014, the Director called the Claimant in the presence of Damaris and herself and directed that the Claimant move to the school section as a cleaner under same terms but she refused and asked to be paid her dues.

The law

22. By dint of section 47(5) of the Employment Act, 2007, an employee complaining of unfair termination or wrongful dismissal is required to prove that an unfair termination of employment/wrongful dismissal has occurred before the employer is called upon show it complied with the procedural fairness requirements (section 41 of the Act), to justify the grounds for the termination of employment, prove the reasons for the termination (section 43 of the Act) and that the reasons are valid and fair (section 45 of the Act).

23. The burden placed upon employees is a low one but nevertheless an obligation which an employee needs to discharge before the employer is called upon to discharge the burden placed on employers.

Applying the law to the facts

24. The first question is whether the Claimant has discharged the burden of proving an unfair termination/wrongful dismissal occurred.

25. The Respondent's second witness narrated about a meeting in which she was present and the Claimant was instructed to report to the school as a cleaner on reassignment but she declined.

26. This witness was not challenged on this testimony. The witness appeared truthful.

27. The Court would accept her evidence that a meeting was held and a decision was made to deploy the Claimant to a different section after discussions with her but she declined.

28. By declining the deployment and asking for her dues, the Claimant was exhibiting an intention to repudiate the contract. In deciding to pay her dues, as she requested, the Respondent was accepting the repudiation.

29. The Court therefore finds that the Claimant has failed to discharge the very low threshold of showing that there was unfair termination/wrongful dismissal.

30. But the Court also noted a lot of inconsistencies on the part of the Claimant who was ably represented by legal counsel.

31. In her pleadings (paragraph 14 of the Statement of Claim) she pleaded that she was given a prepared termination letter dated 17 February 2014 and ordered to sign it.

32. In the Reply to the Response, she pleaded that she received the termination letter but declined to sign it due to misleading averments in it. The Claimant attached a copy of the termination letter though asserting it was materially different from the one produced by the Respondent.

33. In examination in chief, she stated that she was not given a termination letter and was not taken through a hearing.

34. In cross examination, she again testified that she was not given a termination letter and denied ever seeing the termination letter dated 17 February 2014 and shown to her. She categorically denied signing the letter.

35. These inconsistencies were so glaring that they cast a shadow of doubt on the Claimant's credibility.

Whether remuneration was inclusive of house allowance

36. Provision of housing accommodation to employees is one of the basic and minimum terms and conditions of employment, and at the employer's expense. In lieu of providing housing accommodation, an employer should pay a housing allowance.

37. Under section 31(2) of the Employment Act, 2007, where an employer does not provide housing, the contract of service should make provision as to whether the wage paid to the employee is consolidated or not.

38. The Respondent did not provide the Claimant with a written contract with this type of detail or any other benefits or entitlements.

39. The only evidence before Court were the pay slips produced by the Claimant and her evidence that she would get a night out allowance whenever she worked the night shift. The pay slips confirmed this testimony.

40. Considering the documents, testimony and section 10 of the Employment Act, 2007, the Court finds that the Claimant's wage was not inclusive of a house allowance and which allowance is customarily fixed at 15% of basic pay.

Accrued leave

41. The Claimant pleaded and testified that she did go on annual leave during her tenure with the Respondent (from January 2011 to February 2014).

42. Pursuant to section 10(3) and 74 of the Employment Act, 2007, the Respondent should have produced leave records. But among the dues paid to the Claimant was Kshs 15,577/- on account of accrued leave. The Court will not make any further award under this head.

Appropriate relief

43. Some of the reliefs sought by the Claimant are statutory/contractual entitlements and do not depend on the fairness or lawfulness of separation.

Pay in lieu of Notice

44. The Claimant was paid one month basic pay of Kshs 6,720/-. She sought a balance of Kshs 1,008/-. With the conclusion reached this relief is not applicable.

House allowance

45. The Court has found the Claimant's remuneration was not inclusive of house allowance. She sought Kshs 36,288/-. The Respondent did not interrogate this amount and the Court would award her the same.

Gratuity (service pay)

46. Under this head, the Claimant sought a balance of Kshs 437/- out of Kshs 10,080/- she pleaded she was entitled to. She was paid Kshs 9,613/- as service pay.

47. The Claimant did not explain the formula she used to arrive at her computed figure.

48. The Court therefore declines to allow this claim for the balance of gratuity.

Leave

49. The Claimant was paid Kshs 15,577/- on account of accrued leave. She sought a balance of Kshs 706/- but did not really fault the calculations by the Respondent in her evidence.

50. The Claimant was entitled to 21 days annual leave with full pay for each completed year of service. The Court will not disturb the calculations by the Respondent.

Compensation

51. The Claimant failed to show an unfair termination/wrongful dismissal occurred. Compensation is therefore inapplicable.

Conclusion and Orders

52. The Court finds and holds that

(a) The Claimant has failed to show that there was an unfair termination/wrongful dismissal and this cause of action is dismissed.

(b) The Claimant's remuneration did not include house allowance

53. Despite the dismissal, the Claimant was entitled as of contract/statute and the Court awards her and orders the Respondent to pay her

(a) House allowance Kshs 36,288/-

54. This Cause could have easily been settled through conciliation/Labour Office.

55. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 13th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ngamate instructed by M. Korongo & Co. Advocates

For Respondent Mr. Situma instructed by Mukite Musangi & Co. Advocates