



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 112 OF 2014

STELLA MUKOKO AMUTABI CLAIMANT

VERSUS

SAIJAL SHIKOTRA RESPONDENT

J U D G M E N T

INTRODUCTION

1. The Claimant was employed by the Respondent as a Domestic Servant from 15.3.2008 and served until 31.10.2013 when she resigned after serving a 3 months notice to the employer. She now brings this suit alleging that the employer underpaid her salary during the whole period of her service and further that she was forced to work during public holidays. She therefore seeks to recover the salary underpayment plus compensation for the public holidays worked.
2. The Respondent has admitted the employment relationship with the Claimant but denies that she underpaid the Claimant or forced her to work during public holidays. According to the Respondent the suit should be dismissed because the Claimant has no valid claim against her.
3. The suit was heard on 29.10.2014 when the Claimant testified as CW1 and the Respondent testified as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 told the court that she was employed by the Respondent from 15.3.2008 to 31.10.2013 as a Domestic Worker. Her starting salary was Kshs.3000 per month but later it was reviewed to a maximum of Kshs.6000. She used to rest only on Sundays but no holidays were given to her. CW1 resigned by serving a 3 months written notice (Exh. 1) to the Respondent after the employer added her duties to include feeding and washing of cats.
5. Upon termination CW1 was only paid her last salary of Kshs.6000 but refused to sign a discharge voucher which the employer had prepared for her to say that she had no further claim against the Respondent. According to CW1, the Respondent used to underpay her salary in relation to the minimum pay set by the law. She explained that the 2009 Wage Order set the minimum salary for Domestic Servant at Kshs.6130 basic pay plus 15% House Allowance totalling to Kshs.7049 as opposed to Kshs.3000 she was being paid. From May 2010 to April 2011. She was receiving Kshs.3500 as opposed

to the minimum pay of Kshs.7754. As from May 2011 to April 2012, she was getting Kshs.4500 as opposed to statutory minimum pay of Kshs.8724. From May 2012 to April 2013 she was earning Kshs.5500 as opposed to Kshs.9865 set by the Wage Order. Lastly from May 2013 to September 2013 she was earning Kshs.6000 instead of the Kshs.11247 set by the Wage Order.

6. CW1 explained that she used to sign a petty cash voucher to receive payment and denied the allegation by the defence that she used to sign a Muster Roll. She also denied the signature on the said Muster Roll filed by the respondent. She prayed for the salary underpayment plus compensation for the holidays worked as per prayer (i) – (v) in the Claim.

7. On cross examination by the defence counsel, CW1 admitted that she stated in her termination notice that she had good relationship with the Respondent and that the reason for the resignation was that she wanted to go home. She further admitted that the letter did not mention that she was doing the duty of washing cats and being denied tea. She admitted that after 2 weeks of leaving work she went to her union and reported that her starting salary was Kshs.5500 per month but when the suit was being filed she changed it to read Kshs.3000 per month. She further admitted that her union wrote several letters to the Respondent quoting different figures as her salary which differ from the figures pleaded in this suit.

8. She contended that she only used to sign Petty Cash Vouchers to receive salary of which she did not have any copy. She confirmed that the Master Roll for April 2008 showed salary of Kshs.6500 but she denied the signature thereon stating that it was a forgery. She also confirmed that the Muster Roll for 2009 and 2013 showed a salary of Kshs.7050 and Kshs.11250 respectively but again she denied ever receiving such salary and described the figures as strange to her. She however admitted that the employer used to remit NSSF contributions on her behalf. She further admitted that when she reported the dispute with the labour office by the letter dated 27.1.2014, she never mentioned any underpayment or public holidays worked but only complained of extra duties and prayed for payment of kshs.40000. She concluded by admitting that she did not plead the specific public holidays she worked and clarified that her salary in 2009 was ksh.5000 per month.

DEFENCE CASE

9. RW1 is a house wife who lives in Mombasa. She confirmed that she employed CW1 as a house maid from April 2008 starting with salary of ksh.6500 per month. According to her, CW1 used to sign Master Roll (D.exh.1). RW1 later reviewed CW1's salary to a maximum of ksh.11250. She denied that CW1's salary was underpaid at any one time. She explained that CW1 used to report to work at 7.30am and leave at 2pm. She described CW1's duties as washing clothes, dishes and the house, ironing clothes and preparing food stuffs. She denied that CW1 was working on public holidays. According to RW1, public holidays were an opportunity for family outings or rest at home without the employees.

10. RW1 contended that CW1 never at any time complained about the issues she is raising in this suit and indeed she did not mention them in the resignation letter. She observed that the letters. written by CW1's union quoted different figures as the salary she was receiving which were not true. RW1 explained that by the letter dated 27/1/2004 (D.Exh.2) CW1 was demanding ksh.40,000. RW1 produced a bundle of receipts and statements to prove that she used to contribute to the NSSF in favour of CW1. She concluded by stating that she paid CW1 all her salary and prayed for the suit to be dismissed with costs.

11. On cross examination by the claimant's representative, RW1 admitted that CW1 never used to sign any attendance register. She maintained that CW1 worked every day except Sundays, and public holidays. She further maintained that CW1 was receiving salary advance every month including October 2008 when she asked for ksh.4452 to pay for certain things. She denied that CW1 was working on public holidays.

ANALYSIS AND DETERMINATION

12. Upon carefully reading and considering the pleadings, evidence and submissions, it is clear that Cw1 was employed by RW1 between April 2008 and October 2013 when CW1 resigned. The only issue for

determination is whether the claimant was underpaid in terms of her monthly salary and whether she used to work on public holidays. Lastly the court will determine whether the suit is time barred.

Salary underpayment

13. The claimant alleges that she was receiving a salary of ksh.3000 in 2008 which was later reviewed upwards to a maximum of ksh.6000 per month in 2013. That she used to acknowledge the said salary by signing a petty cash voucher and not a Master Roll. RW1 on the other hand contends that the starting salary for the claimant was ksh.6500 which was reviewed in May 2009 to ksh.7050, then ksh.7753 in July 2010, ksh.8750 in May 2011, ksh.9900 in June 2012 and finally ksh.11250 in September 2013. The basis of the foregoing allegations is the Master Roll produced by RW1 as Dexh.1. The claimant has denied the signature on the said Master Roll and dismissed it as forgery. No effort was made by the defence to prove that the signatures on the Master Roll belonged to CW1. One would have expected that RW1 will call a second witness or document examiner to confirm that the said signature belonged to CW1. It is a cardinal principal of law of evidence that he who alleges must prove. Although his court is not bound by strict rules of evidence, in this case the defence did not prove that CW1 signed on the Master Roll (D.exh.1). The signatures differ materially even at a glance. Consequently the Master Roll is dismissed as a worthless forgery intended to defeat the cause of justice. In any event the court wonders why the employer used a Master roll for the CW1 only yet there were other employees as evidenced by the NSSF records produced.

14. The Court has also considered the contradicting facts attributable to the claimant regarding the actual salary she was receiving from the respondent. In paragraph 1.1 of the claim CW1 alleges that her starting salary was ksh.3000 per month in 2008. under paragraph 1.2 of the claim, CW1 alleges that the salary was increased by ksh.500 annually to a maximum of ksh.6000 as at 31/10/2013. On the other hand her union wrote several letters stating that her starting salary was ksh.5000 per month but was reviewed later to ksh.6000 from 2012. The court will resolve the said discrepancy by first blaming the respondent for failing to prepare a written contract of employment as provided for in Section 9(2) of the employment Act. Under Section 10(7) of the said Act unless the employer produces a written contract on any legal proceedings, the burden of proving or disproving any alleged term in the contract of employment lies on the employer. In the present case the employer has failed to both produce a written contract and to prove what was the correct salary for the claimant. She also failed to disprove the salary alleged by the claimant.

15. The foregoing does not however mean that the claimant has proved the exact salary that she used to receive. The reason for the foregoing is that the claimant's evidence is tainted with material contradictions. In fact the pleadings and the evidence were also in sharp contradiction. Under the aforesaid paragraph 1.1 of the claim the claimant pleaded that her starting salary in 2008 was ksh.3000 per month a fact she repeats in her testimony. However by demand letter from CW1's union dated 21/11/2013 and 5/12/2013 respectively, the claimant stated that her starting salary was ksh.5500. In addition there is material contradiction with respect to the exact time when the salary was reviewed to ksh.6000.

16. Under paragraph 1 in the claim, the salary was Ksh.4000 from May 2010 – April 2011, ksh.4500 from May 2011- April 2012, ksh.5500 from May 2012 – April 2013 and ksh.6000 from May 2013 – September 2013. By the said demand letters dated 21/11/2013 and 5/12/2013, the claimant stated that her salary was ksh.5500 between March 2008 – December 2010, Ksh.6000 from January 2012 to October 2013. The foregoing contradictions are not only material but also inexcusable

17. Even if the court takes judicial notice that the claimant is only a semi-illiterate house maid, who was not able to secure legal representation, the magnitude of the factual contradiction in both pleadings and evidence are outrageous and deliberate. On a balance of probability therefore, the court finds that the claimant has not proved the exact salary she was earning in the diverse between 2008 and April 2011. However it appears from the letter dated 5/12/2013 (appendix 5) and the tabulations of the dues payable dated 5/12/2013 (appendix 4) that from May 2011 to October 2013 the claimant's monthly salary was ksh.6000 gross pay. That was obviously below the minimum salary set by the Labour Institutions Regulations (General) Wage Order for May 2011, May 2012 and May 2013. The claim for salary underpayment in respect of that period is therefore justified.

18. Under the said 2011, 2012 and 2013 General Wage Order, the minimum basic salary for a house servant was ksh.7586, Ksh.8579.80 and ksh.9780.95 respectively. The claimant has assessed house allowance at 15% of the above basic pay for the said period which is ksh.1,137.90 ksh.1,286.97 and ksh.1467.14 for 2011, 2012 and 2013 respectively. The minimum statutory gross pay for 2011, 2012 and 2013 was therefore ksh.8723.90, 9866.77 and 11,248.09 respectively. The underpayment from May 2011 to April 2012 was thus $ksh.8723.90 - 6000 = 2723.90$ per month $\times 12 = Ksh.32,686.80$. The underpayment for May 2012 to April 2013 was $ksh.9866.77 - 6000 = 3866.77 \times 12$ months = Ksh.46401.24. Finally the underpayment for May 2013 to October 2013 was $ksh.11248.09 - 6000 = 5248.09 \times 6 = 31488.54$. The total underpayment for the period 2011 to 2013 was therefore ksh.110,576.58. The period before 2011 has not been considered herein because as already found herein above the evidence by CW1 is inconsistency in respect of that period. In addition the claims for the said period are time barred. The suit here was filed on 20/3/2014 and under Section 90 of the employment Act all claims founded on employment contracts must be filed within a period of 3 years after the cause of actions arise.

19. As regards the claim for the public holidays worked, the court observes that, the claimant did not tender or cite any relevant evidence to prove that she used to attend work on public holidays. In addition the particulars of the public holidays worked were not pleaded or at least given in evidence even after the question was raised during the cross examination of the CW1. Consequently the prayer for compensation for the alleged public holidays worked is dismissed.

DISPOSITION

20. For the reasons stated above, the court enters judgment for the claimant in the sum of ksh.110,576.60 being her salary underpayment in arrears for the period between May 2011 and October 2013. She will also have interest from date of termination but each party will bear her own costs.

Dated, signed and delivered this 13th March 2015.

O. N. Makau

Judge