



REPUBLIC OF KIENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 565 OF 2014

JOYCE MWENDE KANG'AACLAIMANT

VERSUS

SHALIY AWAN..... 1ST RESPONDENT

KUKU'S AWAN 2ND RESPONDENT

JUDGEMENT

1. The issues in dispute are the underpayment, unlawful and unfair termination of the Claimant and the contravention of section 46 and 43 of the Labour Institutions Act and sections 36, 29, 25 and 46(a) of the Employment Act.

2. On 7th April 2014, the Claimant Joyce Mwendu Kang'aa filed the Claimant herein. The Respondent filed a defence on 5th May 2014 and admitted employing the Claimant but failed to attend duty from December 2013. On 20th May 2014 the Claimant filed a reply to the statement of defence. On 9th June 2014 the Respondent filed a Notice of Preliminary objection. On 9th June 2015 when the matter came for hearing, the Respondent advocate sought to have the preliminary objection addressed through written submissions and noting that the Claimant is acting in person, the Court directed that the same be heard in Court by oral submissions. Hearing was fixed for 11.30a.m. But at the appointed hour the respondents or the advocates were absent. Court directed the Claimant to proceed with the main suit noting the absence of the respondents.

Claim

3. The claim is that the Claimant was on 27th December 2011 employed by the respondents at their Kileleshwa home as a House help/Cleaner at a monthly salary of kshs.7, 000.00. This was increased to Kshs.8, 000.00. The Claimant served the respondents family diligently until 5th March 2014 when she was terminated due to pregnancy and they refused to pay for the underpayments, notice, leave due and maternity leave and compensation for the unlawful termination. The Claimant is therefore seeking;

- a. *One month payment in lieu of notice at 11,248.90*
- b. *Underpayment balance from May 2012 to April 2013 at kshs.29, 868.30*
- c. *Underpayment balance from May 2013 to January 2014 at kshs.11, 250.00*
- d. *Service pay for 2 years at Kshs.33, 746.70*
- e. *Maternity leave 3 months' salary at kshs.33, 746.80*
- f. *Compensation at kshs...134,986.80*

4. The Claimant also states that she was not issued with any letter of appointment and was not paid the legal wage of kshs.11, 248.90 or paid commuter allowance or paid for the extra 2 hours she worked overtime each day. Despite lodging complaints on her case, the respondents ignored the Claimant concerns. Since termination the Claimant has tried to call the respondents but they have refused to pay. On 5th march 2014 the 1st Respondent called the Claimant and notified her that she would not be paid for her annual leave and at the same time are paid for her maternity leave. The Claimant was however paid for her salary arrears for February 2014 at kshs.4, 070.00 via Mpesa and noting that she was pregnant was dismissed. The respondents were aware of the claimant's pregnancy and were thus terminated not because she got a new job but due to her condition. This was discriminatory. The termination was therefore not justifiable cause and the respondents are liable.

5. In reply to the defence by the respondent, the Claimant stated that her wages are regulated in law and the Respondent failed to pay the minimum wage. The Claimant sent a demand letter to the Respondent and their advocates did a reply noting the Claimant deserted her employment on 7th march 2014. Some salary arrears were paid through Mpesa. She was terminated due to her pregnancy

6. In support of her case, the Claimant gave her sworn evidence and testified that upon her employment by the respondents she worked diligently as their House Help/Cleaner but was underpaid and when she lodged complaints they were ignored. In March 2014 she was to proceed on her annual leave but was called from home and told not to report back to work. She went to the respondent's home and could not go beyond the gate as the security guards were told not to let her into the premises as she was pregnant. She was therefore terminated without notice or payment of her terminal dues. She is also seeking for the commuter allowance and fares spent going for work. The Respondent has since moved to a different house since May 2014 after the Claimant was terminated in March 2014. She was terminated before taking her maternity leave. The Claimant thus confirmed her outlined claims.

Defence

7. In defence, the respondents stated that they did not terminate the Claimant unfairly and noted that in December 2013 the Claimant left the respondents premises and informed them that she was to come back in end of February 2014. No reason was given by the Claimant for being away. The Claimant is not entitled to the outlined claim and the Respondent is keen to file a counterclaim.

8. No evidence was called or offered by the Respondent as they opted to be absent at the hearing.

Determination

9. The Labour Institutions Act makes provision for the government regulation of wages and section 46 makes provision of the publication of such wages via Kenya Gazette. Once such wages for the various sections are published, they become applicable and available to employer to apply with regard to the contracts of employment. The Claimant was employed as a House help/Cleaner, a position regulated in law with a minimum wage. For the period of her employment, the Claimant wages were regulated by the Wage Guidelines and Legal Notices No.71 May 2012 and No. 197 of May 2013. At the time of termination in 2014, the applicable wage guidelines were regulated under the Regulation of Wages (General) (Amendment) Order 2013 to the Labour Institutions Act, and the minimum wage for a House help/Cleaner was kshs.9, 780.95 for Nairobi. The Claimant was employed in Nairobi at Kileleshwa at the domestic residence of the respondents. Her last salary was kshs.8, 000.00 which should have been reviewed upwards from 1st may 2013 when the Legal Notice took effect. Equally where the Claimant remained in the employment of the Respondent from 27th December 2011, the wage guidelines applicable for her area of operation applied being Kshs.8,579.80 according to the Regulations of Wages (General) (Amendment) Order 2012 to the Labour Institutions Act vide legal Notice No. 71 of 1st May 2012. Within this period the Claimant was paid kshs.7, 000.00 which was below the legal minimum. The underpayments not remitted are therefore due as of right. In 2012, for the year, the underpayments each month amounted to kshs.1,579.80 all being **kshs.18,957.60** and the underpayments from the 2013 wage guidelines payable in 2013 to 2014, for the 9 months the Claimant served until termination, the

underpayments were Kshs.1,780.90 per month all being **kshs.16,028.10**. Total underpayments due and owing all amount to **kshs. 34,985.70**. these are statutory provisions that no employer should go under but the same can be improved.

10. Section 9 and 10 of the Employment Act now require every employer to issue an employee with a written contract of employment spelling out the terms and conditions of such employment and where not possible to issue such a written contract immediately upon commencement of such employment, this should be issued within 2 months. Failure to issue such a contract leaves the employer exposed as in the absence of such a contract, in the event of a conflict, the word of the employee who alleged unfair treatment must suffice. In this case, the Claimant gave evidence that upon her employment as a House help/Cleaner on 27th December 2011 by the Respondent she was never issued with any written contract of employment and despite seeking to have provision of the same, the Respondent ignored. The duty is upon the employer to issue such a contract and the responsibility is not placed upon the employee to demand for such a written contract.

11. It is common cause here that the Claimant was away from her place of work from December/January 2013/2014 respectively with the knowledge of the respondent. The Claimant testified that she took her annual leave and was called on 5th March 2014 and told not to resume work and her February 2014 salary was paid via Mpesa phone transaction. In defence, the Respondent state that the Claimant walked away from their premises in December 2013 and promised to resume in February 2013. I take it then the Claimant remained in the employment of the respondents until February 2014.

12. It was the claimant's evidence that she was terminated due to her pregnancy that the respondents became aware of and when they realised that she was about two months to her delivery date thus terminated her contrary to section 46 of the Employment Act which act was discriminatory. These allegations are denied by the respondent.

3. A claim for discrimination against any person is a matter that this Court takes very seriously as with discrimination, any party alleged to have committed such an act, whether directly or indirectly becomes a serious labour violation as well as a constitutional violation. This is in reference to section 5 and 46 of the Employment Act, read together with article 27 and 41 of the Constitution which prohibit any form of discrimination on any basis that includes pregnancy as to do so is tantamount to an unfair labour practice. It is therefore a requirement that when such an allegation is made, the party so alleging has to outline the circumstances within which they are discriminated against. This was the holding of this Court in **Collins Osoro Lukhale versus AAA Growers limited, Cause No. 100 of 2012**.

14. The Claimant alleges that she was terminated on the basis that she was pregnant which also amounted to discrimination against her. In evidence, the Claimant testified that she was on her annual leave from January when she was called on 5th March and told not to report back to work as she had been terminated. That while she was at work, it was apparent that she was pregnant and had two months to her delivery date and that is why the Respondent terminated her. She delivered in May 2014.

15. In this case therefore, while the Claimant was lawfully on her annual leave, she was called by the Respondent and terminated from her employment. Can this then be based on her pregnancy and the fact that she was about to deliver in two months that happened in May 2014? Matter of annual leave and maternity leave are regulated in law. Section 29 of the Employment Act, provides that all female employees are entitled to three months of maternity leave with full pay and annual leave is not forfeited on account of an employee having taken her maternity leave.

29. (1) A female employee shall be entitled to three months maternity leave with full pay.

(2) On expiry of a female employee's maternity leave ... the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.

16. In the case of **jane wangari Njoro** versus **E. N. Peertet t/a Joliday Nursery School**, Cause No. **1600 of 2011** the Court held;

... for an employee to enjoy such leave [maternity leave]she must give not less than seven days' notice in advance or a shorter period as may be reasonable in the circumstances of her intention to proceed on maternity leave on a specific date and to return to work thereafter. This notice must be in writing and if the employer so requests produce a certificate of her medical condition from a qualified medical practitioner or midwife.

An employee who enjoys maternity leave shall not forfeit her annual leave. This is a legal entitlement.

17. In this case, the Claimant took her annual leave and not her maternity leave. There was no evidence that the Claimant applied for her maternity leave and this was denied or that she sought for the respondents to note her condition through provision of the requisite medical notification that she was pregnant and required to be away in that regard and this was denied of her. To therefore cite discrimination against her without a clear outline that the Respondent knew of her pregnancy and that this was the direct or indirect basis for her being away from work or this was the reason for her dismissal in a matter that lacks evidentiary support for the Court to make such a finding of discrimination against the claimant. it is not the duty of the employer to know of an employee's pregnancy, the duty starts with the employee who is pregnant to bring this to the attention of the employer and where there is evidence that due to such knowledge the employer acted differently towards the employee, then such evidence must be analysed in the circumstances of the case. I find no merit in the claim that there was discrimination against the Claimant on the grounds of pregnancy. I however note that there is no contest that the Claimant was called on 5th march 2014 while she was on her annual leave and told not to report back to work. Equally the defence that the Claimant remained away from her work place from December to February 2014 support the fact that the Claimant was away with the knowledge of the respondent. where the Claimant thus remained away and failed to report back to work as required, nothing stopped the Respondent from recalling her or dismissing her from duty on the grounds of absconding duty or deserting duty. The fact that there was continued communication between the two parties and payments of due salary arrears were paid as late as February 2014 is evidence enough that indeed the respondents were aware of the reasons as to why the Claimant was away from work. To thus terminate the Claimant while legally away from work is an unfair labour practice that has no justification and unfair under the provisions of section 45 of the Employment Act.

Remedies

18. On the finding that the Claimant was unfairly terminated, compensation is due. The Claimant shall be awarded three months' pay in compensation based on her last salary at kshs.9,780.95 all being kshs.29,342.85.

19. Termination of employment is regulated by section 35 of the Employment Act. On the finding that the Claimant was not issued with an employment contract to regulate her terms of employment, and that she remained in the respondent's employment for a period of over two years, termination should have been through notice of or payment in lieu of such notice. The Claimant is herein awarded notice pay at kshs.9,780.95.

20. Underpayments are outlined above all being Kshs. 34,985.70.

21. Service pay is due as under section 35 of the Employment Act. Where an employee is not issued with a pay slip or a statement noting what dues were paid and for the Court to assess as to whether all the statutory deduction is made is remitted as appropriate then service pay becomes due. For the two complete years the Claimant served the respondents she will be paid 15 days' pay for each year based on her last due salary all being kshs.9,780.95.

22. The Claimant is seeking maternity leave of 3 months. the Claimant testified that she delivered in May 2014. This was a period after her termination in March 2014. A claim for maternity leave does not arise

after the fact of termination. Such a claim can only arise where delivery is within the duration of employment or where it arose within the period before termination was effected. This is declined as not due in this case.

23. The claim for commuter allowance and fares from home to work was noted in evidence but there was no outline as to why and why this arose. This will not be awarded.

In conclusion, judgment is entered for the Claimant against the Respondent in the following terms;

- a. **The Claimant was unfairly terminated;**
- b. **The Claimant is awarded compensation at Kshs. 29,342.85;**
- c. **Notice pay at kshs.9,780.95;**
- d. **Underpayments all being kshs.34,985.70;**
- e. **Service pay at kshs.9,780.95;**
- f. **Costs of the case.**

Delivered in open Court dated and signed in Nairobi on this 25th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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