



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS NO. 1779 OF 2013

MIRIAM WANJIRU MWENJE.....CLAIMANT

VERSUS

DULCIE SPENCER.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking resolution of a dispute she framed the wrongful and unfair termination of her services and failure by the Respondent to adequately compensate her. She averred that the Respondent employed her in July 1998 as a domestic worker at an initial salary of Kshs. 5,800/-. She averred that as acknowledgment of her loyalty, respect and diligence in her service to the Respondent, her salary was reviewed upwards to Kshs. 9,000/-. She averred that the Respondent's brother offered her financial aid of Kshs. 30,000/- which was not to be repaid but she was later advised by the Respondent that the money had to be repaid and that the amount was repaid save for some arrears of Kshs. 9,000/-. She averred that whereas it was not in her job description, that while working for the Respondent, the Respondent's brother was diagnosed with cancer of the blood and she was given the additional duty to bath, feed, assist him in locomotion including taking him to hospital which duties she performed faithfully. She averred that on 2nd July 2013 she was called by the Respondent to the bedroom and accused of having stolen a gold chain worth Kshs. 100,000/- and that upon accusation she proceeded to Hardy Police Station in the company of her colleague where they recorded statements. The Respondent did not accompany her to the station. She averred that the Police instituted investigations and upon compilation of the investigation the Police concluded that there was lack of evidence to warrant prosecution of the Claimant. The Claimant averred that the dismissal was in contravention of Section 45 and 43 of the Employment Act, that no hearing took place and due process was thrown out of the window in haste to dismiss her. She sought payment in lieu of notice, service pay for 15 years worked, house allowance, 12 months salary as damages for wrongful/unfair termination, costs of the suit and any other relief the Court may deem just.
2. The Respondent filed a defence on 10th October 2014 and in the defence, the Respondent averred that no action lay against her as the Claimant was employed by Frank Howitt, deceased, and that the Respondent would at an appropriate time before hearing of the suit move to strike out the suit. Without prejudice to the foregoing, the Respondent averred that the Claimant lacked the capacity to sue. The Respondent averred that there was never a contract of service between her and the Claimant. The Respondent denied assigning the Claimant duties on behalf of Frank Howitt. The Respondent averred that if the Claimant was her employee then the Claimant was a casual worker only engaged to perform work on limited periods as and when it was available. The Respondent confirmed there was theft at the residence of Frank Howitt now deceased and the Claimant was

summoned by the Police as a suspect. The Respondent averred that the Claimant disappeared soon after the theft was reported to the Police and that the investigations by the Police have had no bearing on the Claimant's claim as the same were commenced and concluded by the Police as is their duty when theft is reported. The Respondent averred that the Respondent did not terminate the Claimant's employment and had not subjected the Claimant to any suffering as alleged. The Respondent thus sought the dismissal of the claim as there was no scintilla of evidence adduced in support of the claim.

3. The Claimant testified before the Court on 22nd April 2015. She stated that she was presently doing odd jobs having been employed by the Respondent in July 1998 as a gardener. She earned Kshs. 5,500/- a month until 2005 when she was given domestic work. She testified that she was earning Kshs. 6,000/- a month and the sum was later raised to Kshs. 7,000/- until August 2012 when the Respondent's brother became unwell and she was given the duty of washing him, cleaning his room in addition to the household chores and feeding him at 1.00pm. Her salary was raised to Kshs. 9,000/- which she earned until June 2013 when Howitt died. She testified that in June there was a memorial for him and that she continued working until 2nd July when she reported to work as usual at 8.00am since she did not reside on the property. She ironed clothes and worked in the kitchen before she was called by the Respondent as she was cleaning the house. She was informed that Kshs. 100,000/- plus gold was lost. She denied taking the money and the tenant, Maureen, was called and the Police notified of the theft. She testified that she was arrested by Police from Hardy Police Station and told that she was dismissed. She was asked to return her apron, and when she got to the Police station she was told to go home and return the next day. She testified that she was not charged and that she later obtained a letter from the Police to take to her employer. She went to the Labour Officer Industrial Area and was given a letter to take to the Respondent. She testified that the Respondent did not respond to the letters and that she never kept copies of the letter. She testified that she received a letter from the advocates for the Respondent M/s Walker Kontos on 29th July 2013 and that upon receipt of the letter she was informed by the Labour Officers that the issue had become complicated. She testified that she was employed by the Respondent and that Frank did not hire her. She acknowledged that the Kshs. 30,000/- was a debt she had paid and the balance was Kshs. 9,000/-.
4. In cross examination by Mr. Kimani for the Respondent she testified that she was employed by the Respondent in July 1998 and that she was paid on 15th and 30th of each month. In December Frank would call the Respondent to pay the staff bonus. She testified that it was the Respondent's home with her brother the late Frank Howitt. She testified that she had heard of Walker when she got the letter from the Labour Office and that she did not know he had been representing Frank Howitt. She testified that Frank used to live with the Respondent and that the Respondent was her employer and not Frank. She testified that she was entitled to house allowance since she was not housed. She testified that the cash was paid by the Respondent and not Frank.
5. In re-examination by Miss Muhanda, she testified that she received the letter from the Labour Office and that she did not know how to read English. She stated that she did not know whether the contents were true.
6. The Respondent was to be called but counsel indicated to Court that she was unwell and that he would adduce her evidence by way of affidavit. The Respondent did call a witness, Julius Mwalunyi Mwalolo. He testified that he was employed as a gardener by Frank Howitt in 1998 and that he knew the Claimant a fellow co-worker. He testified that she was employed by Howitt and that they were paid by Frank Howitt in January 2002 then January 2008. They would be paid in full so that they start afresh and that the final payment was in January 2013. He testified that after Howitt died the Claimant worked for one month. There was a complaint of a theft and the suspects were arrested and taken to Police. The suspects were told to report the next day. He testified that the Claimant did not return.
7. In cross-examination he testified that he was hired in May 1998 by Frank Howitt who lived with the Respondent. He testified that they were not paid by Dulcie Spencer and she only paid them

when Frank was unwell. He testified that he used to take Frank to hospital and that Frank would call him and tell the sister (Respondent) to pay them. He testified that after Frank died the Respondent used to pay them on behalf of Howitt. He conceded that he was not at the Police station with the two suspected to have stolen and did not hear them being told to come to the house.

8. In re-examination he testified that the house was Frank Howitt's house and he was the one who employed them.
9. The Respondent did not file submissions but filed an affidavit sworn on 25th May 2015 in which she deposed that the house was owned by her brother Frank Howitt, now deceased, and that the Claimant was employed by the said Frank Howitt. She deposed she was not the executor of his estate. She deposed that she only came to hear of the Claimant after she filed this claim.
10. The Claimant filed submissions on 15th June 2015 and submitted that she was employed as a domestic worker by the Respondent and that her duties were initially farm related but later upgraded to perform housekeeping duties which included the care of the Respondent's brother who was then suffering from cancer of the blood. She submitted that upon the death of Frank Howitt she continued serving the Respondent and was accused of stealing items from the Respondent's house. She submitted that the Police had confirmed in their letter that they had been investigating allegations of theft by servant brought by the Respondent. The Claimant submitted that the witness availed by Respondent was only an employee who was not privy to the contract between the Claimant and the Respondent. She submitted that under the Employment Act, employer included any person who has entered into a contract of service to employ an individual and includes the agent, foreman, manager or factor of such person. She further submitted that under the Labour Institutions Act employer is defined as any person who employs or has employed an employee and where appropriate includes a heir, successor, assignee or transferor of an employer or an agent, director or a person authorised to represent an employer. The Claimant relied on the cases of **P.O v Board of Trustees AF & 2 Others [2014] eKLR** and the cases of **Alhonce Maghanga Mwachanya v Operation 680 Limited [2013] eKLR**, **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**. The Claimant submitted that she was entitled to fair administrative action under Article 47 of the Constitution as held in the case of **Lilian Nyaboe Nyaribo v Wireless Innovations Nairobi Limited [2013] eKLR** and that her salary if consolidated should have been indicated expressly in the contract of employment as held in the case of **Joshua Lihanda v Outdoor Occasions Limited [2014] eKLR**. The Claimant submitted that she was entitled to severance pay as this was uncontroverted by the Respondent. The Claimant submitted that at the time of termination the Respondent disregarded her long service and failed to apply the law in terminating her services.
11. The Claimant testified of her employment and the tasks she was assigned to by the Respondent. This was consistent with her pleadings. The Respondent called Julius Mwololo who testified that he was employed by Frank Howitt the brother to the Respondent. He testified that the Claimant was also employed by Howitt. He stated that the Claimant was arrested and was told to return to the house the next day. In cross-examination he conceded that he was not present at the Police Station and thus did not know what the Claimant was told. This was clearly a fabrication and watered down his testimony. He came across as a liar and someone who could not be trusted to speak the truth even when on oath. The jurat in the affidavit of Dulcie Spencer sworn on 25th May 2015 was numbered 10 while the affidavit had 14 paragraphs preceding the jurat and was in a different font. It clearly was not made for the affidavit filed in Court on 25th May 2015. It was inconsistent with the pleadings and testimony before the Court. If the Claimant was not her employee how did the complaint at the Police station become one of theft by servant as opposed to theft? In my view, the testimony adduced for the Respondent was largely fabricated as no evidence was availed of the ownership of the house, no employment records were shown to indicate who was employed by whom. The affidavit of the Respondent filed on 25th May 2015 indicates that she only became aware of the Claimant when the suit was filed. How could this be

true if she lived with her brother the late Frank Howitt? Section 74 of the Employment Act places a burden on the employer to provide records. As the sister of the alleged employer it was in her interests to scour through records and avail proof of the alleged employ of the Claimant by her deceased brother. I find that she employed the Claimant. The Claimant in her claim seeks payment in lieu of notice, service pay for 15 years worked, house allowance, 12 months salary as damages for wrongful/unfair termination and costs of the suit. She was dismissed abruptly without notice and she would be entitled to Kshs. 9,000/-. There was no proof that the sum of Kshs. 9,000/- was not inclusive of house allowance and the claim for house allowance fails. The Claimant served for 15 years and is entitled to severance pay of Kshs. 67,500/-. In view of the manner of termination I will grant the Claimant compensation Kshs. 54,000/- being 6 months compensation. The Claimant will also have costs of the suit.

Orders accordingly.

Dated at Nairobi this **10th** day of **August** 2015

Nzioki wa Makau

JUDGE

Delivered at Nairobi this **20th** day of **August** 2015

Hellen Wasilwa

JUDGE