



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 487 OF 2013

JOSPHAT INGOSI ANDULU & ANOTHERCLAIMANT

-VERSUS-

NIGHTINGALE RUKUBARESPONDENT

Claimants in person.

Mr. K'Opere for Respondent.

JUDGMENT

The 1st Claimant *Josphat Ingosi Andulu* and the 2nd Claimant *Jacklyne Nanzala Cheto* were both employed by the Respondent in the years 2004 and 2003 in the position of Chef and Cleaner at the Respondent's homestead respectively.

The 1st Claimant earned a gross monthly salary of Kshs.20,000/- whereas the 2nd Claimant was paid a gross monthly salary of Kshs.12,000.=. The two Claimants worked continuously for the Respondent until the month of November, 2011, when both of them were summarily dismissed on suspicion that they were involved in the loss of jewellery that went missing from the Respondent's bedroom.

The two Claimants filed this suit by a Statement of claim dated 8th April, 2013 to which is attached a list of documents marked "JIA & JNC 1 – 9" in support of the claim.

Simultaneously with the claim was filed a Notice of motion seeking interim orders restraining the Respondent, an employee of the World Bank and a national of the Republic of Rwanda from leaving the jurisdiction of the court pending the hearing and determination of this matter.

The Notice of motion was disposed of and an agreement in part settlement of the claim was reached by the parties in the following terms;

The Respondent paid;

1. To the 1st Claimant (but directly to Equity Bank) in discharge of her guarantee dated 19th August, 2011, a sum of Kshs.90,000/= comprising of;
 - a. *Service gratuity at the rate of 15 days for every year worked for seven (7) years at a salary of Kshs.20,000/= totaling Ksh.70,000/; and*

b. *One month salary in lieu of notice in the sum Kshs.20,000/=.*

2. To the 2nd Claimant a sum of Kshs.48,000/= comprising of;

a. *Service gratuity at the rate of 15 days salary for every year worked for six (6) years at a salary of Kshs.12,000/= per month; and*

b. *One month's salary in lieu of notice in the sum of Kshs.12,000/=.*

The consent was made an order of the court in part settlement of this suit accordingly.

In terms of the Statement of claim, the outstanding dispute in respect of the 1st Claimant is as follows;

1. *Payment in lieu of 21 days outstanding leave per year for seven (7) years;*

2. *House allowance at 15% of the monthly salary for seven (7) years worked;*

3. *Payment of eleven (11) days holidays per year for seven (7) years worked;*

4. *Maximum compensation for unlawful dismissal comprising twelve (12) months salary; and*

5. *Payment of monthly salary for the period the Claimant was on compulsory leave from November, 2011 to April, 2013 when this suit was filed.*

The 2nd Claimant makes the same claims against the Respondent except that the tabulations in respect of the 2nd Claimant are based on the monthly salary of Kshs.12,000/= and for a period of six (6) years.

The Respondent filed a Statement of defence and Reply to the claim on 29th April, 2013, wherein she denied all the claims made save for admission in paragraph 12 which led to the part-payments set out herein above and recorded in court on 2nd July, 2013 thereby settling claims ((a) and (b).

The Respondent thus denies claims relating to leave, house allowance, holidays and compensation for unlawful dismissal.

The parties rely on the pleadings and annexures attached thereto and oral evidence adduced in court.

Summary of facts on which the claim is based.

1st Claimant.

The 1st Claimant told the court that he was employed as a Chef on 1st September, 2004 and worked continuously for the Respondent till 14th November, 2011.

He recalled that on 9th November, 2011, he enquired from the Respondent when he would be allowed to take leave which was long outstanding and she informed him that she would communicate to him later on the matter.

He told the court that he was housed by the Respondent and worked from Monday to Friday for a period of seven (7) years during which period he was not granted any annual leave at all and was not told how many days leave he was entitled to annually.

He testified further that he worked even during national holidays and was not paid overtime. He said the holidays he worked included; 1st January, Jamuhuri day, Labour day, 25th to 26th during Christmas and only was given off from 22nd to 23rd. He added that the 2nd Claimant also did not go on leave and

worked during public holidays like himself.

The 1st Claimant seeks payment based on the minimum provision of 21 days leave for every year worked as per the Employment Act, for seven (7) years and overtime for eleven (11) public holidays for seven (7) years.

On or about 12th November, 2011 he got a report from the Respondent's husband that jewellery was stolen from the house. On that day he had travelled to his home in Kakamega and was to return back on Monday the 14th November, 2011. When he arrived, he found that he had already been replaced by another employee.

Later, Diplomatic Police came to his house and interrogated him about the missing jewellery and his whereabouts. The 2nd Claimant was also interrogated on the matter. The two were asked to give their Identity Cards to the police and were asked to go home and would be recalled if necessary. They were asked to leave their personal effects behind as they had not been dismissed and would be recalled when investigations were complete.

Later, the two were called to the police station at Gigiri where further interrogation took place. They were then taken to their houses in Kangemi, Nairobi where searches were conducted and statements recorded. No jewellery was recovered from the two of them. No charges were subsequently preferred against either of them and they were not recalled to work until they filed this suit.

He was subjected to very close cross-examination by Mr. K'Opere for the Respondent and he explained that he had a good working relationship with the Respondent. He was housed in a servant quarter and was even provided with a television.

He said that on 10th November, 2011, he had travelled to his rural home and had not told his employer about the visit as it was not necessary.

He admitted that the Respondent's cousin had on a day he could not recall asked him to help open a bag that was shown to him in court in which the Respondent alleges, the lost jewellery was kept. He denied cutting the bag subsequently to steal the jewellery stating that he had no access to the Respondent's bedroom where it was allegedly kept.

He also stated that there were various people who visited the house including the said cousin of the Respondent and the Respondent had no basis whatsoever of suspecting him of theft. He told the court that he was wrongly victimised for demanding his leave.

He narrated that the homestead was guarded by a security company known as Securex and they conducted body searches on both Claimants when they came in and out of the compound and there is no way they could have stolen the jewellery without detection.

He also said that the Respondent had many visitors to her home at Nyali, Nairobi even when they were on holiday and the two Claimants would be asked to come from their houses to cook and clean the house respectively. He therefore denied allegations by the Respondent that the two of them went on annual leave every time the family travelled on holiday within the country and abroad. He demanded that records of such leave be produced if the allegations are true, which he denied.

He also added that he used to take care of the pets while the family was away, an allegation which was viciously challenged by the Respondent.

He insisted that he worked during all the public holidays and would only be away from the house, if the family was away and there were no visitors or pet to be fed which was rare.

He gave example of a grandmother who stayed in the house for seven (7) months and he would cook for

her whether the family was in or not.

Other than cooking, he also did several minor chores such as changing bulbs.

The family was generous to him and he used their smart card for shopping. They granted him personal loans and had guaranteed his loan at Equity bank. He was at a loss as to why they would pick on him all of a sudden.

The Respondent was away when the alleged theft took place and she called him on telephone and told him in a very angry tone that he was going to rot in jail for stealing her jewellery. That she did not give him a chance to explain his case to her. He denied that he saw the contents of the bag when he assisted the Respondent's cousin to break its padlock. He therefore had no clue that valuable jewellery was stored therein.

The 2nd Claimant largely collaborated the evidence of the 1st Claimant regarding the work both of them did. That both of them were not granted any annual leave, that they served the frequent visitors, whenever the family was away. She added that they both worked during public holidays and were not paid overtime. She also confirmed that the family was very kind and generous to both of them and she could not dare steal from them. That she was also at a loss as to why the Respondent picked on them yet many visitors came to the house and had access to the room where the alleged theft took place.

She said she was not aware that the bag contained valuable jewellery at all.

The 2nd claimant stated that she served the Respondent from the 12th September, 2005, up to the 14th November, 2011 when they were asked to leave pending investigations into the theft. She claims payment in lieu of leave days not taken for six years and for public holidays worked and not paid overtime.

Her work included clearing the house, washing clothes, making beds and worked from 7.30 in the morning to 5.30 in the evening from Monday to Saturday.

She said that she rented a house at Kangemi where she paid Kshs.2,800/= per month and was not paid house allowance.

She had asked the Respondent about these matters and had been promised salary increment and leave pay.

On the day the theft allegedly took place, she was at the house helping the Respondent to park as she was due to travel. Upon getting home at night, she was informed on telephone about the missing jewellery. She was shown the cut bag the following day by the Respondent's husband. She reiterated that she was no aware of the contents in the bag at all and could not have stolen the jewellery. She was however told to go home pending investigations and was not recalled till this matter was filed.

She confirmed recording a statement with the police and a search was made at her house but nothing was recovered. She was not charged with any offence.

She called the Respondent to find out when she could resume her duties but was told that she had been replaced. She was also subjected to intense cross-examination by counsel for the Respondent which she withstood well to a large extent.

She insisted that she was falsely accused and wrongly dismissed. That she was not given opportunity to explain her case to the Respondent who was hysterical and crying when she spoke to her over the phone.

The Respondent called one **Andrew Walubuka** who testified in support of her case. He was stationed at the Respondent's house as a guard for eight (8) years and knew the Claimants well.

He told the court that the two were not allowed in the Respondent's compound when the family was away. That the Respondent had at different times kept a cat, a parrot and later a dog. That the cat was

kept with the veterinary while the family was away and that he took care of the parrot and the dog when the family was away. He therefore denied that the Claimants were required to serve visitors and take care of the pets when the family had travelled, which they did regularly.

He confirmed several visitors came to the house while the Respondent was away. He remembered Teresa, Grace, Mr. Banza, Sara and Mr. Ngaiza among others. He however denied that the Claimants came to serve the visitors while the family was away, insisting that visitors cooked for themselves and cleaned the house in the absence of the family and they would be directed where to collect house keys when they visited in the absence of the family. He denied that he was lying to spoil the Claimants case.

The Respondent ***Nightingale Rukuba Ngaiza*** also testified under oath in support of her case. She admits the particulars of employment and dismissal and the period the Claimants had worked for her.

She confirmed their respective salaries but denied that they were entitled to any house allowance because she paid them a consolidated salary.

She said she used to have two cleaners and whenever the other cleaner was away, she paid the 2nd cleaner additional Kshs.1500/- per week to step in for her. That the 1st Claimant was housed by her and also had provided a changing room for the 2nd Claimant which she opted not to live in in preference to staying at her house at Kangemi.

She gave her transport allowance of Kshs.2,800/= per month over and above her salary. Regarding leave, she told the court that the two Claimants went on leave whenever the family travelled annually.

She produced a schedule of travel and copies of passports to court on the regular travel. She added that both Claimants were not allowed in the house while the family was away and the security guards were under strict instructions in that regard.

She stated therefore that the testimony by the two Claimants on this matter was false and the court should disregard it and refuse the claim for payment in lieu of leave.

She detailed the various pets she kept between 2005 and 2011 stating that the cat was always left with Dr. Cocker when they were away. She produced a record to this effect. She added that the dog and parrot were taken care of by the guards in her absence.

She admitted that various visitors came in her absence but they took care of themselves as they were regular visitors. That one Mrs. Amina who stayed for a long period was during her presence in the house between 25th September, 2005 and 22nd December, 2005. She referred to her passport to confirm this.

She added that the days the Claimants took leave during her many travels exceeded the statutory minimum entitlement.

With regard to public holidays, she stated that there are only seven (7) public holidays in Kenya and during most of them the Claimants did not work and if they did they were paid overtime.

She gave example of 2007 during the postelection violence when they stayed at home for a long period but they were paid salaries. Regarding overtime, she added that she always paid overtime whenever any of the Claimants worked extra hours.

From the totality of the evidence before court, it is evident that the Respondent was a very considerate employer and went out of her way to make the two Claimants happy and comfortable at work. They have both testified in this regard stating that the Respondent was very generous to them in many respects.

The salary they earned was way above the minimum wage for their respective jobs. The 1st Claimant was housed and well taken care of whereas the 2nd Claimant opted not to use the housing availed to her.

Nevertheless she was paid reasonable travelling allowance to and from the house.

It is without a doubt that the Respondent and her family were away from their home regularly and for lengthy periods. The court is satisfied with the evidence by the Respondent that the Claimants were granted leave corresponding with the family travel.

It is inconceivable that the Claimants did not go on leave at all for 7 and 6 years respectively. The court finds that the Claimants were not candid regarding this matter, their testimony largely appeared exaggerated and incredible to that extent. The court has no hesitation to find that the Claimants have failed to show that they were denied, by a person they described as a very good and generous employer, a single leave day for such a long period.

Equally, allegations regarding working during public holidays without pay are inconsistent with the terms and conditions of service and the friendly work environment provided by the Respondent.

The court does not believe the testimony by the two Claimants on this matter and finds that the two were given off-days during public holidays and if they worked they were adequately paid for it. No wonder no complaint was registered against the employer with the Ministry of Labour on these matters until the two stopped working for the Respondent. In any event, even if these claims were valid, the same would be time barred at least up to that which accrued in the year 2009 by fact of **Section 90** of the employment Act 2007, which bars any claims brought outside a three (3) year period from when the cause of action arose.

The limitation period also applies with respect to the claim for housing allowance which in any event the court finds was well catered for by the provision of housing with respect to the 1st Claimant and the salary and allowance paid to the 2nd Claimant which payment is common cause.

Unlawful dismissal.

The only outstanding matter is whether or not the two Claimants were dismissed for a valid reason and whether the dismissal was done in accordance with a fair procedure.

It is common cause that the two were merely suspected of theft of jewellery from the house. That no concrete evidence at all pointed to their guilt notwithstanding thorough investigations conducted by the Diplomatic Police.

It is also common cause that many visitors came to the house and that there is no evidence at all regarding exactly when the jewellery went missing and who had or did not have access to the particular place the jewellery was kept.

The long periods the two Claimants served the Respondent and her own description of the two, brings out dedicated, diligent and honest employees.

They were entrusted with a lot of valuable property in this family home and this is the first time such an incident had occurred during their tenure.

It is true that in an environment where everybody else was either close family, relative or good friend, soft target for suspicion were the employees.

The court is of the view that no evidence whatsoever before this court points to their guilt on the matter. The manner in which the Respondent treated them was akin to mob justice as it were.

Indeed, in her testimony she said, she suspected the 1st Claimant more and the 2nd Claimant was collateral damage. How unfortunate that human failings easily lead to this kind of victimization.

The only drawback in this matter is the commonly held view that once there is loss of trust between an

employer and employee, regardless of who between the two is in the wrong it is difficult to sustain the relationship.

This however does not validate, a wrongful dismissal. In the circumstances of this case, the Respondent lacked any valid reason to summarily dismiss the two Claimants.

The fact that she did not give them a chance at all to exonerate themselves from the alleged theft and that they were not given any letters of dismissal but were kept at home awaiting feedback for inordinate long periods compounds the unlawful view of the dismissals.

Accordingly the summary dismissal violated **Section 45 (1)** and **45 (2) (a)** and **(c)** of the Employment Act, in that the same was unlawful and unfair for lack of a valid reason and same was not effected in accordance with a fair procedure.

The court notes that the Respondent conceded and paid notice pay and service gratuity and commends the Respondent in this regard. The two Claimants had served her diligently without any adverse record for 7 and 6 years respectively.

Their names were unfairly blemished by the unfounded accusations made by the Respondent against them. The two lost considerably goods jobs in a country where it is difficult to get employment.

The Respondent did not provide them with Certificates of service contrary to **Section 51** of the Employment Act and this has added to their inability to get alternative employment.

Upon considering all the circumstances of the case which are largely similar with respect to the two Claimants, the court awards both six (6) months salary as compensation for unlawful and unfair dismissal in terms of **Section 49 (1) (c)** of the Employment Act, 2007.

Accordingly the Respondent is ordered to;

- i. Pay the 1st Claimant Kshs.120,000/= compensation and provide him with a certificate of seven (7) years service forthwith (20,000 x 6); and
- ii. Pay the 2nd Claimant Kshs.87,000/= compensation and provide her with a Certificate of six (6) years service forthwith. (12,000 + 2,800 transport allowance x 6).

The claim for payment while the Claimants were on compulsory leave is without foundation as the two claimants employment was terminated from the date they were sent home. The Respondent is also to pay the 1st and 2nd Claimants cost of the suit.

Dated and delivered at Nairobi this 4th day of February, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE