



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1497 OF 2011

JANET KYAYUMBI MWANZA.....CLAIMANT

VERSUS

PAMMI THATTI.....RESPONDENT

JUDGEMENT

By a statement of Claim dated 6th September and filed in court on 7th September 2011 the Claimant **JANET KHAYUMBI MWANZA** alleges that she was employed by the Respondent **PAMMI THATTI** on 17th March 2009 as a house servant at a basic salary of Shs 6000/- per month. She alleges she was unfairly dismissed on 24th July 2010.

She prays for the following orders:-

- i. The Claimant's dismissal be declared wrongful and unfair.
- ii. The Claimant be paid her terminal benefits as set out in paragraph 8 herein above.
- iii. The Respondent be ordered to compensate the Claimant for wrongfully dismissal at the equivalent of twelve (12) months gross salary.
- iv. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v. The Respondent to pay the costs of this claim.
- vi. Interest on the above at Court rates.

The Respondent filed an Answer to the statement of claim dated 27th September and filed in Court on 28th September 2011. The Respondent denies the claim and avers that he employed the Claimant on 18th March 2009 at a Salary of Shs. 8400/- per month and the Claimant acknowledged receipt by signing payment vouchers, that the Claimant absconded duty after payment of her salary on 30th June 2010. That the Claimant visited the Respondent's premises in February 2011 when she informed the Respondent that she was unwell and was not able to report back to work.

The Respondent denies owing the Claimant the terminal benefits sought in the claim. The Respondent states that the Claimant's certificate of service could not be delivered to her as the Respondent did not know her whereabouts and the same is ready for her collection. The Respondent prays that the claim be dismissed with costs.

The case was heard on 18th June and 1st August 2013. The Claimant was represented by Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates while the Respondent was represented by Mrs. Oyatta instructed by Mucheru – Oyatta & Associates Advocates.

The Claimant testified that she was employed on 17th March, 2009 at a salary of Shs 6000/- . She was not issued a letter of appointment. She worked from 7.00 am to 6.00 pm for 6 days every week. She went on leave for 14 days but was deducted 5 days salary in May 2010. On 24th June she was told there were things that got lost from the house and she should not continue working. She was not paid salary for the month. She was later called on telephone to go back in July but when she reported she was told there was no work. The Respondent told her to report to Labour Office.

She was never issued a letter of appointment or letter of termination. She was not given Notice. She denied receiving Shs 8400 salary and confirming receipt by signing payment voucher. She confirmed receiving her salary and signing payment voucher on 30th June 2010. She also confirmed being at work on 30th June 2010 day. She stated she did not want her job back because she now runs a business selling second hand clothes.

RW1 PAMJEET SINGH THATTHI the Respondent testified that he employed the Claimant on 18th March 2009 as a domestic help at a salary of Shs 350/- a day which was paid monthly in the sum of Shs. 8400/-. The Claimant signed vouchers to confirm payment. The vouchers were prepared by his Secretary but the name and amount were left blank for the employee to fill at the time of receiving payment.

RW2 who is an architect and worked from home filled the date and Id number on the payment voucher at the time of payment.

The Claimant worked up to 27th June 2010 when she was paid her salary for Jun. She did not turn up the following day. The Respondent called her on her cell phone but she did not answer. When she failed to report back to work the Respondent informed the Ministry of Labour by letter dated 19th July 2010. RW 1 denied that any property was lost from his house while Claimant was working there or that he verbally terminated the Claimant's employment.

On 24th July 2010 the Claimant went to see him and presented a claim verbally for payment of service. The Respondent asked her to resume duty but she declined. He told her if she has any claim she would go to the Labour Officer who would inform him about what was payable. The Claimant again went to see him with a baby in February 2011.

RW1 testified that the Claimant worked from 7.00 am to 3 or 4.00 pm.

She was then free to leave but would take time to clean herself before leaving about one hour after finishing work. She was given a lunch break and tea break. The Claimant did not work on Sundays and Public Holidays except when the Respondent had guests. The Claimant was paid immediately for any work done on Sundays and public holidays. The Respondent had other workers who worked on Sundays and took two days off during the week.

The Claimant went on annual leave on 30th April 2010 for 14 days and was paid her full salary for the month. The salary for May 2010 was paid to her in advance before proceeding for leave.

RW2 MERCY MUMBI KANE testified that she worked for Shelter Systems International owned by the Respondent. She started working there in 2008. Her work involved doing administrative duties such as sending emails, writing letters and writing payment vouchers for all the staff including herself. She prepared payment vouchers for the Claimant while she was employed by the Respondent as a domestic worker.

The Respondent paid employees their salaries personally and returned the vouchers to her for filing. She was not present when employees were paid.

I have considered the pleadings and the evidence adduced by both parties. I have also considered the written submissions and the relevant law.

The issues for determination are the following:-

1. Whether the Claimant was dismissed or absconded duty.
2. Whether the Claimant is entitled to the prayers sought.

Was the Claimant dismissed or she absconded duty?

The Claimant alleges that she was told to go home on 24th June 2010 due to loss of some property in the Respondent's house. The Claimant however confirmed that she collected her salary for June 2010 while at work.

The RW1 on the other had testified that the Claimant took her salary for June and then failed to turn up. His calls went unanswered and he was forced to write to the Labour office informing them of the Claimants absconding duty.

I find contradiction in the Claimants testimony as she stated that she was dismissed on 24th June 2010 yet she confirmed being at work on 30th June 2010 yet she confirmed being at work on 30th June 2010 when she confirms receiving and signing for her salary. For this reason I find that the Claimant has not proved that she was dismissed from employment.

3. Is the Claimant entitled to her prayers?

The Claimant prayed for payment of the following:-

i. One month's salary in lieu of Notice.

Having failed to prove that her employment was unfairly terminated by the Respondent, the Claimant is not entitled to notice.

ii. Leave not taken for 16 months.

During her testimony, the Claimant testified that she took 14 days leave in May 2010 but alleged that she was paid for nine days but five days was deducted from her salary.

RW1 confirmed that the Claimant was given 14 days leave. He however stated that she was paid salary for the entire period when she was on leave. Indeed there are two payment vouchers signed on 30th April 2010, one for the salary for April and another for the salary of May. The voucher for May salary further confirms that the Claimant had taken her leave for the period between March 2009 to May 2010. Both vouchers are signed by the Claimant.

I therefore find the Claimant took 14 days leave in May 2010. However since she worked from 18th March 2009 to June 2010. She is entitled to 1.75 days for each completed month of service. She worked for 14 complete months for which she was entitled to 24.5 days leave. Having taken 14 days she is entitled to the balance of 10.5 days. She is therefore entitled to Shs. 3,675/- being payment for 10.5 days leave at the rate of Shs. 350 per day.

iii. Off duty

The claimant testified that she worked for 6 days a week. She had therefore not proved that she is owed any off duty by the Respondent.

The claim is therefore dismissed.

iv. Public Holidays.

The Claimant did not testify that she worked on any Public Holiday.

The RW1 testified that the Claimant did not work on any public holiday except when he had guests in which event she was paid immediately. I therefore find that the Claimant has not proved that she worked for any public holiday for which she was not paid.

The claim is dismissed.

v. Service Pay

Section 35 (5) provides for payment of service pay to any employee who is terminated provided the employee does not fall under the exceptions under Subsection 35 (6).

The Claimant is therefore entitled service pay for one year at 15 days salary per year worked. I therefore award her Shs. 5,250/-.

vi. 12 months compensation

I have already found above that the Claimant has not proved that her employment was unfairly terminated. Since compensation is only payable in the event of unfair termination she is not entitled to the same.

The Claim is dismissed.

vii. Certificate of Service

The Claimant is entitled to certificate of service in terms of Section 51 of the Employment Act. The Respondent is directed to issue her with the same within 30 days.

viii. Costs

The Claimant has not proved unfair termination and is therefore not entitled to costs.

Each party shall bear its costs.

READ IN OPEN COURT THIS 11TH DAY OF MARCH, 2014.

HON. LADY JUSTICE M. ONYANGO

JUDGE

In the presence of :

Nyabena for Claimant

Okoth holding brief for Mrs. Mucheru for Respondent