



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1720 OF 2011

JENIFFER SHITORO SHISYUBUCLAIMANT

VERSUS

PROF. GANESH P. POKHARIYAL RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 4th October and filed in Court on 6th October and filed in Court on 6th October 2011 the Claimant seeks the following orders:-

- i. Kshs. 198,000/-.
- ii. Certificate of Service.
- iii. Costs of this claim plus interest.
- iv. General damages for injuries sustained while on duty.

The Respondent denies the claim.

The case was heard on 3rd and 13th February 2014. The Claimant was represented by Ms. Betty Rashid instructed by Betty Rashid & Company Advocates while Mr. Senteo instructed by Migos – Ogamba & Company Advocates appeared for the Respondent. Both the Claimant Janeffer Shitoro Shisyubu and the Respondent Ganesh P. Pokhariyal testified in court and did not call any other witnesses.

Claimant's case

She was employed by the Respondent as a house help in June 2002. Her duties were cleaning the house and car, washing dishes, washing and ironing clothes and tending flowers. Her first salary was Shs. 2000 per month. She worked from 7.00 am and sometimes worked up to 7.00 pm. She denied working half day as alleged by the Respondent. She worked continuously and was therefore not a casual. She was paid her salary at the end of each month.

On 27th July 2011 the Claimant was cleaning the house with soapy water when she skidded and fell on the cement floor. She injured her shoulder and leg. A neighbour took her to the spinal injury hospital where she was treated and continued with treatment for some time. When she went back to work with a plaster she was paid Shs. 4000 by the Respondents wife and told to go away.

The Claimant prays for payment in lieu of notice, annual leave, public holidays and service pay for 9 years. She further seeks underpayment as she was paid Shs. 2000 instead of Shs. 6000. She further seeks general damages for injury sustained in the course of employment.

Respondent's Case

The Respondent who is an expatriate professor of mathematics at the University of Nairobi testified that the Claimant worked for him and his wife as a house help from July 2003. She negotiated a salary of Shs 2000 per month with breakfast and lunch. Her duties were washing the car, cleaning the house, and washing clothes. She reported to work between 8 and 8.30 am and left between 2 and 2.30 pm. She did not work on Sundays. The Respondent lives with his wife so they are only two people in the house and there is not much work. The Respondent's wife cooks all meals and they wash dishes after dinner and make their bed. The Claimant took her leave whenever the Respondent and his wife were away on leave and she was paid full salary during her leave.

The Claimant's salary was increased periodically. She signed to acknowledge all payments made to her including salary advances.

The Claimant worked until October 2009 when she left on her own. After 3 months she went back to the Respondent's residence and asked to be re-employed. She worked up to 4th September 2011. She was paid Shs. 4000 being salary for September when she did not even work for the whole month and a further Shs 7,000.

The Claimant had a problem with her leg. She told the Respondent that she got burnt in the leg. At one time the Respondent took her to a professor when the leg was getting blackish. The Respondent bought the medicine that was prescribed for her which cost about Shs. 6000/-. The Respondent's daughter in law also bought the Claimant some medicine in a tube to apply to the leg.

The Claimant never worked on Sundays and on public holidays. There was no time she worked up to 7.00 pm as she said it was not safe for her since she walked to and from work.

On 15th January 2013 when the Respondent and his wife came from leave the Claimant sent auctioneers to attach their household property without a decree. The auctioneers harassed them and forced the Respondent to write him a cheque of Shs 98,000/- and pay cash of Shs 50,000. The cheque was stopped on the advice of the Respondent's lawyer. The Respondent prayed for dismissal of the claimant's suit and refund of Ksh. 50,000 paid to the auctioneers.

Issues for Determination

I have considered the pleadings, the documents attached thereto and the evidence adduced in court. I have also considered the submissions by both parties. Arising from the pleadings and the evidence the issues for determination are the following.

- i. Whether the Claimant was employed as a casual or part time employee?
- ii. Whether the Claimant was injured while at work and whether the Respondent is liable for injury suffered by the Claimant?
- iii. Whether the Claimant was unfairly terminated?
- iv. Whether the Claimant is entitled to the prayers sought?

1. Was the Claimant a casual or temporary employee of the Respondent?

The claimant alleges she worked daily for the Respondent from 7.00 am to sometimes 7.00 pm, and she was therefore not a casual or temporary employee. The Respondent avers that the Claimant reported for duty between 8.00 am and 8.30 am and left between 2.00 and 2.30 pm.

The only work she did was cleaning the car, house, clothes and dishes for 2 people, the Respondent and his wife. The Claimant was paid salary at the end of each month.

The Employment Act defines a casual employee as a person whose terms of engagement provide for payment at the end of each day and who is not engaged for longer than twenty four hours at a time.

A temporary employee would be one who works on a specific task and is paid for the task after which the employment relationship comes to an end.

From above definitions, the Claimant who worked continuously and was paid at the end of each month was not a casual employee. Having worked continuously, she was also not a temporary employee.

2. Was the Claimant injured while at work?

The Claimant pleaded in the Memorandum of claim that she accidentally slipped and fell while at work on 27th July 2011. She injured her right eye and was treated at Spinal Injury Hospital. That on 27th August 2011 while serving the Respondent's guests on a Saturday her right leg got swollen and she was treated at Midhill Hospital when her leg was plastered as it was dislocated. That when she resumed work on 3rd September 2011 the respondent terminated her employment.

In her testimony in court the Claimant testified that she skidded on soapy water after the Respondents wife added soap the water. She stated that she injured her shoulder and leg and a neighbour of the Respondent saw her crawling and took her to hospital. She testified that her leg became crooked as a result of the injury. That she was treated at Spinal Injury Hospital and her leg put on a plaster cast. Under cross-examination the claimant stated that she injured her leg when she fell and the leg started paining later and she went to hospital.

The Claimant produced a treatment summary form and an x-ray request form dated 29th July 2011 stating that she fell on cemented floor while working in a house on Lenana road on 27th July 2011 and sustained a cut of 3 x 1 x 3 cm on right side of her eye and trauma to the left aspect of her lower jaw. The treatment received was stitching of the facial laceration, paracetamol, wound dressing, antibiotic cover and dental examination at Mbagathi District hospital. She also produced treatment receipts for 150/- and waiver Authority form for waiver of Shs. 350/- for dressing and removal of stiches on 1st August 2011. There are no further treatment records. There was no medical report. The treatment records do not show any injury to her leg.

The Respondent testified that he was not at home when the Claimant fell, that he was informed by his wife who was at home that the Claimant was cleaning the house while alone when she fell and was taken to Spinal Injury Hospital by a neighbour whom his wife gave Shs. 200. That she came back to work after 3 days.

I find the Claimants testimony inconsistent and exaggerated. She did not produce any medical report to prove the extent of her injury. The medical treatment records prove only a minor injury. Her evidence does not prove that her fall was as a result of negligence or breach of duty on the part of the Respondent.

I find that the Claimant has not proved her claim on injury and dismiss the same.

3. Whether the Claimant was unfairly terminated from Respondent's employment.

The Claimant pleaded in the claim that when her leg got swollen she was taken to Midhill Hospital where the leg was put on a plaster cast on 27th August 2011. That she resumed work on 3rd September 2011 after recuperating when the Respondent unlawfully and without reasonable cause terminated her employment. The Claimant testified that after her injury she decided to go back to work but the Respondent's wife told her she could not go back to work with a plaster. That the Respondent's wife threw Shs 4000 at the Claimant and told the Claimant not to go back to her house.

The Respondent testified that the Claimant had worked for him from July 2003 then left on her own at the end of October 2009. She resumed work after a 3 month break and finally left on 4th September 2011. That she left on her own volition and was paid salary of Shs 4000 and another Shs. 7000 by the Respondent and not his wife. That he did not throw the money at the Claimant.

In the bundle of documents attached to the Respondents written submissions dated 20th March 2013 and filed in Court on the same date he has attached a schedule of payments made to the Claimant which reflects that all payments made to the Claimant were signed for by her. It shows that she received and signed for Shs 4000 for working for 3 weeks and Shs. 7000 as a final payment.

The Claimant denied receiving Shs. 4000 and Shs 7000 as final payment . However when asked in re-examination by her advocate she responded that she cannot remember whether she signed or did not sign for the payment as she was sick and was crying after losing her job. She further stated that the Respondent wanted her to work while the Respondent's wife refused. The Respondent's wife whom she alleges threw money at her and refused to let her work was not made party to this claim.

From the inconsistent testimony of the claimant and the controverting evidence by the Respondent, I find that the Claimant has not proved that she was unfairly terminated by the Respondent.

4. Is the Claimant entitled to her prayers?

The claimant prayed for several reliefs. I will now consider each of the prayers.

a. 3 months' Notice

The Claimant prays for 3 months' notice at Shs. 6000 per month totaling Shs . 18,000/- .

The Employment Act provides for notice of one month for employment where salary is paid per month unless the parties have agreed on longer notice. In this case the Claimant has not produced any evidence of agreement of longer notice.

In any event, notice is payable by the party who terminates the contract of employment. I have found above that the Claimant has not proved that the Respondent terminated her employment.

The Claimant is therefore not entitled to notice.

The Claim is dismissed.

b. Leave Payment (Pay in lieu of leave)

The Claimant alleges she never took leave for the entire period she worked for the Respondent . She claims 9 years' salary in lieu of leave for 9 years from 2002 to 2011 at Shs. 6000 per month. The total claim is Shs. 54,000/-.

Under cross examination the Claimant stated that when the Respondent went on leave she worked every day. That she cleaned the house, tend flowers and took care of birds.

The Respondent in his testimony stated that the birds in his compound are wild, that he feeds them. The birds come in the morning but are irregular during the rainy season. Since they are wild they do not need feeding when he is away. He further testified that the Claimant takes leave when he takes his leave. His garden is tended by the landlady's gardener and the Claimant did not do any gardening.

In the schedule of payments in the bundle of documents attached to the Respondent's written submissions filed on 20th March 2013 there are payments signed for by the Claimant in respect of payments in lieu of leave and records showing payments paid to the Claimant during periods she was on leave. The Respondent has also attached letters from the University of Nairobi granting him leave between 2003 and 2010. He has also attached a schedule showing that the Claimant was paid for or took leave in June 2004 (one month), December 2004 and June 2005, 2006 (one and a half months), 2007/2008 (40 days salary), 2009 (3 months leave and 2010 – 2011 (52 days paid leave).

I therefore find that the Claimant has not proved that she never took leave. The claim for payment in lieu

of annual leave is dismissed.

c. Service Pay

The Claimant seeks service pay for 9 years at the rate of one month's salary for 9 years. The Respondent has not made any representations about service pay. The Respondent however submits that the Claimant was employed on temporary basis.

As I have already decided above, the Claimant was not a temporary employee.

Section 35(5) and (6) of Employment Act provide for payment of Service pay and circumstances when the same is not payable. The Sections are reproduced below:-

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement

Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

Since the Claimant does not fall under any of the exclusions in Section

35(6) she is entitled to service pay. The rate of service pay is not set out in the Act but the precedents of this court and the general practice provide for 15 days salary per year worked.

The Claimant alleges she worked for 9 years from 2002 to 2011. The Respondent however testified that she worked from July 2003 to 4th September 2011.

The Respondents documents also reflect that the Claimant's first salary was for the period 1st to 31st July 2003. That means she worked for 8 years.

The Claimant's last Salary should have been Shs. 8,723.90/- according the statutory minimum wages applicable as at November 2011.

15 days salary for 8 years is Kshs. 34,895.60/- which I award the claimant as service pay.

d. Underpayments

The Claimant prays for Shs. 36,000 being underpayments for 9 years at the rate of Shs 4000. There is no explanation about how the Shs. 4000 is arrived at. The Respondent has in the further submissions also made some calculations which have no basis in law.

The statutory minimum wages order provides for hourly, daily and monthly rates of pay. If an employee works on an hourly basis the wages are based on the hourly rates of pay. If the wages are paid daily they are based on the daily rate of pay. The mode of calculation is provided for under the Regulation of Wages (General) Order. The Respondent referred to the Agricultural Wages Order rather than the General Wages Order.

Under the minimum rates of pay applicable from 1st May 2011 to 30th April 2012, the statutory minimum wage was Shs. 8723.90 inclusive of 15 % house allowance while the statutory minimum wage for 2010 was Shs. 6743 excluding 15% house allowance and Shs. 7932.95 inclusive of house allowance which the Claimant was entitled to as she was not housed by the Respondent.

It is not the duty of the court to calculate for parties their entitlements while at the same time the court cannot ignore obvious cases of underpayments. For this reason I have calculated and awarded the Claimant underpayment for only the last 12 months of employment. I am doing this in view of the fact that both the Claimants and the Respondent's advocates appear to be completely in the dark on the issue and have not bothered to educate themselves on the provisions of the Labour Institutions Act under which the orders on minimum employment terms including wages for different sectors are regulated.

I award the Claimant underpayments as follows:-

- i. For 8 months ending 30th April 2011 Kshs. (7932.95 less Kshs. 4000 paid) = Kshs. 31,463.60
- ii. For May to August 2011 (Kshs. 8723.90 less Shs. 4000 paid)
= Kshs. 18,895.60/-
- iii. Total - 50,359.20/-

e. General Damages for Unlawful termination.

Having found that the Claimant had not proved that she was unfairly terminated, she is not entitled to payment of compensatory damages for unlawful termination.

Her Claim is therefore dismissed.

f. General Damages for injuries sustained in the course of work.

I have already found above that the Claimant has not proved that she suffered injuries in the course of employment for which the Respondent is liable to compensate her.

The Claim is therefore dismissed.

g. Certificate of Service

The Claimant is entitled to a certificate of service as provided in Section 51 of the Employment Act. The Respondent is directed to issue the same to her within 15 days from date of judgment.

h. Costs

The Claimant having failed to prove the bulk of her claim, and taking into account her demeanor, is not entitled to costs.

Each party shall bear their costs of the suit.

i. Interest

The Claimant shall be entitled to interest on the sums awarded herein from date of judgment.

j. Shs. 50,000/- paid by auctioneer.

I order that the Shs. 50,000/- paid to the auctioneer by the Respondent be recovered from the auctioneer as the attachment was unlawful there having been no notice of 7 days as provided by law.

Orders accordingly.

Read in open Court this 16th day of **May, 2014**

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Senteo for Respondent

Betty Rashid for Claimant