



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 527 OF 2013

BETWEEN

LINET AKASA SHIKOLI
CLAIMANT

VERSUS

LILIAN OTUNDO
RESPONDENT

Rika J

CC. Edward Kidemi

Linet Akasa Shikoli appearing in Person

Mr. Eric Masese instructed by Kosgey & Masese Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. This Claim is brought by Linet Akasa Shikoli against her former Employer Lilian Otundo. She was employed as a House Help, in the year 2006, at a monthly salary of Kshs. 9,000. She was summarily dismissed by the Respondent in November 2012, on the allegation that she was engaged in acts of gross misconduct. She challenges the validity and fairness of the reason given in terminating her contract, and questions the fairness of the procedure. She filed the Statement of Claim on 16th April 2013, in which she seeks against the Respondent, the following orders-:

- a. 1 month salary in lieu of notice at Kshs. 9,000;
- b. Service pay at Kshs. 27,000;
- c. Annual leave pay at Kshs. 37,800;
- d. Public holidays’ pay at Kshs. 16,200;
- e. Compensation for unfair termination, the equivalent of 12 months’ salary;

f. Costs; interest; and any other suitable relief.

2. The Respondent filed her Statement of Response on 6th May 2013. The Respondent agrees that the Claimant was employed by the Respondent as a House Help from 2006 to 2012. The Claimant was summarily dismissed by the Respondent on valid and fair grounds. She does not merit any of the reliefs sought. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. Shikoli testified she comes from Kakamega in Western Region of Kenya. On 23rd November 2012, her Employer hosted some visitors. The Respondent's Child was celebrating a Birthday Party. The visitors arrived from around 11.00 a.m. Around 9.00 p.m. the Claimant was called aside by the Respondent. The Respondent charged that the Claimant had ignored to respond to the Employer, when called by the Employer. This refusal, according to her Employer, happened in the presence of the visitors, which had the effect of mortifying the Employer. The Claimant testified she did not deliberately avoid answering the call from her Employer, but was busy washing the utensils the visitors had used during the occasion.

4. The visitors left around midnight. The Claimant retired to bed after the Respondent had chided her for the alleged insubordination. The following morning the Claimant was asked to leave by the Respondent. She was advised to collect her terminal benefits later. She was not even given bus fare home; a Good Samaritan assisted her with the bus fare. The Claimant approached her Trade Union who computed the terminal dues to her. The Trade Union engaged a Lawyer for her, who wrote a demand letter to the Respondent. The Respondent did not pay.

5. Cross-examined, the Claimant testified she worked alongside another House-help, Leonida. The Claimant did not know whether Leonida still worked for the Respondent. The Claimant initially earned a salary of Kshs. 5,000. She did not abscond in the month of August 2007. She conceded she had gone to her home in August 2007, and stayed away from work for 3 months. She returned to work and was allowed to continue working. During the Birthday Party, the Respondent outsourced cooks, but the House-helps assisted with the washing of utensils. It was true the Respondent called the Claimant, and the Claimant instead of answering the Respondent's call, asked Leonida to go and find out what the Respondent wanted. This did not in the mind of the Claimant, result in gross misconduct. The Claimant testified at first that she did not feed from the Respondent's household, but altered her testimony conceding indeed she fed from there. She lived in the Respondent's home. She did not receive 1 month pay from the Respondent through the M-pesa facility. She denied that she was big-headed, or that she seeks to enrich herself unjustly. She never went on leave. She worked on public holidays, but was not able to say which public holidays.

6. Otundo testified she is a resident of Loresho in Nairobi, and conceded she employed Shikolo as a House-help, as stated by the Claimant in her evidence. She was employed from September 2006, and dismissed on 24th November 2012. Otundo had 2 other Domestic Employees- Jairus and Harrison- who served as Gardeners. The 2 and Leonida are still in employment. All Employees went on annual leave, traditionally during August and December School Vacations, when Otundo and her family went on vacation. All Employees had 4 weeks of annual leave. The Respondent granted all the Employees off days. They however were on duty during the Public Holidays.

7. In 2007, the Claimant went on leave. She extended her leave unilaterally by 3 months. She did not give any reason for her absence. She was pregnant when she left. When she returned after 3 months, she was no longer pregnant. During the Respondent's Child's Birthday Party, food was prepared by way of outside catering. The Caters brought in utensils and food. They did everything, including the washing of the utensils. The Claimant was not involved in this work. When the Respondent called the Claimant; once, twice and thrice, the Claimant refused to answer the call. The Respondent was informed by the Respondent's sister that the Claimant alleged her foot was painning. The Respondent asked the Claimant, after the visitors had left, to leave employment the following morning. The Claimant was advised to collect her terminal dues from the Respondent's Office, a day after she left employment. She instead went to the Office with Trade Union Officials.

8. Otundo described her former Domestic Employee as a moody person, given to mood swings. The

Respondent had issued several warnings to the Claimant about her conduct. Shikoli was not working well with her colleagues. Her conduct during the Birthday Party was the last stroke. All the other Employees worked well. The Claimant took annual leave, and only had a balance of 2 weeks which she was to utilize in December 2012, by the time she left. Otundo did not give her notice, because the decision was a summary dismissal. The Claimant lived with the Otundos, and fed from their home. The Respondent paid Kshs. 8,000 to the Claimant through M-pesa, being November 2012 salary. Kshs. 1,000 was deducted from her usual rate of Kshs. 9,000 and paid to Leonida, in satisfaction of a debt the Claimant owed Leonida. Cross-examined, Otundo testified the Claimant never reported any disputes between her and her fellow Domestic Employees, to the Respondent. Employees went on annual leave every August and December. Kshs. 8,000 was paid to the Claimant by the Respondent through M-pesa. The Respondent prays for the dismissal of the Claim.

The Court Finds and Awards:-

9. The Parties share common ground on certain facts. It is agreed the Claimant was employed by the Respondent as a Domestic Employee in September 2006. Her first salary was a reasonable amount of Kshs. 5,000 per month. She left employment upon summary dismissal on 24th November 2012. There is no dispute the decision to end the employment relationship was made by the Employer. The Claimant lastly, earned the sum of Kshs. 9,000 per month.

10. Domestic Employees have for long worked outside the formal labour market. There have been no legal regulatory framework, and many a Domestic Employee, have suffered harsh terms and conditions of employment, in the hands on hard taskmasters. The society is changing, and domestic work is currently being mainstreamed into the agenda of fair and decent work, and a face given to the oftentimes unrecognizable and unknown Domestic Employee, through Domestic and International Legislative Instruments.

11. The main Instrument that has set the pace for change in Domestic Work is the ILO Domestic Workers Covention No. 189 of 2011. The Convention was adopted by Member States in 2011, against the background of the realization that Domestic Workers serve without clear terms of employment; are not registered in any employment record; and are excluded from the scope of labour legislations. The Convention aims to protect the human rights of Domestic Workers and promote their right of equality and treatment. The benefit of adoption and ratification of this Convention has already been witnessed in Countries such as Italy and Uruguay, where Domestic Workers were able last year, 2013, to conclude Collective Bargaining Agreements. Kenya needs to ratify ILO Convention No. 189 OF 2011, and put in place clear legislation to enable Domestic Workers enjoy their full labour rights, as demanded by the Convention and Article 41 of the Constitution.

12. The minimum wage for Domestic Workers in Nairobi at the time of the Claimant's departure was at Kshs. 8,759 for Nairobi. The Claimant was housed and fed by the Respondent. She was paid a salary of Kshs. 9,000 per month. In terms of remuneration, the Claimant was treated in accordance with the minimum standards. The Respondent must be lauded for affording her House-help fair remuneration.

13. There was sufficient evidence given to the Court by the Respondent to show that on 23rd November 2012, the Claimant was called by the Respondent thrice. It was in the presence of visitors who had graced the occasion hosted by the Respondent for her Child. The Claimant did not answer the Respondent, ostensibly because she was washing utensils. It was also said her legs were paining. She instead sent her Colleague Leonida, to find out what the Respondent was calling her for. Shikolo did not explain to the Court why, even if she was washing utensils, could not have excused herself momentarily, and answered her Employer. Refusal to answer her Employer, without any good reason, and in front of guests, was an aggravated case of gross misconduct. The Respondent had valid reason under Section 44 [4] of the Employment Act 2007. She engaged in insubordination. There was valid and fair reason to justify termination under Section 43 and 45 of the Employment Act 2007.

14. The Respondent had the duty under Section 41 and 45 of the Employment Act 2007, to accord to the Claimant fair procedure. Otundo did not grant the Claimant a formal hearing. There was no hearing in the

mode guaranteed by Section 41. There were no charges, read to the Claimant in a language understood by her. She was asked the same night of the offence, to prepare to leave the following morning. Termination did not conform to the provisions on fair procedure, contained in the Employment Act 2007. To this extent, termination was unfair and a minimal **compensation the equivalent of the Claimant's 1 month salary at Kshs. 9,000, is adequate.** As there was valid ground to warrant termination, the claim for notice pay is rejected.

14. The Respondent did not give evidence to show that the Claimant did not merit service pay under Section 35 of the Employment, by virtue of any Social Security Plan. She is not shown to have been subscribed to the National Social Security Fund. She asks for 15 days' salary for every completed year of service. She completed a total of 6 years, having been employed in September 2006 and dismissed in November 2012. Her years of service, regardless of her manner of exit, cannot and should not have been disregarded. She was not paid anything to recognize and reward her years of service. The only money paid to the Claimant by the Respondent after termination was her November salary, which was paid via M-pesa, and which is not relevant in this dispute. **The Claimant is allowed service pay at 15 days' salary for every completed year of service, computed at Kshs. 31,153.**

15. The Domestic Employees serving at the Respondent's Home, all took their annual leave in the months of August and December, during the School vacations. The Claimant took her annual leave like all her Colleagues. The Court believes the evidence of the Respondent that at the time she left employment, she was owed only 14 days in annual leave, which she was supposed to utilize in December 2012. **She is granted 14 days of annual leave, valued at Kshs. 4,846.** The claim for 54 Public Holidays is not well-founded. It is true the Respondent conceded her Employees worked on Public Holidays. The Claimant conceded she had at one time during her employment, absented herself from duty for 3 months. It would be unjust to compensate her for work performed during the unspecified 54 Public Holidays, while she without leave or lawful cause, deprived the Respondent of her labour for about 90 days. *The Court grants:-*

[a] Termination was justifiable, but unfair on account of procedure;

[b] The Respondent shall pay to the Claimant, within 30 days of this Award, 1 month salary in compensation at Kshs. 9,000; service pay at Kshs. 31,153; and annual leave pay at Kshs. 4,846- total Kshs. 44,999; and

[c] No order on the costs and interest.

Dated and delivered at Nairobi this 30th day of June 2014

James Rika

Judge