



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 148 OF 2012**

**JOSPHINE M. AKINYI O**

**CLAIMANT**

**v**

**FARHIYO MOHAMED**

**RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim against the Respondent on 14 December 2012 and the issue in dispute was stated as *unfair terminal of Josphine M. Akinyi O from employment by the employer.*
2. The Respondent filed a Reply to the Statement of Claim on 21 January 2013 and I heard the witnesses on 28 March 2013 and 27 May 2013. I will only narrate the evidence as may be necessary for the purposes of my determination.

**The evidence**

3. The Claimant testified that the Respondent employed her on 22 September 2011 through an oral contract as a house servant at a wage of Kshs 8,723/- and that on or around 28 September 2012 the Respondent informed her that her services would not be required with effect from the next day, 29 September 2012. According to the Claimant this was without notice or reasons. On the same day, she wrote to the Respondent demanding payment of Kshs 85,034/90 being final dues. These included one month pay in lieu of notice, salary for September 2012, underpayments and severance pay.
4. The Claimant also testified that during the course of her employment the Respondent used to pay her Kshs 3500/- per month, the balance being kept to be paid after the end of one year. She further testified that she fell sick in the course of employment and paid her own bills of Kshs 2347/- for which she seeks a refund. She further acknowledges the Respondent paid her husband some Kshs 4000/-.
5. The Respondent on her part testified that the Claimant was her employee with effect from 11 October 2011 until 28 September 2012 and that she gave her notice of termination of employment and that she was paying the Claimant Kshs 4000/- per month. She further testified that she was not aware about the Claimant's illness and medical bills.
6. The Respondent further testified that the Claimant used to work between 8.00am to 3.00 pm.
7. On the reason for the termination, the Respondent testified that she was looking for an employee

- who would be able to work full time because the Claimant could not work full time because she had a young child.
8. In the Reply, the Respondent pleaded that there was no contract of service as envisaged by section 2 of the Employment Act

### **Issues for determination**

9. From the parties' pleadings, evidence and submissions, the issues which arise in my view are primarily, one whether the termination of the Claimant was unfair and appropriate relief. But before evaluating the parties' cases, I need to restate the statutory burden placed upon each party. I deliberately use the term statutory burden instead of legal burden or evidential burden because section 20(1) of the Industrial Court Act expressly provides that the Court will not be strictly bound by the rules of evidence unless it is dealing with criminal matters.

### **Statutory burden**

10. In cases or claims of unfair termination or wrongful dismissal, the initial statutory burden placed on both employees and employers is located in section 47(5) of the Employment Act. The section provides that

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

11. It is therefore the duty of the employee challenging the termination or dismissal to establish that a termination or dismissal took place and why it is unfair. Some of the reasons are set out in section 46 of the Employment Act. Other reasons are scattered over various sections of the Act and include non compliance with the procedural requirements of sections 35 and 41 of the Act.
12. The employer on the other hand is required by law to justify the reasons for the termination. But the employer is also under a burden to discharge the burden placed upon it by sections 43 and 45 of the Act. The employer is required to prove the reasons for the termination and that the reasons were valid and fair reasons.
13. On 28 May 2013 I directed the Respondent to file her submissions within 7 days. That directive was not complied with. Although the Respondent filed her submissions way out of time, I have considered the same in reaching my decision.

### **Evaluation**

#### ***Whether the termination was unfair***

14. According to the evidence of the Claimant, the Respondent informed her on 28 September 2012 that her services would not be needed with effect from 29 September 2012. On the side of the Respondent it was testified that one month notice was given.
15. The relevant sections of the law which deal with termination of employment are sections 35, 41, 43 and 45 of the Employment Act.
16. It is not disputed that the parties agreed on a monthly wage. The exact amount however is in dispute. The Claimant testified on a sum of Kshs 8723/- while the Respondent mentioned Kshs 4000/-.
17. The Employment Act applies in the case of both oral and written contracts. Section 35(1)(c) of the Act provides that in contracts to pay wages periodically or at intervals of or exceeding a month are terminable by the giving of notice in writing. The Claimant testified that she was informed orally about the termination. The Respondent confirmed this fact.

18. There is only one conclusion that I can draw. The termination of the Claimant, a house help was not in accord with the statute. House helps or any other employees on a monthly wage whether employed on oral or written contracts can only be terminated or dismissed in writing. That is what section 35(1)(c) of the Employment Act envisages. Any other mode of termination would be unfair or unlawful.
19. Section 41 of the Employment Act on its part provides for the procedural requirements to be complied with by an employer contemplating the termination of an employee.
20. In my view, the section requires an employer who is accused of terminating the services of an employee unfairly to show that the employer
  - i. Explained to the employee in a language the employee understood the reasons why it was considering the termination.
  - ii. Allowed a representative of the employee, being either a fellow  
employee or a shop floor representative to be present during the information/explanation of the reasons.
  - iii. Heard and considered any explanations by the employee or his representative.
  - iv. Where the employer has more than 50 employees as required by section 12 of the Employment Act, that it has, and complied with its own internal disciplinary rules.
21. The statutory obligation created by section 41 of the Employment Act is squarely placed upon the employer. It is not clear how/what an employer who is contemplating dismissing a house help is supposed to do about allowing a representative of the employee being present. But what is clear is that section 41 of the Act is applicable where the termination is on the ground of *misconduct, poor performance or physical incapacity*. It is apparent that the reason for termination of the Claimant was poor performance and therefore section 41 of the Act is applicable.
22. Apart from section 41 of the Act, sections 43 and 45 require an employer to prove the reasons for termination and that, the reasons were valid and fair.
23. In the present case, the Respondent has failed to establish that it complied with the procedural requirements of section 41 of the Employment Act.
24. The Respondent has also failed to prove the reasons for the termination or that the reasons were valid and fair. The termination was therefore also substantively unfair.
25. The Claimant was in employment for more than three months. Section 9 of the Employment Act obligates an employer to reduce into writing a contract of service which is for more than 3 months or number of working days in the aggregate amounting to three or more months. Section 10 of the Act provides for the particulars which should be set out in the contract.
26. Section 10(7) of the Employment Act also provides that where an employer fails to produce a written contract in legal proceedings then the employer must prove or disprove an alleged term of the employment relationship. In the instant case the Respondent did not cause a written contract to be drawn up and therefore where there are contradictory statements as to the terms of the contract, the employees statement must be given more weight.
27. In my view the Claimant has satisfactorily discharged the statutory burden placed upon her by proving that her termination of employment by the Respondent was unfair. I therefore find the termination of the Claimant was both procedurally and substantively unfair.
28. Before discussing appropriate relief I need to very briefly address the submission of the Respondent on two issues. The first was that the relationship between the parties was not a contract of service as envisaged under section 2 of the Employment Act. A contract of service is succinctly defined in the section and there can be no question that the relationship between the Claimant and Respondent was a contract of service to which the Employment Act applies.
29. The second issue was that the Claimant was employed for less than thirteen months and therefore cannot claim unfair termination by virtue of section 45(3) of the Employment Act. For one, the said provision was declared unconstitutional by the High Court and again, even if I were to disagree with the decision of the High Court, the parties did not address me on the issue. I need not say any more on the point.

## **Relief**

### ***One month salary in lieu of Notice***

30. Having found the termination unfair, I invoke the provisions of section 36 of the Employment Act and find that the Claimant is entitled to one month salary in lieu of notice which I assess at Kshs 8723/- .

### ***Balance of salary for September 2012***

31. The Claimant testified that she was not paid for September 2012. The Respondent did not in any manner address her testimony to this issue but merely made a general denial in the pleadings and evidence. In any case sections 10, 20 and 74 of the Employment Act have placed certain obligations upon employers as to employment particulars, itemized pay statements (pay slips) and keeping of records.

32. If the Respondent had been faithful to the statutory scheme, nothing would have been easier to do than produce the records kept to show that the Claimant was paid her September salary in full. The Claimant is therefore entitled to the Kshs 5,866/80 claimed.

### ***Underpayments in arrears***

33. The Claimant testified that they agreed on a monthly wage of Kshs 8723/- per month out of which the Respondent used to pay her Kshs 3500/- per month, the balance being kept for her, to be paid at the end of the year.

34. The Respondent on her part testified that they agreed a wage of Kshs 4000/- per month. Whichever way one looks at it, even if I were to believe the Respondent, she was underpaying the Claimant because the set minimum wage for 2011 was Kshs 7586/-.

35. I have already noted that the Employment Act requires employers to keep certain records and the burden placed upon an employer to prove or disprove certain terms of employment. The Claimant claims it was an agreed term she would be paid Kshs 8723/-. This figure was above the statutory minimum of Kshs 7586/- for 2011. The Respondent did not reduce the contract into writing. No employment records were kept or produced.

36. I therefore have to take the Claimant's version on this term. I do find that the Claimant was being paid Kshs 3500/- per month. The Claimant served for some 13 months. The Respondent kept back some Kshs 5223/- per month. This figure multiplied with the 13 months is Kshs 67,899/-. I find the Claimant entitled to this sum.

### ***Severance pay***

37. The Claimant was not declared redundant and is therefore not entitled to any severance pay.

### ***Medical bills***

38. The Employment (Medical Treatment) Rules, 1977 is categorical medical treatment should be at the expense of an employer unless the illness or injury was contracted when the employee was absent from duty without lawful cause.

39. The effect of the Employment (Medical Treatment) Rules, 1977 for employers of house helps and in any case other employers, is that they are liable or have a statutory obligation to meet the medical expenses of their employees if the illness or injury was contracted while in employment. I therefore find that the Claimant is entitled to the reimbursement of Kshs 2347/- incurred on medical expenses.

### ***Compensation for loss of employment***

40. The Claimant served the Respondent for a relatively short period of time. The factors to consider in awarding compensation have been set out in section 49(4) of the Employment Act. I have

considered all those factors and come to the conclusion that the equivalent of one month wage would be just compensation. I do award this head of claim in the sum of Kshs 8723/-.

### ***Certificate of Service***

41.A Certificate of Service is a statutory entitlement of an employee who has separated with an employer. The Respondent therefore has a statutory obligation to issue the Claimant with the same.

### **Conclusion and Orders**

42.In conclusion, I do find and hold that the termination of the services of the Claimant was unfair and award her

- |                                       |               |
|---------------------------------------|---------------|
| a. One month salary in lieu of Notice | Kshs 8723/-   |
| b. September 2012 salary balance      | Kshs 5866/80  |
| c. Underpayment arrears               | Kshs 67,899/- |
| d. Reimbursement of medical bills     | Kshs 2347/-   |
| e. One month compensation             | Kshs 8723/-   |

TOTAL

**Kshs 93,558/80**

43.The Respondent is ordered to issue the Claimant with a Certificate of Service within the next 21 days.

44.There will be no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 28<sup>th</sup> day of June 2013.**

**Justice Radido Stephen**

**Judge**

### **Appearances**

Messrs Atancha and Okemwa instructed by

Siocha Okemwa & Co. Advocates

for Claimant

Mr. Mwawasi instructed by

F.M. Mwawasi & Co Advocates

for Respondent

