



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 1510 of 2010

VIRGINIA NYOKABI.....

CLAIMANT

VS

STELLA MURUGI NJAGI.....

.....RESPONDENT

AWARD

The claim was filed on 5th September 2011 seeking compensation for unlawful termination and payment of terminal benefits itemized as;

- | | | | |
|-----|---|---|---------------|
| (a) | one month's salary in lieu of notice | - | Kshs.8,000/= |
| (b) | payment in lieu of leave not taken for 5 years | - | Kshs.40,000/= |
| (c) | service gratuity at the rate of 18 days salary for every
Completed year of service | - | Kshs.24,000/= |

The Claimant's case is that she was employed as a domestic worker sometimes in November 2005.

That she worked continuously and diligently until 13th May, 2011. She was earning a salary of Kshs.8,000/=

The Claimant alleges that her services were verbally terminated by the Respondent without any explanation and/or reasons.

She testified under oath in support of her case to the effect that her work entailed cleaning the house, taking care of the children and cooking. That she reported to work at 7.00 a.m. till 5.00 p.m. for six days in a week and was asked to stay over whenever the Respondent had travelled.

She told the Court that she had requested the Respondent for a Friday – off but the Respondent refused via an SMS message and so she reported to work as usual in the morning. When she reported, the Respondent told her to pack her bags and go away.

She went away and reported the matter to the Labour Office. She narrated that during the five years of service she was not granted leave and was paid overtime whenever she worked excess hours.

That she had no letter of appointment and was not registered with NSSF. She hoped she would be paid in lieu of leave when she stopped working. She added that she had a clean record, served well and had no warnings for any misconduct. That she was terminated without notice.

She however, said that though she left work on 13th May 2011, she was paid for the full month of May and conceded that she was entitled to payment of 15 days in lieu of Notice thereof.

She said that the Respondent was most unfair to her in that she had taken care of her children for 5 years while she did her masters degree at Catholic University only to be dismissed for no reason at all. She admitted that the Respondent gave her Christmas gifts of assorted nature from time to time but denied that the Respondent helped her to educate her children.

The Respondent testified under oath in answer to the claim. She was working at the Embassy of Switzerland as an Administrator. She admitted that the Claimant worked as a house help for her from November 2005 up to 13th May 2011. She told the court that the Claimant was like a big sister to her and she treated her well at all times.

She stated that her starting salary was between Kshs.7,000 – 8,000 but by the time she left, she used to pay her Kshs.14,000/= per month. In addition, she paid her overtime for extra days and time worked.

That on the day she left, she had requested her not to take an off to allow her sit for a Master's Degree exam. The Claimant insisted to take the leave and she therefore told her to go away and not return.

She said that though the Claimant was a good worker all along, she had started becoming stubborn and absconded work often.

Though she indicated that she had registered the Claimant with NSSF, she was unable to produce any records of registration or remission of NSSF dues on behalf of the Claimant .

With regard to the claim in lieu of leave, she told the court that the Claimant went on leave whenever she had travelled. She was however unable to produce records to this effect. She had also not provided the Claimant with a letter of appointment. She also denied underpaying the Claimant adding that even when she was away for a year, she remitted her salary to a Bank Account. She denies the claim in total.

Analysis

From the documentation produced by the Claimant and attached to the Memorandum of Claim filed with the Ministry of Labour on 22nd June 2011, it is apparent that she was claiming 14 days salary in lieu of notice at Kshs.7,000/=. This confirms the evidence by the Respondent that she was paying her a monthly salary of Kshs.14,000/=. The allegations in her statement of claim and in her testimony under oath that she was paid Kshs.8,000/= per month is untruthful and the court finds accordingly. She also put in a claim for 63 days leave not taken in respect of 3 years but in court she testified that she had not taken any leave for five years.

The Respondent however, told the court that she had paid her a full salary for 8 months while she was away in Sudan, inspite of the fact that she only went to check the home for a few days and was on leave most of that time. That she also took leave whenever the Respondent had travelled and was paid overtime whenever she worked excess hours and/or on Sundays and Public Holidays.

The Respondent also produced a Bank Statement showing salary remittance to the Claimant in the sum of Kshs.14,000/=.

The labour officer in his report of conciliation dated 28th July 2011, indicated that he was satisfied that the Claimant had taken leave with full pay whenever the employer was out of Country.

On account of this evidence, the court finds that the claim for Kshs.40,000 in lieu of leave not taken in five years is untenable and same is dismissed.

The court also finds that the refusal by the Claimant to call off her one day off to allow her employer of many years to take a master's Degree exam was unreasonable in the circumstances of the case and constituted a good ground for termination of her employment as provided under Section 44(4) of the Employment Act 2007;

“an employee knowingly fails, or refuses to obey a lawful and proper command which was within the scope of his/her duty to obey, issued by his/her employer or a person placed in authority over him/her by his/her employer”.

The Respondent was therefore justified to terminate the services of the Claimant and has discharged that onus in terms of Section 47(5) of the Employment Act, 2007.

However, the Respondent having failed to demonstrate that she had registered the Claimant with NSSF for the five (5) years she had served as a domestic worker, in terms of Section 35(5), the Respondent is bound to pay her service gratuity terms of which the court has fixed at 15 days' salary for each completed year of service.

The employer having testified that she paid the Claimant Kshs.14,000/= monthly salary, the service gratuity will be calculated at Kshs.7,000/= for 5 years giving a total of Kshs.35,000 (7,000x5).

In the final analysis, the Respondent is to pay to the Claimant Kshs.35,000/= in respect of 5 years service gratuity. The rest of the claims are dismissed.

No order as to costs the Claimant having partly been successful in her claim.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of June, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE - INDUSTRIAL COURT