



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1309 of 2011

EDNA BOYANI CLAIMANT

VERSUS

CHRISTOPHER MARTIN1ST RESPONDENT

EMILY OYUKO 2ND RESPONDENT

RULING

The Applicant for review of the award in this cause is the Claimant, Edna Boyani. The Respondents are Christopher Martin and Emily Oyuko. The Applicant is represented by Milimo, Muthoni & Company Advocates and the Respondents by G.N. Mugo & Company Advocates.

The memorandum in support of review was filed on 19th March, 2012. It is seeking the review of the award of 25th January, 2012 given by the Honourable Justice Isaac E.K. Mukunya on the grounds that the Honourable Judge erred by holding:

1. that the applicant's oral contract of employment did not constitute a proper contract of employment and the same could not support her claim;
2. that the claimant had not proved employment with respondent when the same had been unequivocally admitted by the respondent;
3. the burden of proof vested in the claimant whereas Section 74 of the Employment Act specifically required the respondent to keep and produce records of payment, leave entitlement time, housing, food rations, warning letters, notices, public holidays, sick leave and all other statutory documents as obligated by the Act;
4. the standard of proof in the employment contract was of a higher threshold than set in provisions of the Law of Contract Act, Cap.23;
5. the claimant was lawfully issued with a termination notice yet it was on record that she was not even at the material time of termination working with the 1st respondent as the 1st respondent had separated with the 2nd respondent; and
6. that the claimant was paid her terminal dues when the law puts the onus on the respondent to

prove so by way of production of employment records which were not tendered by the respondents at all.

There being sufficient reason to warrant the review, the claimant prayed for orders to:

- (a) set aside the award of dismissal against the claimant's claim;
- (b) enter judgment or award in favour of the claimant as prayed in the claimant's memorandum of claim or as the court may assess and award; and
- (c) grant such reliefs as the court may deem fit.

The respondents opposed the application by filing the grounds of opposition on 7th May, 2012. The grounds were that:

- (a) the application is incorrect and bad in law;
- (b) no new or important matter or evidence has been discovered since the award was made;
- (c) there is no mistake or error apparent on the face of the record;
- (d) the award is not in breach of any written law; and
- (e) the award requires no clarification from the court.

The respondents prayed that the application for review be dismissed with costs.

The application was heard on 30th October, 2012 when the Advocates for the parties made submissions in line with the respective grounds on record.

The applicant has grounded the application on the findings of the court at pages 8 to 9 of the printed award which states as follows:

“The contract of employment and entire transaction was oral and there is no credible evidence to support either the claim or counter-claims.

It is observed that in every claim it is upon the one who asserts who bears the burden of proof. In this dispute neither the Claimant nor the Respondent have advanced enough evidence to support the claim or counter-claims. It is considered that the averments made remain, mere allegations without reliable evidence.

Upon careful consideration of this dispute including the written memorandum the evidence adduced, it is the finding and holding that on a balance of probabilities, the claimant has not established her case for award of the reliefs and prayers made in the statement of claim. Similarly the Respondents have not established their counter claim. Accordingly both the claim and counter-claim are respectively found to be without merit and are respectively dismissed. Each party to bear and meet own costs.”

In view of the above findings of the court it has been submitted for the claimant that:

- (a) the claimant worked from February 2009 to July 2011 as a house girl for the respondents and thereafter from December 2010 for 1st Respondent upon separation of the respondents in December 2010. The contract of employment and its termination on 2nd July 2011 was not disputed.
- (b) The claimant supported her claim by way of oral evidence and it was an error for the court to find that the claimant's oral evidence remained mere allegations. It was not necessary that the claimant produced documentary evidence to prove her case.

(c) Under Section 74 it was the duty of the Respondents to keep and maintain the employment records and failure to do so and produce the same to the court and, requiring the claimant to produce such documents amounted to shifting the burden of proof from the employer to the employee; unfairly so; and

(d) The respondents did not produce any documents to show that the claimant's prayers were unfounded.

For the respondents it was submitted that the court was right in holding that the oral contract did not constitute a valid contract from which the claims were discernable. In absence of **"a contract before the court"** it is difficult to tell the claimant's entitlement. Further a copy of the order under review has not been extracted and was not annexed on the application.

The court has considered the grounds for review as set out in rule 32 of the rules of the court as well as the submissions by Counsel and makes the following findings:

(a) The court found that the parties were in an oral contract of employment and the entire transaction was oral. On the material on record and the submissions made, the court's finding cannot be faulted.

(b) In the assessment of the court, neither the claimant nor the Respondents advanced enough evidence to support the claim or counter claims. In absence of enough evidence the averment remain allegations.

(c) The ground for review in the assessment of the court is the weighting of the evidence by the court; that the court did not place necessary weight on the oral evidence before it.

(d) The court finds that the weight given to the evidence by the court is not a ground for review. In making this finding, the court has considered all the grounds for review stipulated in rule 32 of the Industrial Court (Procedure) Rules, 2010 and finds that none of the grounds has been satisfied in the instant case.

Accordingly the court finds that the measure of the weight the court shall place on any piece of evidence is the prerogative of the trial court and that weight cannot found a ground for review of the decision of the court. In the instant case it has not been said that the court misdirected itself in the analysis of the evidence thereby leading to miscarriage of justice. Had it been the case, a good case for review would have been well grounded.

In the circumstances, the application for review is dismissed with costs.

Signed, dated and delivered in court this 9th day of November, 2012.

BYRAM ONGAYA
JUDGE