REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 267 of 2012

ROBAI MUSINZI.....CLAIMANT

VERSUS

SAFDAR MOHAMED KHAN.....RESPONDENT

JUDGEMENT

This is a claim dated 15th February 2012 by the claimant Robai Musinzi against the respondent Safdar Mohamed Khan for wrongful dismissal and termination of employment and refusal to pay terminal dues and seeking the following prayers:

Terminal dues including;

1. ***3 month salary in lieu of notice at kshs.33,000.00;***
2. ***House allowance at 15% of basic salary at Kshs.6,600.00;***
3. ***Severance pay at 15 days per year for the four years all at kshs.22,000.00;***
4. ***11 worked days in October 2011 unpaid at kshs.4,033.00;***
5. ***Payment of overtime;***
6. ***Unpaid leave for 4 years at kshs.44,000.00;***
7. ***NHIF and NSSF contributions of service;***
8. ***Issuance of certificate of service under payment costs;***
9. ***Costs of the suit.***

Despite the respondent being served with summons to enter appurtenance and attend this court for directions, there was no appearance or defence filed herein. This Court notes that vide return of service dated 22nd October 2012 and again on 26th November 2012 filed by Mr. George Okwemba, the respondent Safdar Mohamed Khan was notified of this matter in Court at his home and or residence in Lavington Estate Tulip Villas at the 1st house along Isaac Gathanju Road in Nairobi. This Court being satisfied with the retunes filed that the Respondent had been dully notified of the proceeding herein and particularly the Hearing date of 28th November 2012 vide return of service dated 26th November 2012, proceeded with the claimants case.

It was the Claimant's case that on 7th August 2007 she was employed by the respondent at his home as a house help at a monthly salary of Kshs 11,000.00 a month. That her working hours were from 8.30 am t0 7.00 pm without a break or overtime pay for the seven days a week that she worked for the respondent. That no employment letter was ever issued to the claimant for the entire duration of her employment nor was she given any pay slips at the end of each month... that her duties were multiple ranging from cleaning the house, babysitting, caring for five children and other duties as assigned by the respondent.

It was further stated that the respondent never made any statutory contributions for the benefit of the claimant and at the point of termination no Certificate of Service was issued to her. That at the time of termination, she had worked for 11 days for which no pay was made and now makes her claim based on Section 45 (3) of the Employment Act.

It was the evidence of the claimant in Court that she served the respondent as their house help since 7th August 2007 where she was not on a written contract but her duties were ad hoc with taking care of the respondent five children for a salary of Kshs.11, 000.00. that as a resident of Kagemi, she would start her job as early as 6.30am and end her duties at 7 pm based on tasks allocated to her by the respondent forcing her to arrive home very late as no accommodation or transport was provided for her or an allowance to facilitate her to arrive at work in good time. That for all the overtime hours worked no overtime was ever paid to her.

That on the 11th of October 2011 the claimant services with the respondent were terminated on the basis that she was old yet the respondent was paying her so much money that he was better off using to employ other people instead of her. That for the 11 days she had worked the respondent refused and or failed to pay her and the termination was summary without notice or payment in lieu of notice.

That upon this termination, the claimant noted that no statutory dues were ever remitted by the respondent to the NSSF, NHIF and other bodies mandatory all to the detriment of the claimant. That despite repeated communication and demand to pay her terminal dues, the respondent has neglected and or failed to do so.

The claimant further submitted in evidence that due to the abrupt termination of her employment, she was unable to pay her rent at her rented premises in Kangemi and was therefore forced to relocate back to her rural home in Kakamega as she could not sustain herself and her family in Nairobi without the job that had sustained her. That every time she attends court she has travel costs of over Kshs.5,000.00 which she now claims with interest together with 3 months notice pay in lieu of notice, house allowance, severance pay, days worked unpaid, overtime unpaid, leave unpaid, statutory dues and a Certificate of Service.

Court notes that in the absence of a defence to the above claim, only evidence on record for court consideration is that of the claimant. Based on the documents filed in the claim and evidence in submissions court makes the following observations.

It is now settled law under the Employment Act that a verbal contract is a contract that can confer rights and can be enforced.

8. The provisions of this Act shall apply to oral and written contracts.

Further that all employers should seek at the earliest opportunity to reduce oral contracts of employment into writing. This would help in spelling out the terms and conditions of engagement between the parties.

It is the duty of every employer to keep employee records. Pay slips and leave schedules, should have been issued to the claimant as of right by the employer. Court notes that under Section 10 of the Employment Act, in a contract as between the parties herein [verbal as established by this Court] there are specific details that must be incorporated. Thus the employment particulars;

A written contract .....shall state particulars of the employment .....shall contain particulars as at a specified date....[stating] any terms and conditions relating to any of the following –

(i) Entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

(ii) …

(iii) Pension and pension schemes.

(b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.

In this case the Court is guided by the applicable law, the evidence before it and the submissions in court.

I have carefully considered the claimants memorandum of claim and her submissions in evidence before court. It is not in dispute that the claimant was a house help for the respondent and that she earned Kshs.11, 000.00 a month. This Court notes that many employers fail to issue their employees with a contract of service and this acts to their detriment as none issuance of this document leaves the Court to interpret the relationship between the parties which could have been well outlined by the mutual agreement of the parties. In the absence of appearance and or a defence, the court has only the evidence of the claimant that based on the oral contract between the parties, her terms and conditions of work were that she was serving as a house help for a monthly salary of Kshs.11, 000.00.

It was in evidence that the claimants summary dismissal was based on the ground that she was too old to serve. This is not a fair ground under any written law for a termination and where such a reason is applied to terminate employment, the same is here found to be unfair and the court finds the respondent liable as the same was not justified. For the unfair termination, this Court will award pay equivalent to two months' salary at Kshs. 22,000.00.

On the claim for severance pay, I note provisions under Sections 35 (1) and (3) of the employment Act, that the claimant was serving and being paid on a regular basis each month and despite there not being a written contract for this purpose she is entitled to such terms and conditions of service as she would have been entitled to under this Act had she been initially employed under a contract. This court will therefore award the sum of Kshs. 33,000.00 being one month pay for each completed year worked.

On the claim for leave In the case of accrued leave upon termination the employer shall pay an employee on a pro rata basis an amount in cash for the accrued annual leave to which that employee is entitled. This was claimed at for the 50 months served and the Court will award the same at Kshs. 44,000.00

On the notice pay, this Court notes that an employer may terminate a contract of employment without notice if s/he pays the employer a sum equal to the amount of remuneration which would have accrued to the worker during the period of the notice. There having been a contract between the parties, this Court finds a duration of one month notice and or one month pay in lieu of notice being reasonable in the circumstance and will award the sum equivalent of Kshs. 11,000.00 for the same.

Regarding house allowance section 31(1) of the Employment Act provides that an employer shall at all time, at his own expense, provide Housing. reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. However the section does not apply to an employee whose contract of service contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide him with housing accommodation. No contract of employment was given to the claimant hence the court will proceed to assess the house allowance based on the current sector practice. The claimant was residing in Kangemi in a rented house for which she used to pay for from her salary. This means that there was no provision for housing or an allowance for the same and the Court will make this award as claimed for at 15% of pay being Kshs. 1,650.00 per month this for the 50 months served all totalling to Kshs. 72,500.00.

On the claim for payment of the due statutory contributions, these are dues to government bodies and cannot be conferred to the claimant.

On the claim for overtime, it was not clear from the pleadings and in evidence what time was applicable. I noted that the pleadings stated that worked started from 8.30 am to 7 pm while in evidence the claimant stated that worked started from 6.30 am to 7 pm. It is the duty of a litigant to prove her case and this Court will not go on a fishing mission on her behalf and will therefore not confirm this claim for lack of clarity over the same.

A Certificate of Service is a legal right for all employees at the end of every employment.

In the circumstances I am persuaded that the claimant is entitled to the claims set out above and the court enters judgement for the claimant in the following terms:

a) That the termination was unfair.

b) The respondent is directed to pay the claimant the following final dues

1. One month salary in lieu of notice at kshs. 11,000.00;

2. House allowance all amounting to Kshs.72,500.00;

3. Pay for 11 days worked in October 2011 all at Kshs. 4,033.00;

4. Severance pay all amounting to Kshs. 22,000.00;

5. Unpaid leave days all amounting to Kshs. 44,000.00;

6. two month's salary as compensation for unfair termination all amounting to Kshs. 22,000.00

Total Kshs. 175,533.00.

c) That the claimant be given a Certificate of Service

d) Costs of the suit granted to the claimant.

Dated and delivered at Nairobi this 19th day of December 2012

M. W. Mbaru
JUDGE
INDUSTRIAL COURT OF KENYA

In the presence of:

Court clerk.....

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