



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1324 OF 2014

FELISTAS ACHEHA IKATWA..... CLAIMANT

VERSUS

CHARLES PETER OTIENO..... RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by Statement of Claim dated 8th August 2014 and filed in court on 11th August 2014 is for unfair termination of employment.
2. The Respondent filed a Response on 17th February 2015 but did not call any witnesses. The Claimant testified on her own behalf. Both parties filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent as a house help at a monthly salary of Kshs. 7,000 from October 2007. She states that her employment was terminated in June 2013 when she went on maternity leave. She now claims the following:

- (a) One month’s salary in lieu of notice.....Kshs. 7,000.00
- (b) Service pay.....20,124.99
- (c) Leave pay.....28,174.99
- (d) House allowance.....72,450.00
- (e) Underpayment for May 2011-April 2012.....6,446.00
- (f) Underpayment for May 2012-April 2013.....17,377.80
- (g) Underpayment for May 2013-June 2013.....5,561.90
- (h) 12 months’ salary compensation.....84,000.00
- i. Certificate of service

j. Costs plus interest

The Respondent's Case

4. In his Response dated 17th February 2015 and filed in court on even date, the Respondent admits having employed the Claimant as a house help from October 2007 until June 2013. He however states that the Claimant deserted employment after proceeding on maternity leave.

5. The Respondent denies the Claimant's claim for unlawful termination of employment and claims from her one month's salary in lieu of notice.

Findings and Determination

6. There are two (2) issues for determination in this case:

- a. Whether the Claimant was unlawfully terminated or she deserted duty;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination or Desertion of Duty?

7. The Claimant states that she was unfairly terminated after proceeding on maternity leave. The Respondent on the other hand maintains that the Claimant deserted duty after proceeding on maternity leave. What is common is that the Claimant did not resume duty after her maternity leave. The fact that she had proceeded on maternity leave is therefore not in dispute. The divergence arises from the circumstances leading to the Claimant's exit from the Respondent's employment.

8. Black's Law Dictionary (Ninth Edition) defines desertion as:

"The willful and unjustified abandonment of a person's duties or obligations."

9. In the South African case of *Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the Court sought to distinguish desertion from unauthorized absence from duty as follows:

"...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return."

10. In *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* my brother, **Radido J** held that an employer asserting that an employee has deserted duty must demonstrate efforts made to establish the whereabouts of the employee. I reached a similar verdict in *Dickson Matingi v Db Schenker Limited [2016] eKLR*.

11. The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.

12. The Claimant told the Court that upon expiry of her maternity leave, she contacted the Respondent who told her that he did not wish to employ someone with a baby. The Respondent did not adduce any contrary evidence. Moreover, he did not demonstrate any effort towards getting the Claimant to resume work, if indeed she had deserted duty.

13. In light of the foregoing, the Court rejects the Respondent's line of defence and adopts the Claimant's testimony on the circumstances surrounding the termination of her employment. The logical conclusion therefore is that the Claimant's employment was unlawfully terminated and she is entitled to

compensation.

Remedies

14. Pursuant to the above findings, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I also award the Claimant one (1) month's salary in lieu of notice.

15. There was no evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF). She is therefore entitled to service pay. Additionally, the Claimant states that during her employment with the Respondent, she did not go on leave. In the absence of any evidence to the contrary, this claim succeeds and is allowed.

16. The Claimant further claims house allowance. Section 31(1)and(2) of the Employment Act as follows:

1. An employer shall at all times, at his own expense, provide reasonable housing accommodation to 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.

2. This section shall not apply to an employee whose contract of service-

a. 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 himself with housing accommodation; or

b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

17. The Claimant was not housed and the Respondent did not provide any evidence that the salary paid to her was inclusive of house allowance. I therefore award the claimant house allowance at 15% of her basic salary and adopt the consolidated figure of Kshs. 8,050 as her monthly salary for purposes of this claim.

18. In her final submissions, the Claimant attempted to introduce a claim of discrimination on account of pregnancy. This claim was however not pleaded in the Statement of Claim nor did the Claimant testify on it. The Court therefore found no basis for the claim which therefore fails and is dismissed. The claim for underpayment was not proved and is therefore also dismissed.

19. Finally, I enter judgment in favour of the Claimant in the following terms:

a. 8 months' salary in compensation.....	Kshs. 64,400
b. 1 month's salary in lieu of notice.....	8,050
c. House allowance for 68 months (1,050x68).....	71,400
d. Service pay for 5 years (8,050/30x15x5).....	20,125
e. Leave pay for 5 years (8,050/30x21x5).....	28,210
f. Prorata leave for 8 months (8,050/30x1.75x8).....	3,757
Total.....	195,942

20. This amount will attract interest at court rates from the date of delivery of this judgment until payment

in full.

21. The Claimant is also entitled to a certificate of service and costs of the case.

22. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Felistas Acheha Ikatwa (the Claimant in person)

Mr. Adudafor the Respondent