



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 828 OF 2017

JACKLINE MIGARE KITUNZI.....1ST CLAIMANT

MARY MAGDALENE OBIERO.....2ND CLAIMANT

VERSUS

JUNIOR HEARTS ACADEMY.....RESPONDENT

JUDGMENT

1. This suit was initiated by a statement of claim dated 28th April 2017 and filed on 4th May 2017 through which the Claimant, alleged that the Respondent un-procedurally and unfairly terminated their employment, and sought the following reliefs against it:

- a) *A declaration that the said termination of the Claimant's services and or employment by the Respondent was unlawful, Unfair and/ or illegal.*
- b) *Issuance of a certificate of service.*
- c) *Payment of the sum of money claimed under paragraph 7 and 8 above as damages for loss of employment amounting to Kshs 253,846 for the 1st Claimant and Kshs 270,769 for the 2nd Respondent.*
- d) *Payment of Claimant NSSF Arrears.*
- e) *Costs and Interest of the claim.*
- f) *Any other relief this Honourable court may find fit and just to grant.*

2. At the hearing matter, the Claimant sought that the contents of their witness statements be adopted as their evidence in chief, and the documents that they had filed under the list of documents dated 28th April 2017 be admitted as their documentary evidence. There was no objection by the Respondent. The contents and the documents were consequently adopted and admitted as such respectively.

3. The 1st Claimant was employed by the Respondent as a teacher in the year 2011 by a letter of appointment dated 1st September 2011. Her starting salary was Kshs. 10,000 which was eventually reviewed upwards to Kshs. 15,000. She stated that this adjustment of salary was communicated through a letter dated 7th July 2015 by the Respondent.

4. She testified that on the 11th July 2016, she reported to work as usual and continued to work up to around 10:45 am when she was called to the principal's office, whereat the secretary to the principal handed her a termination letter, letter which informed her that her services of employment were no longer required.

5. The Claimant contended that the Respondent did not give any reasons to her for the termination. The Respondent didn't bother to pay her terminal dues. She concluded that the termination was without a valid reason.

6. The Claimant states that the Respondent un-procedurally and unlawfully terminated the services of the 1st Claimant on 10th July 2016 and the 2nd Claimant on 2nd November 2016 and did not pay their dues.

7. Cross examined by Counsel for the Respondent, the 1st Claimant stated that she didn't have any verbal warnings on her failing to be in class at all times when she was required to be.

8. In her evidence under re-examination, the Claimant stated that she was not invited for any disciplinary hearing at any time.

9. The 2nd Claimant, who testified as CW-1, testified that she was employed as a teacher by the Respondent in the year 2012, through an appointment letter dated 5th January 2012. Her duties included preparing lesson plans, teaching, and evaluating student progress, maintaining discipline in classroom among others.

10. The 2nd Claimant testified that her employment was terminated on the 2nd November 2016. She stated that on this day she went to work at 8:15 am, however the guards at the entry gate didn't allow her in citing instructions from the Principal teacher.

11. She tried to follow up the matter with the principal who kept on promising that she could look into the matter, and get in touch with the former, thing which was never done.

12. She contended that she was not given a reason for the termination. She was not taken through any disciplinary process. At the time of separation, she was earning Kshs. 16,000.00.

13. The Claimant seeks a declaration that their termination from work by the Respondent was unfair, illegal and unlawful

14. The 1st Claimant prays for –

(a) One month's salary in lieu of notice Kshs.15,000

(b) Compensation for unlawful termination gross salary 12 months 15,000 x 12 Kshs.180,000

(c) Leave pay/due $21 \times 3 \times 15000/26$Kshs 36,346

(d) Severance pay $15 \times 3 \times 1500/30$ Kshs.22,500

Total claim Kshs.253,846

15. The 2nd Claimant prays for –

(e) One month's salary in lieu of notice Kshs.16,000

(f) Compensation for unlawful termination gross salary 12 months 16,000x 12 Kshs.192,000

(g) Leave pay/due $21 \times 3 \times 16000/26$Kshs 38,769

(h) Severance pay $15 \times 3 \times 16000/30$ Kshs.24,000

Total claim Kshs.270,769

Respondent's Case

16. In response to the statement of claim the Respondent filed a memorandum of reply dated 17th August 2017 where it admitted that the Claimants were its employees but denied their cause of action and entitlement to the reliefs that were sought in the statement.

17. The Respondent states that the 1st Claimant was issued with termination letter in accordance with the employment contract while the 2nd Claimant was terminated for persistent absenteeism and reporting to work late which she had been issued with various warning letters and had been given a chance to defend herself.

18. The Respondent did not call any witness to testify on its defence to the Claimants' claim herein.

Claimants' Submissions

19. The Claimants isolated two issues for determination; whether the Claimants' termination was fair both procedurally and substantively and whether the Claimants are entitled to the reliefs sought.

20. As regards what a fair termination entails, Counsel for the Claimants placed reliance on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court held:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

21. The Claimants further submitted that Section 41 of the Employment Act, 2007 has provided for the procedure to be followed when terminating the services of an employee on the grounds of misconduct, poor performance and physical incapacity. The 2nd Claimant's employment was terminated on account of one of these grounds, misconduct.

22. Counsel further submitted that Section 45(2) (c) places a requirement on the employer to establish that there was a fair and valid reason for the termination of an employee's employment. The provision applies to all terminations. There was no valid reason given to warrant the termination of the 1st Claimant.

23. The Claimants relied in the holding in **Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR** Court of appeal stated *"The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts"*.

24. A similar jurisprudence was observed in the case of **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** where the Court of Appeal stated *"the procedure the Bank ought to have followed when terminating the Claimant's employment is what is set out in sections 41, 43 and 45 of the Act"*.

25. It was argued that the termination was unfair, as the Claimants were not accorded a hearing prior to their termination. Their testimony on this was not controverted as the Respondent choose not to testify.

26. Counsel for the Claimants argued that the Claimants have established that they were unfairly terminated and entitled therefore to payment of 1 [one] month's salary in lieu of notice and 12 months' salary as compensation.

27. As regards the claim for compensation for leave days that were not taken, it was submitted on behalf of the Claimants that their evidence that they never proceeded for leave from the date of employment until the date of termination was not controverted. To buttress this point, the holding in **Mwende Mbiti v Citrus Inn Limited [2018] eKLR** was cited thus: -

“The Claimant is entitled to leave as there was no proof that she took any leave during her employment with the Respondent.”

Respondent’s Submissions

28. The Respondent did not file its submissions.

Analysis and Determination

29. Considering the material placed before me, the following issues present themselves for determination, namely,

- a. Whether the termination of the Claimants’ employment was substantively fair.*
- b. Whether the termination of the Claimants’ employment was procedurally fair.*
- c. Whether the Claimants are entitled to the reliefs sought.*
- d. Who should bear the costs of this suit.*

Whether the termination of the Claimants’ employment was substantively fair.

30. Section 43 of the Employment Act, 2007 places a duty on the employer whenever there is a dispute arising out of a termination of an employment to prove the reason or reasons for the termination. Any failure to discharge this burden will attract a consequence of the termination being deemed unfair pursuant to the provisions of section 45.

31. It is therefore difficult to read the provisions of section 43 of the Act in isolation from those of section 45. Section 45 commands that no employer shall terminate an employee’s employment unfairly, then goes ahead to prescribe when a termination can be deemed to have occurred thus;

“2. A termination of employment by an employer is unfair if the employer fails to prove-

[a]. that the reason for the termination is valid;

[b]. that the reason for the termination is a fair reason-

[i] related to the employee’s conduct, capacity; or

[ii] based on the operational requirements of the employer; and

[c] that the employment was terminated in accordance with fair procedure.

32. No doubt two sections of the law do require an employer to discharge two burdens if a termination of employment by him or her has to be considered substantively fair; first prove the reason[s] for the termination, second that the termination was for a valid and fair reason based on the statutory grounds.

33. Now I turn to consider whether or not the burdens were discharged by the Respondent in respect of the terminations, the subject matter of the dispute herein. A burden of proof is discharged by a party required by the law to, by that party adducing evidence of existence or nonexistence of the facts in issue or facts relevant to the issue. The Respondent didn’t present any witness to testify in court, in order to prove that which these provisions required of it. I have no difficulty in coming to a conclusion that the burden was not discharged.

34. Further, I have seriously considered the termination letter dated 11th July 2016, addressed to the 1st Claimant which reads in part,

“In line with the terms and conditions of employment contract under clause no. 4 of your letter of Employment dated 01/06/2014, your service with the Academy will stand terminated as on the 10th August, 2016. The period between 11th July, 2016 to 10th August, 2016 will be treated as Notice Period.”

Your dues payment for the days worked during the month of July/August, 2016 will be credited into your account in due course.”

And cannot hesitate to state that the letter is testament that the Respondent didn't offer any reason for the termination. Even on this count alone, it is clear that the reason[s] and valid and fair one for that matter was absent.

35. An employer can be tempted to argue that the contract of employment, allowed him or her to terminate an employee's contract of employment for as long as he or she has issued the requisite notice under the contract or made a payment in lieu of the contract notice. Such a thinking or argument will in ignorance of the fact that the employment and labour relations law, that came into being in this country in the year 2007, completely obliterated application of common law principles regarding termination of employees' contracts of employment, and wrestled the power that employers had to terminate the contracts at will from them. All employment contracts must be terminated for cause.

36. Having failed to render evidence on the 2nd Claimant's employment, the Respondent didn't prove the reason for termination, and that if there was any reason the same was for a valid and fair reason.

37. In the upshot, I find that the termination of the Claimants' employment was not substantively fair.

Whether the Termination was procedurally fair.

38. It is now trite that section 41 of the Employment Act provides for an elaborate and mandatory procedure that an employer contemplating to terminate an employment of contract of an employee or summarily dismiss an employee must adhere to, between the time he conceives the intention to so act and the point of making the decision to terminate or dismiss. Non-adherence to the procedure will attract the consequence of the employer's action being deemed unfair. A fair procedure contemplated in the provision has three components, the information, hearing and consideration.

39. From the material before the Court, I find it inconsiderably difficult to conclude that there was a fair process leading to the termination of the Claimants' employment. The Respondent did place any evidence before the Court to establish that there was. The Claimants' evidence that there wasn't, was not rebutted.

40. I conclude therefore that the termination of the Claimants' employment was procedurally unfair.

Whether the Claimants are entitled to the reliefs sought.

41. The Claimants sought for a compensatory relief for unfair termination. I am cognisant of the fact that a grant of the relief is discretionary. It depends on circumstances of each case. I have considered the manner in which the Respondent terminated the employment of the Claimant, the extent of its deviation from what the law expected of them, the fact that the Claimants did not contribute to the termination, and conclude that they are entitled to the relief and to the extent of six months gross salary each.

42. The Claimants contended that for that entire period they were in the employment of the Respondent they were not accorded a chance to benefit from their leave entitlement. I note that from their letters of appointment of the 1st Claimant, and more specifically clause 12 thereof provided for her leave entitlement in the following manner;

“you will be entitled to 30 calendar days per annum of paid vacation to be taken during the school holidays [i.e. April, August & December] at a time convenient to yourself and the academy.”

43. I note that the 2nd Claimant did not tender her letter of appointment for one to ascertain whether or not the contractual term for leave, if it was provided was similar to that in the 1st Claimant's contract. However, I have not lost of the fact that leave entitlement is a statutory right under section 28 of the Employment Act, and that even if the contract were to be silent on the entitlement, she could still have a benefit of the same on strength of the provision.

44. The Respondent didn't put any evidence before court, to establish that they indeed enjoyed the entitlement in the manner provided in the contract or statute. Consequently, I shall award them under this head as sought.

45. I now turn to the notice pay. The 1st Claimant was given a termination letter which had embodied in it a 30 days' notice. The notice was as contemplated in the employment contract and section 35 of the Employment Act, I consequently find that she is not entitled to the pay prayed for. I decline the claim.

46. As regards the 2nd Claimant, I find that she was not given any notice as contemplated in section 35 of the Act, or a payment made in lieu of notice. She will be entitled to one month's salary in lieu of notice.

47. The 1st and 2nd Claimants have claimed for severance pay for Kshs. 22,500 and 24,000 respectively. Severance pay is grantable under section 40 of the Employment Act, in redundancy disputes. The dispute herein is not one. Assuming that they were pursuing service pay under section 35 of the Employment Act, the same cannot be availed to them for the reason that from their material before this court, they have shown that they were registered with NSSF. Under Section 35[5], they are debarred from claiming entitlement to the same.

48. In the upshot, judgment is entered in favour of the Claimants in the following manner;

I. A declaration that the termination of the Claimants' employment was both procedurally and substantively unfair.

II. Compensation to the 1st Claimant for unfair termination, Kshs. 90,000.

III. Unpaid leave for 1st Claimant, Kshs.36,346.

IV. Compensation pursuant to section 49[1][c] of the Employment Act, for 2nd Claimant, Kshs. 96,000.

V. Leave pay for the 2nd Claimant, Kshs, 38,769.

VI. One month's salary in lieu of notice, Kshs. 16,000.

VII. Interest on the awarded sums above, at court rates from the date of this Judgement till full payment.

VIII. Costs of the suit.

IX. The Respondent to issue each Claimant with a certificate of service within 21 days of this Judgement.

Read and Delivered virtually at Nairobi this 31st day of March, 2022.

Ocharo Kebira

Judge

Delivered in presence of;

Mr. Were for the Claimant.

No appearance for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions

issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE



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