



REPUBLIC OF KENYA

High Court at Kisumu

Cause 8 of 2013

KUDHEIHA WORKERSCLAIMANT/APPLICANT

V

B.O.G. MASENO SCHOOL FOR THE DEAFRESPONDENT

JUDGMENT

The claimants herein KUDHEIHA filed this suit on 28/3/2012 for their member Roselyne Akach against the respondents – Board of Governors, Maseno School for the Deaf. The issue in contention is the unfair termination of M/s Roselyne Akach.

Facts of the case:-

The claimant led oral evidence before this Court where they called one witness Roselyne Atieno Akach. Roselyne told court that she was employed by the respondent on 26.6.2008 as an (ECD) teacher being paid a salary of Ksh 6,500/= per month consolidated with no other benefits. One morning she just received a letter indicating that the School had received a TSC teacher and her services were no longer required. She avers that when she was employed there was no indication that her services were to be terminated if a TSC teacher was posted to the School. She was also not contended as to the reasons for termination as per her termination letter. Further she was never given any hearing to indicate why her services were being terminated. At the time, there were two BOG teachers and she says she was more qualified than the other teacher having a Diploma in Special Needs Education.

Sexual harassment claims:-

The claimants contention was that the main reason for her termination was her refusal to fall into the sexual advances directed at her by the Headmaster of the respondents' school. She produced before this court an email message purportedly sent to her on 17.6.2010 by the the said Headmaster which read as follows:-

“I received your reply on why you abandoned duty this morning. I want you to know that this is a serious offence that if I were to parade you before the board, you could be sacked. But I don't want this thing to go that far. Remember, that I have always asked you for favours and you have turned me down. Now I have got you square and you have nothing to do.

Remember the other time you were travelling to Nairobi you cheated me that your husband was seeing you in Kisumu and that is why you refused my offer of travelling with me. Now I have the rope to tie your neck. So if you want me to finish this thing quietly without nobody knowing, can you arrange for us to meet anywhere in a room of your choice in any resort, I will square the bill. Let us have a good time and I will reciprocate by not forwarding this to the board. Remember I hold the key to your being here.” your word against mine. Secondly remember that you are a board employee who we can always do away with and get somebody to step in your place -----”

On 15.6.2010, she told court that she had received a letter from the Head teacher asking her to explain her absence from work between 18th – 30th May, 2010. She had made a reply explaining her absence on 17.6.2010 and that is when the email came in on the same day.

Following this exchange of letters and the purported email, the claimant proceeded to seek help from the District Education Officer. The DEO convened a panel of other officers who listened to her case with the headmaster. A verdict was passed that he should pay for her two months salary and let her work and also desist from sexually harassing her. She was allowed to continue working until 29.10.2010 when she was called to a BOG meeting. The sexual harassment claims were discussed in the meeting and she was reprimanded for reporting the matter to the DEO. She says she felt intimidated in the meeting and was told to go and speak to her husband so he speaks to the Headmaster if she wanted to continue working in that School. She continued working until Schools closed in November, 2010.

On 20.12.2010, she received a letter terminating her services and this is when she filed this case seeking to be paid her terminal dues and compensation for the suffering she had gone through. In cross – examination the claimant told court that she accepted to be paid Ksh 6,500/= per month. According to the appointment letter she was to be on probation for 6 months. This letter is dated 26.6.2008. She says she wrote a letter asking the BOG to confirm her and they didn't do so. She indicated that she was never paid any house allowance. She says the email she received was from the in box of Joab Gwara who is the respondents' headmaster and she believed he wrote it to her as she knew her email address. She also admits having known the respondents ' headmaster before when he was their tutor at Bondo TTC but he later started making sexual advances to her when she came to teach at Maseno School for the Deaf. She admits the case was referred to a conciliator appointed by the Ministry of Labour but she was not satisfied with the benefits calculated by the conciliator.

Respondents case:-

The respondents filed their memorandum of response on 17.8.2012 through the office of the A.G. They denied the claimant's contention on sexual harassment. Their contention is that the claimant was paid her salary and as agreed upon in the employment letter. They aver that the grievant is not entitled to any of the relief sought as proper procedure for termination of her services was followed and that she is only entitled to gratuity of Kshs 3,250/= and 1 month's salary in lieu of notice being Ksh 6,500/= - Total Ksh 9,750/=. They submitted that the Ksh 6,500/= paid was a consolidated salary for the claimant inclusive of house allowance which claimant agreed to. They contend that the respondents terminated the services of the claimant on grounds of redundancy.

The respondents also called one witness Joab Gwara the principle of the respondents School. He said that the services of claimant were terminated after they received 3 teachers from the TSC between June & August, 2010. The BOG dismissed her case and decided she should be terminated but be paid all her dues as the school could not sustain her services. She was given a cheque of Kshs 8,000/= as her dues and she refused to pick it.

On the issue of the email, he said he didn't write it and it did not form the basis of her termination. In cross – examination the witness indicated that the board never gave her a hearing after considering the whole case.

Expert evidence:-

After hearing the evidence of the parties, the court invoked the provisions of Section 20(2) and (4) of the Industrial Court Act 2011 that:-

“The court shall have power to summon witnesses, to administer oaths and affirmations and to require any person who appears to it to have special knowledge of any relevant matter or of any of the matters to which this Act applies or any written law to which it relate to furnish it in writing or otherwise and to confirm on oath, such expert action as may be relevant to any of the issues in the proceedings ----”

and summoned the head of IT within the Judiciary to give expert evidence on the authenticity or otherwise of the email purportedly written by one Gwara herein and send to the claimant. One Mr. Thomak Atak the director of ICT in the Judiciary in answer to these summons appeared before court and gave evidence that he did inquire into the email in question and talked to both the recipient and originator and confirmed that the email address where the email originated from exists and belongs to Mr. Gwara. However since the soft copy of the mail had been deleted from the receipt's in-box, he was unable to authenticate whether it did exist. He contacted Yahoo who said they can only confirm where the email originates from after deletion if it is within a short span of time. He was therefore unable to authenticate the existence of the email as originating from Gwara's address.

Having heard evidence on record I frame issues of determination as follows:-

Issues for determination:-

1. What were the terms and condition of employment of the claimant.
2. Whether these terms were breached in any way.
3. Whether the procedures for termination on account of redundancy were followed in terminating the claimant herein.
4. Whether the claimant was terminated following allegation of sexual harassment by the head teacher.
5. Considering answers to questions above, whether the claimant is entitled to any remedies.

On the 1st issue, the claimant was employed by the respondents on 26.6.2008 as per her appointment letter annexure 1 herein. As per the appointment letter, she was employed as an ECD Teacher at a salary of Kshs 6,500/=. She was expected to be on probation for 6 months. She accepted this offer and signed it on 3.7.2008. Going by this letter, her probation period ended on 3/1/2009. Under Section 42(2) of the Employment Act 2007:-

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”

Given that this probationary period was never extended, the claimant became a permanent employee of the respondents on 3.1.2009 and is entitled to all rights and duties of an employee on permanent terms. That being the position, if she had to be dismissed or terminated, the procedures laid down in the Employment Act 2007 had to apply. It is unfortunate that her letter of appointment does not contain any other terms of her employment contract and in that case, the court falls back on the minimum terms envisaged under the Employment Act 2007. That being the position, when the respondents allege that the claimant was a casual employee, they are not in order.

I will answer issue 2 and 3 concurrently. To answer the question on whether her rights were breached under this contract of employment, this court falls back to what transpired before claimant was terminated. Also in answer to issue No. 3 on redundancy, I will consider the procedure used to lay off the claimant.

According to the claimant's evidence, she received a letter indicating that the school had received TSC teachers and her services were no longer required. In essence, the respondents were stating that they were terminating her on account of redundancy. This was done without due regard to the law. First and foremost, the claimant was not accorded any opportunity to be heard. She was not also given any notice before this decision was made.

S. 40(1) of the Employment Act 2007 states that:-

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.

b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer.

c) the employer has, in the selection employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union.

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash.

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu; and

g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

Considering the provisions of this Section, it is apparent that the procedure envisaged was not adhered to in case of the claimant.

In any case, the claimant had averred that in her view, the reason for her termination was not redundancy but reason of her failure to bend to the whims of the head teacher who was making sexual advances towards her. This brings me to the fourth issue on sexual harassment. The law expressly states at S. 6(1) of Employment Act 2007, what sexual harassment is and includes an incident where an employer-

“directly or indirectly requests an employee for sexual intercourse sexual contact or any other form of sexual activity that contains an implied or express;

i) promise of preferential treatment in employment

ii) threat of detrimental treatment in employment

iii) threat about the present or future employment status of the employee ---”

The claimant has made allegation that the respondents' Head teacher sent her an email expressly demanding for sexual activity. That email was produced before this court and in parts of this judgment has been quoted.

The investigations done by the judiciary head of ICT confirmed the existence of the respondents email address which is active to-date but given that the claimant had deleted the alleged mail from her in-box, it could not be tracked and therefore it was not possible to prove whether it did originate from the respondents head teacher or not. That being the case, the allegation that the claimant was sexually harassed falls by the wayside and cannot form the basis of the reasons as to why she was terminated.

However, it is apparent that many institution of learning in this Country lack a policy statement on sexual harassment as envisaged under S. 6(2) of Employment Act:-

“An employer who employs twenty or more employees shall after consulting with the employees or their representative if any issue a policy statement on sexual harassment”

S. 6(3) explains what this statement shall contain including a statement that every employee is entitled to employment that is free of sexual harassment and that the employer shall take steps to ensure that no employer is subjected to sexual harassment. Though allegations of sexual harassment in this case have not been established, it is apparent that this issue was discussed at length by the DEO and even a report was made to the police on the same. The missing link however may be lack of implementation of this section 6(2) by many employees which I urge all employees in this Country to try and implement if they have not done so in the past.

I now come to the last issue on remedies if any. I have already stated that the claimant was terminated without following the laid down procedure. Her rights to be heard were flouted since she was not given any notice before being terminated from the contract, she was paid Ksh 6,500/= monthly without any payments for house allowance.

S. 31(1) of Employment Act states that;

“An employer shall at all times at his own expense, provide reasonable housing accommodation for each of his employee either at or near 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.”

A proviso to this provision is only in case where the contract of employment 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 such or which is otherwise intended to enable the employee, to provide himself with housing accommodation or if it is a matter covered by a CBA which provides consolidation of wages.

In the case of the claimant, there was no provision of a house allowance in the contract, nor was there a provision that the amount payable was a consolidated figure inclusive of house allowance. It is therefore apparent that the claimant was not provided for a house nor given a house allowance as envisaged in the law and is therefore entitled to this payment which I set as 15% of her salary = 975×25 months = KSH 24,375/=.

TOTAL HOUSE ALLOWANCE = KSH 24,375/=

Claimant was not given any notice before being terminated. I award her 1 month salary in lieu of notice = KSH 6,500/=.

I also award claimant 12 months salary compensation for unlawful termination = 6500×12 = KSH 78,000/=.

Claimant should also be paid 15 days salary for each year worked as gratuity = $37 \frac{1}{2}$ days \times 217 = KSH 8,125/=.

TOTAL AWARDED = KSH 117,000/=

She should also be issued with a certificate of service. The respondents should pay costs of this suit.

H. WASILWA

JUDGE

16/05/2013

Appearances:-

KUDHEIA Claimant present in per for Respondent.

CC. Sammy Wamache