



Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Management of the Blessed Virgin Mary Loreto Sisters, the East Africa Province (Cause 2247 of 2017) [2024] KEELRC 1856 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1856 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2247 OF 2017**

**JK GAKERI, J
JULY 16, 2024**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS CLAIMANT**

AND

**THE MANAGEMENT OF THE BLESSED VIRGIN MARY LORETO SISTERS,
THE EAST AFRICA PROVINCE RESPONDENT**

JUDGMENT

1. The Claimant filed the instant suit on 14th November, 2017 on behalf of the grievants namely; Judy Christopher, Ann N. Njihia, Ziporah Onsoti, Margaret Atieno Ongalo and Beatrice Leah mutende.
2. Shockingly, the Memorandum of Claim had no reliefs and on 25th July, 2022, the union sought leave to amend the claim and was allowed to do so the delay notwithstanding and the Respondent had no objection.
3. The amended Memorandum of Claim was filed on 18th May, 2023, 10 months later.
4. The Claimant avers that the grievants were employees of the Respondent and were terminated from employment when the Respondent sought to introduce contracts without consultations with the workers or the union.
5. That the Claimant has a Collective Bargaining Agreement (CBA) with the Ministry of Education that included employees of the Respondent.
6. The union avers that the grievants responded to the Respondent’s letter dated 8th September, 2017 but failed to address the same and sought withdrawal of the grievants from the union.



7. Finally, the Claimant avers that it was unfair for the Respondent to introduce new contracts with terms inferior to what the grievants had hitherto.
8. The Claimant prays for;
 - i. Compensation for unfair termination.
 - ii. Damages for loss of employment.
 - iii. Outstanding salaries and allowances.
 - iv. Costs of the suit and interest thereon.

Respondent's case

9. By a response filed on 21st March, 2019, the Respondent avers that it ought to be sued as The Trustees of the Institute of the Blessed Virgin Mary.
10. It admits that the grievants were its employees before 2017 when it made a decision to amend the contracts of employment to grant them better terms following consultations between the parties but the grievants refused to sign the contracts at the instigation of the Claimant.
11. That the grievants refused to burge, reminders notwithstanding.
12. It is the Respondent's case that it issued notices to show cause to the grievants for insubordination but they did not respond.
13. They were invited for disciplinary hearing which they did not attend and had been notified of the right to be accompanied by a witness.
14. That the Respondent had no choice but to terminate their employment.
15. The Respondent avers that the Claimant was copied all correspondences to the grievants.
16. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

17. Significantly, Ann Njeri Njihia, Beatrice Leah Mutende and Zipporah Kemunto Onsoti authorised Margaret Atieno Ongalo to testify on their behalf. It is unclear to the court why Judy Christopher did not sign the letter of authority.
18. Each of the grievants recorded a witness statement.
19. Strangely, neither the original Memorandum of Claim nor the amended one or any other document contains a list of the grievants.
20. The standard form witness statements only differ on the date of employment, salary and name of the grievant as follows;
 1. Zipporah K. Onsoti May 2012 21/9/17
 2. Beatrice L. Mutende 1st August, 1996 21/9/17
 3. Anna N. Njihia 6th January, 1996 21/9/17
 4. Margaret A. Angalo 8th January, 1996 21/9/17



21. Puzzlingly, none of the grievants availed a copy of the latest payslip. Zipporah Onsoti's payslip, the only one on record is for July 2012 more than 6 years before termination. The grievants availed no verifiable evidence of their actual salary.
22. On cross-examination, the witness confirmed that she joined the Claimant union in 2013 and was employed in 1996 and was unaware of any meeting between the Claimant and the employer on the letter dated 16th August, 2017 from the Respondent to all employees but then changed tune and testified that they were given the letter.
23. The witness testified that she responded to the notice to show cause but had no response on record.
24. It was her testimony that the letter was written after they agreed with the Respondent.
25. CWI confirmed that she was invited for a hearing and attended the same alone.
26. That they were given the letter dated 8th September, 2016 but they refused to sign but support staff at the institution did so.
27. The witness testified that they appealed the termination and were invited for a hearing, were heard and the outcome provided.
28. The grievant testified that she was not paid terminal dues.
29. On re-examination, CWI testified that the Respondent wanted them to quit the union but they refused to sign the letters.

Respondent's evidence

30. RWI, Sr. Jane Fransisca Mulongo confirmed that the Respondent had a joint meeting with the union but did not file the minutes of the meeting and she had since left office.
31. RWI confirmed that she met the teachers in her office and they read the contract and agreed, but changed their minds later.
32. That the change in employment was necessitated by performance contracting introduced by the Government.
33. On re-examination, RWI testified that she had meetings with the teachers and the union officials.

Claimant's submissions

34. On 15th February, 2024, both parties were accorded 14 days a piece to file and exchange submissions.
35. On 14th March, 2024, neither of the parties had filed and the scenario recurred on 16th April, 2024 when the Claimant was accorded 14 days and the Respondent 7 days to file and exchange submissions but by 7th May, only the Respondent had filed its submissions.
36. By 6th June, 2024 when the court retired to prepare this judgement, the Claimant had not filed submissions.

Respondent's submissions

37. On whether the grievants were unfairly terminated from employment, counsel submits that the Respondent had a meeting with all its employees and informed them about the intended amended contracts which provided for better terms and benefits and no objection was raised and all employees



except the grievants signed the amended contracts and the grievants provided no explanation but followed the advice of the Claimant union.

38. That the grievants' refusal to obey a lawful command amounted to gross misconduct as the Respondent and the Claimant union had agreed on the new contracts.
39. According to counsel, the Respondent had a reason to take action against the grievants.
40. As regards due process, counsel submits that the Respondent was complainant as the grievants were served with notices to show cause and invited for a disciplinary hearing and the union was copied but they refused to attend the hearing without providing a reason.
41. On the reliefs sought, counsel submits that the grievants are not entitled to compensation and had not proved any loss on account of loss of employment and their salaries were duly paid.

Analysis and determination

42. It is not in dispute that the four grievants were employees of the Respondent from diverse dates and served the Respondent diligently until the Respondent resolved to amend or modify their terms of employment.
43. It is notable that before the intended amendment or modification, the grievants had written contracts of service as evidenced by the letter of appointment of Anna Njeri Njihia dated 13th January, 1997, and CWI confirmed that all the grievants were given appointment letters with terms and conditions of service although she availed no verifiable evidence of having been employed on permanent and pensionable terms.
44. From the evidence on record, it is discernible that the Respondent engaged the union in matters affecting its employees.
45. As adverted to above, the bone of contention before termination of the grievants employment was signing of the amended contracts.
46. Although the Respondent's witness, Sister Mulongo mentioned that the amendments were necessitated by the performance contracting requirements of the government, she was silent on when the process was institutionalised and how the Respondent implemented it.
47. More significantly, neither of the parties provided a sample of the amended contracts for the court's perusal and appreciation.
48. Equally, although CWI testified that to get the new contract, they had to withdraw from the union, the witness availed no evidence to prove that those who signed the new contracts withdrew from the union as they were the majority.
49. However, copies of letters allegedly by the Respondent under reference withdrawal from the union dated 8th September, 2016 would appear to suggest that the Respondent was not comfortable with the union.
50. The fact that the 3 letters are typed in fairly good english and are copied to the Respondent gives credence to the Claimant's evidence that indeed the Respondent desired its employees to quit the union.
51. It is also unclear to the court why the Claimant union prevailed upon the grievants not to sign the new contracts yet it admits by its letter dated 8th September, 2017 that it was consulted on the issue.



52. It is not in dispute that the grievants' employment was terminated for refusal to sign the employment contract, failure to respond to or acknowledge communication from the employer and refusal to respond to the notice to show cause.
53. Having considered the pleadings, evidence on record and submissions by the Respondent's counsel, the issue for determination are;
- i. Whether termination of grievants' employment was unfair.
 - ii. Whether the grievants are entitled to the reliefs sought.
54. On termination of employment, it requires no belabouring that for a termination to pass muster, it must be proved that the employer had a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the employer and the termination was conducted in accordance with a fair procedure.
55. The provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 set out the elaborate architecture on termination of employment.
56. (See Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR).
57. In Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, Ndolo J. held that;
- “... 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.”
58. The court is guided by these sentiments.

Reason for termination

59. The notice to show cause dated 7th September, 2017 accused the grievants of insubordination for failure or refusal to sign the contract of employment despite several reminders. Responses were required by 11th September, 2017.
60. Although the Claimant's witness confirmed on cross-examination that she received the letter and responded, she had not filed the response and none of her colleagues had done so.
61. The witness was untruthful as neither she nor her colleagues responded to the notice to show cause.
62. Previously however, the grievants had responded to the invitation to sign the new contract of employment.
63. The responses appear to suggest that the new contracts were not permanent and pensionable as had been the case according to the letters which could appear to explain the grievants reluctance to sign the contracts.
64. As adverted to elsewhere in this judgment, the grievants employment was terminated on account of their refusal to sign the new contract and responded to communication.
65. Section 10 of the *Employment Act*, 2007 provides that;
1. ...
 2. ...



3. . . .
 4. . . .
 5. Where any matter stipulated in sub-section (5) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
 6. The employer shall keep the written particulars prescribed in sub-section (1) for a period of five years after termination of employment.
66. Section 10 is couched in mandatory tone to underscore the obligations placed on the employers on matters relating to the written contract of employment and in particular where changes occur.
 67. A perusal of the grievants response to the invitation to sign the contract reveals that they were apprehensive about the change of the contract of employment.
 68. It is also evident that the Respondent did not comply with the provisions of Section 10(5) of the Employment Act, 2007 as it availed neither the original contracts of the grievants employment nor the ones they failed or refused to sign.
 69. Section 10(5) of the Act is unambiguous that the employee must be notified of the change in writing. The Respondent did not avail the notification of change to the grievants.
 70. Section 13 of the Employment Act, 2007 embodies provisions analogous to those in Section 10(5) of the Employment Act.
 71. Relatedly, although Sister Mulongo, RWI testified that she met the teachers and they even bought her a gift, she adduced no evidence of the purported agreement by all the teachers or those who agreed.
 72. In the absence of evidence to demonstrate compliance with the provisions of Section 10(5) and 13(1) of the Employment Act, 2007, the Respondent cannot be heard to say that it had a substantive justification to terminate the grievants' employment.
 73. Similarly, in the court's view, refusal to respond to a notice to show cause does not amount to insubordination as an employee may legally opt not to respond. Silence per se does not amount to misconduct.
 74. Flowing from the foregoing, it is discernible that the court is not persuaded that the Respondent has demonstrated on a preponderance of probabilities that it had a valid and fair reason to terminate the grievants employment.

Procedure

75. It is common ground that the Respondent issued, and the grievants received notices to show cause, were invited for a disciplinary hearing, attended and employment was terminated thereafter.
76. The invitation to attend the disciplinary hearing dated 14th September informed the grievants of the date, place and time of the hearing.
77. More significantly, the notice catalogued the charges the grievants were required to defend themselves against and informed them of their right to be accompanied by a fellow employee of their choice or the shop floor representative, call witnesses and cross-examine witnesses.



78. RWI confirmed that they opted to attend the hearing unaccompanied. CWI also confirmed that she attended the meeting alone.
79. Although the Respondent did not avail minutes of the disciplinary hearing, the court is satisfied that the hearing took place as admitted by the grievants.
80. It is not in contest that termination of employment took place 3 days after the hearing and the grievants appealed the termination vide letters dated 25th September, 2017, were invited for an appeal hearing on 29th September, 2017 at 9.00 am and could be accompanied by a fellow employee or shop floor representative.
81. The appeal was unsuccessful and the grievants were informed accordingly, vide letter dated 3rd October, 2017.
82. Section 41 of the *Employment Act*, 2007 prescribes the procedural precepts of a fair termination of employment and as held by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (Supra), the provisions of Section 41 are mandatory for a termination of employment to pass the fairness test.
83. The specific elements of Section 41 of the *Employment Act* have been itemised in several decisions such as Postal Corporation of Kenya V Andrew K. Tanui and Loice Atieno V Kenya Commercial Bank Ltd (2013) eKLR. (See also Alphonse Maghanga Mwachanya V Operation 680 Ltd (2013) eKLR).
84. Guided by the foregoing authorities and the evidence on record, the court is satisfied that the Respondent has proved that termination of the grievants employment by the Respondent met the threshold prescribed by Section 41 of the *Employment Act* and it is the finding of the court that the termination was procedurally fair.

Appropriate reliefs

85. Puzzlingly, the original Memorandum dated 9th November, 2017 prayed for costs only.
86. However, the amended Memorandum of Claim dated 11th January, 2023 identifies four reliefs including costs.

i. Compensation for unfair termination

87. Section 49(1)(c) of the *Employment Act* provides that where a court finds that a termination of an employment contract or summary dismissal is unjustified, it may award compensation not exceeding 12 months' gross salary of the employee as at the time of dismissal.
88. In making the determination whether to award compensation, the court is required to take into consideration the relevant factors set out under Section 49(4) of the Act.
89. In this case, the court has taken into consideration that:-
 - i. The grievants served the Respondent for a long time save for Zipporah K. Onsoti as follows;
 1. Margaret Atieno Angalo 8/1/1996 21 years 8 months
 2. Ann Njeri Njihia 6/1/1997 20 years 8 months
 3. Beatrice Mutende 1/8/1996 20 years 1 month
 4. Zipporah K. Onsoti July 2012 5 years 2 months



- ii. The grievants expressed their wish to remain in employment by lodging an appeal against termination of their employment.
 - iii. The grievants nominally contributed to the termination of their employment by the Respondent.
 - iv. Although the grievants expressed their desire to work till retirement, none of them made reference to the relevant duration.
90. In the circumstances, the court is satisfied that the grievants be compensated as follows;
- Margaret Atieno Ongalo equivalent of 4 months gross salary
Ann Njeri Njihia equivalent of 4 months salary
Beatrice Mutende equivalent of 4 months salary.
Zipporah K. Onsoti 2 months salary.
91. Regrettably, and as adverted to elsewhere in this judgment, none of the grievants provided a copy of the latest payslip to enable the court compute the total amount awarded. The Respondent shall do so.

ii. Damages incurred due to loss of employment

92. The Claimant did not justify an award of damages for loss of employment and the grievants adduced no evidence of the alleged loss.
93. More significantly, neither the *Employment and Labour Relations Court Act*, 2011 nor the *Employment Act*, 2007 contemplate the award of damages for loss of employment.
94. The claim is unmerited and is dismissed.

iii. Outstanding salaries and allowances

95. The grievants adduced no evidence to prove that there were outstanding salaries or allowances. The claim makes no reference to any outstanding salaries or allowances.
96. Needless to emphasize, a claim for outstanding salaries or allowance is a claim for special damages which must not only be specifically pleaded but strictly proved evidentiary. See *Hahn V Singh* (1985) KLR 716 at 717, *Jogoo Kimakia Bus Services Ltd V Electrocom International Ltd* (1992) KLR 177 among others.
97. In the upshot, judgment is entered in favour of the grievants against the Respondent as follows;
- i. Margaret Atieno Ongalo 4 months gross salary.
 - ii. Ann Njeri Njihia 4 months gross salary.
 - iii. Beatrice Leah Mutende 4 months gross salary.
 - iv. Zipporah Kemunto Onsoti 2 months gross salary.
98. The Respondent to compute the amount due to each grievant based on their salary as at the date of termination of employment.
99. Parties shall bear their own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

