



Mbevi v Board of Management County Girls High School & another (Cause 2184 of 2017) [2024] KEELRC 84 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 84 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2184 OF 2017
J RIKA, J
JANUARY 31, 2024**

BETWEEN

REGINA MWASYE MBEVI CLAIMANT

AND

BOARD OF MANAGEMENT COUNTY GIRLS HIGH SCHOOL 1ST RESPONDENT

PRINCIPAL, COUNTY GIRLS HIGH SCHOOL 2ND RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 7th November 2017.
2. She states that she was employed by the 1st Respondent as a General Worker, in January 2008. The School was at the time known as Murang'a Road School.
3. In January 2009, the Government posted a Principal to the School and the School's name was changed to Murang'a Road Mixed Day Secondary School. The Claimant was offered employment as a Cook, on a monthly salary of Kshs. 8,000.
4. She was removed from the kitchen to become the Receptionist/Messenger, on health ground.
5. The School further changed its name to County Girls High School Nairobi, in the year 2015. Deputy Principal Njeri Mwangi was appointed the Principal in January 2017.
6. The Claimant was appointed School Cateress in January 2016, on a monthly salary of Kshs. 23,000. She was not reverted to the kitchen, but was retained at the department of exams.
7. She fell sick in March 2017. She applied for, and was granted sick-off days, on 20th March 2017. She was diagnosed with hypertension and placed on 2 days' bed rest.



8. On 21st March 2017, she received a text message from the School Bursar, accusing her of failure to report to work. She was required to report back immediately, regardless of her health condition.
9. The Claimant was threatened with termination of her contract, and compelled to report to work on 22nd March 2017. She worked until late in the evening on 22nd March 2017 and 23rd March 2017.
10. She received a letter of suspension from the 2nd Respondent on 19th April 2017. She was instructed to appear before the 1st Respondent on 4th May 2017.
11. She appeared before the Executive Board of Management, consisting 5 members. False allegations were presented to the Claimant. She received a notice of intention to terminate her contract the same day.
12. She was invited for further meetings on 3rd June 2017, 16th June 2017, and 28th June 2017. The Executive Board of Management regurgitated the allegations against the Claimant.
13. On 3rd July 2017, she received a letter of termination, dated 29th June 2017.
14. She states that the reasons advanced by the Respondents, in justifying termination were not valid, and amounted to a witch-hunt. She states that procedure was high-handed.
15. She prays for: -
 - a. Reinstatement with full salary and benefits.
ALTERNATIVELY,
 - b. Gratuity/ service pay for 9 years, at 1-month salary [Kshs. 23,000], for each year of service at Kshs. 207,000.
 - c. Notice of 3 months at Kshs. 69,000.
 - d. November 2016 salary at Kshs. 23,000.
 - e. 12 months' salary in compensation for unfair termination at Kshs. 276,000.
Total...Kshs. 575,000.
 - f. Certificate of Service to issue.
 - g. Costs.
 - h. Any other suitable order.
16. The Respondents filed their joint Statement of Response, dated 23rd July 2021. They state that the County Girls High School, was established in the year 2014, as a Public Girls Boarding School. Staff employed by the previous School, Murang'a Road Day Secondary School, including the Claimant, were absorbed in the new School.
17. The Respondents explain that the Claimant asked for permission to seek medication, on 20th March 2017, from 2.00 p.m. to 8.00 a.m. on 21st March 2017.
18. She did not report back on 21st March 2017. She did not notify the School of the outcome of her medical attention. There was no medical recommendation from an authorized Medical Officer, communicated to the Respondents in accordance with the Claimant's terms and conditions of service.
19. She returned on 22nd March 2017 without any medical records. She told the Respondents by word of mouth, that she had been placed on bed rest by her Doctor. She was instructed to go back and



- bring medical records. She confirmed in writing that she had not informed the Respondents about the outcome of her medical check-up.
20. No threat was made to the Claimant about termination of her contract. She did not perform any tasks, even after she reported back on 22nd March 2017. She refused to work, alleging she was unwell.
 21. She engaged in disruptive conduct which included: numerous disagreements with the Principal; persistent complaints about unfair treatment; incitement of other Staff not to exert themselves; refusing to work and dozing at work; and refusing to complete typing of exam papers.
 22. She was an Employee of the Board of Management. She was therefore directed to appear before the Board on 1st April 2017. She refused to appear and was therefore suspended with pay.
 23. She was invited to attend hearing before the Board, in the company of a colleague of her choice, on the various dates pleaded in her Claim. She was granted full opportunity to be heard.
 24. She is not entitled to the prayers sought. Termination was fair and lawful. She was paid all her terminal dues. The Respondent prays that the Claim is dismissed with costs.
 25. The Claimant testified on 4th July 2023 and 21st July 2023, when she rested her Claim. The School Principal Anne Wahito Mukele and Board of Management Chair, Learned Counsel Margaret Ameka, similarly gave evidence on 21st July 2023, when the hearing closed. The Claim was last mentioned before the Court on 26th October 2023, when the Parties confirmed filing and exchange of their Closing Submissions.
 26. The Claimant relied on her Witness Statement and Documents, marked exhibit 1-18, in her evidence-in-chief. She withdrew the prayer for reinstatement. She restated the contents of her Statement of Claim, as summarized above.
 27. Cross-examined, she told the Court that the Respondents employed her in 2016 as a Cateress. She was transferred to reception on health ground. She carried out typing duties, including typing of examination papers.
 28. She had high blood pressure in March 2017. She was granted sick-off days, and treated on 20th March 2017. The Doctor placed her on 2 days' bed rest. She called her supervisor the Bursar, on 21st March 2017, and communicated the Doctor's advice.
 29. The Deputy Principal called the Claimant to his office, and recorded their conversation. She did not know why he was recording. The Principal threatened the Claimant. She did not report threats to the Police.
 30. She did not desert. She did not refuse to work. She reported to work and typed exam papers. The Principal asked her to write an explanation concerning her absence on 21st March 2017. She wrote, apologizing, because she needed to continue working. She apologized also, because she was threatened with termination by the Principal.
 31. The Principal sent the Claimant a text message, advising the Claimant to avail herself on 1st April 2017. She reported, but was told by the Secretary that there was no message for her. She later met the Principal. She was invited to attend Board meeting for disciplinary hearing on various dates. She was advised to have a colleague of her choice at the hearing.
 32. The Claimant, in concluding her cross-examination, told the Court that, "I have made certain prayers. I only seek compensation. I am not pursuing others. I have other things to do..."



33. She clarified on redirection that she seeks all other prayers, except reinstatement. Permission to seek medical attention was granted through the form, at page 25 of the Claimant's Documents. It was granted by the Deputy Principal and the Head of Department. The School was aware that the Claimant had gone for medical check-up. She was granted bed-rest of 2 days as shown at page 26 of her Documents. She availed the medical records to her Supervisor, and also called him. She apologized because she was afraid of losing her job.
34. Principal Wahito Mukele, relied on her Witness Statement in her evidence-in-chief. The Claimant complained of a headache, and was granted permission to seek medical attention, on 20th March 2017. She was to leave at 2.00 p.m. and return the following day, 21st March 2017, at 8.00 a.m.
35. She did not return as advised. She did not supply the Respondents with her sick-off authorization. She tendered an apology, upon the Respondents enquiring about her absence. She asked for forgiveness. Her apology did not disclose that she was under threat. She reported to work on 22nd March 2017, but did not work. She was severally invited to appear before the Board of Management. She was advised to appear with a colleague of her choice. She appeared with a colleague, Mercy Adhiambo. She was heard and a decision to terminate her contract made. She was paid terminal dues, including salary for days worked, 15 days of annual leave and notice, which amounted to Kshs. 33,170 after-tax. This is shown in the bank statement. Nothing remains to be paid to the Claimant by the Respondents.
36. Cross-examined, the Principal told the Court that she joined the School on 23rd February 2023. Her evidence was based on personnel records. The records included a letter by the Claimant dated 27th February 2012, about a Deputy Principal who later became the Principal, who had threatened to terminate the Claimant's contract. Principal Mukele did not know if the issue was addressed. She did not know what differences the Claimant may have had with the former Principal. The Claimant was a pioneer Staff. There were warning letters issued to her by the former Principal. She was heard before the Executive Management Board. There were no minutes of a meeting before the full Board.
37. Board Chair Margaret Ameka relied on her Witness Statement in her evidence in-chief. She associated herself fully with the evidence of the Principal Mukele. Cross-examined briefly, the Chair told the Court that she assumed the position in 2018. Mukele was not the Principal at the time. Ameka was a Board member, at the time the Claimant was taken through a disciplinary hearing. The Claimant was given a fair hearing. There were various invitations leading to the hearing.
38. The issues are whether termination of the Claimant's contract was carried out fairly; whether it was based on valid reason or reasons; and whether she merits the remedies sought.

The Court Finds: -

39. The Claimant joined Murang'a Road Secondary School as a General Worker, in January 2008. The School had just been set up, and the Claimant correctly characterizes herself, as a pioneer Staff.
40. The School evolved with the Claimant. It became Murang'a Road Mixed Day School in January 2009. The Claimant became its Cook. She was offered a monthly salary of Kshs. 8,000.
41. The Claimant was moved from the kitchen to the reception in August 2014, where she served as the Receptionist/ Messenger.
42. In 2015, the School changed to County Girls High School -Nairobi, and the Claimant became its Cateress in January 2016, earning a monthly salary of Kshs. 23,000. Her duties included typing of examination papers.



43. Procedure. There are multiple letters showing that the Claimant was invited for disciplinary hearing. She was, preceding these invitations, issued a letter of suspension and notice of the Respondents' intention to terminate her contract. She was suspended with pay. The allegations against her were communicated. She was advised to attend hearing in the company of a colleague of her choice. She was heard in the presence of her colleague Mercy Adhiambo. A decision was made to terminate her contract, and communicated to her through a letter dated 29th June 2017.
44. Procedure was slow, deliberate and fair. The allegations against the Claimant concerned her absence way back in March 2017, the decision to terminate coming after 3 months of laborious engagement between the Parties.
45. The Claimant's complaint about not being heard by the full Board, is not based on any procedural requirement under the Respondents' disciplinary procedures or human resource policies. It is not founded on any provision of the *Employment Act*. She was heard by the Executive Management Board comprising 5 persons, and the Court is not persuaded that she was in any way prejudiced, by not being heard by the full Board.
46. Her concerns about the sitting School Principal not having been there at the time the dispute arose, are unfounded. The School Principal relied on personnel records held by the School and was the officer best placed to speak on these records. It quite irrelevant to the issues in dispute, for the Claimant to raise issues about her differences with a previous School Principal, which are documented in a letter dated 27th February 2012, 5 years before her termination.
47. The Court is satisfied that the Respondents observed the minimum statutory standards of fairness, in terminating the Claimant's contract, under Sections 41 and 45 of the *Employment Act*.
48. Reason[s]. The letter of termination dated 29th June 2017 states that the Claimant's contract was terminated on account of gross misconduct. The acts of gross misconduct were listed to include persistent defiance of authority; insubordination; negative and careless approach to performance of work; absenteeism; and periodical desertion from duty without permission.
49. The Claimant fell ill on 20th March 2017. She had a headache. She required medical attention, and filled the requisite Staff Permission Form, dated 20th March 2017. Permission was granted by the Deputy Principal and the Head of Department.
50. She was advised to seek medical attention between 2.00 p.m. on 20th March 2017, and 8.00 a.m. on 21st March 2017.
51. There is evidence that she was treated for hypertension by a Doctor Kanta Bhasin on 20th March 2017. She was issued off-duty of 2 days, from 20th March 2017 to 22nd March 2017. She told the Court that she communicated this medical advice to the Respondents, through her supervisor, the School Bursar.
52. The Court believes her. There was no evidence from the School Bursar disputing receipt of the communication from the Claimant.
53. Once she was granted permission to seek medical attention, it was not known to her, what the diagnoses would be, and what the advice of her Doctor would be.
54. The Claimant had served the School for 9 years. Section 30 of the *Employment Act* provides that, "[1] After two consecutive months of service with his Employer, an Employee shall be entitled to sick leave of not less than 7 days with full pay, and thereafter sick leave of 7 days with half pay, in each period of 12 consecutive months of service, subject to production by the Employee of a certificate of incapacity



to work, signed by a duly qualified medical practitioner, or a person acting on the practitioner's behalf, in charge of a dispensary or medical aid centre.

(2) For an Employee to be entitled to sick leave with full pay, under subsection [1], the Employee shall notify, or cause to be notified as soon as is reasonably practicable his Employer, of his absence and reasons for it.”

55. The Claimant merely failed to report to work at 8.00 a.m. on 21st March 2017. The Respondent was aware that she had signed off sick, and was away on medical attention. She reported back upon the Respondents' rather insensitive demand on 22nd March 2017, while she was still meant to be on bed rest.
56. Why would the Respondent raise allegations about persistent absenteeism and periodical desertion, while aware that the Claimant was away on medical ground?
57. Section 44[4][a] of the *Employment Act* does not make every absence from the place of work an employment offence. It is an offence where the Employee is away without leave or other lawful cause. The Claimant left the place of work with the leave of the Deputy Principal and her Head of Department. She exceeded the time granted to her, through the advice of her Doctor, which would amount to other lawful cause. The Claimant cannot be said to have been away without the leave of the Respondents, or other lawful cause.
58. There is evidence that the Claimant had been unwell previously, and was moved away from the kitchen, on account of ill-health. The Respondents needed to show some degree of flexibility, in responding to the Claimant's hypertension. It was not cast in granite, that the Claimant returns to work on 21st March 2017, at 8.00 a.m.
59. Other allegations stated in the letter of termination were not supported by evidence. The Principal and the Board Chair did not establish in their respective evidence before the Court, that the Claimant was persistently engaged in acts of insubordination, and negative and careless approach to her work. She was assigned multiple roles during her period of 9 years of service. It is not likely that she would last 9 years, serve in multiple roles and be promoted from a General Worker, a Cook, to a Cateress, Receptionist and Exam Typist. It is unlikely that an Employee who is divisive, defiant to authority, rebellious and insubordinate, would last and even thrive, in employment for 9 years.
60. The assertion that she was invited to a consultative meeting of the Board of Management on 1st April 2017, which she failed to attend, was not established as an act of insubordination. The Claimant told the Court, without any counterevidence, that she received a text message from the Principal on 31st March 2017 at 17.25 hours, advising her to avail herself at the School the following day at 11.00 a.m. She was already on suspension. She reported as advised to the Principal's office. She was told by the Principal's Secretary, that the Principal did not leave any message for her. The Claimant waited at the Laboratory Assistant's office until 16.00 hours. The Principal's Secretary called her to office, but when the Claimant reported, the Principal was not there.
61. There is no evidence that the Claimant engaged in any act of insubordination against the Principal or the Board, or any other Officer placed in authority over the Claimant.
62. The Respondents did not establish valid reasons to justify termination, as required under Sections 43 and 45 of the *Employment Act*, and to this extent, termination was unfair.

Remedies

63. The Claimant rightly withdrew the prayer for reinstatement.



64. There is no support in her contract or the law, for the prayer for service/gratuity pay. Her letter of termination indicates that terminal dues offered to her, were subject to N.S.S.F contribution for the month of June 2017, at Kshs. 200. The Court has not come across her pay slips, but this piece of evidence would suggest that the Claimant was actively enlisted to the N.S.S.F, and therefore, not eligible for service pay under Section 35[6] of the *Employment Act*.
65. The Claimant was offered 1-month salary in lieu of notice, in her letter of termination. There is no evidential support for her prayer for 3 months' salary in lieu of notice. She was offered salary for days worked.
66. She worked for 9 years. Her contract was indeterminate, and she expected to continue working until retired. It was not established that she caused, or contributed to the circumstances leading to termination of her contract. She appears to have moved on and mitigated her loss of employment. She told the Court that she is a businesswoman, and that, "I only seek compensation. I am not pursuing others. I have other things to do." These other things to do, and her businesses, are most probably income-generating ventures. She mitigated loss of her employment, and moved on. The Court cannot however lose sight of her long years of service. She was a pioneer at the School, a founding mother. She is granted equivalent of 9 months' gross salary in compensation for unfair termination at Kshs. 207,000.
67. Certificate of Service to issue.
68. Costs to the Claimant.

In Sum, It Is Ordered: -

69.
 - a. It is declared that termination was not founded on valid reason or reasons, and was therefore unfair.
 - b. The Respondents shall pay to the Claimant equivalent of 9 months' salary in compensation for unfair termination at Kshs. 207,000.
 - c. Certificate of Service to issue.
 - d. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA

JUDGE

