



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamande v Kakuzi PLC (Cause E652 of 2022)
[2024] KEELRC 1509 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1509 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E652 OF 2022**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

GRACE NYAMBURA KAMANDE CLAIMANT

AND

KAKUZI PLC RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim, dated 16th September 2022, amended on 15th February 2023.
2. She avers that she was employed by the Respondent as an ECDE Teacher on 15th May 2013.
3. She was paid a monthly salary of Kshs. 8,220, which she avers, was below the Gazetted Minimum [General] Wage Order, 2018.
4. Her Claim is that she was supposed to be paid Kshs. 28,822 in monthly salary.
5. She never took annual leave.
6. She was dismissed on 15th June 2022, on the allegation that she was absent from school for 3 days, 26th, 27th and 28th of May 2022. She was away on these days, which fell within the school half-term holiday.
7. She was not heard. The reason given in justification of termination was not valid. Her right to fair labour practice was violated.
8. She was denied gratuity, provided for under contract, after serving for 9 years.
9. She prays for: -
 - a. Annual leave over a period of 9 years at Kshs. 298,308.
 - b. Gratuity over a period of 9 years at Kshs. 206,521.



- c. Compensation for unfair termination equivalent of 10 months' salary at Kshs. 331,454.
 - d. 1-month salary in lieu of notice at Kshs. 33,145.
 - e. Underpayment of salary at Kshs. 1,848,945.
 - f. Salary for days worked in June 2022 at Kshs. 20,931.
 - g. Costs.
10. The Respondent filed its Statement of Response, dated 28th February 2023. It is not denied that the Claimant was employed by the Respondent.
 11. She was dismissed on valid ground. She absented herself without permission or lawful cause.
 12. She was earning a monthly salary of Kshs. 20,522, at the time of dismissal. This was exclusive of allowances and non-cash benefits. She was not underpaid. The Minimum Wage [General] Orders, did not apply to ECDE Teachers. She was paid in accordance with the applicable CBA.
 13. She worked at the Respondent's Mitini Nursery School, within the Respondent's Horticulture Estate, in Thika. She was employed on 15th May 2013 as a Teacher. She was housed within the workplace, in accordance with her contract.
 14. She was at all time, a member of the Kenya Plantation and Agricultural Workers Union [Kpawu] and covered under the CBA concluded between the Respondent and Kpawu.
 15. She was absent from the school from 26th May 2022 to 28th May 2022, without the Respondent's permission or lawful cause. She admitted that she was absent. This was confirmed by her colleagues.
 16. She was suspended on 31st May 2022 with full pay. She was invited to disciplinary hearing, scheduled for 10th June 2022. She attended hearing accompanied by a colleague, shop steward, Sylvia Wabwire. She admitted that she was aware of her duties during half-terms, and that she did not attend to those duties. She did not give reasons for her absence, and when the Respondent called her to enquire about her whereabouts, she lied that she had attended duty.
 17. Through a letter dated 15th June 2022, the Respondent informed the Claimant that a decision had been reached, to summarily dismiss her for skipping duty.
 18. She was advised about her right of appeal. She appealed and was heard in the company of a representative, Patrick Mchuma, Chief Shop Steward. She did not present any fresh evidence, and agreed, that she had admitted wrongdoing, at the disciplinary hearing. The appeal was declined.
 19. She utilized her annual leave and was paid leave traveling allowance. Her claim for annual leave pay is baseless. She was paid salary up to, and including, the date of summary dismissal.
 20. The Respondent prays that the Claim is dismissed with costs.
 21. The Claimant, and the Respondent's Divisional Manager Kelvin Gatheo, both gave evidence on 22nd February 2024, closing the hearing. The Claim was last mentioned in Court on 4th April 2024, when the Claimant confirmed filing and service of her submissions, and the Respondent undertook to file and serve its submissions, within 14 days.
 22. The Claimant restated the contents of her Amended Statement of Claim, in her evidence-in-chief. She explained that she was away for 3 days during the school half-term break. The Children were away. She was not called upon to perform any half-term duties. She adopted her witness statement and documents on record.



23. Cross-examined, she told the Court that clause 5 of her contract stipulated that gratuity would be paid in certain circumstances. She received a letter of summary dismissal. She was a member of KPAWU before dismissal. Clause 8.2 of the CBA defined the term 'gross misconduct.' Absence from work, without authorization was an act of gross misconduct.
24. At Respondent's page 34, she wrote that every time the school was closed, she and a colleague named Maureen, would report and perform holiday duty.
25. She confirmed that she was heard. She was heard on appeal. Her pay slip of March 2021, showed she was paid leave traveling allowance at Kshs. 4,500. The CBA provided for payment of leave traveling allowance in lump, before an Employee went on annual leave. She was provided a house at the workplace. She lived there throughout. It was not the first time she had been accused for being away from work without authorization. She had received warning letters for the same offence, on 28th August 2015, 27th June 2020, and 23rd January 2021.
26. Redirected, she stated that annual leave was taken at the discretion of the Employer. Warnings had a validity period of 12 months. The last one had expired, by the time of dismissal.
27. Kelvin Gathee adopted his witness statement and documents [1-24] filed by the Respondent in his evidence-in-chief. His evidence was as contained in the Statement of Response, summarized above.
28. He emphasized that the Claimant and her colleagues, were to report at the school stores during the half-term break, to assist there. She did not. She was dismissed for being away without authorization. Her pay slips showed leave traveling allowance of Kshs. 4,500 was paid to her. She was not entitled to annual leave.
29. Cross-examined, he told the Court that the Claimant's duties could be varied, under her contract. Annual leave forms were not exhibited before the Court.
30. Redirected, Gathee told the Court that leave traveling allowance was paid to Employees who were proceeding on annual leave. She was aware that Teachers were required to assist with holiday work. She had always assisted in the past.
31. The issues are whether the Claimant was dismissed on valid ground under Sections 43 and 45 of the Employment Act; whether dismissal was executed fairly in accordance with Sections 41 and 45 of the Employment Act; and whether the Claimant merits the prayers sought.

The Court Finds

32. The Claimant was employed by the Respondent as its Nursery School Teacher, within its Horticultural Plantation, at a school called Mitini, in Thika.
33. Reason: It is confirmed in her evidence, and in that of the Respondent's witness, that she was away from work for 3 consecutive days, 26th May 2022 to 28th May 2022.
34. There is no dispute that the period covered the half-term break, and that the Parties had agreed, that the Claimant would avail herself during such breaks, to assist the Respondent at its stores.
35. It is undisputed that the Claimant had always in the past, been available for holiday work. She did not seek permission from the Respondent to be away on the 3 days. She did not advance any other lawful cause for her absence. She just took her liberty and made herself scarce.



36. It was not a one-off misadventure. She had a history of unauthorized absences, followed by written warnings. The Respondent quite clearly, had justification in dismissing the Claimant, under Sections 43, 44 [4] [a] and 45 of the Employment Act and clause 8.2 [a] of the CBA.
37. Procedure: As observed above, the Claimant was a habitual absentee, a deplorable form of indiscipline, not to be emulated, which did not augur very well for her calling as an Early Childhood Development Education [ECDE] Teacher, mentoring young Children.
38. She had been warned in writing. Although the warnings may have gone stale at the time of her dismissal, and were not invoked in dismissing her, they were. indicative of her character as a serial absentee.
39. The Respondent sought and recorded a statement from her, explaining her absence. She was suspended with full pay. The allegations against her were fully investigated. She was invited to disciplinary hearing. She attended in the company of a Shop Steward. She was heard. A decision was made to dismiss her. She was advised on her right of appeal. She appealed and was granted a personal hearing, accompanied this time by her Chief Shop Steward. There was no fresh evidence or other material, shown by her on appeal. The appeal was dismissed, and the decision communicated to her.
40. Hearing was in accordance with Sections 41 and 45 of the Employment Act. Procedure was faultless.
41. Remedies: In light of the above findings the prayers for salary in lieu of notice, and compensation have no foundation and are declined.
42. She was provided free housing by the Respondent, in accordance with clause 13 of her contract and clause 9.1 [a] of the CBA. She confirmed in her evidence that she resided in this house throughout, in her evidence. Her prayer for house allowance is baseless.
43. She is not entitled to gratuity. She was dismissed on account of gross misconduct. Clause 10 of the CBA applicable to the Claimant, provided for gratuity where an Employee retired or resigned due to sickness, or where the Employee's services were terminated for other reasons, other than gross misconduct. The Claimant was dismissed for gross misconduct and is not entitled to gratuity.
44. Her sampled payslips for November 2020, April 2021, March 2022 show payment of leave traveling allowance at Kshs. 4,500. Clause 9.2 of the CBA entitled sub-staff grades S1 to S3 leave traveling allowance of Kshs. 4,500. It was payable in lump sum, on a date prior to the commencement of annual leave. She cannot have been paid leave travelling allowance, if she was not going on annual leave. It cannot be correct that the Claimant was denied annual leave throughout. Her prayer for annual leave is declined.
45. Her salary and allowances were negotiated and agreed between the Respondent and her Trade Union Kpawu. They are shown in the CBA on record. It was out of order for the Claimant, who changed her Union on presentation of the Claim, to fault what was collectively agreed between her Employer and her Trade Union. Her current Union was not involved in the authorship of the applicable CBA, to legitimately fault its implementation.
46. The prayer for underpayment of salary is declined.
47. The Claimant was paid her salary, to the last day worked.
48. The Respondent was entitled to keep away from conciliation process involving Kunoppet. It did not have a Recognition Agreement with Kunoppet, and the dispute revolved around a CBA to which Kunoppet was a stranger. Indeed, the grievances raised by the Claimant in this dispute arose during her membership of Kpawu. They were to be handled in accordance with the grievance handling procedures



and dispute settlement mechanisms, agreed to between the Respondent and Kpawu, under their Recognition Agreement and CBA.

49. This Claim has no merit. The costs shall be paid to the Respondent by Kunopett, who drew and filed all the Claimant's Pleadings and prosecuted the Claim.

In Sum, It Is Ordered

- a. The Claim is declined.
- b. Costs to the Respondent, to be paid by the Claimant's current Trade Union, Kenya Union of Pre-Primary Education Teachers [Kunopett].

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

