



Waweru v Chairman, Board of Governors, Kairi Secondary School (Cause 1764 of 2016) [2024] KEELRC 2572 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2572 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1764 OF 2016
S RADIDO, J
OCTOBER 24, 2024**

BETWEEN

FELISTAS NJERI WAWERU CLAIMANT

AND

THE CHAIRMAN, BOARD OF GOVERNORS, KAIRI SECONDARY SCHOOL RESPONDENT

JUDGMENT

1. This Cause was filed before the High Court in 2006 but was transferred to this Court for hearing and determination. It proceeded to hearing unopposed and the Court delivered a judgment in favour of Felistas Wanjeri Waweru (the Claimant) on 21 May 2018.
2. Upon the application of the Board of Kairi Secondary School (the Respondent), the judgment was set aside on 17 February 2020, with an order that the Respondent file and serve a Response and hearing commence afresh.
3. The Respondent did not comply with the order and on 5 October 2021, the Court directed that the Cause proceeds to formal proof.
4. On 23 July 2024, the Deputy Registrar fixed the Cause for hearing on 8 October 2024. Both the Claimant and Respondent were represented during the session.
5. When the Cause was called out for hearing on the due date, the Respondent and its advocate were absent and the Court allowed the hearing to proceed.
6. The Claimant gave sworn testimony and filed submissions on 14 October 2024.
7. The Court has considered the pleadings, evidence and submissions.



Unfair termination of employment

8. The Claimant was employed by the Respondent on 27 December 1991 as an Accounts Clerk. She rose to the position of Bursar.
9. On 14 April 2005, the Claimant applied for maternity leave.
10. On receipt of the application, the Secretary of the Respondent wrote to the Claimant on 14 May 2005 to inform her that the Board had rejected the application for maternity leave and directed her to report back to work on 16 May 2005 without fail.
11. The Claimant did not report back, and on 20 May 2005, the Secretary of the Respondent wrote to her instructing her to appear before the Board on 24 May 2005.
12. The Claimant attended the meeting and 25 May 2005, the Respondent informed the Claimant that it had been decided that she be summarily dismissed.
13. The reasons given for the dismissal were:

You are very negative in your attitude towards the employer and the work you do.

You deserted your duty/negligence of duty. Frequent absenteeism and lateness despite several warnings/cautions from the Employers Secretary – the Principal.

You in subordinated the employer – Board of Governors by failing to take lawful orders especially on resumption of duty after absconding. You are in subordinating the Secretary to the Board and you do not regard his caution or consultation/Office.

You hold the Board into contempt and even trying to incite/divide the workers.

NB. This is gross misconduct on your part and hence SUMMARILY DISMISSED from the services of the Board of Governors.
14. Unfair termination of employment as a concept was given statutory underpinning in this country through the *Employment Act*, 2007.
15. At the time of the Claimant's dismissal in 2006, dismissals were guided by the common law. Under that regime, an employer could dismiss an employee for no cause, a good cause or a bad cause provided notice in accordance with the terms of contract was given.
16. If no notice was given, then an equivalent pay in lieu of the notice period would become payable. Where there was no notice period, the Court could determine a reasonable notice period.
17. The Claimant was taken through a process in which she participated. She was summarily dismissed thereafter.
18. She contended that she was absent because of a problematic pregnancy and she produced medical reports to show that she was admitted into hospital on 7 April 2005, had a premature delivery on 14 April 2005 and was discharged on 18 April 2005. She also produced a medical report detailing her pregnancy medical history from 2004 to 26 May 2005.
19. The *Employment Act* (now repealed) provided for maternity leave.
20. The Claimant applied for maternity leave on the day she had a premature delivery. She was denied the leave through a reply which came about a month later.



21. Maternity and or medical reasons constituted lawful cause and still does constitute lawful cause for an employee to be absent from work.
22. The Court therefore finds that the Claimant had lawful cause to be away from work.
23. And if the Court is wrong on that conclusion, it is of the view that at the very least, the Claimant had lawful cause to be absent from work to recover from the premature delivery which was through a surgical procedure.
24. On the other allegations, the Respondent did not appear in Court to shed light on the same.
25. In the view of the Court, the dismissal of the Claimant was wrongful, and for that she is entitled to the equivalent of 1-month salary in lieu of notice.

Breach/violation of rights

26. Maternity leave was a statutory right in 2005.
27. The Claimant applied for maternity leave but that request was denied.
28. That was a violation of a statutory entitlement and which denial directly led to the dismissal of the Claimant.
29. For the breach of that statutory entitlement which consequently led to wrongful dismissal, the Court is of the view that the Claimant is entitled to a remedy of damages.

Discrimination

30. The Claimant contended that she was discriminated against but she did not disclose the nature of discrimination and whether the Respondent had treated other women in her position differently.
31. The Court therefore is unable to concede to the Claimant's contention that she was discriminated on account of her gender or reproductive health.

Breach of contractual rights

32. The Claimant anchored her claims for breach of contractual rights/entitlements (salary arrears, house allowance, medical allowance, service gratuity, unpaid leave) on the supposition that she was a civil servant and therefore entitled to benefits/entitlements available to other civil servants through Circulars being, New Conditions of Service for the Kenya Civil Service 1994 (7 July 1994); New Conditions of Service for the Kenya Civil Service (29 August 1997); New Salaries for the Kenya Civil Service (27 October 1997) and New Salary Scales for Civil Servants (1 July 2004).
33. To strengthen the contention that she was a civil servant, the Claimant drew the attention of the Court to the case of *Dadson Maina & 33 Ors v Board of Management, Nyeri Primary School* (2017) eKLR.
34. However, in the view of the Court, the Claimant was not a civil servant for she was not an employee of the Public Service Commission.
35. The *Dadson* decision cannot help the Claimant's case as it was predicated on [*the Constitution*](#), 2010. The Claimant left service long before the promulgation of [*the Constitution*](#).
36. The Claimant was an employee of the Respondent and served under the terms agreed with it and any specific terms and conditions gazetted and or made expressly applicable to other employees in her



status. She did not demonstrate that the Respondent was in breach of contract as far as remuneration was concerned.

37. These claims therefore are untenable.

Appropriate remedies

Pay in lieu of notice

38. The Claimant was earning Kshs 10,951/- at the time of separation. She is entitled to an equivalent as pay in lieu of notice.

Damages

39. The Claimant was not only denied a statutory entitlement under circumstances where she deserved the leave, but she lost her job.

40. The Respondent's conduct and decision was more than reprehensible, and the Court is of the view that the sum of Kshs 350,000/- as damages would be appropriate.

Conclusion and Orders

41. The Court finds and holds that

- (a) The summary dismissal of the Claimant was wrongful.
- (b) The Claimant's right to proceed on maternity leave was violated.

42. The Court awards the Claimant

- (i) Pay in lieu of notice Kshs 10,951/-
 - (ii) Damages Kshs 350,000/-
- TOTAL Kshs 360,951/-

43. Claimant to have costs and interest on the awards at court rates from the date of judgment.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 24TH DAY OF OCTOBER 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Mr. Kariuki instructed by Jesse Kariuki & Co. Advocates

Respondent R.O. Nyamweya & Co. Advocates (did not participate)

Court Assistant Wangu

