



REPUBLIC OF KENYA



KENYA LAW
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**Hanif v Stepping Stones Kindergarten Ltd (Cause 1249 of 2015)
[2023] KEELRC 149 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1249 OF 2015
AN MWAURE, J
JANUARY 26, 2023**

BETWEEN

JULIE HANIF CLAIMANT

AND

STEPPING STONES KINDERGARTEN LTD RESPONDENT

JUDGMENT

1. The Claimant filed the amended memorandum of claim on the 8th March 2018 claiming unlawful and unfair termination. She avers that by contract of employment dated 3rd October, 2007 in writing and supported by the several written letters the Claimant says she was employed by the Respondent as a class teacher from September 1999 at a salary of ksh 18,000/= per term.
2. She states that she was appointed as the head teacher of the Respondent from 28th March, 2010 at a salary of ksh 138,000/= per month, with additional administrative duties pay of ksh 30,000/= which was increased to ksh 35,000/= in 2014.
3. She says that by a letter dated 23rd July 2014 the Respondent wrongfully and in breach of the employment agreement terminated the Claimant on grounds that she resigned as a class teacher of Stepping Stone Kindergarten which was contrary to Article 41 (1) of *the Constitution* of Kenya 2010 that enshrines the right of every person to fair labour practices.
4. The Claimant avers that the Respondent contravened section 45 (1) of the *Employment Act* that provides that employer shall not terminate the employment of the employee unfairly.
5. That by a letter dated the 20th November 2013, the plaintiff was deprived of administrative pay she was entitled to under the said agreement.
6. The Claimant prays for judgment against the Respondent for:



- a. A mandatory injunction to compel the Respondent to return the Claimant's personal items held.
 - b. A declaration that the Claimant is entitled to damages for wrongful dismissal.
 - c. An order for the payment of the amount found to be due to the Claimant in respect of such loss and damage.
 - d. A sum of ksh. 1,792,600/=.
 - e. Costs of the suit.
 - f. Interest at Court rates.
 - g. Any other relief the Court deems fit to grant.
7. The Respondent filed statement of defence dated 3rd September 2015 on the 04/11/2015 and stated that the Claimant's position in the Respondent's school was head teacher earning a gross monthly salary of ksh 139,132/= commensurate to her position and could not demote herself at will to class teacher after accepting and taking up the position of Head Teacher for a period of 4 years or thereabout.
 8. The Respondent says that it did not accept the Claimant's offer to be employed as a class teacher after tendering her resignation and advised that her position at the material time was only one, the Head teacher, who could teach a class as is normally the practice in schools and that she was not holding two separate positions. The Respondent says that it did not violate Article 41 (1) of the Constitution as the Claimant voluntarily resigned from her employment
 9. By way of counter claim, the Respondent says that the Claimant abruptly left her employment without giving written notice to the Respondent as required under clause (e) (b) of the contract of employment and hence the Respondent counter claims 3 months' salary in lieu of notice. 3 x 139,132= Ksh 417, 396.
 10. That the Claimant as a head teacher intimidated and coerced staff to make irregular cash payment to her for ksh 97,350/-.
 11. The Respondent prays for judgment against the Claimant for:
 - a. A sum of ksh 514,746/=
 - b. Interest at 25 % commercial rate from the date of receipt of the said sum to the date of filing this suit.
 - c. Interest at 12 % Court rate from the date of filing the suit to the date of payment in full.
 - d. Costs
 - e. Any other relief the Honourable Court may deem just to grant.
 12. The claim was to be disposed on the basis of the pleadings and submissions. The Court did however not find any submissions in the file and in the Court CTS at the time of writing this judgment. The Court will nevertheless proceed and deliver the judgment based on the pleadings and the evidence adduced as well as case laws and statutes.
 13. It is now well settled law that for termination of employment to be deemed lawful and fair, it must conform both to the procedural and substantive requirements under the law.
 14. The law on termination of contracts of service in Kenya is now largely governed by the Employment Act, 2007. Of significance in this respect are sections 41, 43, 44, 45 and 47 of the Act.



15. Section 45 of the [Employment Act](#), 2007 prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination. Section 45(1) of [Employment Act](#) provides:

“No employer shall terminate the employment of an employee unfairly.”
16. Section 47(5) of the [Employment Act](#) 2007 provides that:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
17. In the Court of Appeal decision in the case of [Ken freight \(EA\) Limited v Benson K. Nguti](#) [2016] eKLR, the Court held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”
18. In the present claim, there is a disagreement as to the effect of the Claimant’s resignation as the head teacher of the Respondent School. The Claimant says that on the 22nd of July, 2014 she wrote her resignation letter only resigning as a head teacher due to erratic payments of his administrative fees but not that she was willing to continue working as a teacher. The Respondent as can be seen in the witness statement dated the 31st of August 2015 disagrees saying that she voluntarily resigned on the 22nd of July, 2014 and her attempt to be re-employed as a class teacher was not accepted.
19. On the application of section 47(5), the Court in [Galgalo Jarso Jillo v Agricultural Finance Corporation](#) [2021] eKLR held that :

“The interpretation given to the section by Courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the Court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, “Under section 47(5) of the [Employment Act](#), the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”
20. In my view, granted the dispute on the resignation of the Claimant, she ought to have presented at least some evidentiary material on the terms of her contract as the head teacher for Court to determine whether the said agreement was independent of her employment as a school teacher before the burden placed on the employer of justifying the grounds of the dismissal arises. It does not suffice to simply assert that the terms were separate, as ordinarily one would expect a teacher’s role as head teacher to be in addition to other teaching duties/ roles in a school.



21. What is on record however is the claimant's resignation letter dated 22nd July 2014. She resigned as a head teacher but purported to continue as a class teacher of year one. An employee cannot dictate what jobs she will undertake and what she will not do. She had been offered a job of a head teacher and as an employee she cannot advise her employer what she will do or not do. In every organisation there are rules and policies and without such there would be no harmony or discipline at the work place.
22. If Claimant was not comfortable to work as a head teacher there must have had structures to consult with the employer and agree on way forward rather than tender a resignation. It is not clear to the Court even what remuneration she would have expected as a class teacher. She had been promoted and her salary increased because she was a head teacher. Was she to receive deductions on her salary as a class teacher? These are questions that beg answers.
23. In any event the Claimant resigned from her employment as a head teacher of stepping stones Kindergarten. It would be unheard of to resign from one role in an organisation and retain another role. The Claimant tendered her resignation and that is it. The Court is persuaded by the authority in the case of *Edwin Beiti Kipchumba vs National Bank of Kenya Limited* (2018) eKLR where it held:
- “Resignation is a unilateral act on the part of an employee. There is no provision in the *Employment Act* suggesting that its efficacy is dependant upon any action by the employer. It follows that once an employee hands in a resignation letter the employment relationship comes to an end. The subject of any ensuing obligations to the employer is a separate one to be pursued as such.”
24. The Court finds that in view of the foregoing the Claimant resigned voluntarily from her employment and there is no evidence that she was terminated by the employer. The employer simply accepted her resignation. The Court holds therefore that the Claimants did not prove a case for wrongful termination. The case is dismissed accordingly
25. In the contract to act as a school teacher dated the 03/10/2007, there is a provision that either party could terminate the contract by the giving of one term's notice. It is not stated whether either party was required to make notice pay as per the agreement in the absence of giving notice. And it is not clear whether this term formed part of the working relationship when the Claimant was made the head teacher. The counter claim on this issue of three months in lieu of notice therefore falls. There is equally no evidence before Court that the Claimant coerced staff to make irregular cash payments as alleged and so she cannot be ordered to make abstract refunds. The counterclaim by the responder therefore fails. There will be no order made as to costs on the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

ANNA N. MWAURE

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.

ANNA N. MWAURE

JUDGE

