



Kunyera v Vendramini Education Centre (Employment and Labour Relations Cause 566 of 2016) [2023] KEELRC 272 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 272 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 566 OF 2016**

**SC RUTTO, J
FEBRUARY 3, 2023**

BETWEEN

VIRGINIA KARIMI KUNYERA CLAIMANT

AND

VENDRAMINI EDUCATION CENTRE RESPONDENT

JUDGMENT

1. The claimant avers through her memorandum of claim dated March 31, 2016, that she was employed by the respondent as an assistant teacher with effect from January 1, 2011. She avers that sometimes in 2016, she conceived and was soon to be a mother. That consequently, she informed the respondent of her pregnancy status, only to be told by Sister Catherine who was the sister in charge, that in December, 2015, the respondent had passed a policy to the effect that any unmarried member of staff who became pregnant outside wedlock would have to be terminated from employment.
2. That she opted to retain the pregnancy hence was asked to handover her class to the head teacher. That on February 29, 2016, she handed over her class as instructed and was informed that she would be issued with a termination letter together with a certificate of service on March 1, 2016. It is the claimant's case that her termination was unfair and unlawful hence prays for the sum of Kshs 159,921.76 being notice pay, leave days and compensatory damages.
3. The respondent opposed the claim through its Memorandum of Reply filed on July 15, 2016. It denied the claimant's averments and put her to strict proof. It averred that the claimant had two other children in the school and had not been terminated on similar grounds. It further denied the claimant's assertions that she was requested to handover her class on February 27, 2016 or terminate her services. The respondent avers that there were numerous complaints regarding the claimant's attendance to duty and several meetings were held to discuss the same but there were no improvements from the claimant's end. That the claimant ignored subsequent summons to discuss the complaints and reported to the school on March 2, 2016, collected her personal effects and left without giving



any reasons. The respondent further contends that the issue of termination of contract had not arisen despite the claimant's conduct. Consequently, it has asked the Court to dismiss the claim with costs.

4. The claimant filed a Reply to the Memorandum of Response through which it reiterated its averments and denied the assertions by the respondent. It termed the Memorandum of Response as consisting bare denials.
5. The matter proceeded for hearing on three diverse dates being May 9, 2022, July 18, 2022 and later, July 28, 2022. Both parties called oral evidence.

Claimant's case

6. The claimant testified in support of her case and to start with, she adopted her witness statement together with her bundle of documents to constitute her evidence in chief.
7. It was her testimony that she was terminated from the respondent's employment on account of her pregnancy. That this was contributed by the fact that she was not married. That upon informing Sister Catherine who was the Sister in charge, of her pregnancy, she was told to make a decision of either terminating the pregnancy or handing over her resignation. That she was confused why she was being asked to choose between keeping the pregnancy and her employment. That her answer was expected by Friday, February 26, 2016.
8. That on Saturday, February 27, 2016, Sister Catherine asked her what she had elected to do and she informed her that she was not going to terminate her pregnancy, but begged to be allowed to keep her job. That Sister Catherine told her that that was not an option hence she had to handover her class as her employment stood terminated.
9. That on February 29, 2016, she reported to class to handover to the head teacher and thereafter, sought audience with Sister Catherine on the way forward with respect to her terminal dues. That however, she was called to attend to her child who was unwell hence they did not meet on that day. That she was however asked to go to the office the following day to collect her termination letter and her certificate of service.
10. That she reported back on March 1, 2016 and was informed by the receptionist that Sister Catherine was not present and that she had to return the following day to collect her documents. That upon returning the following day, Sister Catherine informed her abrasively that she was not going to give her any document and that she was free to take whatever action she deemed fit.
11. That subsequently, she proceeded to the labour office on March 4, 2016 and reported the matter. That the respondent was given 7 days to respond to her claim but they never did so. That she then engaged a lawyer who wrote a letter dated March 10, 2016 to the respondent, seeking payment of her terminal dues. That the respondent through a letter dated March 15, 2016, informed the claimant's advocate that she had absconded duty from February 29, 2016 and that she had to report to their offices within 48 hours for a disciplinary hearing. That her advocate through another letter dated March 16, 2016, notified the respondent that there was no justification for a disciplinary hearing as she had been terminated from employment. That the respondent wrote back and stated that it had not terminated her from employment and that she was needed for a disciplinary hearing.
12. It was her testimony that she knows that the respondent's letters were written merely to frustrate her from realizing justice since they terminated her from employment based on her pregnancy. She further denied absconding duty and termed the respondent's allegations in that regard as purely malicious.



13. That prior to her dismissal, she was not issued with a show cause letter and did not appear for a disciplinary hearing. Concluding her testimony, she asked the Court to award her full salary and damages.

Respondent's case

14. The respondent presented oral evidence through Sister Catherine Njagi and Ms Elizabeth Ndichu, who testified as RW1 and RW2 respectively. Sister Catherine was the first to go. She adopted her witness statement to constitute her evidence in chief and produced the respondent's bundle of documents as exhibits before Court. She told the Court that she is a teacher by profession and belongs to the Franciscan Elizabethan sisters, which is a catholic congregation. That the congregation are administrators of the respondent on behalf of the Catholic Diocese of Nairobi. That she is the Administrator of the respondent which has three pre-schools. She was emphatic that the respondent is not a legal entity.
15. Sister Catherine further testified that at the beginning of February, 2016, the claimant was transferred to one of their preschools being Pambazuko from Kamae. That immediately after her transfer, she started receiving complaints about her performance from parents and the head teacher. That the issues raised included tardiness in reporting to work, failure to give homework, keeping the children in dirty conditions, rudeness to parents and the head teacher and poor performance of the children she was in charge of.
16. That these complaints were similar to those she had received from the head teacher of Kamae, in that the claimant was quarrelsome and rude to both her colleagues and the parents and would borrow money and fail to repay and mishandle school property. That despite several meetings between herself, the claimant and her supervisor, she did not show any improvement.
17. It was Sister Catherine's further evidence that on February 26, 2016, she summoned the claimant to discuss the same issues but in gross insubordination, she did not go. That she went on February 27, 2016, which was a Saturday, hence she asked her to return on Monday, February 29, 2016. That on Monday, she was informed by the head teacher that the claimant had left the School premises in the morning to take her child to hospital. That she called the claimant on her cell phone and reminded her to see her upon returning to school but she failed to do so. That the claimant went back to the school on March 2, 2016 and collected her personal belongings.
18. She further testified that she verbally informed the claimant to report to her office on March 3, 2016 for a disciplinary meeting to show cause why she deserted her place of work but the claimant never reported back and did not pick her calls.
19. That on March 16, 2016, the respondent received a demand letter from the claimant's advocate, alleging that she had been unlawfully terminated from employment. That they wrote back on March 21, 2016, informing the claimant's Advocate that they had not terminated her employment. That on the same date, they invited to the claimant to appear before the administration for a disciplinary hearing on March 29, 2016, to discuss her absenteeism. That the letter was delivered to the claimant by one of the respondent's teachers by the name Gladys Wangechi. That the claimant neither responded to the letter nor turned up for the disciplinary hearing.
20. That through another letter dated March 30, 2016, the respondent wrote to the claimant requesting her to go to the school on April 5, 2016 for a disciplinary hearing. That the letter was delivered to the claimant by one of the respondent's cooks by the name Sarah Njoki on the same day. That yet again, the claimant did not respond to the summons and did not attend the disciplinary meeting.



21. Sister Catherine was categorical that the respondent did not terminate the claimant's services and that there is no document terminating her employment.
22. She also admitted that the claimant informed her of her pregnancy as required under her contract of service. That it is against the respondent's policies to discriminate against pregnant staff and it has never been a ground for termination and it was certainly not a ground in the instant case.
23. It was her testimony that when she joined the respondent in 2013, she found the claimant already working there and at the time, she was unmarried and had two children. That the claimant's children were studying at the respondent school and were paying half of the school fees payable. That it was not true that unmarried ladies were not allowed to work at the respondent school and that she never saw such a policy. She added that the Elizabethan sisters support single mothers and have never discriminated against them. That in addition, just like the Catholic church, she does not support abortion.
24. Closing her testimony, Sister Catherine asked the Court to dismiss the suit with costs.
25. RW2 started by adopting her witness statement to constitute her evidence in chief. She identified herself as the head teacher of one of the respondent's pre-schools, being Pambazuko. At the opening of her testimony, RW2 stated that the respondent is not a legal entity and is owned by the Archdiocese of Nairobi. That she has worked for the respondent for 20 years.
26. She stated in evidence, that on February 2, 2016, the claimant was transferred to the said school from Kamae, which is also one of the respondent's preschools. That in the second week of the claimant working there, she started receiving complaints from parents that she did not give children homework and that she was rude to the parents when they questioned her about lost and stolen items such as sweaters and jackets belonging to the children. That in addition, the parents were complaining that the children were dirty and not properly fed. That in fact, this led to one of the children being removed from the school.
27. That the claimant was also accused of not keeping time. That in this regard, the claimant was always late during break and lunch time and when she questioned her as her boss, she would be rude. She cited one incident when she requested the claimant to ring the bell but the claimant handed the bell back to her and ordered her to ring it herself. That she discussed these issues with the claimant on several occasions and she agreed to improve. That at no time was the claimant threatened with dismissal.
28. It was RW2's further evidence, that on February 29, 2016, the claimant reported to school and at 9:00 am, went to her office and requested to take her child to hospital. That she granted her permission and she signed the off-day book. That she did not go back on that day and only returned the following Wednesday to collect her belongings and left. She maintained that the claimant left on her own volition and was not terminated.
29. RW2 further denied the claimant's allegations that she was terminated on account of her pregnancy. That the school is managed by the Catholic church and it does not condone abortion. That further, the respondent has no policy on pregnant and single mothers. That indeed, the church supports single parents in the school and those who are not able to pay the school fees are sponsored either fully or partially. That the claimant had children in school and was paying half the school fees.

Submissions

30. The claimant submitted that her termination from employment was not procedurally fair and that the respondent never complied with the requirements of section 41 of the *Employment Act*. In support



of her submissions, the claimant relied on the case of *Anthony Mkala Chitavi vs Malindi Water & Sewerage Co Limited (2013) eKLR*.

31. It was the claimant's further submission that her termination from employment was not substantively fair as there was no valid reason to terminate her from employment. In this regard, the case of *CFC Stanbic Bank Limited vs Danson Mwashoko (2015) eKLR* was cited in support of the claimant's arguments.
32. On its part, the respondent submitted that it has no capacity to sue or be sued in the context of the *Civil Procedure Act*. To this end, it placed reliance on the case of *Nairobi HCCC No 69 of 2009, Andrew Inyolo Abwanza vs Board of Trustees of Pentecostal Assemblies of God & 3 others*. That this issue was not controverted by the claimant and she did not take any steps to amend her pleadings to reflect the correct name.
33. The respondent further submitted that the claimant was not terminated and that she left on her own accord. It further termed the claimant's allegations on discrimination as baseless and unfounded.

Analysis and Determination

34. Flowing from the pleadings before Court, the evidentiary material before me and the opposing submissions, the issues falling for the Court's determination can be distilled as follows: -
 - i. Whether the respondent is a legal entity.
 - ii. Whether the claimant was terminated from employment or absconded duty.
 - iii. If terminated, was the termination fair and lawful?
 - iv. Is the claimant entitled to the reliefs sought?

Whether the respondent is a legal entity

35. It is the respondent's case that it is not a legal entity hence has no capacity to sue and be sued. On this account, it has asked the Court to strike out the suit. It is notable that the claimant did not respond to this issue in its Reply to the Response to Claim and did not address the same in her submissions.
36. It is instructive to note that despite the respondent's contention, it did not tell the court or demonstrate its legal status. In this regard, there was no evidence of its legal status for instance a certificate of registration. To this end, the respondent was not clear as to how was it recognized under the law. For instance, is it a Trust, an association etc? In other words, what sort of an entity is it?
37. Another question that crops up in light of the respondent's contention is in what capacity did it enter into a contract of service with the claimant? If indeed, the respondent is not a legal entity then it follows that it had no capacity to contract in its own name. Further, why didn't the correct party which has the legal capacity execute the contract of service on behalf of the respondent?
38. In light of the foregoing, I am inclined to find that the respondent has not proved its assertion to the requisite standard, in that it is not a legal entity.

Termination from employment or abscondment of duty?

39. Each party has presented its own version of events as to how the employment relationship came to an end. Whereas the claimant avers that she was terminated on account of her pregnancy, the respondent contends that she absconded duty and that it never terminated her employment.



40. It is apparent that the claimant engaged an Advocate who in turn, addressed the respondent, on allegations that it had unlawfully terminated her employment. Subsequently, the respondent invited the claimant through its letter dated March 15, 2016, to show cause why disciplinary action should not be taken against her for abscondment of duty. It is for this reason that the claimant's advocate addressed the respondent once again through the letter dated March 16, 2016 stating that the claimant had no case of absenteeism and would not be subjecting herself to an unlawful disciplinary process.
41. Consequently, the respondent wrote to the claimant's advocate on March 21, 2016 indicating that she had not been terminated from employment. The letter reads in part:
- ' Re: Unlawful And Unfair Termination Of Virginia Karimi Kunyera
- We acknowledge receipt of your letter dated March 16, 2016. This is to inform you that we have not terminated the contract of your alleged claimant and the letter was to request the said employee to appear in a disciplinary hearing which is part of the management action.'
42. In addition, the respondent wrote to the claimant on the said March 21, 2016 and clarified to her that she was still its employee. The letter reads in part:
- ' Re: Disciplinary Hearing
- We acknowledge receipt of the letter from your advocate Collete and Akwana Company Advocates and wish to confirm to you that you are still our employee. However, you are invited for a disciplinary hearing to be held on March 29, 2016 at (sic) administrator's office at 0930 hours to answer to a charge of absenteeism.'
43. What manifests from the foregoing correspondence, is that from the respondent's end, it had not terminated the claimant's employment and that it still considered her its employee.
44. The *Black's Law Dictionary, 10th Edition* defines the term 'Termination of Employment' to mean: -
- 'The complete severance of an employer-employee relationship.'
45. Applying the said definition to the instant case, it is clear that termination of employment had not occurred. If that were the case, then the respondent would not have subjected the claimant to a disciplinary process.
46. This was enough evidence to confirm that the employment relationship was still subsisting and there was no complete severance.
47. It also worthy to note that section 47(5) of the *Employment Act* places the burden of proving that an unfair termination or wrongful dismissal has occurred on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.
48. Addressing the import of section 47(5), the Court of Appeal in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR*, reckoned as follows: -
- ' So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): 'to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.'



49. Bearing in mind the definition of the term 'termination' and in light of the provisions of section 47(5), the claimant was required to prove that there was complete severance of the employment relationship between her and the respondent.
50. In this case, there was no evidence that the employment relationship had been severed. If anything, the evidence on record suggest that the claimant was still the respondent's employee. Whether she agreed with the disciplinary process she was being subjected to, was another issue altogether. The bottom line is that she had not been terminated from employment.
51. It is against this background that I find that the claimant has failed to prove on a balance of probabilities, that she had been terminated from employment and on the contrary, it is her who opted not to continue her employment relationship with the respondent.
52. Having found that there was no termination, it is not logical to consider whether the claimant's termination was unfair and unlawful, as that issue falls by the wayside.

Reliefs

53. As there was no finding of unfair termination, the claim for compensatory damages and notice pay collapse.
54. The claim for leave is denied as the claimant has failed to particularize her claim and prove the specific periods when she claims to have been denied leave.

Orders

55. In the final analysis, I find that the claimant has not proved her case to the requisite standard hence I dismiss the claim in its entirety.
56. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2023.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kuyoh

For the Respondent Ms. Beacco

Court Assistant Abdimalik Hussein

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 had 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 {>/akn/ke/act/1924/3 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.

STELLA RUTTO

JUDGE

