



**Akumu v Board of Management Kanyamedha Mixed Secondary School
(Cause 92 of 2018) [2023] KEELRC 1038 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 92 OF 2018
CN BAARI, J
APRIL 27, 2023**

BETWEEN

ALMERIDA ELIZABETH AKUMU CLAIMANT

AND

**THE BOARD OF MANAGEMENT KANYAMEDHA MIXED SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

Introduction

1. Before court is the claimant's a memorandum of claim dated April 5, 2018, and filed on April 9, 2018. The claimant's prayer is for payment of a total of Kshs 1,454,345.00, on account of unpaid salaries, salary *in lieu of* notice, overtime pay, severance pay and 12 months' salary for loss of employment.
2. The respondent filed a reply to the memorandum of claim on May 29, 2018, wholly denying the claimant's case.
3. The claimant's case was heard on December 5, 2022, followed by the defence hearing on February 8, 2023. The claimant testified in support of her case, adopted her witness statement, and produced a bundle of documents as exhibits in her case.
4. The respondent presented Ms Lydia Opiyo, the school principal and a Mr John Fred Agonyo Kungu to testify in support of its case. The witnesses adopted their witness statements and produced documents filed in the matter in support of the respondent's case.
5. Both parties filed submissions in the matter.



The Claimant's Case

6. The claimant's case is that she is a trained secretary/typist who was employed by the respondent as such. It is her case that she served in the service of the respondent for a period of six years and nine months, from January 6, 2011 up to November 10, 2017, when the respondent wrongfully and unlawfully terminated her services.
7. The claimant was employed on a monthly gross salary of Kshs 12,651.00, and which is confirmed by her letter of appointment exhibited in court. She states that she was an exemplary employee and executed her duties diligently up to around midday of November 10, 2017, when she was ordered to leave the school premises and further warned never to return.
8. It is her case that the respondent terminated her employment on November 10, 2017 without any notice and/or reason whatsoever.
9. The claimant further states that RW1 is the respondent's school new principal and that her dismissal was actuated by her predecessor and the board chairman, who resolved to replace all the non-teaching staff who served under the previous principal.
10. The claimant states that she was a trained secretary/typist and in accordance with legal notice No 111 of 2017, she was entitled to a minimum wage of Kshs 17,447.15 and not Kshs 12,651.00 that she was being paid.
11. The claimant states that her dismissal was contrary to the principles of natural justice and was actuated by malice and nepotism. She further states that she rendered six years and nine months of service to the respondent and is therefore entitled to her terminal dues.

The Respondent's Case.

12. The respondent states that the claimant was her employee, employed on an agreed starting salary of Kshs 7,000.00 at probation, and which rose to Kshs 9,000.00 upon confirmation, with an annual increment of Kshs 500.00 leading to a monthly salary of Kshs 12,000.00 as at December, 2017.
13. The respondent further states that the claimant was given off duty on October 31, 2017, during school exams as is required by the Ministry of Education and Kenya National Examinations Council regulations, and asked to resume as soon as the examinations were completed.
14. The respondent states that the claimant returned to school on November 10, 2017 when there was no examination paper being done, cleaned her office and when she was done, she was asked to leave behind the office keys by the principal so as to allow the school access typing, printing and photocopying services during the examination period. The respondent states that the claimant went back home and did not returned to school to resume her duties.
15. It is the respondent's case that the claimant was paid her salary up to and including December, 2017.
16. The respondent further states that the claimant did not report when the school opened on January 2, 2018, prompting the board of management, through the principal/secretary to the board, to write to her a letter on January 5, 2018, asking to know her whereabouts and informing her of possible disciplinary action should she fail to respond to the letter within two weeks.
17. It is the respondent's case that the claimant did not respond as advised, causing the board of management secretary to issue another letter dated January 22, 2018, informing her of termination



of salary, upon consultation with the County Labour Officer. The respondent further states that the claimant once again failed to respond and/or resume duties, and instead, chose to file the instant suit.

18. The respondent avers that it is the claimant who deserted duty and not the respondent who terminated her services.
19. The respondent's further case is that the claimant lost a projector and a laptop both valued at Kshs 140,000.00, and she was to pay through monthly deductions from her salary.

The Claimant's Submissions

20. It is submitted for the claimant that her termination of employment by the respondent was not only unfair but also unprocedural.
21. It is submitted that the respondent's allegation that the claimant absconded duty and that attempts to reach her through letters written on January 5, 2018 and January 22, 2018, but which bore no response is not true.
22. The claimant submits that the letters were an afterthought meant to sanitize her unlawful termination, as no minutes were produced in evidence indicating the board resolution on the matter, and for failure to show that the letters were posted to the claimant. It is her further submission that not even a postage stamp was produced to show that the letters were sent.
23. The claimant submits that she is entitled to an award for the claim of underpayment as the same is provided for under section 48 of the *Labour institutions Act, 2007*, and her claim for compensation as required under section 49 of the *Employment Act, 2007*.
24. The claimant further submits that she worked for 40 hours extra every day from Monday to Saturday and as such, she has proved her claim for overtime pay and urge the court to find in her favour and grant the award.

The Respondent's Submissions.

25. The respondent submits that the claimant suit was filed partly to avoid paying the respondent the sum of Kshs 140,000.00 on account of the lost laptop and projector, but mainly, her claim is an attempt to reap where she had not sown.
26. The respondent submits that the claimant is not entitled to any compensation, and that if anything, she is the one who owes the respondent one month's salary *in lieu of* notice, and the value of the laptop and projector that were lost while in her custody, and which remains unpaid for despite her commitment to pay.
27. It is submitted for the respondent that there was no termination, let alone an unprocedural one, and that no evidence was adduced to prove termination. It is the respondent's position that the claimant's testimony on the alleged dismissal was uncorroborated.
28. It is submitted for the respondent that the claimant is not entitled to both gratuity and service pay for reason that she was a member of the NSSF. It is the respondent's further submission that the claimant's salary was consolidated with house allowance and her claim in respect of house allowance is thus not payable.
29. The respondent submits that the claimant was not declared redundant and hence is not entitled to severance pay.



30. The respondent further submits that the claimant adduced no evidence whatsoever in support of her entire claim that would warrant the reliefs prayed for, and that specifically, she is not entitled to terminal dues as set out in paragraph 2 of her memorandum of claim.

Analysis and Determination

31. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
- i. Whether the claimant was unfairly terminated or whether she absconded duty.
 - ii. Whether the claimant is entitled to the remedies sought.

Whether the claimant was unfairly terminated or whether she absconded duty.

32. The claimant's case is that she reported to work and after finishing her daily routine including cleaning her office, the respondent's principal directed her to leave and not return to work, which instructions, the claimant obeyed, having left and never returned.
33. The respondent on its part denied terminating the claimant and argues that the claimant was allowed to be off duty from October 30, 2017, on account of on-going national examinations, but that when school reopened, she did not resume duty, and hence the correct position is that she deserted duty.
34. RW1, who is the current principal of the respondent, told court that the claimant was last at work on November 10, 2017, which was a day when no examination was on-going, and that after cleaning her office, she was asked to leave the office keys to allow the school access to the typing, photocopying and printing service during her absence.
35. The claimant's evidence is that she was not paid salary from November, 2017. The respondent in their letter of January 22, 2018, gave the claimant notice of termination of salary and required her to respond to the letter. Nothing shows that the letters were posted/sent to the claimant as the mails were neither registered nor were postage stamps produced in evidence.
36. Further, the respondent did not lead any evidence to show that they paid the claimant salary for the months of November and December of 2017, being that the termination of salary happened or was communicated in January, 2018.
37. In my view, I am convinced by the claimant's assertion that she was indeed terminated without notice and without reason and the subsequent letters said to have been written in January, 2018, were merely an attempt at working the disciplinary process backwards.
38. Premised on the finding that the claimant was terminated, and for reason that the respondent did not attempt to comply with the law on termination, I find and hold that the claimant's termination is procedurally and substantively unfair. No disciplinary action was alluded to and no reasons whatsoever were said to have informed the decision to send the claimant away.
39. The allegations that the respondent's lap top and projector were stolen under the claimant's watch, was not attributed to the termination as the claimant had already agreed to pay for the lost items and deductions had started to be made from her salary.



40. In *Anthony Mkala Cbitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, the court observed as follows:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

41. From the foregoing decision of the court, it is clear that even in instances of summary dismissal, a hearing is paramount and without it, a termination/dismissal is unfair and wrongful.

Whether the claimant is entitled to the remedies sought.

42. The claimant’s prayer is for payment of a total of Kshs 1,454,345.00, on account of unpaid salaries, salary in lieu of notice, overtime pay, severance pay and 12 months’ salary for loss of employment. Compensation for unfair termination

43. The court has held that the claimant was unfairly terminated. This finding entitles the claimant to compensation per sections 49 and 50 of the *Employment Act*, 2007.

44. The Supreme Court in *Kenfreight (EA) Limited v Benson K. Nguti* [2019] eKLR noted as follows in regard to an award of compensation:

“When giving an award under section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”

45. The claimant was terminated for no wrong committed, after being in the service of the respondent for more than six years. Premised on the claimant’s long service, I find and hold that she has proved a case for maximum compensation. She is hereby awarded 12 months’ salary as compensation for the unfair termination.

Salary in lieu of notice

46. Going by the court’s analysis on how the claimant lost her job, it is apparent that she was simply asked to leave and to never return to the service of the respondent. There was certainly no notice issued nor was she paid *in lieu of* the termination notice.

47. I find the claimant’s claim in this respect merited and is awarded one one month’s salary *in lieu of* termination notice.



Salary Under payment

48. Section 48(1) of the [Labour institutions Act](#), 2007, states thus on under payment: -

“If an employer is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.”

49. The respondent has not disputed that the claimant’s salary at termination was Kshs 12,651.00. It is also not in dispute that the Regulation of Wages Order under legal notice No 111 of 2017, placed the salary of a copy-typist at Kshs 17,447.15.

50. The claimant’s claim in respect of under payment is for the period January, 2011 when she was employed, to November, 2017, when she was terminated.

51. Salary is a monthly occurrence and by section 90 of the [Employment Act](#), it is a continuing injury, and hence the only part of the claimant’s claim that is valid is that which falls within one year before November, 2017, being the time when the cessation of the injury happened.

52. I therefore find and hold that the claimant is entitled to salary under payment for her last year of service, at a monthly under payment of Kshs 4,797.15/-

53. The claimant’s claim on account of under payment for the rest of years is statute barred.

Rest days, leave days and overtime pay

54. The evidence of RW1, and which was corroborated by RW2, is that school employees take their leaves during school holidays, and which is taken three times in a year. The claimant did not lead any evidence to show that she worked during school holidays or that she worked beyond the hours of 8am and 5pm. There is also no prove that she was entitled to rest days which she did not utilize.

55. The claims for unutilized leave days, rest days and overtime have not been proved and are hereby dismissed.

Gratuity and severance pay

56. As correctly submitted by the respondent, the claimant did not leave the service of the respondent for reason of redundancy. Her claim for severance pay is thus not merited. It is dismissed.

57. Section 35 (6) (b) of the [Employment Act](#), 2007 entitles an employee to a gratuity or service pay where it is established under a collective agreement or an employee’s contract of service.

58. The claimant’s employment contract did not provide for payment of gratuity. Further, the respondent’s evidence is that it made NSSF contribution on behalf of the claimant.

59. The claims fail and are dismissed.

60. In sum, judgment is entered for the claimant as against the respondent as follows: -

- a. Payment of one-month salary *in lieu of* notice at Kshs 17,447.15/-
- b. Salary under payment for the year 2017 at Kshs 57,565.80/-
- c. Payment of 12 months’ salary as compensation for unfair termination at Kshs 209,365.80/-



d. Costs of the suit and interest until payment in full.

61. Judgment of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH
DAY OF APRIL, 2023.**

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Mrs. Asunah present for the Respondent

Christine Omolo- C/A

