



**Mupe v St. Augustine Preparatory School (Cause 148 of 2018)  
[2023] KEELRC 1673 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1673 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 148 OF 2018**

**M MBARÚ, J  
JULY 6, 2023**

**BETWEEN**

**ELIZABETH MUPE ..... CLAIMANT**

**AND**

**ST. AUGUSTINE PREPARATORY SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. On December 30, 1998 the respondent employed the claimant as the school cateress at a wage of Ksh 6,810 per month.
2. The claim is that on August 8, 2016 the respondent accused the claimant of insubordination and gross-misconduct.
3. The genesis of the accusations made against the claimant was that on March 24, 2016 during the Easter holiday, at 11 AM the claimant left for the Mombasa Memorial Cathedral to attend the burial service of her brother-in-law which was to start at Noon and she asked the school chaplain to take over her duties for the rest of the day which was to release students for the Easter holiday. The chaplain, out of negligence and malice, released the students but did not follow the due procedure despite being aware of the same.
4. On March 29, 2016 the respondent issued the claimant with notice accusing her of releasing the pupils without following the required due process as there were records that evidenced the accusations that not all students were officially released by recording and signing the names of parents. The claimant was issued with a notice to show cause and required to explain why disciplinary action should not be taken against her for gross-misconduct. On April 2, 2016 the claimant responded and on August 8, 2016 the respondent issued the claimant with notice terminating employment.
5. The claim is that the termination of employment was unfair and without notice. the allegations made were false and he claimant is seeking the following the following;



6.
  - a. 15 years salary being remainder of the employment to retirement at Ksh 20,50 x 12 x 15 Ksh 3,663,000;
  - b. 7.5% of the basic pay in pension for 15 years to retirement Ksh 274,725;
  - c. One month notice pay Ksh 20,350;
  - d. 21 accused elave days Ksh 16,436.70
  - e. Compensation for unfair termination of employment; and
  - f. Costs of the suit.
7. The claimant testified in support of the claim that she worked diligently for the respondent but due to malice and with intent to unfairly terminate her employment, on March 24, 2016 she left work to attend to a burial memorial and left her duties to the school chaplain of releasing students to go home for the Easter holiday but he did so without the due process and proceeded to release the students without noting the parents. The claimant was accused of failing in her duties and issued with a notice to show cause and despite her response denying liability, the respondent convened the board and terminated her employment without a hearing or due process. This resulted in unfair termination of employment and the claims made should issue.
8. The claimant testified that upon termination of employment, the respondent only paid her Ksh 265,228 for years of service but she sought legal advice and is claiming for years not served under her employment until retirement at 60 years.
9. In response, the respondent's case is comprised of mere denials and that the letter terminating employment was issued upon satisfaction of the required procedures and the claims made are without proof.  
No evidence was called by the respondent.
10. At the close of the hearing both parties agreed to file written submissions. Only the claimant complied and these analysed, the issues for determination are whether there was unfair termination of employment, whether the reliefs sought should issue, and whether costs should be awarded.
11. As noted above, the response comprise mere denials. The respondent did not call any evidence or file any work records as required under Section 10(6) and (7) of the Employment Act, 2007 (the Act).
12. This denies the court crucial records with regard to the claims made, particularly the procedures undertaken leading to termination of the claimant's employment. the court is only left with the claimant's evidence, which shall be analysed based on the applicable law.
13. The claimant's case is that on August 8, 2016 she was issued with notice terminating her employment for alleged insubordination and gross misconduct after being issued with a notice to show cause following an incident on March 24, 2016 when she left the school and left the chaplain to carry on her duties but the officer failed to undertake the same properly out of malice. The claimant testified that before notice terminating her employment issued, she was not given a hearing.

The letter dated August 8, 2016 is on the basis that;

... the BO have noted with great concern the contents of your letter dated April 2, 2016 in answer to the Heartache's letter dated March 31, 2016 and are amazed at the arrogance depicted therein.



14. This is gross-misconduct and demeaning on the person and office of the head of the school to whom you are duly answerable to. Such behaviour cannot be tolerated in this school. Arrange to handover to me all the school property in your possession.

The school bursar will arrange payment of your dues. ...

15. Without the respondent filing any work records, the background this this notice terminating the claimant's employment is lost.
16. Whatever misconduct or gross misconduct the claimant had committed to justify the sanction of immediate termination of her employment, the due process secured under the law was imperative to adhere to. Gross misconduct of an employee is resulted under Section 44(4) of the Act. The employer is allowed to dismiss the employee on condition that the procedures under Section 41(2) of the Act are followed. That is;

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

17. The employer is directed to issue the employee with notice and allow a hearing of the subject employee in the presence of a fellow employee of her choice.
18. In the case of *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment), the court in addressing a case of summary dismissal held that;

... even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate. We have laboured through the appellant's disciplinary policy and procedure manual to find out the disciplinary procedure adopted in the case of the respondent and have not been able to find any, considering that the earlier complaint had been dealt with exhaustively. If another complaint arose after the earlier one, then the appellant was obligated to commence the termination procedure in accordance with its manual. That this did not happen the summary dismissal of the respondent was unfair, unprocedural and illegal. ...

19. Even in a case where the employee is insubordinate, has committed intolerable acts, the due process of the law is imperative. In the case of *Standard Group Limited v Jenny Luesby* [2018] eKLR the court held that;

There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that



of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be an unfair labour practice.

Without any evidence that the claimant was allowed a hearing before her employment terminated, this went contrary to the mandatory provisions of Section 41, 43 and 45 of the Act for lack of due process, valid reasons and this was both procedurally and substantively unfair. There is no justification however her conduct was.

For lack of due process, notice pay is due. Ksh 20,350 is due.

The last wage paid was ksh.20,350. The claimant worked for the respondent from the year 1998 to the year 2016. An award of 5 months gross wage is hereby found appropriate in compensation all at ksh.101,750.

20. On the claims made, the claimant is seeking payment for the next 15 years she expected to work for the respondent. Under the law, in employment and labour relations practice, employment can terminate through notice or as the case may be. No employment term can be termed permanent. This is the essence of Section 35 and 36 of the Act. it allows termination of employment through lawful means.

21. Upon termination of employment, the claimant retained her skills and is expected to secure new employment. The futuristic earnings have not been mitigated and the claimant was expected to look for alternative employment upon the respondent terminating her employment as held in *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR the court held that;

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The *Employment Act* 2007 requires he moves on as he has done, and mitigated the loss of his job .... An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.

22. In *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR, the Court of Appeal dismissed a claim for anticipatory earnings the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in *Engineer Francis N Gachuri v Energy Regulatory Commission* [2013] eKLR where the Court held that;

There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word "permanent employment

23. This claim is not justified together with the claim for 7.5% of pensions contributions over the same period.

The claimant has since been paid ksh 265,228 in terminal dues.

24. On the claim for 21 leave days, the claimant as a cateress in a school, without any evidence as to how this right was secured, she is entitled as claimed at her basic wage and without any work records, the claim for ksh 16,437 is hereby confirmed as due.



25. The claims largely successful, the claimant is entitled to 50% of her costs.
26. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. A declaration that employment terminated unfairly;
  - b. Compensation Ksh 101,750;
  - c. Notice pay Ksh 20,350;
  - d. 50% of costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JULY, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

