



REPUBLIC OF KENYA



Kariuki v Board of Management, Moi Girls School, Nairobi (Cause 2291 of 2015) [2023] KEELRC 2189 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2291 OF 2015
AN MWAURE, J
SEPTEMBER 22, 2023**

BETWEEN

HELLEN WANJIRU KARIUKI CLAIMANT

AND

**THE BOARD OF MANAGEMENT, MOI GIRLS SCHOOL,
NAIROBI RESPONDENT**

JUDGMENT

1. The claimant filed a memorandum of claim dated December 22, 2015.

claimant's Case

2. The claimant was employed by the respondent on May 27, 1993 as a school nurse, Job Group G, which position she served diligently until her termination on February 4, 2014. That at the time of termination she was earning a monthly salary of Kshs. 27,674/-.
3. That the claimant worked for 19 years without taking leave days, public holidays and/or off days which accrued to 344 days by February 15, 2012 when the claimant vide a letter requested the respondent to use the accrued days to take study leave.
4. The respondent responded to the claimant's request vide a letter dated May 17, 2012 and claimed that the claimant had taken her leave days. It however granted the claimant unpaid study leave and requested her to vacate the school nurse house with effect from June 30, 2012. The claimant wrote to the respondent on June 14, 2012 inquiring the respondent's reasons behind its request to vacate the house and whether the decision was tantamount to a disciplinary action against her. On June 15, 2012 vide a letter, the respondent clarified the claimant was not under disciplinary action but it could not give the claimant accommodation when she was on study leave.



5. In June 2012, the respondent stopped paying the claimant's salary contrary to clause 35 of the Collective Bargaining Agreement between Kenya Union of Domestic, Hotels, Educational Institutions Hospitals and Allied Workers ('KUDHEIHA Workers') and the Ministry of Education which states an employee is entitled to 80% of his/her basic salary during the study leave.
6. Upon completion of the claimant's KRCHN course, she reported back to work on September 16, 2013 but she was informed that the respondent will meet in November 2013 to decide her case. However, the claimant did not receive any updates from the respondent which prompted her to inquire on the respondent's outcome on December 4, 2013.
7. The respondent vide a letter dated February 4, 2014 informed the claimant of its decision that the claimant should vacate the school nurse house and that the respondent will advertise her position and she is at liberty to apply for consideration.
8. The claimant avers the respondent did not give her chance to defend herself against any allegations. She responded to the respondent's decision vide a letter dated February 12, 2014. However, despite sending various reminders the respondent refused to respond to the claimant's letters in respect to her accrued salary prompting the claimant to seek recourse from KUDHEIHA Workers. The Union's Branch Secretary wrote to the respondent indicating the claimant was entitled to 80% salary during the study leave and proposed for an amicable settlement but the letter was ignored by the respondent.

respondent's Case

9. The respondent filed their response dated May 24, 2018 in which it admitted the claimant was employed as a school nurse in 1993, a position she held till 2012 when she left to pursue further studies. Further, the terms of the claimant's employment were subject to the agreement between the Ministry of Education and KUDHEIHA and terms and conditions of service by the Board of Management.
10. The respondent admitted that the claimant requested for study leave for a period of one and half years to pursue a course at KMTC, and in its response the respondent notified the claimant that she did not have any outstanding leave days as she had regularly taken up her leave days and her claim for off duty days was not merited as the respondent had employed a second nurse to relieve her from time to time. It nevertheless approved the claimant's request to proceed on study leave and expressly stated she would not be entitled to a salary and she would require to vacate the school premises by June 30, 2012 to enable the school accommodate a resident nurse.
11. The respondent paid the claimant 3 months' salary to cushion the claimant for the period she was away on unpaid leave and to enable her acquire alternative accommodation. However, the claimant declined to vacate the respondent's premises despite being urged to do so although the respondent had engaged the services of another resident nurse while she was on study leave.
12. The respondent avers that in 2013, the claimant requested to resume her duties upon completion of her studies to which it responded vide a letter dated February 4, 2014 advising the claimant to formally apply for the position for consideration, however, she failed to do so and as such she was not considered for the position.
13. The respondent avers the claimant voluntarily left her employment and it was mutually agreed that she was not entitled to a salary when on study leave and further she declined to apply for employment on completion of her studies and therefore there is no basis for the claim.



claimant's evidence

14. The claimant testified on March 8, 2023 and produced her witness statement dated December 17, 2018 and list of documents dated December 22, 2015 as her evidence in chief and exhibits respectively.
15. She testified that she started working for the respondent in 1993 and never went for off days except for a few when school would close and she only started taking her off days and leave days after 2005 when the respondent engaged another nurse.
16. The claimant testified that the respondent's document number 4, 5, 6, 10 and 12 have been altered and that she is entitled to the leave days as provided in her memorandum of claim.
17. During cross examination, the claimant testified she has no document to show that she worked during public holidays.
18. The claimant testified another nurse got her employment letter in 1992 and she joined the respondent in 1993 and another nurse was engaged in 2021 when she had left. Further she had a reliever for 2 days a week.
19. The claimant further testified that she collected her NSSF dues with exception of June 2012 to August 2013 when she was on study leave.
20. She testified also that as per the CBA when an employee is on study leave he/she will draw 80% of his/her salary if the study leave was approved and vide the claimant's exhibit 4, the respondent granted her study leave without pay and although she did not agree to the unpaid study leave she proceeded on leave. Additionally, the respondent approved the course although she did not produce in this court the document to prove this.
21. Lastly, the claimant testified that although she did not work for the respondent from September 2013 to February 2014, she is entitled to a salary as she received her termination letter on April 4, 2014.

respondent's evidence

22. The respondent called its witness Margaret Njagah (RW1), a Senior Principal in Moi Girls School, who produced her witness statement and list of documents both dated November 30, 2020 and further list of documents dated December 8, 2021 as her evidence in chief and exhibits.
23. During cross examination, RW1 testified that the claimant left employment in 2012 when she proceeded for unpaid study leave and that the claimant did not indicate she was not coming back to work.
24. RW1 testified that the claimant had a reliever nurse, Josephine Itangata, who was employed by the respondent in 1992 vide a letter dated September 2, 1992 up until 2020.
25. RW1 testified that the school always had 2 nurses and that when the claimant was on study leave, the respondent employed another nurse and on completion of her studies in 2013 and request of the claimant to resume work she was advised by the respondent to apply for the position.
26. RW1 testified that the claimant is not entitled to payment of salary for the period between September 2013 to January 2014 as she did not render any services to the school and further the memorandum of agreement page 50, paragraph 35 provided 80% payment during study leave when the course is approved. If the course is not approved as in the claimant's case the study leave is unpaid.
27. RW1 testified the claimant voluntarily left employment but there is no resignation letter on record



Analysis and Determination

28. The main issue for determination is whether the claimant was unfairly terminated.
29. It was submitted for the claimant that her employment was terminated without due process on grounds that she reported back to work on September 16, 2013 backed by a letter from KMTC dated September 2, 2013. She was however informed that the respondent would decide her fate in November and she had to wait until January 4, 2014 when the respondent vide a letter informed the claimant the school would advertise the position of a nurse and she was at liberty to apply for the same.
30. The respondent on the other hand submitted that the claimant was never terminated. The averment is that the claimant was advised to apply for the position when she resumed from her study leave for the reason that since the services rendered were essential her position could not wait until her return from the study leave and the claimant declined to reapply and therefore left her employment on her own volition.
31. The RW1 testified that the claimant was advised to apply for the position as it had already employed another nurse. Further, in its submissions, the respondent argued that the services rendered by the claimant were essential and the position could not remain vacant until her return from the study leave. However, this court takes note that this fact was not communicated or addressed with the claimant when she was applying for the study leave or even vide the respondent's letter dated May 7, 2012 which the respondent approved the claimant's unpaid study leave and subsequent correspondence. Therefore, the respondent's assertion that the claimant left her employment is unsubstantiated. It would have been prudent if the respondent engaged another nurse on contract basis for the period when the claimant was on study leave.
32. Vide the claimant's exhibit 11, the respondent communicated that it had held a meeting on November 25, 2013 and February 28, 2014 in which several allegations were levelled against the claimant and based on the allegations respondent directed that the claimant vacates the school quarters and that it will advertise the claimant's position. It is the court's position that this is clear termination of the claimant's employment. This court disagrees with the respondent's argument that the claimant voluntarily left her employment as seen above it terminated the claimant's employment and asked her to reapply for the same position. Further it did not produce before this court a resignation letter by the claimant supporting its submission.
33. Section 43, 45 and 47 of the [Employment Act](#), provides for the unfair termination of employees thus:-

“Section 45 (2)

- (2) A termination of employment by an employer is unfair if the employer fails to prove?
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason.
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and



- (c) that the employment was terminated in accordance with fair procedure.”

Section 41

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) 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.”

34. The request by the claimant for study leave was not tantamount to resigning from her employment. The request for leave was very clear. It was for 1^{1/2} years study leave and she offered to cover the school for any emergencies.
35. The court agrees it was not realistic that the claimant would be able to serve the school when she was away as she avers in her letter that she would cover the school during emergencies. Nevertheless, it is clear the claimant was asking for a study leave and she was not tendering her resignation.
36. Upon completion of her studies the respondent demanded she should re apply for her position of a nurse yet she had served in that position from 1993 to 2012. The chief principal of the respondent by the letter dated May 17, 2012 granted her study leave without pay. Apart from being instructed to vacate the school premises she was not informed that her contract had been terminated.
37. The subsequent communication between the respondent and the claimants allude to the submissions of some documents by the claimant to wit letter of study leave communication and formal letter of release for study leave. The respondent had not alluded that the claimant’s services were terminated therefore and so it is surprising that when she finished her studies she was asked to re apply for her former position as per the respondent’s chief principal letter dated February 4, 2014.
38. Hence the claimant did not re apply for the job and that is understandable because she had never resigned from the same. She did not get any communication from the respondent even though she kept writing for a response severally through herself and also through the union. She then instructed her advocates to write on her behalf on March 17, 2015 and then filed this suit on December 22, 2015.
39. The respondent did not follow the required procedure to terminate the claimants as per employment laws and in particular section 45 of *employment act* and section 43 and section 41 which allude to the procedure followed to discipline an employee prior to termination.
40. There are numerous case laws that back employment laws that for dismissal to be fair there must be both fair procedure as provided in section 41 of the *employment act* and justification as provided in section 43 *employment act*. One such case *Erick Murungi Njagi vs clarion Hotel Limited* (2022) eKLR where court stated “an employee facing disciplinary action must be given adequate opportunity to



respond to any charges before action is taken against them..... it does not matter what offence the employee is charged of. If the employee is not heard the termination is ipso lapso unfair.

41. Without any doubt this is a case where the respondent mishandled the claimant and can only be concluded it is a case of constructive dismissal. The claimant did not resign and despite contract letters to the respondent asking for her position she did not get a response except the one letter asking her to re-apply for her former position of the school nurse.
42. There is no other explanation this court can interpret this scenario except that the claimant was unfairly, unlawfully and unprocedurally terminated from her job which she had held from 1993 to 2012 and without any reasonable explanation or following the mandatory procedure provided in section 41 of the *employment act*.
43. Having entered judgement in favour of the claimant for unfair and unlawful and unprocedural termination the court awards her the following remedies: -
 - i. Three months' salary in lieu of notice as per clause 5(i) of the CBA kshs 27,674x3=83,022/-.
 - ii. Salary when claimant was on unpaid study leave in June 2012 to 2013 is not granted as claimant did not object to the same and accepted to be on unpaid leave and so the same is declined.
 - iii. claimant did not work from September 2013 to January 2014 but expected to work and so had legitimate expectation as in the case of *Kenya Union of Printing Publishing Paper Manufacturing and Allied Workers vs Timber Treatment International Limited* (2013) eKLR. She was awarded kshs 138,370/-
 - iv. There is no proof of unpaid public holidays and is declined.
 - v. Rest days are also not proved and prayer is declined.
 - vi. Leave days not proved, as in unspecified and is declined and in fact are barred by limitation of time.
 - vii. For Service pay respondent produced proof of remittances of NSSF dues so service pay is declined.
 - viii. The claimant was unfairly terminated after working for respondent for over 19 years. I will grant her 12 months equivalent of her salary as per section 49(1)(c) and (4) (e) of the *employment act* @ kshs 27,674/- - 332,088/-
 - ix. Total awarded therefore is kshs. 553,480/-.
44. claimant is awarded costs as well.
45. She is also awarded interest at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

ANNA NGIBUINI 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 NGIBUINI MWAURE

JUDGE

