



REPUBLIC OF KENYA



**KENYA LAW**  
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**Benson v Oshwal Education and Relief Board t/a Oshwal Academy Nairobi (Cause 1434 of 2018) [2023] KEELRC 2667 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2667 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 1434 OF 2018**  
**B ONGAYA, J**  
**OCTOBER 30, 2023**

**BETWEEN**

**MARY KAGWIRIA BENSON ..... CLAIMANT**

**AND**

**OSHWAL EDUCATION AND RELIEF BOARD T/A OSHWAL ACADEMY  
NAIROBI ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on 11.10.2018 through Asaala & Kinyanjui Company Advocate. She prayed for judgment against the respondent for:
  - a. A declaration that the dismissal of the claimant's employment was wrongful, unfair and unlawful.
  - b. Kshs.1, 294, 320.00 being 12 months' salaries in compensation.
  - c. Kshs.323, 580.00 being compensation of 3-months' salaries in lieu of the termination notice.
  - d. Kshs.107, 860.00 worked and unpaid leave days.
  - e. Medical benefits for unexpired period of the contract (up to 28.02.2019).
  - f. Unremitted deductions to the National Social Security Fund (NSSF).
  - g. General and exemplary damages.
  - h. Costs.
  - i. Interest on (b) to (h) above at court rates until payment in full.
  - j. Any other appropriate relief as the court may deem fit, just and fair to grant.



2. The claimant has pleaded and alleged as follows. The respondent employed her in August 2012 on a two-year contract renewable for a similar period per tradition and practice of the respondent. The contract was renewed severally and the last such renewal was on 01.03.2017 set to expire on 28.02.2019. On 29.03.2018 the school was closed for about a week for Easter Holidays and reopened on 09.04.2018. The claimant states that she had travelled out of Nairobi for the Holidays and experienced transport problems with the consequence that she did not report back on 09.04.2018 and informed the respondent's Deputy Head of the Senior School Dr, Saxena about her predicament. The claimant alleges she reported back on 10.04.2018 and worked on her desk until 10.30am when Dr. Saxena summoned her and demanded an explanation for her belated reporting from the Holidays. Dr. Saxena asked her to fill a leave form for the absence on 09.04.2018. On 23.04.2018 the Assistant Human Resource Officer informed the claimant about the letter to show cause dated 21.04.2018 requiring her to respond. The letter addressed to the claimant stated that she had been absent on 09.04.2018 and sent a WhatsApp message to Dr. Saxena on 09.04.2018 at 7.56am about transport problems that had developed on her way back to school. Further, that on Tuesday 10.04.2018 at 9.14am Dr. Saxena had written an email to the claimant stating that the claimant had clocked in at 6.17am in the biometric system but could not be physically located in school. Further, the letter stated that the claimant had arrived in school around 11.30 and evaded Dr. Saxena and in a meeting between the claimant and Dr. Saxena the claimant failed to explain why she could not be located in school despite having clocked in and in a later statement stated she was at material time in the school gym. The later stated, "This is a false statement as investigations indicate that you did not even attend student registration for your class at 7.50 am as required." The letter concluded that the alleged claimant's actions were in breach of section 44(4) (a) and (c) of the *Employment Act* and the claimant was to show why disciplinary action would not be taken against her. She was to respond not later than 23.04.2018.
3. The claimant pleaded that on 20.04.2018 while traveling to attend a burial of a colleague's relative Dr. Saxena had telephoned her and demanded that the claimant writes a report about her absence on 09.04.2018 and to do so within 10 minutes which she did by email on her mobile phone.
4. On 24.04.2018 Dr. Saxena summoned the claimant to the Human Resource Office 11.00am where she met Dr. Saxena, Human Resource Officer and the Academic Consultant. She was asked to explain her absence on 09.04.2018 and asked to produce her passport. On 25.04.2018 the claimant informed the Human Resource Officer that she had failed to trace her passport. On 26.04.2018 she was summoned and asked to produce the passport by 27.04.2018. On 27.04.2018 the claimant wrote explaining that she had failed to trace her passport and she produced police abstract about her lost passport. Thereafter she was summoned to the Human Resource Office and handed a letter of summary dismissal dated 27.04.2018. The letter referred to the letter to show cause, the meeting of 24.04.2018 and stated that the claimant had been absent from duty on 09.04.2018 and informed Dr. Saxena she would be late and not absent. Further, the claimant had failed to communicate her absence on 09.04.2018 in advance to facilitated work adjustment and for 10.04.2018, the claimant had claimed to have arrived early and fell asleep in the gym. However, the letter stated that was a blatant lie per witness statements because the claimant had actually arrived in school at 11.25am in the back seat of her car which was being driven by a member of staff whom the claimant had asked to pick her from the airport. Further, she had stated the absence had been due to a breakdown of her car in Tanzania but failed to produce the passport to establish the position. She had therefore failed to attend duty on 09.04.2018 and on 10.04.2018 failed to attend to the registration of students as required. The letter questioned her integrity and commitment to school's core values as she had breached section 44 (4) (a) and (e) of the *Employment Act*. She was dismissed effective 27.04.2018. The claimant's case is that the termination was unfair and unreasonable in the circumstances.



5. The respondent filed the memorandum of response on 08.10.2019 through Macharia-Mwangi & Njeru Advocates. The respondent admitted employing the claimant as pleaded. The respondent pleaded that investigations had been carried out about the claimant's absence on 09.04.2018 and on 10.04.2018. The guards on duty had shown that the claimant had arrived back at school on 10.04.2018 at about 11.30am. Further, the claimant had failed to produce her passport to verify her travel predicament on 09.04.2018 and her alleged early arrival on 10.04.2018. Further she had been accorded due process of a letter to show cause, her written response, a disciplinary hearing, chance to avail the passport and then, the summary dismissal. The respondent prayed that the suit be dismissed with costs.
6. The claimant testified to support her case. The respondent witness No. 1 (RW1) was Brian Odhiambo Ojiem the Human Resource Officer and witness No. 2 (RW2) was Ibrahim Mukalo the Human Resource Officer at the material time. The Court has considered the pleadings, the evidence and the final submissions. The Court returns as follows.
7. To answer the 1<sup>st</sup> issue, the Court finds that parties were in a contract of service. At the material time the claimant was serving on a two-years contract running from 01.03.2017 to 28.02.2019 per letter of renewal of contract dated 03.02.2017.
8. To answer the 2<sup>nd</sup> issue there is no dispute that the claimant was dismissed per the letter of summary dismissal dated 27.04.2018.
9. The 3<sup>rd</sup> issue is whether the summary dismissal was unfair. As for reasons for termination, the Court finds that the respondent has shown that as at termination the reasons existed as genuine per section 43 of the *Employment Act*, 2007. Further the Court finds that the reasons related to the claimant's conduct or compatibility and the respondent's operational requirements so that they were not unfair per section 45 of the Act. The statements by the guards show that the claimant had reported on duty on 10.04.2018 at about 11.30am. In any event, the claimant by her own written response confirmed that she had not performed her duties on 10.04.2018 thus, "I travelled overnight and arrived on Tuesday 10/04/2018 early in the morning and reported to work. After clocking in at around 6.20am, I proceeded to the Gym office. Due to the travelling lag, I was fatigued and dozed off and by the time I woke up it was past morning registration time; which I sincerely regret, and it will not recur in future. I spent the rest of the morning sorting out uncollected swimming gala and sports day certificates until around 10.30am, after which I went to the library to charge my phone...I wish to clarify that I did not evade the deputy head as stated as I wasn't aware that she was looking for me. The moment I was told she was calling me I went straight to her office." By that response, the claimant confirmed that she had not performed her duties on 10.04.2018. As relates 09.04.2018, the claimant testified that her message to Dr. Saxena was not that she would be absent on that date but that she would be late due to travelling challenges. It therefore appears to the Court that the respondent was not wrong in stating and finding that the claimant had misled the respondent by being absent full day on 09.04.2018. The claimant in her testimony confirmed that she had no evidence that she had permission to be absent on 09.04.2018. The Court returns that the reasons for the summary dismissal were not unfair as they were genuine. On procedure, the claimant has confirmed that she was given the letter to show cause, she replied, she was heard at the disciplinary meeting, she was given an opportunity to produce her passport and was later dismissed. She testified that Dr. Saxena gave her a verbal notice about the disciplinary hearing. No doubt she had received and replied to the letter to show cause. The Court finds that as at the time of disciplinary hearing, the claimant knew the case that confronted her. The procedure was not unfair as section 41 of the Employment Act on notice and hearing was complied with. The respondent's submission that the summary dismissal was not unfair is upheld. While it was submitted for the claimant that she had filled a leave form for 09.04.2018 as directed, there is no pleading and



evidence that the leave was subsequently approved. The Court therefore finds that per the respondent's submissions, it was misguided for the claimant to urge a case of double jeopardy as at the time of the letter to show cause, the respondent has not been shown to have closed the issue of the claimant's absence on 09.04.2018 by way of belatedly approving the leave. Further, the reasons for the dismissal spread to events of 10.04.2018 and it has been shown that by her misconduct, her integrity appears to have been indeed, wanting.

10. The 4<sup>th</sup> issue is on remedies. The summary dismissal has been found not to have been unfair. The prayer for a declaration and compensation in that regard is declined as not justified. The claimant testified that she did not know the number of leave days claimed and it was with respect to a period of service she could not specify. The prayer is found wanting in particulars of pleadings and not strictly proved. It will fail. The prayer for three-months pay in lieu of termination is unfounded as its basis was not pleaded or established as is unavailable in view that the summary dismissal was not unfair. The claimant gave no evidence to support the prayer for days worked and not paid. No submissions were made for the claimant in that regard. The prayer is declined as unfounded as the respondent's submissions are upheld that particulars were not pleaded and no evidence was provided. As submitted for the respondent, the prayer for medical benefits for unexpired period lacked basis as well as the prayer for general and exemplary damages. The Court returns that the suit will collapse with costs.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 30<sup>TH</sup> OCTOBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

