



**Wanjagua v Nairobi Waldore School Trust (Cause E6449 of 2020)  
[2023] KEELRC 2517 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2517 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6449 OF 2020  
MN NDUMA, J  
OCTOBER 12, 2023**

**BETWEEN**

**JOYCE MWIHAKI WANJAGUA ..... CLAIMANT**

**AND**

**THE NAIROBI WALDORE SCHOOL TRUST ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant on 12/11/2020 seeking general damages for unlawful and unfair termination of employment and payment of terminal benefits to wit;
  - (a) 2 months' salary in lieu of notice Kshs.228,042
  - (b) Refund of contribution to school's welfare group Kshs.9,000
  - (c) Damages for libel and slander.
2. The claimant adopted a witness statement dated 6/11/2020 as his evidence in Chief. He stated that he was employed vide a contract of employment dated 14/4/2014 as a teacher at a monthly salary of Kshs.41,786.
3. That she worked diligently and continuously until the employment was terminated by a letter dated 8/7/2019 for alleged gross misconduct in that the claimant had failed to submit her class reports for proof reading and submission before school closed on 5/7/2019. That the last contract of employment was for the period 1/7/2017 to 30/6/2020. That during the period of employment claimant made monthly contributions of Kshs.500 to the school welfare fund which monies have not been refunded.
4. That on the day she was terminated, the school manager made the following remarks at a Teachers' meeting "If a driver is carrying five passengers and finds a drunkard on his track, the law allows him to knock and kill the drunkard and save the lives of the other five passengers."



5. The claimant testified that these were defamatory words directed at her and her image and reputation was greatly damaged before any right thinking member of the society and especially her fellow teachers, parents and students who came across the information. That she claims damages for defamation in that respect.
6. The claimant testified that she did not receive any termination notice or even given a chance to explain herself. That she unlawfully and unfairly lost her source of income to the loss and detriment of herself and family members as the sole bread winner. That the claimant prays to be awarded accordingly.
7. The claimant added in Chief that she worked at Nairobi as a class teacher for 5 years. Before she was a subject teacher and worked on permanent basis.
8. That the teachers were usually given an extra work upon closure of school to do report writing for each student. That it was a demanding exercise. That in the year 2019, management decided to have the reports ready by the closing date of the school. The claimant stated that it was a lot of work since the sessions were running. That the end of year was very busy for a class teacher. That the claimant requested for more time to complete her report and other activities but management declined. The claimant stated that she continued to write the reports but she was unable to meet the deadline of closing date. That is the reason her employment was terminated. The claimant said therefore it was the first time reports were demanded on the closing date. That the teachers should have been consulted and a review of policy done. That the termination was unlawful and unfair. That the respondent should have considered her request for extension of time since she had a lot of work as a class teacher as opposed to a subject teacher.
9. The claimant stated that she submitted her reports within three days upon closure of the school. That they had requested for the three extra days to complete the tasks and kept her word. The claimant stated that she reported to work on time and never went to work late as alleged or at all. The claimant denied that she had failed to attend meetings. The claimant said she had no warnings prior to the termination. That the employees' manual hand book produced before Court provided a disciplinary procedure that included oral; written and final warning. That this procedure was never followed by the respondent. The claimant stated that she appealed the termination on 14/7/2019. That she was called to a meeting and the respondent upheld the termination even after she had explained why she was unable to meet the deadline. That she had no hearing before the termination but was just issued with a letter of termination.
10. That the school wrote to the parents of her class indicating that she was performing her work poorly and was put on Performance Improvement Plan. That this was false information since for 5 years, her performance was very good. That this is demeaning, scandalous and defamatory. That the claimant has faced hardship to get alternative employment due to the letter of termination and was forced to become a Private tutor. That she was wrongly accused of insubordination. That her salary was increased over time an indication of her good performance. That the respondent destroyed her career. That she was not paid anything upon termination. That she cleared with the school and served a demand notice before filing suit.
11. Under cross-examination, the claimant denied the allegations of poor work performance made by the respondent. The claimant stated that she taught four (4) classes and had submitted reports from the different classes and only report left was for her own class which she submitted three (3) days upon closure of the school as per her request. That she had explained her situation to the management and sought extension of time. That the manager had offered to help her with activities. That her classes were big including 33, 24, 18 and 20 students. That claimant agreed that she was called to a meeting before the termination. The claimant stated that she was invited to collect her terminal dues but she did not go



- to collect as there was no agreement. That at the meeting before the termination, her school manager and the Human Resource Manager told her that her class report was required before closing date. That no disciplinary meeting was held. That the manager had offered to assist her in some activities to enable her finalise the reports. The claimant did not decline the support offered and said she had requested for three (3) days extension to finalise the reports. The claimant says that the termination was unlawful and unfair and the suit be allowed.
12. C.W.2, Paul Doherty testified before Court that the claimant was a teacher of her child. That the claimant was a very good teacher. That he often sat in class and listened to her. That his child developed very well. That he was very disappointed when her employment was terminated. That parents were not consulted about the matter.
  13. That the parents should have been consulted since the school follows a devolved system. That the Board should not rule by decree.
  14. C.W.2 said that the reports made by the claimant on their children were very detailed and precise. That the parents were very happy with her performance. That the claimant was one of the best teachers they ever had for their children.
  15. Under cross-examination, C.W.2 insisted that the parents should have been consulted before the employment of the claimant was terminated. That they had problem in waiting for the reports for a few days upon closure.
  16. R.W.1 James Kioko Muthengi testified that he was a Director of the respondent. He testified that teachers prepare reports for the students from term one to term three. That final reports are prepared for the parents by the class teacher. That class teacher teaches most subjects in a particular class. That the school also had subject teachers. That the school has seven (7) class in Karen and one (1) in Lavington. That the claimant was to do a report for class five (5) and for class seven (7). She was to provide six subject reports for class 7. That class 5 had 9 students and she was to do 9 reports. That the claimant did not provide reports for class 5 by 5<sup>th</sup> July, 2019. That she only sent 7 reports and 2 were still remaining.
  17. That because she did not meet the set deadline, on 8<sup>th</sup> July, 2019, her employment was terminated for gross misconduct. That five (5) deadlines are given to the claimant before the termination on 7<sup>th</sup> June, 2019; 18<sup>th</sup> June, 2019; 21<sup>st</sup> June, 2019; 4<sup>th</sup> July, 2019 and 5<sup>th</sup> July, 2019.
  18. That the conversation or submissions of reports was done in September, 2019. That the teachers had agreed to meet the deadline. That the teachers were reminded of the deadline in April, 2019. R.W.1 said he did not know if the claimant had attended the meeting where the deadlines were set. R.W.1 said that the claimant was called to a disciplinary hearing on 3<sup>rd</sup> July, 2019. R.W.1 said that he enquired from the claimant why she had not met the deadline for the reports. That the claimant said that she was overwhelmed by activities including her private studies. R.W.1 said that he had to volunteer to help the claimant by offering to attend a meeting she had planned with her class. That the claimant declined the offer. R.W.1 said that the respondent gave the claimant all the support she needed but could not write the reports for her. That people volunteered to help her but she declined. That upon being issued with the letter of termination, the claimant appealed the decision after five (5) days. That the claimant was accorded a hearing on the appeal and she called one witness. That on 17/7/2019, the claimant was given the verdict. That the Board offered to pay the claimant three (3) months' salary in lieu of notice plus salary in days worked. That the claimant did not collect her dues. That the claimant may collect the same any time amounting to Kshs.108,421 Less statutory deductions and Kshs.50,000 advance she had taken. That the claimant may also collect her certificate of service.



19. Under cross-examination, R.W.2 said that he was with the respondent for a period of 7 years. That he joined as a manager and was now a Director. That the claimant joined the school in 2014 as a Class teacher. That the claimant was experienced and qualified. That the claimant taught other classes also. That she was class 5 teacher and was subject teacher for class 7. That class 5 had 9 students and class 7 had 6 students. That the school held planning meetings with the teachers on diverse dates. That teachers prepared class and subject reports. That the reports were given at the end of the year. That usually the reports were prepared during holidays but the school had made a decision to have the reports submitted before the closing date of the school. That the reports were to be discussed with the parents on the closing date. That this was a change implemented for the year 2019. That there were no deadlines in the year 2018. That R.W.1 gave deadlines to the teachers on stated dates. That the claimant did not respond to his emails. That the claimant did not ask for extension of time. That the claimant said she was not able to do the reports on time. That on 3/7/2019, the claimant said the reports would not be ready.
20. R.W.1 said he received the reports from the claimant on 10/7/2019. R.W.1 said the claimant was disrespectful and did not take orders from anyone. That the claimant did not answer emails and did not submit reports on time. That the claimant declined help from R.W.1 and her colleagues. R.W.1 said that the claimant had no warning letter. R.W.1 said that insubordination called for a summary dismissal. R.W.1 said that he was not sure if the class reports were given to the parents. R.W.1 said he knew C.W.2 as a parent. R.W.1 said the school did not invite parents on matters of employment. That the class 5 had 9 parents. That C.W.2 spoke on his behalf and not for other parents. That the suit be dismissed for lack of merit.

### **Determination**

21. The parties filed written submissions in which the Court has carefully considered together with the evidence adduced by C.W.1, C.W.2 and R.W.1. The issues for determination are:-
  - (a) Whether the termination of employment of the claimant was for a valid reason following a fair procedure.
  - (b) Whether the claimant is entitled to the reliefs sought.
22. The respondent have in their submissions raised the Preliminary issue that the suit is res judicata having been filed before Nairobi Chief Magistrate's Court Employment and Labour Relations Case No. 1870 of 2019. That the suit was then withdrawn by consent of the parties. The defence of res-judicata has critical elements to wit; that the suit is based on same cause of action; that it is by and against same parties; that the cause of action was heard and determined in the previous suit.
23. There is no assertion or evidence before Court that the issues for determination in this suit were heard and determined before the Chief Magistrate's Court. There is also no evidence that the Consent settled the issues in dispute, and now before this Court by consent of the parties and that the consent was adopted as an order of the Court. The defence of res judicata has not been established in this matter and is not upheld. Withdrawal of a matter does not bar a party from filing a suit afresh if the issues in dispute remain unresolved.
24. The totality of evidence before the Court is that the claimant delayed in submitting subject and class reports to school/management for the term ending 5<sup>th</sup> July, 2019. The claimant had worked in the respondent as a class teacher from 10<sup>th</sup> April, 2014. That at all material times, before the end of term in question, the policy of the respondent was for teacher to prepare the class and subject reports during school holidays. That the respondent had for the first time requested the teachers to submit their



reports before the closing date of the school which was 5<sup>th</sup> July, 2019. It is the testimony by the claimant that she had requested for extension of time, by three days due to the number of students she handled and that she also doubled up as Class 5 teacher. That she was also involved in other activities which put pressure on her. The claimant testified that her request for extension of time was rejected by R.W.1. That indeed she was unable to submit the subject and school reports by the 5<sup>th</sup> July, 2019 but was able to submit the same on 7/7/2019 but unfortunately her employment was terminated on 8/7/2019. That she was not served with a notice to show cause before the termination and was not subjected to a disciplinary hearing before the termination. That her request was reasonable given her good record at the school and the heavy workload she dealt with firstly, as a class 5 teacher and subject teacher in other classes which were bigger including 33, 24, 18 and 20 students respectively. That the meeting she was called to before the termination on 3/7/2019 was not a disciplinary hearing but she had been summoned with a view to be told to submit the report before 5/7/2019 which was not possible.

25. The claimant denied that she was guilty of insubordination but had made a genuine request to management to allow her reasonable time to submit her reports as she had done in the past. C.W.1, a parent of class 5 testified that the claimant was one of the best teachers he had come across. That as a parent he was aggrieved by what he viewed as unfair treatment of the claimant who was a teacher of her son and was very much liked by the parents of the children she taught. C.W.2 felt that the respondent ought to have gotten the views of the parents before terminating the employment of the claimant. R.W.1 on the other hand testified that the claimant insubordinates the management; was rude and failed to observe deadlines agreed upon between the teachers and management. That the claimant failed to submit the reports in good time because she was involved in private studies when she was supposed to dedicate her full time to the employment. R.W.1 admitted that the claimant had no warning or prior record of misconduct. That she had failed to submit the reports for the first time because it was a new agreed policy by the teachers and management to submit class and subject reports before the closing date to enable the teachers to discuss the report with the teachers on the closing date.
26. That R.W.1 insisted that it had given the claimant opportunity to be heard before the termination. R.W.1 did not produce minutes of any disciplinary hearing conducted by the respondent before terminating the employment of the claimant. R.W.1 did not produce any notice to show cause issued to the claimant requesting her to answer to charges of insubordination or any other charge. R.W.1 did not produce any evidence that indeed the claimant was insubordinate to her superiors or any evidence that she was rude to any member of staff.
27. R.W.1 did not directly deny that the claimant had requested for more time to finalise her reports and that R.W.1 had turned down the request.
28. Section 41 of the *Employment Act*, 2007 provides:-

“Subject to Section 41(1) an employer, shall, before terminating the employment of the employee, on the ground of misconduct or poor work 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 own choice present during this explanation.”
29. The respondent did not adduce any evidence to demonstrate that it had given notice to the claimant of the intention to terminate her employment for reasons of insubordination and that the claimant should explain either in writing or orally why the termination should not be effected.



30. The respondent having failed to produce evidence of any notice to show cause issued to the claimant or evidence of any disciplinary hearing held in which the claimant was given opportunity to defend herself, it is the finding by the Court that the respondent violated Section 42 of the *Employment Act* and the Rules of natural justice.
31. Accordingly, having failed to provide the claimant with opportunity to answer to any charges laid against her, the respondent failed to discharge the onus placed on it under Section 43(1) and (2) of the Act, by proving that it had a valid reason to terminate the employment of the claimant and that the said reason was arrived at having presented the claimant with opportunity to explain herself in the presence of an employee of her choice.
32. The Claimant on the other hand has demonstrated that she had made a request to be provided with reasonable time to complete writing her subject and class report. The evidence by the claimant that she had requested for 3 extra days and was able to submit her reports within the 3 days on 7/7/2019 is credible and the Court finds the same to be truthful. R.W.1 did not come out, as a truthful witness on the fact of this case. R.W.1 came across as unreasonable and vindictive. The Court finds that no reasonable employer could have dismissed the claimant, as a teacher of good standing for a period of five years while serving the respondent and one who was highly recommended by a parent of one of the children she taught. Indeed, the fact that the respondent admitted that the claimant had a clean record and no previous warning discredited the evidence by R.W.1 that, the claimant had in the past gone to work late, insubordinate and rude. These bare allegations by R.W.1 were not corroborated by any record kept by the respondent. The Court finds the said allegation to be untruthful. In *Antony Mkla Citavi -vs- Malindi Water & Sewerage Co. Limited* (2013) eKLR the Court stated:-
- “The ingredient 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.”
33. . Clearly, this was not the case in the present matter. The Court finds that the termination of the employment of the claimant was unlawful and unfair and in violation of Section 36, 41, 43 and 45 of the *Employment Act*, 2007.
34. The claimant is entitled to compensation in terms of Section 49(1) (c) and 4 of the Act.
35. With regard to the case of slander and libel, the claimant has not discharged sufficient evidence to prove that it had followed the proper procedure in notifying respondent of the words that constitute slander and libel and that the claimant had given the respondent opportunity to retract the same failing which the claimant would institute a case for defamation against the respondent. Indeed, the claimant has failed to prove that a claim for defamation has been established on a balance of probabilities against the respondent. The claim is accordingly dismissed.

### **Compensation**

36. With regard to the unlawful and unfair termination, the Court relies on the case of *Alphonse Maghangha Mwachanya -vs- Operation 60 Limited* (2013) eKLR and the principles set out under Section 49(4) to assess the quantum of compensation to be awarded to the claimant. In this respect the claimant had a clean record; had served the respondent diligently for a period of five (5) years and expected to continue serving the respondent, a school of good repute. The claimant lost her employment, unjustifiably abruptly and without notice. The claimant lost her means of support and opportunity for career advancement. The claimant in the Court’s view had made a reasonable request for extension of time to the respondent and therefore did not contribute to the termination. The



claimant was not compensated for the sudden loss of her income and support in her family as a sole bread winner. The claimant had not obtained alternative employment a fact she attributes to the bad name she got from the unlawful termination of her employment.

37. Accordingly, the Court awards the claimant the equivalent of six (6) months' salary in compensation and unfair termination of employment in the sum of Kshs.114,021 x 60 = 684,126.

#### **Terminal Benefits**

38. The claimant did not collect her terminal benefits that had been offered to her including payment of three (3) months' salary separation gratuity as per the testimony of R.W.1. The claimant did not also collect her Certificate of Service in that she felt aggrieved and there was no agreement between her and the respondent.

39. Accordingly, the Court awards the claimant in terms of her contract of service:-

- (i) One-month salary in lieu of notice in the sum of Kshs.114,021 as per the contract of service.
- (ii) Kshs.9,00 refund of contribution made to the School's Welfare Group.  
and
- (iii) Provision of her Certificate of Service which as per the R.W.1 was not collected by the claimant.

40. . In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-

- a. Kshs.684,126 in compensation.
- b. Kshs.114,021 in lieu of one month notice.
- c. Kshs.9,00o refund.
- d. Certificate of service to be granted to her within 30 days.
- e. Interest at Court rates from date of judgment till payment in full.
- f. Costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

Appearance

Mrs Morara for claimant

Mr. Madow for respondent

Ekale: Court Assistant

