



**Makokha v Islamia Madrasa Society & 2 others (Employment and Labour Relations Appeal 821 of 2016) [2023] KEELRC 3189 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3189 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 821 OF 2016  
MA ONYANGO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**HASIAH MAKOKHA ..... CLAIMANT**

**AND**

**ISLAMIA MADRASA SOCIETY ..... 1<sup>ST</sup> RESPONDENT**

**MUSLIM ACADEMY ..... 2<sup>ND</sup> RESPONDENT**

**BOARD OF GOVERNORS MUSLIM ACADEMY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. *Vide* Statement of Claim dated 9<sup>th</sup> May 2016 the Claimant avers that her employment was unfairly terminated by the Respondent. She seeks payment of ksh 564,000.00 by the Respondents, costs and interest.
2. The sum of ksh 564,000.00 is made up of
  - i. Notice ksh 20,000.00
  - ii. Transport allowance ksh 192,600.00
  - iii. Compensation ksh 240,000.00 and
  - iv. Gratuity ksh 112,000.
3. The Respondents filed a Statement of Defence dated 15<sup>th</sup> July, 2016 in which they admit that the Claimant was an employee of the 1<sup>st</sup> Respondent from 8<sup>th</sup> January, 2008. The Respondents however deny the averments that the Claimant was denied maternity leave as alleged in the Statement of Claim.
4. It is the averment of the Respondents that the Claimant went on maternity leave without approval. That the maternity leave was to begin on 3<sup>rd</sup> May, 2016 after approval by the Administration Manager



and the Head of Human Resource Departmental but the Claimant's leave form was only signed by the Section Head.

5. At the hearing the Claimant testified on her behalf as CW1 while the Respondent called Mwanaisha Omar Ahmed, the Finance Manager, Muslim Academy who testified as RW1. The parties thereafter filed written submissions.

### **Analysis and Determination**

6. The facts of this case are not contested. The 1<sup>st</sup> Respondent is a society registered under the *Societies Act*. The 2<sup>nd</sup> Respondent is a school registered under the *Education Act* and the 3<sup>rd</sup> Respondent is the Administrative body that manages the 2<sup>nd</sup> Respondent.
7. The Claimant was employed by the 1<sup>st</sup> Respondent which operates the 2<sup>nd</sup> Respondent through the 3<sup>rd</sup> Respondent, as a secretary. She signed a staff service contract which states that her employment was a two-year renewable fixed contract with effect from 2<sup>nd</sup> January, 2008.
8. The contract provided for other terms of employment including salary, probation, leave (sick/annual/maternity) and termination notice among others.
9. It is common ground that on 31<sup>st</sup> March 2016 the Claimant filled a leave application form in which she indicated that she would be proceeding on maternity leave for 90 days with effect from 3<sup>rd</sup> May, 2016 to expire on 31<sup>st</sup> July, 2016. The Claimant indicated in the form that she would resume duty on 1<sup>st</sup> August, 2016.
10. The leave form has several parts. Part A is to be filled by the Applicant (Employee). Parte B is to be filled by the person maintaining the leave records. Part C is titled "Verified – Leave Subject To Availability Of Leave Days. It was to be signed by Finance Manager.
11. Part D is titled: Approval By The Human Resource And Administration Manager. Part E is for approval by Finance Sub-Committee. The form states that it was to be filled in 3 parts. Original was for staff personal file, second copy to be retained by Finance and Administration Manager and the 3<sup>rd</sup> Copy to be retained by the staff after approval.
12. The Claimant's leave form is only filled in part A and B. Part A is signed by the Claimant on 31<sup>st</sup> March 2016, and Part B is signed on 4<sup>th</sup> April 2016. Part C, D and E are blank.
13. The Claimant's letter of termination was issued by the 1<sup>st</sup> Respondent and is dated 4<sup>th</sup> April 2016. It is reproduced below:

4<sup>th</sup> April, 2016

Hasiah Makhokha

Secretary, Secondary Boys Section

Muslim Academy

Box 41013

Nairobi

Dear Hasiah,

Notice Of Termination Of Employment.



We regret to inform you that your employment with Islamia Madrassa Society is hereby terminated with immediate effect. Your employment, as discussed during the meeting held between yourself, the Secondary head and the HR on 25<sup>th</sup> February 2016 is being terminated because your attendance and your general conduct violates our School expectations and policies. You have received prior several verbal and written warnings that you signed and acknowledged. These warnings are in your personal file.

You have subsequently held several meetings with the HR Manager highlighting the progressive discipline practices and areas you needed to improve on; you have also been counseled repeatedly by your Section Head but despite all the verbal, written warnings and different discussions, you have not made any efforts to show some improvement on the same. This behavior cannot be countenanced and it also violates our code of conduct.

Based on your length of service, your notice period is 1 month. We shall therefore pay you a month's salary in lieu of notice, which shall be paid to you at the end of the month. We are also in the process of computing your gratuity and this will be paid to you once it is ready.

Yours sincerely,

Signed

Ms. Saifudin Saroya

Assistant Hon. Secretary — IMS

Cc: Human Resources Office - Personal file

Esmael Mamdani — Administrator & Finance Manager

The Head Teacher – Secondary Section

14. As is evident from the Letter of termination, there is no mention of maternity leave or in the letter.
15. The Claimant filled a Clearance Form on 7<sup>th</sup> April, 2016 that was signed by several departments of the Respondents.
16. In the Statement of Claim, the Claimant avers that her employment was terminated without being accorded an opportunity to defend herself and without just cause. It is her position that the termination was wrongful and unfair.
17. RW1 testified that there were several disciplinary hearings that the Claimant was subjected to before her contract was terminated. Under cross examination RW1 stated that there were no minutes of any disciplinary hearing. She stated that the disciplinary process was progressive, which she explained to mean that there were some warning letters, sometimes suspension and sometimes withholding of salary.
18. The letter of termination does not make any reference to disciplinary hearing but refers to previous incidents of misconduct. The Respondent produced an attendance register as evidence of late reporting to work by the Claimant, a letter of 1<sup>st</sup> warning for late reporting for work dated 6<sup>th</sup> June, 2011, another warning dated 15<sup>th</sup> April, 2013, a warning letter dated 15<sup>th</sup> November, 2015 and another warning letter dated 16<sup>th</sup> November, 2015.
19. Obviously, these warning letters could not form the basis of termination of employment on 4<sup>th</sup> April, 2016.



20. For termination to be fair, there must be valid reason as provided in section 43 of the *Employment Act* and fair procedure as provided in section 41 of the *Employment Act*. If either or both are not proved by an employer, the termination is unfair as provided in section 45(2) of the *Employment Act* which provides-
1. No employer shall terminate the employment of an employee unfairly.
  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 employee’s 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.
21. This position has been restarted in innumerable decisions of this court and the Court of Appeal which I need not rehash here.
22. From the evidence on record, the termination of the Claimant’s employment was without due process or valid reason.
23. Having been done just after the Claimant had applied for maternity leave, and noting the wording of the letter of termination, it would not be far-fetched to conclude that the real reason for termination was motivated by the Claimant’s application for maternity leave.
24. This would make it discriminatory and against the express provisions of Section 5(3) and 46 (a) and (b) of the *Employment Act* and Article 27 of the *Constitution* which provide for equality and freedoms from discrimination. The above sections are reproduced below for emphasis:
- i. Section 5 (3) of *Employment Act*
    3. No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
      - a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
      - b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
  - ii. section 46 (a) and (b) of *Employment Act*
    46. Reasons for termination or discipline
 

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

      - a. a female employee’s pregnancy, or any reason connected with her pregnancy;
      - b. the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;



iii. Article 27 of the constitution

Equality and Freedom from Discrimination.

27.

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need. (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

25. Had the Claimant prayed for damages for discrimination on grounds of pregnancy I would have awarded her the same. Since she did not I will award her maximum compensation at the rate of 12 months gross salary at ksh 240,000 to incorporate the same.

26. The Claimant prayed for gratuity. The same has been offered in her letter of termination and was computed by the Respondent at Annexure "IMS5N" at ksh 79,968 net of PAYE and what the Respondent refers to as "Tax Balance to KRA" in the sum of ksh 12,032. I award the Claimant the said sum of ksh 79,968.

27. The Claimant also prayed for 1 month's salary in lieu of notice. I award her the same at ksh 20,000.

28. The Claimant's prayer for transport allowance which she claimed to have been orally agreed upon was not proved. The same is declined.



29. In conclusion I award the Claimant the following against the Respondents jointly and severally:
- i. compensation ksh 240,000.00
  - ii. gratuity ksh 79,968
  - iii. pay in lieu of notice ksh 20,000
  - iv. the gratuity and notice payments shall attract interest at court rates from date of filing suit while the award on compensation will attract interest from date of judgment.
  - v. The Respondents shall pay the Claimants costs of this suit.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

