



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1432 OF 2016

ROBERT MUCHIRI.....CLAIMANT

VERSUS

ST. MARY ACADEMY.....RESPONDENT

JUDGMENT

Introduction

1. This dispute arises from an employment relationship between the Claimant, Robert Muchiri and the Respondent, St. Mary Academy. The Claimant lays out his claim in a Statement of Claim dated 20th July 2016 and filed in court on 21st July 2016. The Respondent filed a Statement of Response on 25th January 2017 to which the Claimant responded on 7th February 2017.

2. The trial proceeded before me on 7th October 2021, with the Claimant testifying on his own behalf and the Respondent calling its Executive Director, Ephantus Mugo.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in October 2013, as a Teacher earning a monthly salary of Kshs. 25,000.

4. The Claimant worked for the Respondent until 31st December 2014, when his employment was terminated, on allegations of poor performance.

5. The Claimant’s case is that the termination of his employment was without lawful cause and was in total disregard of due procedure.

6. He now claims the following:

- a) Leave pay for 1 year.....Kshs. 17,500
- b) Prorata leave for 3 months.....4,375
- c) 1 month’s salary in lieu of notice.....25,000
- d) 12 months’ salary in compensation.....300,000
- e) Certificate of Service
- f) Costs plus interest

The Respondent’s Case

7. In its Statement of Response dated 20th January 2017, the Respondent denies the Claimant’s claim and states that:

- a) The Claimant was issued with a termination notice on 30th November 2014, which was to take effect on the said date;

b) The Respondent paid to the Claimant Kshs. 21,778 vide cheque No 003412 dated 13th January 2015 as one month's pay in lieu of notice;

c) The Claimant took all his leave days from his entry into employment until his termination;

d) The Respondent had issued several warning letters to the Claimant on his unsatisfactory performance, which translated to very poor student performance. However, he failed to improve;

e) The reasons for termination were known to the Claimant as the Respondent had explained them to him.

8. The Respondent maintains that the termination was lawful and fair. Further, the Claimant was paid all his dues and was also issued with a Certificate of Service.

9. The Respondent denies the Claimant's entire claim.

Findings and Determination

10. There are two (2) issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant's employment was terminated by letter dated 29th November 2014 stating as follows:

"Dear MR Muchiri

RE: TERMINATION OF SERVICE

We regret to inform you that we have with effect from 30th November 2014 terminated your service on account of poor performance that is below our expectation.

In accordance with your terms of employment we offer you one month's salary in lieu of notice. This payment will be paid through your bank account.

We thank you for working with us and wish you all the best.

Yours faithfully

(signed)

Executive director"

12. According to this letter, the Claimant's employment was terminated on account of poor performance. This is a distinct ground for termination of employment under the Employment Act and the applicable procedure is well established under case law.

13. In *Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR Mbaru J* stated the following:

"...where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof.....to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance."

14. Similarly, in *Alois Makau Maluvu v Cititrust Kenya Limited & another [2018] eKLR Onyango J* stated:

"In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvement as was stated in the case of FREDRICK OWEGI V CIC LIFE ASSURANCE AND JANE WAIRIMU MACHIRA (supra)."

15. The holding in these decisions, with which I fully associate myself, is drawn from the procedural fairness requirements set by Section 41 of the Employment Act.

16. In the case now before me, there was no identifiable performance benchmark against which the Claimant's performance could be

measured nor was there an appraisal report to verify the allegations of poor performance. The ground of poor performance was therefore not proved.

17. What is more, in the course of the trial, the Respondent sought to introduce new grounds of termination in the nature of misconduct that were not mentioned in the termination letter and were not placed before the Claimant for his response.

18. In this regard, the Respondent exhibited warning letters that the Claimant denied having received. It was incumbent upon the Respondent to prove that these letters were indeed served on the Claimant and in the absence of any such proof, the Court adopts the Claimant's testimony that these letters were not issued to him.

19. In light of the foregoing, I find and hold that the termination of the Claimant's employment was without justifiable cause and was in violation of due procedure.

Remedies

20. I therefore award the Claimant six (6) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

21. The Respondent claims to have paid the Claimant one (1) month's salary in lieu of notice. The Claimant on the other hand, states that the payment received by him was with respect to his salary for December 2014.

22. The Respondent's Executive Director, Ephantus Mugo confirmed that the Claimant received the termination letter on 31st December 2014. It follows therefore that until the said date, the Claimant remained an employee of the Respondent and was entitled to salary for the month of December 2014. There was no evidence of any other payment made to the Claimant within this period and I agree with the Claimant that the subject payment was for his salary for December 2014 and not notice pay. He is therefore entitled to a further one month's salary in lieu of notice.

23. Regarding the claim for leave pay, the Respondent relied on the decision in *Brookhouse Schools Limited v Dorcas Njeri Gichuhi [2016] eKLR* where this Court stated thus:

"...the Court takes judicial notice that schools, as a category of employers, operate a set calendar where leave schedules for employees are set in advance. Lack of leave records cannot therefore be used as evidence that an employee is entitled to leave pay."

24. I have no reason to change my mind on this issue. At any rate, the Claimant himself admitted having taken breaks from work during the school holidays. The claim for leave pay is therefore disallowed.

25. The Claimant's Certificate of Service is on record and I will therefore not make any order under this head.

26. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....Kshs. 162,000

b) 1 month's salary in lieu of notice.....27,000

Total.....189,000

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Claimant will have the costs of the case.

29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2022

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JUDGE

Appearance:

Mr. Wanjohi for the Claimant

Mr. Bett for the Respondent