



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2592 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

SEMENTAINA KARIMI NJIRU

CLAIMANT

VERSUS

WALLANCE KAMAU

MRS MARY KAMAU

DIRECTORS, MISSIONS OF HOPE

INTERNATIONAL

1ST RESPONDENT

EXECUTIVE DIRECTOR,

NGO COORDINATION BOARD

2ND RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by a memorandum of claim dated 14th December 2016 filed in Court on 18th December 2016 alleging unlawful/unlawful termination and prays for:

- (a) A finding that the termination of services by the 1st Respondent is unlawful/wrongful.
- (b) 12 months' salary compensation under Section 49(1)(a) of the Employment Act
- (c) Salary for the unexpired period of the contract.
- (d) Costs of this claim.

2. The Claimant avers that the 1st Respondent NGO employed her as a social worker at Kiamaiko on 1st January 2014 under a one year contract after having served a probationary period of three months from February 2013 and a seven months' contract. The terms of employment included a basic salary of Kshs.11,700/-, house allowance of Kshs.5,250/- and a commuter allowance of Kshs.1,050/- per month. The contract was renewed for one (1) year on 1st January 2015 at a salary of Kshs.17,000/- house allowance, Kshs.6,250/- and a commuter allowance of Kshs.1,250/-.

3. It is further averred that on 1st January 2016 the 1st Respondent renewed the contract for three years on enhanced employment terms. The Claimant was in charge of children under the sponsorship of the Respondent.

4. The Claimant further avers that among the families supported by the 1st Respondent was a family of five under a registered guardian named Grace Opiyo. The children were Suleiman, Rose, Yvonne, Awino and Achieng, a mother of one. However, only Rose and Yvonne received support from the 1st Respondent. The family lives at Kiamaiko. The Claimant avers that Rose who was in class 5 joined class 6 in Joska School, Machakos which was under the management of the 1st Respondent. The school matron was one Loice and the counsellor was one Christine.

5. The Claimant further avers that during the first term in 2016, Rose had bleeding challenges and it was suspected that she was using family planning services but during the second term in May 2016, Rose reported to staff at the school that she had been sexually assaulted by the

brother Suleiman and disclosed that Grace Opiyo was in fact their mother. That the team from Joska School visited Rose's home at Kiamaiko to appreciate the family circumstances of Rose but did not notify the Claimant about the visit or its findings.

6. The Claimant further avers that it was the management of the 1st Respondent who requested her to report the allegations of sexual assault to the Children's Officer at Kariokor District Commissioner's Office which she did.

7. It is averred that the 1st Respondent verbally accused the Claimant for having failed in her duties to protect the children under her care and did nothing even after learning that Rose had been sexually assaulted.

8. That the Claimant was subsequently terminated on 14th July

2016 and was offered a one month's salary.

9. It is also averred that the Claimant was not taken through a disciplinary hearing.

Respondent's Case

10. The 1st Respondent filed its response to the memorandum of claim on 24th January 2018.

11. The Respondent avers that the Claimant, as a social worker was expected to know and adhere to the 1st Respondent's child protection policy on how to protect children.

12. That the Claimant neglected and/or failed to protect Rose from sexual assault and did not report the assault to the 1st Respondent.

13. Further, the Respondent avers that the Claimant was guilty of gross misconduct which warranted summary dismissal. That she failed her primary duty to protect children under her care both at home and school.

14. That the Claimant admitted knowledge of the matter in her undated letter.

15. Finally, it is averred that 1st Respondent acted on conformity with Section 44(4) of the Employment Act and prays that the Claimant's suit be dismissed with costs.

Claimant's Evidence

16. The Claimant adopted the written statement and was cross examined. The written statement replicates the memorandum of claim.

17. On cross examination, the Claimant confirmed that she was serving under a three year contract as at the date of termination.

18. The witness further confirmed that the family of Grace Opiyo was under her care. That when she learnt of the sexual assault against Rose from the Head of Department at Pangani, she reported the matter to the Children's Officer at Kariokor.

19. The witness further confirmed that she had read and understood the 1st Respondent's policy as well as its core business of protecting vulnerable children and families.

20. On re-examination, the Claimant testified that the sexual assault against Rose was reported to staff at Joska School. That she was not in charge of children at the school. The school had a social worker and a Counsellor who did not inform the Claimant about the assault and only learnt of it from the Head of Management and Programmes Manager at Pangani.

Respondent's Evidence

21. The Respondent's witnesses adopted the written statements and were not cross examined. One of the social workers based at Kiamaiko testified that the Claimant was a colleague at Kiamaiko in 2016.

22. He testified that sometime in May 2016 he received a call from the Coordinator of social work, one Lynn Maringa informing him that a pupil by the name Rose Akinyi had been sexually assaulted by the brother during the school holiday. That she was calling to enquire about the whereabouts of the Claimant who was responsible of the family as she could not be reached on phone.

23. The witness further testified that he later learnt that on the day in question, the Claimant was at the Kiambu Hospital with a sibling of Rose Akinyi who had collapsed in school. That the Claimant taken her to Pangani MoHI Clinic and was referred to Kiambu Hospital and the Claimants phone had broken down.

24. The witness testified that he was requested by the Coordinator to intervene and establish the truth. It was his testimony that he and the Kiamaiko Centre Manager, one Isaac Nang'odia visited the family of Grace Opiyo but Rose's mother insisted that she was only a guardian to the family.

25. Finally, it was the Respondent's testimony that RW1 was requested to report the case to the Children's Centre and prepare a report on the recommendations of the children's centre.

Claimant's Submissions

26. The Claimant identifies three issues for determination, namely; whether the Claimant was guilty of child neglect, whether termination was unfair and whether the Claimant is entitled to the reliefs sought.

27. As regards the accusation of child neglect, the Claimant submits that she could not have done much since the child was attending Joska School at the time. That while attending school at Kiamaiko up to class 5, the Claimant successfully monitored the family that lived in a single room at Kiamaiko.

28. It is further submitted that the child had already transited to Joska School which had a social worker and a school matron who were in charge of the child. That since the incident was reported to Joska School, the management of the school should have sought justice for the child and taken her through counselling. It is submitted that the matter should have been reported at Machakos Police Station. That the allegations of child neglect should have been directed to Joska School Management.

29. Moreover, that the management of the 1st Respondent was aware of the challenges of siblings and parents living in single rooms and did not provide additional funding.

30. As to whether the Claimant's termination was unfair, reliance is made on Sections 43, 45(2) and 47(5) of the Employment Act to underscore the essentials of a fair termination with specific reference to the reasons for termination and the burden of proof to be borne by the employer.

31. Article 41 of the Constitution of Kenya, 2010 is also cited to emphasise the need for fair labour practices.

32. Section 41 of the Employment Act is relied upon to accentuate the importance of procedural fairness in termination of employment contracts.

33. It is submitted that the termination of the Claimant's employment was both substantively and procedurally unfair. The decisions in **Fredrick Odongo Owegi v CFC Life Assurance Limited [2014] eKLR** and **John Ratemo Ondiek v Islamic Relief Food World Wide [2014] eKLR** as well as **National Bank of Kenya Limited v Samuel Nguru Mutunya [2014] eKLR** are relied upon to urge that compliance with Sections 41,43 and 45 of the Employment Act was mandatory.

34. As to whether the Claimant is entitled to the reliefs sought, it is submitted that the remedy of re-engagement that has no time limit and the Court is urged to order the same to give life to the Claimant as well as salary for the unexpired duration of the contract, 29 months and 16 days equivalent to Kshs.744,250/-.

35. Reliance is made on the decision in **George Njogu Ndungu v Keroche Breweries Limited [2018] eKLR** where the Court awarded 18 months being the remainder of the contract.

Respondent's Submissions

36. The Respondent submits that the Claimant was terminated due to gross misconduct and neglect of duty in that he failed to report sexual assault of a child under her care contrary to the mandate of the 1st Respondent to safe guard vulnerable children and was conversant with the 1st Respondent's policy. That she was accorded an opportunity to defend herself but failed to do so.

37. The Respondent further submits that if the Court find the Respondent culpable, the award should not exceed six months since the Claimant had also sued for the remainder of the contract.

38. Reliance is made on Section 44(4)(c) of the Employment Act to urge that the termination was proper since the Claimant had failed to report the sexual assault against the child. It is submitted that the Respondent had reason to dismiss the Claimant.

39. Further, it is submitted that the failures of Claimant warranted dismissal and the Respondent's action was justified. On compensation and the remainder of the contract reliance is made on the decision in **Eric Ochieng Apollo v Vision Institute of Professional Studies Limited Industrial Cause No. 18 of 2012** where the Court declined to award compensation for the remainder of the contract after awarding the Claimant compensation for the entire duration for the unlawful termination.

Analysis and Determination

40. The issues for determination are: -

- a) Whether the Claimant's summary dismissal was unlawful or unfair;
- b) Whether the Claimant is entitled to the reliefs sought.

41. As regards the fairness or otherwise of the termination, Section 45 of the Employment Act 2007 is the bedrock of fair termination. The

Section provides that –

(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.

42. In addition, Sections 43 and 47(5) of the Act set forth the burden of proof to be discharged by the employer and the employee.

43. Finally, Section 41 of the Act provides the procedural steps

to be complied with by an employer in the conduct of a lawful and fair termination.

44. These provisions have been robustly and steadfastly enforced by this courts and the Court of Appeal in legions of decisions. Courts have been unapologetic that for a termination to pass the fairness test, there must have been a substantive justification and the procedure must have been fair. See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Standard Group Limited v Jenny Luesby [2018] eKLR** and **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**.

45. I will now proceed to apply the law to the facts of the instant case.

Reasons for Termination

46. The termination letter dated 14th July 2016 stated *inter alia* that –

“Please notice the child who was under your care was sexually abused and even after getting to know, you did nothing to help the child get justice or to offer counselling service to the child. This is total negligence and against the organisation’s policy warranting immediate termination. For that reason, you are terminated with immediate effect. Consequently, your last working day with Missions of Hope will be 14th July 2016.”

47. Whereas the Claimant submitted that it was the duty of Joska School to protect the child in their custody, the Respondent argued that it was the Claimant’s duty to do so and report the alleged violation of the child’ rights. The Claimant further avers that she reported the matter to the children’s centre at Kariokor.

48. The Court notes the following:

49. First it is not in contest that the Claimant was in charge of the family of Grace Opiyo, the guardian to the child (Rose Akeyo) who was one of the two children under the sponsorship of the 1st Respondent.

50. Second, it is not in dispute that the child was molested at home during the holiday but only reported the same to the Management of Joska School (Machakos) when the school opened for term II. There is no evidence on record on whether the Claimant met the child during the school holiday or they had an engagement or visited the family for an update.

51. The undated letter by the Claimant is reporting what she had been told about the child. It made no reference to an encounter with the children. It makes reference to another social worker.

52. It is evident that the Claimant as unaware of the molestation until she was informed by the management of the 1st Respondent.

53. Third, it is unclear why the social worker and the Counsellor at the Joska School did not inform the Claimant about the child’s condition or circumstances or visit but called the Claimant’s employers. The submission by the Claimant that the burden of protecting and reporting the violation fell exclusively on Joska School is not sufficiently persuasive as the violation took place elsewhere and the culprit was known.

54. Relatedly, there is no evidence on record of the outcome of the report made to the Children’s centre at Kariokor.

55. The testimony that the Claimant was at the Kiambu Hospital after a referral to the hospital from Pangani and that the phone had broken down is unconvincing why she appears to know so little about the child under her care as a social worker.

56. From the evidence on record, it is unclear whether the Claimant had established contact with the social worker at the Joska School for feedback on how the child was doing.

57. Although the Claimant tendered no evidence on the number of homesteads or families which were under her care, it is clear that she had not kept a tab on the family and in particular the two children under the sponsorship of the 1st Respondent.

58. It is puzzling how such a serious violation of the child's rights could remain unreported until the child reported to school yet she had a social worker in whom she could have confided.

59. In the Court's view, the Claimant should have known this family better than she did. Having testified that she was conversant with the 1st Respondent's child protection policy and mandate, she ought to have rendered a better account of the child than she did.

60. For the above reasons, it is the finding of the Court that the Respondent has on a balance of probabilities established that it had a valid, fair and justifiable reason to dismiss the Claimant on 14th July 2016. Section 44(4)(c) of the Employment Act empowers an employer to dismiss an employee summarily where

“an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

Procedure

61. Section 41 of the Employment Act, provides that –

(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.

62. In **Standard Group Limited v Jenny Luesby (supra)** the Court of Appeal expressed itself as follows in relation to Section 41 of the Employment Act –

“That procedure has been construed by the Industrial Court in the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd, [2013] eKLR, as a mandatory process and the holding was approved by this Court in the case of CMC Aviation Limited v Mohammed Noor [2015] eKLR.”

63. It is not in dispute that the Claimant was not taken through any form of disciplinary process. The termination letter dated 14th July 2016 makes no reference to a meeting or disciplinary hearing. The Respondent did not issue a notice to show cause nor invite the Claimant to a disciplinary hearing and no minutes or record of such meeting were provided.

64. Put in the alternative the Respondent led no evidence that Claimant was taken through any form of disciplinary hearing.

65. The noncompliance with the provisions of Section 41 of the Employment Act implies that the summary dismissal of 14th July 2016 was procedurally defective.

66. It is the finding of the Court that termination of the Claimant's employment by the Respondent was unfair.

67. I will now proceed to deal with the reliefs prayed for by the Claimant. The first prayer is that the Court finds that the Claimant's termination of employment by the Respondent is unlawful. The Court has so found.

68. The second relief is 12 months' salary compensation for the unfair termination. Having found that the Claimant's termination of employment was unfair, the Claimant is eligible for the remedies provided by Section 49 of the Employment Act. Specifically, the remedy of compensation under Section 49(1)(c) of the Act.

69. In arriving at the level of compensation, the Court is enjoined to take into consideration the parameter set out in the Section 49(4) of the Employment Act. In the instant case, the Court has taken the following into account: -

70. In the instant case, the Court has taken the following into account –

i) The Claimant was serving the 1st Respondent under a three year fixed term contract from 1st January 2016. She had previously served under one year contracts from January 2014. Although the Claimant averred that she was an employee on 2013, she tendered no evidence to that effect and had therefore served for about 2½ years and wished to continue as evidenced by the prayer for

payment for the unexpired duration of the contract.

ii) The Claimant substantially contributed to the summary dismissal.

71. For the foregoing reasons, the equivalent of two months' salary is fair.

72. The third and final relief is the salary for the unexpired period of the contract under Section "49(a)" read together with Section "49(b)" of the Employment Act 2007. It is unclear whether the Claimant meant Sections 49(1)(a) and Section 49(1)(b) of the Act. Section 49 of the Act has neither Section 49(a) nor Section 49(b).

73. Be that as it may, the claim envisioned here amounts to anticipatory earnings or benefits which this Court and the Court of Appeal have been reluctant to award for want of legal justification. The Court is guided by the sentiments of the Court of Appeal in **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR** as follows: -

"We have considered whether, from the facts of this appeal, the appellant was entitled to a further award for compensation in terms of the anticipatory benefits. One of the factors to be considered under section 49 of the Employment Act is Section 49(4)(f) which provides that "the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;" as well as at Section 49(4)(g) "the opportunities available to the employee for securing comparable or suitable employment with another employer.

*On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013)** this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) **Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011)** ...*

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails."

74. The Court is bound by these sentiments.

75. It is important to note that the three (3) year contract effective from 1st January 2016 had an exit clause. Clause 10 of the contract provided that *"Either party can terminate services by giving one month's notice or one month's salary in lieu of notice."*

76. The decision in **George Njogu Ndungu v Keroche Breweries Limited [2018] eKLR** relied upon by the Claimant where Wasilwa J. awarded the salary for the unserved portion of the contract is distinguishable in that the Respondent in the case disguised an unlawful and unfair termination as a redundancy. Relatedly, the Claimant had not prayed of compensation under Section 49(1)(c) of the Employment Act.

77. The Court is persuaded by the holding in **Eric Ochieng Apollo v Vision Institute of Professional Studies Limited (supra)** where Onesmus Makau J. ordered payment of salary for the remainder of the term but declined to award compensation under Section 49(1)(c) of the Employment Act. The Learned Judge expressed himself as follows –

"Otherwise, in my view, it would be unjust and irrational to order further relief for procedural unfairness after awarding the employee his whole salary for the unexpired period of his fixed term contract."

78. For the above reasons, the claim for the unexpired period of the Claimant's fixed term contract is **declined**.

79. In the upshot judgment is entered for the Claimant against the Respondent as follows:

(a) Equivalent of two (2) months' salary.

(b) Costs of this suit.

(c) Interest at Court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE