



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 271 OF 2018

SHEILA FAITH FUNA ESPOSITO.....CLAIMANT

- VERSUS -

NYALI ACADEMIC SERVICES T/A THE MOMBASA ACADEMY..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th February, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 24.04.2018 through Anne Wamithi and Company Advocates. There is no dispute that at all material time the claimant was employed by the respondent as a mathematics and science teacher as per the letter of employment dated 29.05.2015 for the term 01.09.2015 to 30.06.2017 at Kshs.70, 000.00 per month. The contract was renewed on 08.05.2017 for the period between 01.09.2017 and 30.06.2019.

The claimant's case is that on 20.04.2017 she notified the respondent that effective 03.09.2017 she would be due for maternity leave and requested the respondent to make alternative arrangements for her teaching assignments during the coming maternity leave. The claimant states that she had an early emergency caesarean section and was blessed with twins on 04.08.2017 so that her maternity leave had to commence accordingly. It is her case that while on maternity leave in October and November 2017, the respondent withheld her monthly salaries. The claimant alleges that during the maternity leave the respondent harassed, intimidated and discriminated her occasioning great psychological torture, loss and damages resulting in unlawful dismissal on 25.01.2018 in violation of Articles 27(4); 28; 41; and 50 of the Constitution of Kenya 2010, section 5(2) and (3); 29; 31; 41; 44(1) and (2); 46(a), (b) and (h) of the Employment Act and the 3rd schedule of the Income Tax Act. The particulars of intimidation, harassment and discrimination were pleaded as follows:

- a) On 09.11.2017 the respondent wrote asking the claimant to forego her maternity leave and to report to work on 06.11.2017. The claimant replied that her maternity leave was to end on 28.11.2017.
- b) The claimant reported at work on 29.11.2017 the respondent failed to assign her duties despite her request to be so assigned.
- c) By notice dated 30.11.2017 the respondent invited the claimant to a disciplinary meeting on 01.12.2017 and the claimant states the disciplinary proceeding was about her maternity leave.
- d) The claimant had acted within contract to give notice of her maternity leave and the respondent purported to act unfairly to deny her the summer holiday days.
- e) On 07.12.2017 the respondent promoted the claimant to teach senior classes and the claimant requested the school head (by email dated 03.01.2018) for assistance for her smooth transitioning to the senior (examinations) classes she had been assigned on 07.12.2017 but she received no response.
- f) On 09.01.2018 she requested for lesson plans or co-teaching support for smooth transition to senior examination classes but none were given despite that, mock examinations were due in two months.
- g) On 09.01.2018 her classes were re-assigned to other teachers.
- h) The head teacher attended a class the claimant was teaching in a sham appraisal and on 10.01.2018 she was not given notes of the appraisal as she had requested for.
- i) On 11.01.2018 the head teacher informed the claimant by email that her classes had been reassigned to other teachers.

The claimant's further case is that on 12.01.2018, she received a notice of disciplinary hearing fixed for 15.01.2018 upon allegations that she had failed to discharge her responsibilities despite the respondent re-assigning the claimant's duties to other teachers. The claimant attended accompanied with her spouse and the hearing was adjourned on that account – the respondent taking the view that the disciplinary hearing was an internal proceeding purely between the parties. The notice dated 16.01.2018 invited her to a disciplinary hearing fixed for 18.01.2018 and she attended and further laments that the panel members were all male and from the same ethnic tribe. On 19.01.2018 the claimant was informed by the deputy head teacher that instructions had been given that she is not assigned duties – and the claimant wrote to the head teacher asking for copy of the minutes of the disciplinary hearing of 18.01.2018 and whether she was still on suspension. The claimant further pleads that on 22.01.2018 the head teacher informed her that he was waiting for a reply from the school's owner one Mr. Prinja and one Ms. Bhanu of the respondent's Finance Department. The claimant alleges that on 25.01.2018 the head teacher had tried to coerce her to sign minutes of the disciplinary meeting of 18.01.2018 but she declined to do so because the minutes were not accurate. Further, on 25.01.2018, the claimant states that she received a dismissal letter terminating the employment on account that the claimant was unwilling to take charge of the classes assigned to her despite the respondent allocating the claimant's classes to other teachers without her knowledge. It is her further case that PAYE was miscalculated and the respondent failed to refund or reimburse the excess deduction for January 2018. The claimant pleads that she suffered psychological, mental anguish, and humiliation before her colleagues and students and loss of earnings. She claimed for:

- a) Three months' notice in lieu of notice Kshs. 231, 000.00.
- b) House allowance Kshs. 252, 000.00 then Kshs. 57, 750.00.
- c) Unlawful PAYE deduction January 2018 Kshs.4, 789.60.
- d) 12 months' compensation Kshs. 924, 000.00.

The claimant prayed for judgment against the respondent for:

- a) The declaration that the purported disciplinary action as covered in letters dated 30.11.2017, 12.01.2018, 16.01.2018 is unfair, unprocedural, unlawful and void and contrary to the Constitution of Kenya, 2010 and labour laws.
- b) Three months' salary in lieu of notice Kshs. 77, 000.00 x 3 = Kshs. 231, 000.00.
- c) Unpaid house allowance for the period served Kshs. 309, 705.00.
- d) Unlawful PAYE deducted Kshs. 4, 789.60.
- e) 12 months' compensation for unfair termination Kshs. 924, 000.00.
- f) Damages for discrimination.
- g) Costs.
- h) Interest on b, c, d, e, f and g at court rates.
- i) Any other relief the honourable court may deem fit to grant.

The respondent filed the memorandum of reply on 30.05.2018 through Daly & Inamdar Advocates. The amended memorandum of reply was filed on 14.06.2018. The respondent pleaded as follows:

- 1) It was admitted that the respondent employed the claimant for a term contract which was extended as pleaded for the claimant. The last contract was running from 01.09.2017 to 30.06.2019 but the claimant was summarily dismissed from employment on 25.01.2018.
- 2) The claimant wrote on 20.04.2017 conveying that she was due to give birth on 03.09.2017 and requested to be on maternity leave and alternative arrangements be made on covering her lessons.
- 3) On 30.10.2017 the claimant's husband orally informed the respondent that the claimant had in fact delivered twins on 04.08.2017 while she was on an annual leave. The respondent's case is that her maternity leave had therefore commenced on 28.08.2017 and ended on 28.11.2017 with full pay.
- 4) There were issues about the period of the maternity leave and whether she had served due notice for the leave but which were sorted out prior to the claimant's termination. The summary dismissal on 25.01.2018 had nothing to do with the maternity leave. The respondent denied withholding the claimant's salary for whatever reason.
- 5) The claimant previously taught year 4 and 5 and there were parents who were not happy with her performance. The respondent therefore assigned the claimant to teach senior classes for which she was qualified to teach. On 12.07.2017 the respondent wrote to the claimant conveying that after maternity leave she would be assigned to teach the senior classes.
- 6) On 07.12.2017 the head teacher and the head of physics met the claimant and she was instructed that she would be redeployed to

the senior school from January 2018. She was formally redeployed by a letter dated 07.12.2017. The claimant then wrote an email on 14.12.2017 to the head teacher and protesting that she was not prepared to teach senior school. The respondent replied on 18.12.2017 that the claimant was qualified to teach the senior classes but she was adamantly refusing to do so. The claimant was instructed by her supervisor to undertake the assignment but she protested again by the email of 21.12.2017 that she was inexperienced to teach the senior examination classes as assigned.

7) The parties had further correspondence and the respondent states that the claimant failed to undertake the teaching of the senior classes as had been assigned or instructed and amounting to insubordination. A letter to show cause was issued on 12.01.2018 and invited the claimant to a disciplinary hearing on 15.01.2018, accompanied with a fellow employee of her own choice. The claimant arrived at the hearing with her husband one Pasquate Esposito who was not a fellow employee. The hearing could not proceed because the claimant insisted that the husband attends but the respondent rejected that position as being outside the applicable law. The meeting was adjourned to 18.01.2018 and the claimant wrote a long email on 15.01.2018 purportedly as a response to the letter to show cause dated 12.01.2018.

8) On 18.01.2018 the claimant attended and stated that she had said all she had to state in reply as per her email of 15.01.2018. The claimant declined to sign minutes of the meeting held on 18.01.2018 and she was requested to report on duty the following day pending outcome of the disciplinary hearing. She was summarily dismissed by the letter dated 25.01.2018 and which set out full reasons for the dismissal. She was paid 25 days worked in January 2018 Kshs. 64, 167.00; gratuity per contract Kshs. 14, 887.00; less PAYE Kshs. 16, 372, NSSF Kshs.200.00 and NHIF Kshs. 1, 400.00; and making a net payment of Kshs. 61, 082.00. She acknowledged the payment by signing on 23.01.2018 in final settlement. The certificate of service dated 26.01.2018.

9) The reason for termination was that the claimant refused to discharge her duties as per her contract of employment. Having been summarily dismissed she was not entitled to contractual 3 months' salaries for notice pay. The salary was inclusive house rent provision and she was not entitled as prayed for. As termination was not unfair, she was not entitled to 12 months' salaries in compensation. The claimant had not been subjected to discrimination as was alleged. The respondent therefore prayed that the suit be dismissed with costs.

The claimant filed a reply to the response on 08.06.2018. She urged that she had been given a short notice to teach the senior examination classes. She pleaded that the assignment to teach senior classes had been premature as it was to commence in January 2018 and not earlier.

The claimant testified to support her case. The respondent's witness (RW) was Carey Yiembe, the Head Teacher. The Court has considered the pleadings, evidence and the final submissions. The Court returns as follows.

To answer the **1st issue** the Court returns that there is no dispute that parties were in a contract of service.

To answer the **2nd issue** the Court returns that the respondent summarily terminated the contract of service by the letter dated 25.01.2018.

To answer the **3rd issue**, the Court returns that the procedure leading to the claimant's summary dismissal was not unfair because it entailed a notice of allegations and a disciplinary hearing as envisaged in section 41 of the Employment Act, 2007. The claimant received the letter to show cause and was invited to a disciplinary hearing.

To answer the **4th issue**, the Court returns that the respondent has established the reason for termination existed and was genuine as at the time of termination. The undisputed evidence is that the respondent employed the claimant to teach mathematics and science. The contract provided that the claimant was contracted to teach and to carry out whatever duties as may be assigned from time to time. By the letter dated 07.12.2017 the respondent assigned the claimant to teach and allocated her as follows:

- a) Year 12 Physics, Nature of light unit.
- b) Year 12 Physics, Mechanics Unit.
- c) Year 13 Physics, Astro physics unit.
- d) Year 11 F.P Maths, Further trigonometry unit.
- e) Year 12 Maths (normal), Remedials.
- f) Year 12 (FP group), C3 module.
- g) Year 12 Maths, Integration unit.
- h) Year 13 Maths, Hypothesis testing unit.

The evidence shows that the claimant was unwilling to take up the assignment per the contract of service and instead raised excuses such as need for certain handover, short notice, in event of complaints by parents or learners she would not take responsibility, it was too close to mock examinations and other excuses in the correspondence on record. It is submitted for the claimant that she took up the assignment in view that she attended classes despite her reservations that the notice was short and she had not prepared to teach the senior classes. However, the Court returns that the submission is inconsistent with the claimant's own evidence in re-examination thus, **"I had given notice of pregnancy in April 2017, in writing. I did not resume duties after maternity leave. I was assigned other classes – it was not the**

same duties.... I do not agree that the respondent had the right to redeploy me after maternity leave. It was contrary to Section 29 of the Employment Act. A smooth transition was necessary. I did not at any time refuse to work. I asked for co-teaching to take place. I said I was ready to learn....” The Court finds that by that evidence, at that material time, the claimant lamented that she needed mentorship by way of co-teaching whereas she had been employed as competent and qualified to teach mathematics and science as had been assigned – and in the words of RW’s testimony, the respondent had not employed the claimant to be trained but as an already qualified teacher for mathematics and science. Section 29 (2) of the Act provides that at expiry of the maternity leave, the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity. The evidence is that the job the claimant held was to teach maths and science. The notice of redeployment to teach senior classes had been conveyed long before the start of the maternity leave and the claimant had not raised objection prior to proceeding on leave, and the claimant testified that she welcomed the promotion to teach the senior classes. The job held not having changed at all except for the redeployment and the claimant having enjoyed a renewal on promotion, section 28(1) of the Act does not aid her case. The correspondence between the claimant and RW show that while the claimant stated that she was willing to teach and she was attending classes as assigned, she had made it clear she was not able to deliver unless she was accorded a smooth transition through mentorship, co-teaching and handover. The correspondence further show that the respondent took charge of the classes otherwise assigned to the claimant and other teachers were then promptly assigned her lessons in view of a deadline that was looming in terms of syllabus coverage. The respondent had taken such measures after the claimant had threatened that should the parents air their concerns or disappointment, she would uphold her professional ethics and be honest and tell them that she was trying her best given the duress she was in and put them in the picture out of concern for the candidates – and the Court considers that such rejection of responsibility by the claimant made it manifestly clear that she was not ready to work as reassigned and it amounted to a fundamental breach of the contract of service on her part. Taking into account the evidence and the rapid flow of events in a demanding and time bound academic calendar, the Court finds that the claimant was notified about the reassignment to teach the senior classes well in advance, the assignment to teach physics and maths units in the senior classes was within the contractual duty of the claimant, the claimant indicated to the respondent that she would not properly carry out the instructions to teach senior classes as assigned, the respondent moved to remedy the situation by promptly assigning other teachers in place of the claimant, and in the meantime, the disciplinary process issued.

Thus, as pleaded and as submitted for the respondent, the contract required the claimant to work and teach maths and science as was assigned but she failed to do so. In terms of section 45 of the Act, the Court returns that the reason for termination related to the claimant’s conduct and compatibility or suitability and also the respondent’s operational requirements and it was a fair reason.

To answer the 5th issue for determination, the Court finds that the claimant was not discriminated on account of pregnancy as alleged and urged for her. The evidence was that she was accorded the maternity leave which coincided with the school vacation. The parties were thereafter in a dispute on the period and notice of the maternity leave resulting in a disciplinary proceeding in which the claimant was exculpated. The first fixed term contract was ending on 30.06.2017 and on 20.04.2017 the claimant wrote requesting for maternity leave. The Court finds that despite that notification, the respondent extended the contract effective 01.07.2017 showing that there existed no manifest intention to discriminate the claimant on account of pregnancy – as the respondent obviously had an option not to extend the contract but elected to extend it. The Court finds that the evidence was that parties were in a genuine dispute about the period and notice of maternity leave and once the related disciplinary case was determined, the matter ended. The Court finds that the claimant has not provided evidence to establish that the subsequent summary dismissal had proximal connexion to the earlier determined disciplinary case relating to the maternity leave notice and period. Further, the claimant, in cross-examination, testified thus, “**I was expectant by the time my contract was renewed. My salary was paid in full during maternity leave. I resumed duty after maternity leave....**” The Court finds that the evidence is inconsistent with the alleged discrimination on account of pregnancy. The Court finds that the alleged constitutional violations were not established at all and no damages are justified in that regard.

The 6th issue is whether the claimant is entitled to the remedies as prayed for. As submitted for the respondent, the respondent was entitled to dismiss with shorter notice than the contractual notice as provided in section 44 of the Act and on account of the gross misconduct and clause 6(i) of the contract provided thus, “**The Company reserves the right to terminate the Contract at any time, and without notice, for reasons of gross misconduct, in which event the Employee will be entitled to only the salary up-to the date of termination.**” The claimant is therefore not entitled to compensation and notice pay as was prayed for. The evidence was that the salary was consolidated with reasonable provision for house rent as envisaged in section 31 of the Act and the prayer for house allowance is found unjustified as it was outside the contractual terms. Clause 4 on salary stated thus, “**The employee will be paid a gross salary of Kshs. 77, 000.00 per month inclusive of any responsibility allowance.**” The Court finds that parties were bound accordingly.

It was submitted for the claimant that for January 2018 the amount payable was Kshs. 64, 167.00 and the PAYE thereon was to be Kshs.11, 582.60 and not Kshs.16, 372.00 that was deducted so that, the claimant prays for a refund of **Kshs.4, 789.60**. The respondent’s pleadings show that the amount was payable for January as urged for the claimant and the disputed deduction took place. The respondent was silent on the issue in its submissions. The Court finds that the claimant is entitled as prayed for. In that view and looking at the parties’ otherwise margins of success, each party to bear own costs of the suit.

In conclusion judgment is entered for the parties for:

- 1) The respondent to pay the claimant a sum of **Kshs. 4, 789. 60** plus interest at Court rates from the date of filing the suit until the date of full payment.
- 2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE