



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 196 OF 2016

NAOMI WANGUI KUNG'U.....CLAIMANT

VERSUS

BOARD OF GOVERNORS S.C.L.P SAMAJ SCHOOL.....RESPONDENT

JUDGMENT

1. The suit was filed on 12th February, 2016 by the claimant seeking the following reliefs:-

(a) Maximum compensation for unlawful termination. 50,000.

(c) Notice pay – Kshs 50,000.

(d) Severance pay – Kshs 125,000

(e) Certificate of Service

(f) Salary for December, 2015- Kshs 50,000

(g) Costs and interest.

2. The statement was amended on 8th February, 2019.

3. The claimant testified as C.W.1 and adopted a witness statement dated

12th February, 2016 as his evidence in Chief. C.W.1 testified that she was employed by the respondent on 1st November, 2011 as a teacher. That she had a letter of appointment of the even date. C.W.1 produced list of documents in support of her case including the letter of appointment, the letter of termination dated 28th November, 2015 and Ledger Book showing salary payments. The claimant also produced a letter of demand dated 4th January, 2016. C.W.1 testified that she worked continuously for the respondent until the date of termination. That she was not granted annual leave during the tenure of employment and that the respondent deducted her salary whenever she took statutory leave. That she worked from Monday to Saturdays despite the Ministry of Education prohibiting Saturday classes. That whenever the claimant refused to work on Saturdays, she was served with a letter for neglect of duty and his salary was deducted without any justification.

4. C.W.1 testified that she performed well but constantly harassed by the Deputy Principal Mrs Singh. That she was prevented from attending hospital whenever she was sick because any sick-off letter was questioned. That she would be deducted salary whenever she took sick off days.

5. That she was dismissed without notice to show cause or any hearing. That she was not paid terminal benefits upon termination. That the dismissal was unlawful and unfair.

6. Under cross-examination by Mr. Maina for the respondent, C.W.1 stated that she was given statutory leave during school holidays in April, August and December. C.W.1 said she worked during public holidays and Saturdays. C.W.1 stated that her services were satisfactory hence worked for 5 years. C.W.1 added that she was discriminated on salary increments. That she was not involved in performance appraisal. C.W.1 stated she was entitled to payment of gratuity. The claimant said she did not get the dismissal letter sent to her on time.

7. On re-examination, C.W.1 said salary slips show deductions unlawfully made on her salary. That she had written warnings on lateness three (3) times. That salary was deducted for the whole weekend if one failed to come on Saturday.

8. C.W.1 added that she was not invited to any disciplinary hearing but only received the letter of dismissal.

9. C.W.1 prays to be awarded as set out in the Statement of Claim.

10. R.W.1 **Kawaijit Kaur Singh** testified for the respondent. R.W.1 stated that he was the Deputy Principal of Respondent. That he relied on a recorded witness statement dated 24th November, 2016 as his evidence in Chief. C.W.1 stated he worked for the respondent from May, 2004 and that C.W.1 was employed as a class teacher on 6th January, 2011 to teach Mathematics and Science subjects to classes 3, 4 and 5 pupils.

11. That between 2011 and 2014, the claimant received warning letters for different professional misconduct. In 2015, C.W.1 received verbal warnings regarding her dress code and reporting late. That respondent received complaints from parents that C.W.1 had subjected their children to corporal punishment which was a breach of school rules.

12. That claimant on several occasions absconded work without permission. Claimant also had issues on exam supervision.

13. That due to these complaints, the respondent did an appraisal of the claimant's performance which never improved and her respective classes performed poorly in academic due to her incompetence and breach of terms and conditions of employment.

14. Under cross-examination, RW1 stated that C.W.1 received several warnings. That she responded to some and not to others. That she also received verbal warnings. That the letter dated February, 2012, shows C.W.1 subjected pupils to corporal punishment and parents complained to the principal.

15. R.W.1 insisted that C.W.1 absconded duty severally. R.W.1 said he had no student's performance records before Court.

16. R.W.1 stated that letter of termination was dated 28th November 2015 which was a Saturday. That Saturdays were working days. R.W.1 stated that termination was with immediate effect. R.W.1 stated that the Respondent did not hear the claimant before termination but had engaged her in the past on different occasions. R.W.1 did not have a record of any of the past disciplinary hearings. R.W.1 prayed that the suit be dismissed with costs.

17. The claimant filed submissions dated 17th August, 2021 whereas Respondent filed submissions dated 10th September, 2021. The issues for determination are:-

(a) Whether the dismissal of the claimant from employment was for a valid reason and whether respondent followed a fair procedure in dismissing the claimant.

(b) Whether the claimant is entitled to the reliefs sought.

18. In answer to (a) above, it is clear that the claimant was summarily dismissed from work by the respondent without notice; notice to show cause and or a disciplinary hearing. This comes out clearly from the testimony of C.W.1 and R.W.1. The respondent has emphasized alleged past misconduct by the claimant between the years 2011 to 2014 in respect of which the claimant had received written and verbal warnings. The respondent also states that appraisals done on the claimant showed that the claimant performed poorly in her work and her students consequently did poorly in their exams and parents of the pupils complained to the school that C.W.1 was administering corporal punishment on their children.

19. The letter of termination dated 28th November, 2015 simply stated that the school management and parents were not satisfied with the performance by C.W.1 as a teacher. The termination was with immediate effect and the claimant was to hand over to the Principal by 30th November, 2015.

20. The provisions of Section 41, 43 and 45 are clear. An employer who wishes to summarily dismiss an employee without notice in terms of Section 44 of the Employment Act, 2007 must give a Notice to Show Cause to the employee and notify them to respond to specific charges levelled against them for which they may be dismissed if found guilty. In terms of Section 41, the employer must also arrange for an opportunity to explain his/her case and be accompanied by a representative of choice.

21. This did not happen in the present case. The claimant was simply dismissed without notice, notice to show cause and or any hearing.

22. The respondent lost opportunity to establish a valid cause to dismiss the claimant. The claimant was denied opportunity to be heard. The summary dismissal was therefore wrongful and unfair and in violation of Section 41, 43 and 45 of the Employment Act, 2007. The Court so finds.

23. Accordingly, the claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Act.

24. In this respect, the claimant had served the respondent for a period of 5 years. The record of the claimant was blemished by issues of misconduct. However, the summary dismissal was not linked to that history in a fair and valid manner. The claimant did not get terminal benefits upon dismissal. The claimant lost employment without notice at all and suffered loss and damage. The claimant was not

compensated for the loss of employment.

25. The Court relies on a similar case of **Bansio Ngota –vs- Market Masters Limited, ELRC Cause No. 438 of 2016** in which the Court awarded the claimant who had served the respondent for a period of 8 years the equivalent of 10 months' salary in compensation. The claimant had also been summarily dismissed without compensation and or payment of terminal benefits.

26. The Court awards the claimant herein the equivalent of six (6) months' salary in compensation for the wrongful and unlawful dismissal.

Terminal Benefits

27. The claimant has proved on a balance of probabilities that she is entitled to payment in lieu of one month notice following the summary dismissal in the sum of Kshs 50,000.

28. In terms of the contract of employment dated 1st November, 2011, the claimant has demonstrated that she was entitled to payment of gratuity upon completion of minimum of three (3) years' service excluding probation. The gratuity was not paid. The Court awards the claimant gratuity in the sum of Kshs 50,000 as claimed.

29. With regard to the claim for severance pay, the summary dismissal was clearly not a retrenchment and so this claim is misconceived and is dismissed.

30. The Court finds that the claimant is entitled to grant of a certificate of service and directs the respondent to issue her with one.

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

(a) Payment of the equivalent of 6 months' salary in compensation in the sum of Kshs 300,000.

(b) Salary in lieu of one month notice – Kshs 50,000.

(c) Service gratuity – Kshs 50,000.

Total amount Kshs 400,000.

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

(e) The respondent to provide Certificate of Service to the claimant within 30 days of the judgment.

(f) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF FEBRUARY, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Ochieng for claimant

Mr. Maina for Respondent

Ekale – Court Assistant