



**Wanjuhi v Patrick Shompole t/a Santa Lucia Academy (Cause
1793 of 2017) [2022] KEELRC 20 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 20 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1793 OF 2017**

SC RUTTO, J

APRIL 28, 2022

BETWEEN

PENINAH WANJUHI CLAIMANT

AND

PATRICK SHOMPOLE T/A SANTA LUCIA ACADEMY RESPONDENT

JUDGMENT

1. The claimant avers that she was employed as a cook/cateress and office attendant at the respondent's school with effect from 2013 until 2017 when her employment was terminated. According to the claimant, the termination was unlawful, unprocedural and unlawful and as a result, she claims the sum of Kshs 400,800/= being notice pay, accrued leave pay, severance pay, compensatory damages, unpaid house allowance and unpaid water and food allowance since 2013.
2. The respondent challenged the Claim through its Response dated 29th September, 2021. The respondent denies the claimant's assertion that he was unlawfully terminated. That it is the claimant who deserted duty on 8th February, 2017. The respondent further filed a counterclaim against the claimant through which it seeks to recover one month's salary in lieu of notice on account that she deserted duty. Consequently, the respondent asked the Court to dismiss the Claim with costs and to allow the Counterclaim.
3. The matter proceeded for hearing on 19th October, 2021 and each side presented oral evidence.

Claimant's case

4. At the commencement of the hearing, the claimant took the stand and testified as CW1. She adopted her witness statement and bundle of documents to constitute part of her evidence in chief. The said documents were also produced as exhibits before Court.



5. In her testimony, the claimant stated that she was employed as a cateress by the respondent with effect from sometimes in May, 2013. That she also undertook some office duties as the office shares a wall with the kitchen. She averred that on 8th February, 2017, she was summoned by Mr. Otunga, the head teacher of the respondent school, who handed her a letter of suspension. That through the letter of suspension, she was accused of beating three pupils at the school.
6. That she was then instructed to look for the parents of the said pupils and apologize to them. That as such, she went from door to door and met with the parents of the concerned pupils and who she avers, were surprised to learn of the accusations against her, as they had not received any complaints regarding the issue.
7. That the letter of suspension was silent as regards the date she was expected to report back. That the head teacher instructed her to stay away from work and await further instructions but this was not to be as she never heard from the respondent since then.

Respondent's case

8. The respondent presented oral evidence through the head teacher, Mr. Lawrence Otunga, and Ms. Josephine Sein, a teacher at the school.
9. Mr. Otunga who testified as RW1, adopted his witness statement and the bundle of documents filed on behalf of the respondent to constitute part of his evidence in chief. He also produced the said documents as exhibits before court.
10. It was RW1's testimony through his witness statement that the claimant deserted duty on 8th February, 2017 hence was never dismissed from employment. That the claimant deserted duty after he had summoned her to his office and handed her a letter of suspension. That the suspension was issued to the claimant following accusations of indecency and child assault.
11. RW1 averred that he had received reports that on 26th January, 2017, the claimant had verbally and physically assaulted three children at the school. That Ms. Sein who was a teacher in charge of the baby class had witnessed the incident, hence reported the same to him. That he investigated the issue between 26th January, 2017 and 8th February, 2017. That he also got in touch with the parents of the concerned pupils who had lodged complaints following the incident. That he apologized to the said parents on behalf of the claimant.
12. He averred that on 8th February, 2017, in the presence of Ms. Sein, and another teacher, Ms. Jane Wairimu, he gave the claimant an opportunity to explain the circumstances which led her to verbally and physically assault the children. That after listening to her, he cautioned her that her behaviour was not acceptable and thus asked her to apologize and get clearance letters from the parents of the affected children as well as the school proprietor before being allowed back to work.
13. That pending resolution of the matter, the claimant was suspended from duty. That the claimant proceeded on suspension on 8th March, 2017, and thereafter, went back to his office and delivered a letter in which she stated that she had consulted with the parents of the concerned pupils. That he later received a demand letter dated 23rd March, 2017 from the claimant's Advocate through which they demanded her reinstatement and payment of her full salary. That he responded to the said demand letter, stating that the claimant was required to apologize to the parents of the concerned pupils before reporting back to work. He further averred that it is the claimant who deserted duty, instead of apologizing to the parents of the pupils she had assaulted. That as such, the claimant was not



terminated as alleged. That her salary was paid up to 8th February, 2017. He asked the court to dismiss the Claim with costs.

14. Ms. Josephine Sein, testified as RW2. She also adopted her witness statement to constitute part of her evidence in chief. She identified herself as a teacher at the respondent school. That on 26th January, 2017, during lunch break, the claimant verbally and physically assaulted three pupils namely; JN in baby class, LL in the nursery class and RM, also in the nursery class.
15. That she personally witnessed the incident hence reported the matter to the school head teacher, Mr. Otunga. That the claimant was asked by the head teacher to apologize to the parents of the affected pupils, but she failed to do so.

Submissions

16. It was submitted on behalf of the claimant that the respondent had not by evidence shown that her termination was fair and valid. That she was not issued with any notice prior to her termination. The case of *Kenfreight (E.A) Limited vs Benson K. Nguti* (2016) eKLR was cited in support of the claimant's submissions.
17. At the time of writing this Judgment, the respondent was yet to file its submissions.

Analysis and determination

18. Flowing from the pleadings on record as well as the evidence placed before me, this Court is being called to resolve the following issues: -
 - a. Whether there was justifiable cause to terminate the employment of the claimant?
 - b. Whether the claimant was subjected to a fair procedure?
 - c. Is the respondent's counterclaim sustainable?
 - d. Is the claimant entitled to the reliefs sought?

Whether there was justifiable cause to terminate the employment of the claimant?

19. The determination of this issue is hinged on the provisions of Sections 43 and 45 (2) (a) and (b) of the *Employment Act* (Act). Under section 43(1), an employer bears the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Further and in light of the provisions of subsection (2), such reasons are those it genuinely believed to exist at the time of the employee's termination.
20. Further, section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
21. The provisions set out above constitute the parameters necessary to establish justifiable cause or rather the reasons for an employee's termination. In this regard, it is the respondent's duty to establish that there was a valid and fair reason to terminate the claimant's employment.
22. The claimant's exit from the respondent's employment was on account of allegations that she had verbally and physically assaulted three pupils at the school. She denies the allegations, hence what now presents before me is a credibility contest.



23. From the testimony of RW2, she personally witnessed the claimant assault the pupils hence she reported the issue to the respondent's head teacher.
24. To further prove the allegations levelled against the claimant, the respondent annexed screenshots of messages exchanged with the parents of the concerned pupils. I will sample a few.
25. One of the parents identified as Mama L, stated as follows in one of the messages: -

“I see UA (sic) ano (sic) nonsense man Penina just called me telling me sorry I was joking with ua (sic) son things are hot on ma (sic) side itald (sic) her I have to come she tells me y (sic) she did that she is crying.”
26. In yet another message from a parent identified as Baba J, states: -

“If it's the issue of harassing our child, I challenge anybody to deny that because we were given all the details about it by them and others including some teachers and the perpetrator even confessed to my wife the following day before even being asked no one can change those facts. I advice you mwalimu usijibu hizo barua zake.”
27. There is also another text message of 26th January, 2017 where one of the parents writes: -

“I just want to inform you that am not happy of(sic) what Peninah had done to one of my kid(sic) n(sic) that is J sister to j class amemchapa kwa kupiga kelele wakati wa kuchukua lunch na the brother was there na amesema anaenda kuambia babake so nimeshindwa kunyamaza ndio ukiambiwa umejua.”
28. It is apparent that the messages emanated from parents at the respondent school and the claimant was mentioned adversely. It is also apparent that the gist of the messages was the assault of the pupils by the claimant while at the school. This confirms the allegations of assault levelled against the claimant, who notably did not contest the messages.
29. Further, there was the testimony of RW2, who stated that she personally witnessed the claimant verbally and physically assault the pupils. This further supports the assertions by the respondent, that the claimant assaulted the pupils at the school.
30. It is obvious that the claimant being a cateress at the respondent school, interacted closely with the pupils, especially during meal times. As such, it was paramount that the claimant handles the pupils whilst under her care at all times, in a manner that instils confidence in the pupils, their parents and the school management.
31. The allegations leveled against the claimant were serious and had the likelihood of breaching the trust that existed between the claimant, the parents and the school management. Indeed, and judging from the tone of the messages received from the parents of the concerned pupils, they were unhappy with the turn of events.
32. In the circumstances, upon receiving the allegations of assault of the pupils by the claimant, the respondent acting as a reasonable employer and as custodian of pupils within its care, had reasons to take disciplinary action against her.
33. Besides, the respondent being in the business of managing a learning institution which takes in pupils from a tender age, had to maintain a reputation that it was concerned about the wellbeing of the children within its institution. Over and above, the respondent owed a duty of care to the pupils within



its learning institution. The nature of allegations against the claimant were serious enough and had the likelihood of tainting its image as a learning institution.

34. In the circumstances, and based on the evidence received in respect of the allegations of assault by the claimant, the respondent had a fair and valid reason to take action against her. As such, I find that the respondent acted as any reasonable employer would, faced with similar circumstances.
35. Having found as such, I now turn to consider whether the claimant was subjected to fair process.

Whether the claimant was subjected to a fair procedure?-

36. In line with the provisions of section 45 (2) (c) of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. Section 41(1) of the Act provides the specific requirements that entail fair procedure. In this respect, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
37. The burden of proving that the process of termination was fair, lies with the employer.
38. In this case, the process commenced against the claimant with a letter of suspension dated 8th February, 2017. She was required to apologize and get clearance letters from parents of the affected pupils, the school proprietor and the representatives of the affected classes who were to schedule a meeting with the Board of Management. She was also advised that she would resume duty upon clearing with the parties named. The letter reads in part;

“you are therefore expected to apologize and get clearance letters from the following;

Parents whose children were affected (ID photocopies of both parents attached School proprietor...”
39. The claimant responded to the letter of suspension vide hers dated 8th March, 2017 and through which she maintained her innocence and stated that the parents of the pupils were strangers to the allegations of assault. She ended her letter by stating as follows; “I have consulted the parents of the said pupils who were total strangers to the allegations levelled against me, since they are not aware let me have response to the effect latest 15th March, 2017.”
40. There was no response or action from the respondent’s end following the claimant’s letter. As such, she was not given a way forward as regards her fate in line with the disciplinary process, which had been commenced by way of the letter of suspension.
41. Indeed, there seems to have been no further process beyond the letter of suspension. This was despite the claimant asking for a response from the respondent through her letter dated 8th March, 2017.
42. Ideally, the respondent ought to have asked the claimant either to resume duty or take her through a further disciplinary process. In other words, the process which had already commenced, ought to have had an end.
43. Without a word from the respondent, the claimant was quietly dismissed, since either way, she was not allowed back to work.
44. Above and beyond, it is worth noting that the respondent asked for too much from the claimant by requiring her to submit clearance letters with copies of the identity cards of both parents of the affected



children. This was next to impossible and bordered on unreasonableness. As a matter of fact, by this very requirement, the respondent made it almost impracticable for the claimant to resume duty.

45. Notwithstanding the fact that the claimant had given the respondent reasons to terminate her from employment, she deserved to be taken through a fair process which was reasonable.
46. Her suspension coupled with no word from the respondent, left her in limbo and this was not fair. She had a right to be subjected to and informed of the outcome of the disciplinary process.
47. In the circumstances, I cannot help but find that the claimant was not subjected to a fair process hence her termination was procedurally unfair.

Is the Counterclaim justified?

48. The respondent has filed a counterclaim against the claimant on account that she deserted duty. It seeks to recover from the claimant one month's salary in lieu of notice.
49. As stated herein, the claimant was suspended from duty on 8th February, 2017. She was not notified of the date she was required to resume work despite her issuing an ultimatum to the respondent vide her letter of 8th March, 2017.
50. Under the *Black's Law dictionary* (10th Edition), defines desertion to mean: -

“the willful and unjustified abandonment of a person's duties or obligations.”
51. Accordingly, the claimant did not desert duty as the respondent knew her whereabouts. In the premises, the claim for one month's salary in lieu of notice is unsustainable.
52. To this end, the counterclaim cannot stand and is consequently dismissed.
53. I now turn to consider the reliefs that avail to the claimant.

Reliefs

54. Having found that the claimant's termination was procedurally unfair, I award her compensatory damages equivalent to (five) 5 months gross salary. This award has taken into account the length of the employment relationship and the conduct of the claimant leading to her exit from the employment.
55. The claimant is also awarded one month's salary in lieu of notice.
56. The claim for accrued leave days is denied since the claimant did not refute that she was entitled to proceed on leave when schools were closed for the holidays. Besides, she did not allege that she was required to work during the school holidays.
57. The claimant has prayed for accrued house allowance in the sum of Kshs 86,400/=. The same is backdated to 2013. The relevant minimum wage guidelines for the category of workers the claimant fell within, is Kshs 11, 831.20. per month. It was her testimony that her salary was Kshs 12,000.00 hence was above the minimum wage. Further, during cross examination, the claimant stated that her salary was consolidated. It is therefore presumed that the said house allowance was subsumed in the consolidated salary. Accordingly, the prayer for house allowance is declined.
58. The claim for food and water allowance, is also declined since the claimant was a cook at the respondent school and she did not present evidence that she was denied access to food or water while at the school.



Orders

59. Accordingly, I enter Judgment in favour of the claimant against the respondent in the following manner;
- a. Compensatory damages in the sum of Kshs 60,000.00 being equivalent to 5 months gross salary.
 - b. One month's salary in lieu of notice being the sum of Kshs 12,000.00.
 - c. The total award is Kshs 72,000.00.
 - d. Interest on the amount in (c) at Court rates from the date of Judgment till payment in full.
 - e. The counterclaim is dismissed.
 - f. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28 DAY OF APRIL, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Ambani

For the Respondent Mr. Botany

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

