



**Kuria v Board of Management, Kikuyu Day Secondary School (Cause 2226 of 2017) [2022] KEELRC 1448 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1448 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2226 OF 2017**  
**NZIOKI WA MAKAU, J**  
**JUNE 29, 2022**

**BETWEEN**

**PATRICIAH NJOKI KURIA ..... CLAIMANT**

**AND**

**BOARD OF MANAGEMENT, KIKUYU DAY SECONDARY SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim on 9<sup>th</sup> November 2017 vide a Statement of Claim which she later revised and filed an amended statement of claim dated 11<sup>th</sup> May 2018. She avers that the Respondent employed her on 26<sup>th</sup> May 2008 as a Librarian up to and/or until 13<sup>th</sup> September 2017 when it unprocedurally and unlawfully terminated her services. She avers that termination of her employment was unlawful and illegal because the Respondent failed to issue her with notice and/or reasons for dismissal and did not grant her a fair hearing. She thus claims compensation for unlawful and/or unfair termination of her employment, three months' notice pay, leave pay due, salary arrears, and house allowance arrears. The Claimant further prays for orders and/or judgement against the Respondent for issuance of a certificate of service, costs and interest of this Claim.
2. In response, the Respondent filed a Reply to the Amended Claim dated 13<sup>th</sup> June 2018. It avers that the Claimant was employed as a Cleaner on a one-year contract from 4<sup>th</sup> August 2014 to 4<sup>th</sup> August 2015 and not on any other terms whatsoever. That it thereafter renewed her contract for a two-year period on similar terms with effect from 5<sup>th</sup> August 2015 to 4<sup>th</sup> August 2017 and that none of the parties' obligations changed. It avers that it suspended her on 8<sup>th</sup> June 2017 to allow for investigations into her conduct and that the suspension letter also notified her of disciplinary proceedings. The Respondent avers that it did not terminate the Claimant's contract but rather the contract expired on 4<sup>th</sup> August 2017 while she was on suspension and that she was no longer their employee even when the Respondent's disciplinary committee sat on 13<sup>th</sup> September 2017. The Respondent avers that it paid



her all her legal dues during the employment contract and she is thus not entitled to any claim. It prays the Claim be dismissed with costs to the Respondent.

3. The Claimant submits that in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR the Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination. The Claimant submits that in *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR, the Court of Appeal stated that the *Employment Act* established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee, as prescribed minimum terms.
4. It is the Claimant's submission that she testified of having never gone for leave from the date of employment until the date of termination and that the leave application forms attached by the Respondent are not conclusive proof that she was granted leave. The Claimant submits that she also testified she was being paid a basic salary of Kshs. 10,250/- which was an under payment and that she attached a Payslip at page 10 of the statement of claim in support of the claim. She submits that regulation 4 of the Kenya Gazette Notice No. 56 of 3<sup>rd</sup> September 1993 provides for terms and conditions of employment for non-teaching staff and that a similar position has been reflected in the Basic Education Regulations 2015 under regulation 18. The Claimant submits that being a Librarian she ought to have been in Job Group J whose new salary was Kshs. 21,304/- as per the Circular dated 1<sup>st</sup> July 2008 issued by the Ministry of State for Public Service. The Claimant submits that she however received a salary of Kshs. 5,000/- between May 2008 to July 2011 as confirmed in the bank statement filed as further supplementary list of documents dated 7<sup>th</sup> May 2018. Additionally, a person in Job Group J as at July 2012 ought to receive a salary of Kshs. 24,662/- but she received a salary of Kshs. 9,174/- hence the arrears sought. As regards house allowance, she submits that the Kenya Gazette Notice No 56 of 3<sup>rd</sup> September 1993 under regulations 4 and 18 of the Basic Education Regulations 2015 and Circular dated 10<sup>th</sup> December 2014 issued by the Salaries and Remuneration Commission, a person in Job Group J ought to receive a house allowance of Kshs. 4,200/- whereas the Claimant received 1,440/-, hence the arrears claimed. In view of the foregoing, the Claimant urges the Honourable Court to enter judgement in her favour as against the Respondent, as prayed for in the Statement of Claim. The Claimant relies on the case of *Kudheihia v B.O.G Ngaru Girls Secondary School* [2014] eKLR where the Court stated that it would only interfere with the calculation of the claimant's exit pay if it was established as a fact that her remuneration was not in compliance with Legal Notice No. 262 of 1993 that was relevant to her case.
5. The Respondent submits that it lawfully suspended the Claimant who has not in any way faulted the said suspension. That the suspension was a disciplinary measure it took in order to allow for investigations into the Claimant's unbecoming conduct, as evidenced by the Report on Claimant's gross misconduct dated 7<sup>th</sup> June 2017 in the Respondent's Further List of Documents. In the case of *Donald C. Avude v Kenya Forest Service* [2015] eKLR, the Court observed that suspension of an employee is intended to enable an employer carry out investigations where the presence of the employee may jeopardize the investigations. Further, in the case of *Charles Muturi Mwangi v Invesco Assurance Co. Ltd.* [2019] eKLR, the Court of Appeal enunciated the purpose of suspension stating thus: "Suspension and interdiction pending investigations for alleged misconduct is ordinarily part of the disciplinary process. Whether such suspension or termination was unfair is another issue altogether". It is the Respondent's submission that it was within its rights to suspend the Claimant pending institution of disciplinary proceedings.



6. The Respondent submits that where a contract lapses by effluxion of time, unlawful termination cannot be construed from such circumstances. It submits that in the case *Emily Migwa v Seventh Day Adventist Church Central Kenya Conference (CKC) & Another* [2020] eKLR, having found that the claimant's contract of employment had lapsed by effluxion of time, the Court held that the issue of unfair and unlawful termination of the claimant's contract under Section 45 of the *Employment Act* does not arise in the circumstances of the case. It submits that the Claimant in the instant case has not demonstrated any evidence of her alleged termination and there is no written letter of termination as anticipated by Section 35(1)(c) of the *Employment Act*, 2007. That it is therefore not sufficient for the Claimant to allege unlawful termination without tendering any evidence in that regard whereas Section 47(5) of the *Employment Act* places the burden of proof upon her.
7. The Respondent further submits that in light of the Claimant's contract having expired, it could not subject the Claimant to its disciplinary proceedings of 13<sup>th</sup> September 2017 as she was no longer its employee at the time. That Regulation 20 of the Basic Education Regulations, 2015 provides that the Board deals with a claim or grievance arising from an employee of the Board of management and that the disciplinary hearing envisaged under the *Employment Act* is also in respect to an employee (emphasis theirs). That therefore the disciplinary hearing is with respect to an employee which the Claimant ceased to be on 4<sup>th</sup> August 2017 when her contract expired. It is also the Respondent's submission that having found that the Claimant was not unlawfully terminated, the prayers for a declaratory order for unlawful termination, notice pay, and compensation for unfair termination should fail. Further, that the claim for leave pay due is unsubstantiated and should fail as it has supplied numerous letters of request for annual leave and corresponding letters approving annual leave between 2011 and 2016. That the claim for house allowance arrears is similarly unsubstantiated and should fail and that the Respondent has never refused to issue the Claimant with a Certificate of Service.
8. Where an employer initiates a disciplinary process that runs to the end of an employee's contract it is not lawful to assert that there was fairness. In this case the Respondent fully aware that the Claimant's term of employment was coming to an end suspended her and now asserts that the contract suffered effluxion while she was under suspension. The Respondent created a condition that precipitated the inglorious end to the contract and as such this smacks of outright illegality. An employee who is facing a disciplinary process under the law would be entitled to substantive and procedural fairness and none was accorded the Claimant as demonstrated by the Respondent's conduct. As such the Claimant would be entitled to recover. The Claimant failed to prove underpayment. In addition, one cannot claim underpayment for years gone by as underpayment is a continuing wrong and one must mount a claim within a year in terms of Section 90 of the *Employment Act*. The Claimant took leave from the evidence the Respondent adduced as the applications for leave which are duly approved are prima facie proof of the leave taken as there is nothing more an employer can present to show an employee went on leave. In all the Claimant only proved unlawful termination and no more.
9. In the final analysis I enter judgment for the Claimant against the Respondent for –
  - i. Compensation for unlawful termination of contract – 6 month's salary – Kshs. 74,100/-.
  - ii. Costs of the suit
  - iii. Interest on the sums in (i) above at court rates from the date of judgment till payment in full.
  - iv. Certificate of service.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2022**



**NZIOKI WA MAKAU**  
**JUDGE**

