



**Shelaly v Eman Girls Educational Centre (Cause 875 of 2017)
[2022] KEELRC 1708 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 875 OF 2017**

**B ONGAYA, J
JULY 22, 2022**

BETWEEN

ALI TIRO SHELALY CLAIMANT

AND

EMAN GIRLS EDUCATIONAL CENTRE RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on November 20, 2017 through Ameli Inyangu & Partners Advocates. The claimant prayed for judgment against the respondent for:
 - i. A declaration that the termination of the claimant's contract of service was unfair and unlawful
 - ii. One month's salary in lieu of termination notice.
 - iii. Leave allowance.
 - iv. Compensation for unfair termination.
 - v. Interest on the above at court rates.
 - vi. Costs of the suit.
2. The claimant pleaded as follows. He was employed by the respondent by the written employment contract dated May 5, 2016 in capacity of Ustadh (Islamic Religious Teacher) effective January 5, 2016. He was to serve 6 months on probation and thereafter to be confirmed. The contract was on contractual basis renewable annually. The pay was kshs 20, 000.00 per month. His further case is that he worked exceptionally well and when he reported at work in January 2017 he was told his services were no longer required. His case is that he worked for a continuous one year. He alleges he was terminated for no reasonable cause and without notice. He alleges unfair termination.



3. The respondent filed on January 25, 2022 the memorandum of response through Garane & Somane Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent admitted employing the claimant as pleaded for the claimant. He was employed as a part-time teacher to teach religious education from 1 pm to 4 pm and effective January 5, 2016. Further, the respondent was a girls' school and the parties agreed that the claimant's employment was only temporary because his role would best be undertaken by a female *mudhira* rather than a male. Further the employment was renewable annually effective January 5, 2016. Further, in August 2016 it was school holidays and the claimant was called and informed about termination of his contract of service and he requested for retention for 2 months in the best interest of his family. The claimant agreed to be terminated but to be paid for two months being September and October 2016. The claimant thereafter disconnected all communication with the respondent. Further, the claimant took annual leave during school holidays in April and August and the claims on annual leave were not justified. The claimant having disconnected, the termination letter dated September 13, 2016 was dropped at a centre the claimant was known to go for his other projects known as *madrassa-tul munawara* with the hope that it would reach him. The claimant was paid two months' salaries and he had been informed about his termination. The respondent submitted that it did not owe the claimant any dues as claimed and as prayed for.
4. The claimant testified to support his case. The respondent's witness no 1 (RW1) was Khadija Khalid, respondent's principal. The court has considered the pleadings, the evidence and the final submissions filed for the parties respectively. The Court makes the findings as follows.
5. To answer the 1st issue for determination the court returns that there is no dispute that parties were in a contract of service as pleaded for the claimant and admitted for the respondent. The claimant was employed by the respondent by the employment contract dated January 5, 2016.
6. To answer the 2nd issue for determination the court returns that the claimant's employment was terminated by the letter dated September 13, 2016 and it was not an unfair termination. Prior to that letter the claimant had been telephoned about the termination and he requested for two months' payment. The payment was effected per RW's evidence. The contract provided for at least one-month termination notice or pay in lieu thereof. In absence of any other material, the court finds that the respondent substantially complied with that contractual provision.
7. The respondent's witness RW Khadija Khalid, testified that she works as a principal to the respondent, that the claimant was not placed on probation, he was working in many other schools, he was paid all his dues, the claimant's last day in the school was August 2016, he was paid his salary in August, his last pay was in September 2016. RW further stated that they tried to trace the claimant with no avail, the claimant left the contract to expire, the claimant never claimed any arrears, and, the claimant deserted work. There is no reason to doubt RW's evidence that the claimant agreed to the terms of separation and his last pay was in September 2016. While he was paid until September 2016, there was no evidence that he worked throughout that month so that desertion appears established as urged by RW. The claimant has not accounted for his service between August 2017 to his alleged termination date on opening day on January 4, 2017 (or January 5, 2017) whereas, he does not in his testimony dispute that his last pay was in September 2016. The court upholds the submissions for the respondent and the account by RW that parties agreed to separate as per telephone call in August 2016 and in any event the separation was with more than the contractual one month pay in lieu of notice. The termination is found not to have been unfair. The claim for compensation for unfair termination and notice pay will collapse as unjustified. While making that finding, the court observes that the claimant has not pleaded a claim for wage arrears for the months of September 2016 to January 2017 (which was part of the



duration of the contract he had signed) clearly indicating that he had not worked for the respondent for the said period so that the respondent does not owe him any salary arrears, in that regard.

8. The 3rd issue for determination is whether the claimant is entitled to leave payment as claimed. The respondent filed a leave application form duly signed by the claimant. It is the claimant's evidence that he did not sign the leave form. He claims that the signature is a forgery but he had not reported the same to the authorities.
9. There is no reason to doubt the claimant signed the leave application form and took the leave days. Further, there is no reason shown to doubt the testimony by RW that the claimant took leave in April and August 2016 during the regular school holidays.
10. Further, the undisputed evidence was that he worked only in the afternoon as a part-time religious teacher. In any event he had not served for 12 months as envisaged in section 28 of the Employment Act so that annual leave had not accrued at all. The claim and prayer on leave will therefore collapse.
11. The claimant is entitled to a certificate of service for the term served and per section 51 of the Act. The Court has considered the parties' margins of success and each will bear own costs of the suit. In conclusion the suit is hereby determined with orders:
 1. The respondent to deliver the certificate of service by September 1, 2022.
 2. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND JULY, 2022.

BYRAM ONGAYA

JUDGE

