



**Kasili v Academy & another (Cause 600 of 2016)
[2022] KEELRC 1312 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1312 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 600 OF 2016
AN MWAURE, J
JULY 21, 2022**

BETWEEN

KELVIN WAFULA KASILI CLAIMANT

AND

EPHANTUS MBURIA MUGO T/A ST MARY ACADEMY 1ST RESPONDENT

MARY MUTHONI MUGO T/A ST MARY ACADEMY 2ND RESPONDENT

JUDGMENT

1. The claimant brought a claim against the respondent dated April 6, 2016 and the respondent filed a response dated June 3, 2016.

Claimant's Case

2. Claimant says he was employed by the respondent as a teacher and his monthly salary was Kshs 18,000/= (gross). He says he used to teach various subjects in classes 4-8 and he performed his work with due diligence.
3. The claimant says that he worked for the whole year and the school closed for christmas holiday. He says that when the school re-opened he reported to work as usual.
4. He says around January 8, 2016 he was handed a termination letter and the reason for termination was that the school performance was poor. He says that indeed the school's performance had improved that year.
5. He says he was asked to hand over the respondent's assets before leaving school.
6. The claimant says he was not issued with a warning letter or notification of disciplinary hearing.
7. The claimant is praying for compensation as follows:-



- a) One month salary *in lieu* of notice..... Kshs 18,000/=
 - b) House allowance 15% of Kshs 18,000/=
 - (2700 x 11months)..... Kshs 29,700/=
 - c. 12 months compensation..... Kshs 216,000/=
- Total Kshs 263,700/=

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He also prays for costs and interest

Respondent’s Case

- 8. The respondent in their response state that the claimant had no zeal or dediCation for work but was in fact working for the downfall of the school. Hence he was terminated legally as per the laid down procedures of law and in compliance of his contract.
- 9. He says the claimant received many warning letters for his poor performance but did not improve. The respondent says due to claimants poor performance the pupils performed poorly in their KCPE exams. For that reasons the respondent could not retain him anymore.
- 10. They however claim they paid all his terminal dues and so he is not owed any dues. The respondent therefore says that since they terminated the claimant legally and also in accordance to his letter of appointment his claim should be dismissed with costs.

Claimant Submission

- 11. The claimant in his submissions relies on the case *inter-alia* of [David Gachana Omuya vs Mombasa Maize Millers Limited](#) (2014) eKLR where the court rules that section 43 of the [Employment Act](#) has placed a statutory obligation upon the employer to prove the reasons for terminating the services of an employee. Section 45 of the act on the other hand required the employer to prove that the reasons for terminating are valid reasons.
- 12. He also says that with the support of the case of [Elizabeth Osiche Adwora vs National Bank Of Kenya](#) (2017) eKLR where court held that an appraisal of the performance of an employee must of necessity involve active participation of an employee. He says there is no evidence that the claimant was subjected to any performance review. He says the issue of performance is therefore an afterthought and the respondent did not have genuine reasons to terminate the claimant’s employment.

Respondents Submissions

- 13. The respondents submits that the claimant in signing his appointment letter dated February 6, 2015 he committed himself to work with diligence. He says his performance was consistently wanting and it led to the respondent giving him verbal as well as written warnings.
- 14. The respondent claims that the claimant was still within his probationary period when he was terminated. He relied on the case of [Chadwick Onyango Ogollab v Bandari Savings & Credit Co-operative Society](#) [2021]eKLR where the court held “the termination events being substantially within the probation period the termination was as well a termination of probationary period and the termination did not amount to unfair termination both upon merits and procedure. The respondent urges the court therefore to find the claimants termination from employment was therefore justified.



Decision

15. In determining this case I am focused on whether the claimant employment was unfairly terminated or was it justified. The employment laws are crystal clear that in order for an employer to terminate the employment of an employee he must show a valid reasons. Section 45 of *Employment Act* provides:-

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

16. The case where employer claims poor performance by the employee the employer must inform the said employee that his performance is below standard. He must then propose to him training, guidance and fresh instructions to the employee (see *Maina Mwangi v Thika Coffee Mills Limited* 2012 eKLR).

The employer according to the determination in the above *Maina Mwangi* (Supra) case is required to give employee time to improve. If no improvement is noted after a reasonable passage of time the employer should issue a formal warning to the employee and advise him he may be separated from employment on account of poor performance. Then the employer should proceed to investigate and ascertain if employee can perform better in another part of organization.

The employer should engage the employee and if at the end of these steps dismissal of the employee is the course that commends itself to the employer, then section 41 of the *Employment Act* must come into play. All this was the findings in the above case.

17. The same is also observed in the case of *Jane Wairimu Muchira v Mugo Waweru & Associates* [2012] eKLR where the court observed that proper procedure once poor performance of an employee is noted is to point out the shortages to the employee and give employee an opportunity to improve over a reasonable time.

The court also observed that appraisal of performance must of necessity involve active participation of the employee and that a credible performance appraisal process must be evidently participatory.

18. In the current case the claimant was given a letter of appointment dated February 2015 and was told his post was of a teacher. There is no specific job description on record. There are two warning letters to the claimant one was on July 30, 2015 and claimant was told the class 7 & 8 maths was performing poorly. He got another warning letter on September 7, 2015 and he was moved to class 4, 5 and 6. There is otherwise no evidence that claimant was the only maths teacher for class 7 & 8 and especially if in September 2015 he was moved to lower classes.

19. At the same time the respondent did not produce evidence on how they appraised the claimants performance save to advise him the classes he was teaching were performing poorly in maths. After he was moved to lower classes there was no further communication by the respondent pertaining to his performance. He was terminated on January 7, 2016 and was informed he was terminated because



his subjects scored low grades in the class 8 national exams. There is no other particulars given to him and he was advised to handover the books and leave immediately. The respondent informed him in his termination letter that termination was under probation terms.

20. The claimant on the other hand had accepted to be on probation for one year as he accepted his contract of appointment dated February 6, 2015. The respondent complied with section 42 of the Employment Act. In that case even if the respondent did not have a valid reason to terminate the claimants employment however he had a legal right under section 42 to terminate him in compliance with the terms of the probationary service. The parties are bound by their contracts and the courts cannot rewrite contracts. In this case the claimant was on a one year probationary period and the term was terminable by giving one month notice.

The respondent complied as far as that was concerned. Section 42 of Employment Act clearly stipulates that if an employee is under probation then section 41 of Employment Act does not apply. This section 42 of the Employment Act has not been revised or repealed. In this case the court finds that the respondent acted in accordance to the law and to the contract between it and the claimant. The claimant was therefore not unfairly terminated and his claim is dismissed accordingly as per the law and contract between the parties.

21. The above notwithstanding, the claimant is entitled to one month salary *in lieu* of notice of Kshs 18,000/= but house allowance and general damages are not payable.
22. In view of the circumstances in which claimant's employment was terminated it is fair I do not award costs. Each party to bear their costs. Interest is awarded from the date suit was filed till full payment. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 21ST JULY, 2022

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

