



Murage v Principal, Gathambi Girls' High School & another (Cause E053 of 2021) [2022] KEELRC 12750 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12750 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E053 OF 2021
DKN MARETE, J
SEPTEMBER 28, 2022**

BETWEEN

IRENE WANGECI MURAGE CLAIMANT

AND

PRINCIPAL, GATHAMBI GIRLS' HIGH SCHOOL 1ST RESPONDENT

B.O.M GATHAMBI GIRLS' HIGH SCHOOL 2ND RESPONDENT

JUDGMENT

1. This matter was originated by way of a statement of claim dated October 29, 2021. The issue in dispute is as follows;

In the matter of unfair termination of claimant's employment.

2. The respondent did not file a response to the claim. instead, they filed a replying affidavit sworn on November 17, 2021 in which they respond to their cases.
3. The claimant's case is that at all material times to this suit, she was an employee of the 2nd respondent.
4. Her further case is that on October 1, 2021, she received a letter from the 1st respondent sending her on compulsory leave pending alleged investigations into an alleged forged invoice to a business known as Lurocyk Enterprise. This came as a shock as she had not been summoned for hearing before suspension.
5. The claimant's other case is that she was disgracefully hounded out of office to compulsory leave despite her many years of exemplary service and claim of innocence. The set out investigations were a malicious attempt to justify the unlawful suspension from duty.



She further avers as hereunder;

11. In any case, there were other persons in the school administration with access to information found in the office of the account's clerk that could have been used in the alleged fraud and they were not suspended, terminated from employment or disgraced and painted and portrayed in bad light like the claimant was and it was malicious for her to be alienated and treated as if she was guilty of the allegations without an investigation and/or inquiry or any other form of fact-finding by the Respondents.
6. The claimant further avers that during the pendency of the compulsory leave, attempts were made to her replacement instead of a reinstatement on her part.
7. It is her other case that she was not heard, or even afforded an opportunity to defend herself. The action of the respect sparks of unfairness, inhumanity and was unlawful. It was bereft of the requirements of natural justice.

Her further case is as follows;

18. The claimant avers that during her tenure with the school, which spans over 19 years, she discharged her duties with utmost integrity, transparency and professionalism and her good character is the reason that she lasted so long at the institution.
24. Further, the claimant contends that despite her dedication and devotion in serving the respondent, the respondent has deliberately frustrated, mistreated and finally terminated her employment.

Particulars of malice/breach of contract/statutory duty of care

- a. Failing to adhere to the procedure laid down under the *Employment Act*.
- b. Failing to issue a notification of hearing and a disciplinary hearing, if necessary to hear the claimant's case.
- c. According the claimant an opportunity to defend herself as required by the mandatory provisions of section 41 of the *Employment Act, 2007* before dismissing her.
- d. Failing to notify the claimant of the outcome of the investigations.
- e. Advertising the job position of the claimant as vacant and inviting candidates to apply for the same during the period of suspension of the claimant.
24. As a result of the aforesaid, the claimant claims reinstatement to her place of employment at Gathambi Girls' High School.

She prays thus;

- a. A declaration that the termination of the claimant's employment was unfair, unlawful and a nullity.
- b. An order directing the respondents to reinstate the claimant to her employment without loss of benefits and pay to the claimant her unpaid salary up to the date of reinstatement.



- c. In the alternative to (b) above an order do issue directing the respondents to pay to the claimant her unpaid salary from October 1, 2021 plus 14% per annum interest thereon until the date of his retirement at the age of 60 years;
 - d. Costs of the suit;
 - e. Certificate of service;
 - f. Interests of the award at court rates.
8. The respondent in her replying affidavit sworn on November 19, 2021 denies the claim.
 9. It is her case that the claimant was offered a temporary appointment to the position of accounts clerk with effect from January 6, 2003. This was later confirmed vide a letter dated March 29, 2004.
 10. It is her further case that throughout the claimant's term of duty, numerous complaints were made against her and she was also subjected to various disciplinary issues.

Her further case is as follows;

7. That during a meeting held on July 13, 2018, a complaint was raised against the claimant as she had failed to give students pocket money that had been deposited in her office.(Annexed hereto and marked GJMW.3 is a copy of the minutes from the said meeting)
8. That during a meeting held by the parents association on June 6, 2019, a complaint was raised about the claimant's conduct where it was reported that she was rude and uncooperative. (Annexed hereto and marked GJMW.4 is a copy of the minutes from the said meeting)
9. That at a BOM meeting held on March 8, 2019, the 1st respondent raised several issues regarding the claimant's conduct and abilities to perform her duties.(Annexed hereto and marked GJMW.5 is a copy of the minutes from the said meeting)
10. That the human resource and discipline committee met on October 7, 2019 to discuss the conduct of employees and the claimant was noted to have several pending disciplinary issues. She had been accused of giving misinformation, failing to keep proper records and insubordination. (Annexed hereto and marked GJMW.6 is a copy of the minutes from the said meeting)
11. That in response to the complaints and disciplinary issues that had been raised against the claimant, the 1st respondent wrote several warning letters and show cause letters to claimant, none of which have ever been responded to.(Annexed hereto and marked GJMW.7-GJMW.13 are copies of the said letters)
12. That in a meeting held on February 6, 2020, the committee resolved that the post of bursar be advertised in order to assist and ease the claimant's work load as she had admitted to being overwhelmed. (Annexed hereto and marked GJMW.14 is a copy of the minutes from the said meeting)
13. That during a meeting by the hr committee held on September 29, 2021, the claimant's conduct was yet again being discussed and it was reported that she had issued invoices for goods that were not supplied to the school. It was also reported that she had issued false requisitions. (Annexed hereto and marked GJMW.15 is a copy of the minutes from the said meeting)
14. That the 2nd respondent intends to hold a disciplinary hearing sometime in the month of December in order for the claimant to be heard and defend herself and thus her employment is not terminated and neither is she being replaced as alleged.



15. That the claimant is jumping the gun by coming to court to make this application before the convening of the board meeting and hearing of her disciplinary case.
- 11 There is therefore no cause of action that has arisen against the respondents. She adds thus;

... on this issue we would like to submit on behalf of the respondents that the claimant's employment has not been terminated. The claimant in her statement of claim states that she received the letter dated October 1, 2021 from the respondent sending her on compulsory leave on allegations of forging an invoice. It is evident from the contents of the letter that she herself has produced before this court, that there was no mention of termination of employment. In fact, it clearly provides that she is still an employee entitled to half pay pending investigations and a final determination by the board of management.

The claimant's allegations that she has been terminated from work have no actual basis. She has not produced any evidence of her alleged termination or any communication to that effect. However, a reading of the statement of claim seems to imply that her claims of termination stem from the fact that the respondent has issued an advertisement for the position of bursar/ accounts clerk. The respondents had since February 2020 made plans to advertise for the position not to replace the claimant but to give her the assistance which she had previously stated that she needed. This is evidenced by the minutes of the HRC meeting held on 6th February 2020 where it was noted in Min 3 /2/2020 that the school was growing and that there was a need to get the claimant someone to assist her in her duties as she herself had admitted to being overwhelmed. The human resource committee thereafter recommended that the post of bursar be advertised to help ease her work.

The decision to advertise for the post of bursar had been made over a year before the claimant's compulsory leave and was therefore in no way meant to serve as a termination of the claimant's employment. The 2nd respondent intends to carry out a proper investigation into the claimant's case and if she is found innocent the post of accounts clerk will still be hers.

Again,

The claimant has refused, neglected and/or failed to participate in the school's disciplinary process. We therefore humbly submit that this suit against the respondents is premature and the claimant is by all means 'jumping the gun' in that regard. The court in dismissing the claimant's suit in *Peter Otabong Ekisa v County Government of Busia* (2017) eKLR stated that:-

"The employment of the claimant was also terminated in terms of a fair procedure in that he was charged and served a notice to show cause why the employment should not be terminated. The claimant made an unsatisfactory explanation through his advocate. The claimant was given opportunity to appear before a disciplinary committee but he forfeited that chance. This court has said time and again that court proceedings are not a substitute for internal disciplinary processes unless the court has interdicted such internal procedures. The charges brought and proved against the claimants are in terms of section 44 of the *Employment Act* and attract summary dismissal. The court cannot fault the respondent in this respect. The court equally does not fault the procedure followed by the respondent. Accordingly, the second issue for determination is answered in the negative. The claimant is not entitled to any of the reliefs sought as the suit by the claimant lacks merit and is dismissed with costs to the respondent."



The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent.
2. Whether the termination if at all, was wrongful, unfair and unlawful.
3. Whether the claimant is entitled to the relief sought.
4. Who bears the costs of this cause.
12. The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. It is the respondent's case and submission that a case of termination of employment has not been established by the claimant. Indeed, the claimant was only issued with a letter of compulsory suspension and no further action was taken against her. This does not amount to termination of employment as no disciplinary process or determination has been made or communicated to the claimant. Therefore, the claimant has no cause of action or claim against herself.
13. This is so. The respondent brings out an overwhelming case of no termination of employment. The claimant has not adduced any evidence of termination of employment, or at all. She has not adduced evidence of a letter of termination or even demonstrated verbal termination. She has not pleaded or established a case of constructive termination either.
14. I therefore find a case of no termination of employment of the claimant by the respondent and hold as such. This answers the 1st issue for determination.
On a finding of no termination of employment, all other issues for determination fall by the wayside.
I am therefore inclined to dismiss the claim as set out with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.Njagi Marete

JUDGE

Appearances

Ms. Wanyaga holding brief for Mr. Oongo instructed by Wanjiru Thungu & Company Advocates for the claimant.

Mr. Muthuri instructed by State Law Office for the Respondents.

