



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kahiu v Melly & another (Cause 2 of 2018)
[2022] KEELRC 12684 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12684 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 2 OF 2018
NJ ABUODHA, J
SEPTEMBER 23, 2022

BETWEEN

SALIMA KAHIU CLAIMANT

AND

PIUS MELLY 1ST RESPONDENT

**CHAIRMAN OF BOARD OF GOVERNORS OF PROVIDENCE HIGH
SCHOOL FORMERLY KNOWN AS SECOND CHANCE EDUCATION
CENTRE 2ND RESPONDENT**

JUDGMENT

1. The claimant alleged that she was employed by the respondent as a Head Teacher from 9th September, 2016 to 22nd September, 2017 when her service was terminated unlawfully. Her monthly salary was Ksh. 13,000/= at the time of termination.
2. The claimant alleged that the termination was unfair because the respondent did not act in accordance with justice, and equity thus violated section 45 of the *Employment Act*. The claimant further averred that upon termination the respondent declined to pay her terminal dues.
3. The 1st Respondent filed a response alleging among others that the claimant was an employee of the 2nd respondent or its agent hence he was not privy to the employment contract and was not aware of the termination or the circumstances under which the claimant was terminated.
4. In the alternative the 1st respondent stated that the claimant was not faithful at all and could not manage the school therefore she would be put to strict proof and to account for any monies received and or expended on behalf of the 1st respondent.
5. At the oral hearing, only the claimant was present and testified. In her evidence in chief she stated among others that the 1st respondent was a director of the 2nd respondent. She worked from September,



- 2016 to September, 2017 and that she was issued with a termination letter on 23rd September, 2017. According to her, she was not issued with any prior notice and further that she was not paid any terminal dues.
6. The claimant further stated that she was never paid any leave allowance during the period she worked. It was her testimony that she used to work during public holidays and was never paid. She further alleged that she worked overtime without pay.
 7. On questioning by the Court, the claimant stated that she was working for the respondent as a Principal and that she was teaching physics and mathematics from Form 1 to 4 and that she was a trained teacher though not registered with TSC.
 8. The claimant in her testimony before the Court conceded that the 1st respondent was a director of the second respondent. The claimant sued both the 1st and 2nd respondent. She however did not disclose why she chose to sue the 1st respondent in his personal capacity yet the 2nd respondent was her employer.
 9. Directors are agents of a juristic persons and cannot be sued in their official capacity while acting for the bodies they represent unless it can be shown that the decisions or actions they took were outside their official capacity. To this extent the 1st respondent was wrongly joined in the suit and is hereby struck out.
 10. Concerning the 2nd respondent though they were served, they never entered appearance or filed a response to the claim. They further did not attend court for the hearing. The matter therefore proceeded ex-parte.
 11. It is important to note that under Section 47(5) of the [Employment Act](#), the burden of prove that unlawful dismissal or unfair termination has occurred rests on the employee while the burden of proof of reasons for dismissal or termination is on the employer. The two burdens are exclusive and failure by one party to discharge the burden cast upon them by law does not absolve the other from discharging their burden.
 12. In this particular case, the respondents never attended the trial to defend the claim. That therefore did not lessen the burden on the claimant to prove her claim.
 13. The claimant produced a letter dated 21st September, 2017 which she considered was her termination letter. This letter does not directly refer to termination of her service and reasons for such termination but thanks her for the time she spent working for the respondent and calling upon her to hand over to one Ruth Kibor. The letter further asks her to collect her dues or the same would be sent via Mpesa to her contact.
 14. The letter referred to above did not contain any reasons why the claimant's services were being terminated and or call upon her to make representations before her service was terminated. Section 41(1) of the [Employment Act](#) makes it mandatory that before a termination or dismissal takes place an employee must be furnished with reasons why termination was being considered and granted opportunity to make representations. This did not seem to have happened in the claimant's case. The termination is therefore found to be unfair within the meaning of section 45 of the [Employment Act](#).
 15. Regarding the quantum of compensation payable, the claimant alleged that she was employed as a Head Teacher by the respondent. She however did not produce any letter of appointment as such nor did she produce any certificate or testimonials showing she was a qualified teacher. The claimant in her own evidence stated that she was not registered with TSC as a teacher. The claimant therefore failed to prove she was a qualified teacher to entitle her to salary payable to a Head Teacher in the market. The



claimant's monthly salary therefore remain at Ksh. 13,000/=. The issue of underpayment therefore does not arise.

16. The claimant made a claim for overtime but did not lead any evidence on when she reported to work and when she left and further the nature of the work she performed that required her to work overtime. The claimant further made a claim for severance pay but did not lead any evidence to show she was declared redundant. These heads of claim are therefore disallowed for lack of evidence.
17. The claimant in addition to compensation for unfair termination is as of right entitled to payment for monthly house allowance at one third of her monthly salary and payment in lieu of leave.
18. From the record, the claimant had worked for the respondent for about one year hence an award of four months' salary would adequately compensate her for unfair termination.
19. In conclusion the Court awards the claimant as follows.
 - a. Ksh.
One month's salary in lieu of notice 13,000
 - b. House allowance 52,000
 - c. Payment in lieu of leave 13,000
 - d. Four months' salary as
compensation for unfair termination 52,000
130,000
 - e. Costs of the suit.
20. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

