



REPUBLIC OF KENYA



KENYA LAW
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Kuira v Karanja & 2 others (Cause 79 of 2018)
[2022] KEELRC 4158 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4158 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 79 OF 2018
HS WASILWA, J
SEPTEMBER 22, 2022
(FORMERLY NYAHURURU HCCC NO 31 OF 2017)

BETWEEN

GEOFFREY NGARI KUIRA CLAIMANT

AND

MARTHA WANGUI KARANJA 1ST RESPONDENT

JOSEPH WAGURA KARANJA 2ND RESPONDENT

BUSARA FOREST VIEW ACADEMY 3RD RESPONDENT

JUDGMENT

1. The claimant filed the further amended memorandum of claim dated July 18, 2018 on even date through the firm of Mutonyi, Mbiyu and company advocates, seeking the following reliefs;
 - a. A declaration that the claimant's purported dismissal from employment of Busara Forest View Academy was illegal, null and void.
 - b. A mandatory injunction do issue, compelling the respondents to reinstate the claimant as the headmaster of Busara Forest View Academy and a permanent injunction restraining the respondents by themselves, servants, agents, employees or any other person claiming through or under them from interfering in any manner with the claimant's duties as a headmaster of Busara Forest View Academy or his director and shareholder of the 3rd respondent.
 - c. In the alternative and without prejudice to the foregoing, the claimant prays for general damages for unlawful dismissal together with payment of all accrued benefits under the termination employment contract.
 - d. Special damages.



- e. Costs of this suit plus interests thereon at court rates.
 - f. Other or further relief this court may deem fit to grant.
2. The claimant states that he is a co-director of the 3rd respondent, together with the 1st respondent, while the 2nd respondent is the chairman of the 3rd respondent.
 3. He states that he is a professional teacher and on or about March 8, 1988, the board of the 3rd respondent appointed him, by a resolution, to be the headmaster of the 3rd respondent, while the 1st respondent was appointed to take charge of the financial administration of the 3rd respondent as the manager. According to the claimant, it was an implied term that the said arrangement would not be changed unless by resolution of the board of the 3rd respondent, properly constituted.
 4. The claimant continued discharging his duties for the 3rd respondent until December 29, 1998 when the 1st respondent, served him with a termination letter, which decision was unilaterally made by the 1st respondent, contrary to the memarts of the 3rd respondent.
 5. The dismissal was illegally ratified by the 1st and the 2nd respondent, the 2nd not being a shareholder of the 3rd respondent, on the January 12, 1999. This was done on the basis that the 2nd respondent was the husband of the 1st respondent.
 6. In furtherance of their actions, the respondent engaged the services of a mason to break the wall that separated the claimant's office as a headmaster and that of the deputy headmaster in the view to evict him out of the said office. The claimant was in effect denied access to his office as such was dismissed.
 7. He contends that the actions by the respondent towards his dismissal was illegal since the resolution to terminate his service was not made by a resolution of the board of directors, the alleged vote by the 2nd respondent was illegal since, he is not a director and not entitled to vote in a meeting of the board, the notice of the alleged meeting of January 12, 1999 was inadequate and the agenda was not disclosed and that the termination was done against the rules of natural justice.
 8. He thus prayed for reinstatement and in the alternative he be paid; leave allowance from 1988 to 1999, salary in lieu of notice, unpaid salary for December, 1998 and January, 1999, underpayment between 1988 January to 1999, damages for the unfair termination and unpaid house allowance.
 9. The respondent did not file an amended defence but in their earlier defence filed on March 3, 1999, the respondents aver that the 1st and 2nd respondent are directors of the 3rd respondent and by virtue of having a controlling shareholding, the 2nd respondent became the chairman of the board.
 10. It is admitted that the 3rd respondent employed the claimant to take charge of academic matter at the 3rd respondent, while the 1st respondent handled the finances of the school together with the support staff affairs.
 11. It is the respondent's case that the decision to terminate the services of the claimant was arrived at the meeting of the board held on January 12, 1999, which was ratified by the 1st and 2nd respondents. Subsequently, that they engaged another party to be the headmaster of the 3rd respondent.
 12. The respondent further stated that the arbitration agreement of the 3rd respondent, requires that any dispute between the parties should be taken before an arbitrator as such the suit was prematurely filed.
 13. A similar defence was mounted by the 3rd respondent in its defence filed on June 6, 2000.



Claimant's Case

14. The claimant's case was heard on the November 9, 2021, where the claimant testified as CW-1 and adopted his statement dated July 17, 2017 and produced documents as his exhibits. In summary, he testified that he was employed by the 3rd respondent, while himself and the 1st and 2nd respondents are directors of the 3rd respondent. He stated that this case is in relations to services he rendered to the 3rd respondent as the head teacher. He testified further that the meeting of May 8, 1988, which appointed him indicated at minute 6 that his salary was to be the same as that of the manager. He stated that he was fired on December 29, 1998, without being subjected to any disciplinary hearing or informed of the reason for termination.
15. He testified that he, at some point, tendered his resignation, however the 3rd respondent refused to accept it on the basis that they had not obtained a replacement for him, therefore the letter was overtaken by events. He testified that prior to securing employment at the 3rd respondent he was teaching elsewhere English and later became the head teacher of Nyeri Primary School. He stated that he was forced out of employment on January 12, 1999 by a meeting called by Dr Karanja. He indicated that he was not paid his December, 1998 salary and January, 1999 salary or any other terminal dues he was entitled to. He added that, he never went for leave, throughout his employment with the 3rd respondent, which he now claims. He also stated that this case was file in February, 1999.
16. Upon cross examination by Kibet Advocate, the claimant testified that, the 3rd respondent was his employer. He stated that the dismissal was unfair and personal. It was his testimony that the 1st respondent was a director, while the 2nd respondent was not a director therefore the resolution made, if any was illegal. On employment he stated that he was not interviewed but that since he was a director and a teacher by profession, the parties resolved to have him head the school. He further states that he became the director of the 3rd respondent on April 27, 1997 and got employed on March 8, 1988.
17. On further cross examination, the claimant testified that, the meeting of March 8, 1988 was the one that designated them their duties and responsibilities and in minute 6 is on emolument of the manager, which stated at the bottom that the pay of the manager shall be the same as that of the head teacher as such he was underpaid. On the letter of resignation dated July 1, 1992, the claimant testified that he indeed tendered his resigned and the basis upon which he wanted to resigned was on diversion of Kshs 694, 423. 35 being profits made from the school to private business owned by the 1st and 2nd respondent. He however stated that the resignation did not take effect as the school did not get a replacement, forcing him to continue working in the school. On the directorship of the company, the claimant testified that he is the director together with the 1st respondent, while the 3rd respondent is an alternate director, who can only operate the business of the 3rd respondent in absence of the principal director. He stated that it's the issue of listing all the parties as director that made him reach out to the Registrar of Company's resisting the move, which saw the closure of the 3rd respondent's account. He stated also that the issue in Nairobi 169 of 2013 is on shareholding of the company, while the matter before this court is on dismissal from employment.

Respondent's Case

18. Martha Wangui Karanja, the 1st respondent, appeared for the respondents as RW-1 and adopted her statement of October 22, 2021. She testified that the claimant was the employee of the 3rd respondent and a co –director. She admitted that she terminated the services of the claimant on December 29, 1998 for gross misconduct. The gross misconduct according to her was that she had open confrontation with the claimant that caused fear among customers and employees. She also stated that the claimant



has refused to manage third terms examination for the pupils and there she was not ready to continue working with him the coming term. She admitted that the claimant was not paid December, 1998 salary because he had not cleared with the school. On salary underpayment, the witness testified that the claimant was earning over 20,000, which money was what was agreed by the board. On leave pay, the witness testified that the claimant enjoyed his leave during school holidays, which leave was not paid for. She admitted that the claimant was not paid notice pay and contends that having engaged in gross misconduct he was not entitled to any notice pay. She testified against reinstatement and stated that they are no longer in talking terms with the claimant therefore the prayer should be disallowed.

19. Upon cross examination by Mbuyu Advocate, the witness testified that the salary payable to the head teacher and the manager was agreed by the board. She confirmed that the minutes of the board was for her pay to be the same as that of the claimant. On the resignation the witness testified that indeed the letter was received but the claimant continued working for the 3rd respondent till termination in December, 1998. She also admitted that at the time of termination she was earning Kshs 40,000 while the claimant was earning Kshs 33,260. She also admitted that she did not write any warning letter or notice to show cause on allegation of gross misconduct. She further testified that the matter in Nairobi serialized as HCCC 169 of 2013 is on ownership of shares and directorship.
20. Upon further cross examination, she testified that the claimant was not paid notice pay. On leave pay she stated that the same is not granted to teacher as they enjoy such leave during school holidays. On house allowance, she testified that she lost some documents and could not tell whether house allowance was paid.
21. On re-examination, the witness testified that there was no indication that she was to be paid the same salary as the claimant, since the claimant's salary was informed by the Teacher Service Commission (TSC) salary structure.

Claimant's Submissions.

22. The claimant submitted that he was abruptly dismissed from employment when he was served with a termination letter of December 29, 1998, which did not state the reason for termination. He argued further that he was not subjected to any disciplinary process before the termination, therefore that the termination was unfair.
23. On reliefs sought, it was submitted that the claimant worked throughout including school holidays as such is entitled to leave pay. He also urged this Court to allow the claim for unpaid salary for December, 1998 and January, 1999, together with notice pay. On underpayment it was submitted that the page 90 exhibits the minutes of March 8, 1988 that resolved that the claimant was to be paid the same as the 1st respondent as such that the claimant ought to have been paid the same 1st respondent throughout the tenure of employment at the 3rd respondent, which he calculated the arrears at Kshs 791,472. He argued that these calculations are derived from the list send to manager of Barclays Bank.
24. On general damages, the claimant submitted that he was unfairly terminated as such entitled to maximum compensation as provided for under section 49 of the *Employment Act*. To support his case, he relied on the case of *Walter Ogal Anuro v Teacher Service Commission* [2013] eKLR.

Respondents' submissions.

25. The respondents on the other hand submitted that the termination of the claimant's services was lawful and procedural. It was argued that the claimant engaged the 1st respondent in open confrontations which is one of the basis upon which an employee can be terminated as envisaged under section 17 of the repealed *Employment Act*. Furthermore, that there was tension between the claimant and the



- respondents that made the claimant even decline to manage third term examination for the pupils. These reasons according to the respondents are sufficient to warrant a dismissal.
26. On procedural fairness, the respondent submitted that they invited the claimant to a disciplinary hearing but he failed to attend to the same, informing their decision to summary terminate his services.
 27. On the reliefs sought it was submitted that the claimant has not shown any grounds for leave allowance sought as the issue was not discuss before the employment of the claimant, therefore the same cannot be introduced before this court and to do so, would amount to re-writing of a contract by this court. In this they relied on the case of *National Bank of Kenya V Pipelastic Samkolit (K) limited and another* [2001] eKLR. It was argued further that the clamant enjoyed his leave during school holiday and in any case that the salary paid to the claimant was an all-inclusive sum.
 28. On notice pay, it was submitted that the claimant was terminated for gross misconducted, thus not entitle to notice pay.
 29. With regard to underpayment claim, the respondents submitted that that minutes alleging that the head teacher shall be paid the same as the manager is misleading and in fact that minute 86 provided for payment of the head teacher’s salary which is in accordance with Teacher Service omissions salary guidelines. Based on the above, the respondent submitted that the claimant was not underpaid at any point.
 30. On damages for unfair termination, it was submitted that the repealed *Employment Act* did not provided such maximum compensation and if any compensation is owing the same is discretionary to be decided by the court. In this they relied on *CMC Aviation Limited V Mohammed Noor* [2015] eKLR.
 31. On the house allowance claim, it was submitted that the salary paid to the claimant was an all-inclusive sum and if the claimant was not contended, he ought to have raised it with the 3rd respondent, considering that he was a co-director for the company.
 32. In conclusion the respondents submitted that the claim herein is not merited and urged this court to disallow it with costs.
 33. I have examined the evidence and submissions of the parties herein. The claim as filed was initially brought before Court as High Court Civil Case No 43 of 1999.
 34. This being the case, this claim can only be resolved under the regime of the repealed *Employment Act* cap 226 Laws of Kenya.
 35. That preceded the *Employment Act* 2007. It is evident that the *Employment Act* 2007 cannot operate retrospectively in relation to this claim.
 36. Under section 16 of *cap 226* (repealed);

“ Either of the parties to a contract of service to which paragraph (ii) or (iii) of 55(5) or the provision thereto of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be in respect of the period of notice required to be given under the corresponding provision of that sub section.”
 37. The law as it then was was that a contract of employment was terminable without assigning any reason thereto and without notice and only remedy was notice pay or wages earned under the contract.



38. In respect of the case before hand the contract of employment was terminated in 1998.
 39. The reasons whether valid or not leading to the termination may not be valid at this point in time due to the nature of the law in existence during the time.
 40. This therefore implies that the only remedy the claimant is entitled to is notice pay of 1 month and any dues unpaid.
 41. The claimant submitted that he was not paid his December 1998 salary which the respondents have admitted.
 42. He also submitted that he was to be paid the same salary as the director of the 1st respondent as per the exhibited minutes of the 3rd respondent. This was never paid.
 43. The claimant is therefore entitled to payment of the difference in salary between him and the 1st respondent which is the difference between 40,000/= paid to the 1st respondent compared to what he was paid 33,260/= per month during the period.
 44. The claimant sought to be paid leave from 1988 to 1999. Unfortunately there is no evidence that he sought to proceed on leave and applied for it and the same was denied.
 45. In that case he has not proven that he is entitled to leave pay.
 46. The issue of house allowance does not also arise because the agreement was he be paid what was payable to the 1st respondent.
 47. The upshot is that the claimant is entitled to payments as follows;
 1. 1 month salary in lieu of notice = 40,000/=
 2. Unpaid salary for December 1998 = 40,000/=
 3. Underpayments from 1988 to January 1999 as prayed = 791,472/=Total = 871,472/=
- Less statutory deductions
4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF SEPTEMBER, 2022.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kahiga for Respondents – present

Mutonyi for Claimant – present

Court Assistant - Fred

