



REPUBLIC OF KENYA



KENYA LAW
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**Ogechi v Wambiri & 2 others (Cause 100 of 2018)
[2022] KEELRC 4006 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4006 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 100 OF 2018
HS WASILWA, J
SEPTEMBER 22, 2022**

BETWEEN

EVANS OTUKI OGECHI CLAIMANT

AND

ISAAC NKARI 1ST RESPONDENT

GLADWELL WAMBIRI 2ND RESPONDENT

**MICHAEL MUREITHI (SUED AS THE OFFICIALS AND ON
BEHALF OF PRESBYTERIAN CHURCH OF EAST AFRICA SUKARI
PARISH) 3RD RESPONDENT**

JUDGMENT

1. The Claimant instituted this suit against the Respondents vide a memorandum of claim dated March 20, 2018, alleging to have been unfairly terminated and his dues illegally withheld. He also alleged to have been discriminated against in the said termination. He therefore sought for the following reliefs; -
 - a) Certificate of service.
 - b) Terminal benefits of Kshs.933,523.
 - c) General damages for withholding terminal benefits.
 - d) General damages for unlawful discrimination.
 - e) Costs and interests.
2. The Claimant is a graduate teacher in Kiswahili and Geography while the Respondents are the Session Clerk, CBM Chairman and the CBM Treasurer of the Presbyterian Church of East Africa, Sukari Parish, the proprietor of Sukari Presbyterian Senior School located in Nairobi Kenya.



3. The Claimant avers that he was employed by the Respondent vide the letter of appointment dated December 22, 2014 to commence on the January 1, 2015. In the letter of employment, the Claimant was to work for 12 months on probation after which he could apply for the confirmation of the employment on permanent terms. Accordingly, the Claimant states that he applied for his employment to be confirmed on permanent terms in the year 2017, which letter was not acted upon by the Respondents.
4. According to the Claimant, the application to be confirmed on permanent terms was the beginning of his woes as the Respondents issued him with a notice to show cause dated December 31, 2017 requiring him to give written explanation of an alleged incident of him giving a student his phone on the June 3, 2017, while he had taken student for an academic event in Sarakasi Hall in Pagani, Nairobi. The letter indicated that the student extorted money from his parent and used the said money to buy Alcohol. He was summoned to disciplinary meeting on the same day.
5. He alleged that he was discriminated upon when he was singled out and subjected through a disciplinary process when his colleague who had a similar charge was not questioned only on the basis that he was a member of the said Church. Also that the head teacher would from time to time disseminate information to all staff excluding him. This according to the Claimant is against the provisions of Article 27 of *the Constitution*.
6. The Claimant allege that the Respondent advertised for the vacancy of his position when the disciplinary process was ingoing, making the disciplinary process a sham, with a pre-determined end.
7. He states that he was not given time to answer to the charges leveled against him as he was issued with a Notice to show cause and subjected to disciplinary hearing on the same day. Further that upon termination, he was not given notice for termination as provided for under the law.
8. It is the Claimants' case that, while he was at the Employment of the Respondent, he worked 9 hours' overtime, 6 hours per week and 3 hours over the weekend, on remedial lessons, which was not paid for by the Respondent. He stated further that the lessons were 39 of 40 minutes each instead of 28 hours provided for by the Ministry of education.
9. The Claimant states that on termination on the January 31, 2018, he was not issued with certificate of service as required by law. He prayed for notice pay, gratuity, overtime and compensation for the unfair termination.
10. The Respondent entered appearance and filed a defence on the June 14, 2018 admitting to employing the Claimant and denying the allegation of unfair termination contained in the said Claim. The Respondent alleged that the Claimant was never discriminated upon and the termination was done in accordance with the law.
11. The Respondent avers that the Claimant entered into a contract of employment with it and agreed to be bound by the terms of employment as such should not raise issue of overtime when the same had been indicated to him before accepting the employment.
12. On the disciplinary process, the Respondent state that the first disciplinary hearing was carried out on the September 1, 2018 by the school committee and a second one was scheduled on December 31, 2018. Prior to that that the Claimant had been granted 7 days to file its response to the allegations against him but none was filed by the Claimant.
13. The Respondent affirm that the Claimant was not paid his terminal dues because he was yet to clear with the school, which was a pre-requisite for payment of terminal dues.



14. The Respondent denied the good record of employment alleged by the Claimant and stated that the Claimant was on several occasions issued with warning letter and his character never changed.
15. The Respondent also denied the territorial jurisdiction of the Court and avers that the school subject of the proceedings herein is in Kiambu County and the nearest Employment Court ought to have been Nairobi Employment and Labour Relations Court.
16. The Respondents want the case herein dismissed with costs for being misconceived, baseless and an abuse of Court process.
17. In the response to defence, the Claimant filed a reply on the July 17, 2018 and reiterated the contents of his claim and averred with regard to discrimination that Teacher Brian Echakara, was spared disciplinary action for a similar offense. Also that Mr Marsen Maisha a teacher in the same school was confirmed as a permanent employee on the sole reason that he was a member of Presbyterian Church therefore the discrimination was on religious grounds. He also stated that the defence was filed out of time without leave of Court as such should be struck off record.

Hearing.

18. The Claimant testified at CW-1 and stated that he now works at Nyaibaria High School in Nyamira County. He adopted witness statement dated March 20, 2018 and the document of even date and a further list of May 21, 2019 as his exhibits.
19. Upon cross examination by Mbaabu Advocate, the witness testified that he was employed by the Respondent and not Teachers Service Commission. He stated that the terms governing his employment were in the letter of employment of December 22, 2014. He avers that according to the letter of employment he was to apply to be confirmed after 12 months, but the said letter of application was not filed in Court. He testified that he worked overtime clocking 39 hours per week. Working past 5 pm on most days and from 8 to 1pm on most Saturdays with a few Saturdays running up to 4 pm. At times that lessons began at 7am and not the 8am as indicated in the timetable.
20. Upon further cross examination, the Claimant testified that he indeed gave his phone to the student but was to communicate with his teacher. He also stated that he was the only teacher in the trip taking care of 200 students and was not aware that one of the student had sneaked out. He avers that when he learnt of the allegation that some students had bought alcohol, he immediately informed the principal. The Claimant testified that he was given an opportunity to respond to the claims and was subjected to disciplinary hearing. But was terminated. The Claimant affirmed that he did not clear with the school but wrote a demand letter requesting for his dues and the Response was for him to clear first then take his terminal dues.
21. On re-examination the Claimant avers that the phone was requested by students to communicate with their parents and that he was unable to have his eyes on all the 200 student when he was the only teacher in the said trip. Also that the notice of disciplinary hearing was handed to him the same days the disciplinary hearing was slated.
22. The Respondent summoned two witnesses; Moses Muiruri and Gladwell Wambiri the principal and the session Clerk of PCEA Kahawa Sukari as RW-1 and RW-2 respectively.
23. RW-1 testified that he was an employee of the Respondent from 2015 to 2018. He adopted his statement of September 29, 2019. In addition, he stated that in the said period when the Claimant was a teacher, the student population was 96 and not 200 alleged by the Claimant. He denied being



informed by the Claimant of the actions of the student who bought alcohol. He stated that when he learnt of the same he escalated the issue to the school management.

24. Upon cross examination by Momanyi Advocate, RW-1 testified that the Claimant's services were terminated on the January 31, 2018, however the advertisement for his replacement was done on the November 20, 2017. He contends that the advertisement was due to complaints made by the students.
25. Upon further cross-examination, RW-1 testified that there was a requirement by employees to be members of the PCEA church, even though the same was not indicated in the employment letter. He also stated that there was no complaint on his performance as a teacher.
26. On re-examination the witness testified that teachers were confirmed on permanent terms upon posting good performance coupled up with other requirements by the church,
27. The second witness Gladwell Wamburi, testified as RW-2 and stated that she was the clerk of PCEA Kahawa Sukari in 2017. She adopted her statement dated October 21, 2021.
28. Upon cross-examination by Momanyi Advocate the witness testified that Mr. Maisha was confirmed for complying with the church requirement. She confirmed that the issue of church membership was not indicated in the letter of employment. She finally testified that they were ready to issue the Claimant with certificate of service but he did not clear with the Respondent to enable them issue the said certificate.

Claimant's Submissions.

29. The Claimant submitted on three issues; whether there was discrimination against the Claimant on account of religion, whether there was unfair termination of employment and whether the remedies sought should issue.
30. On the first issue it was submitted that the Claimant was denied equal treatment before the law and instead treated differently from his fellow colleagues on the basis of religion contrary to Article 27 of *the constitution* as read with section 5 of the *Employment Act*. It was argued that as per the minutes of June 6, 2017 the Respondent's employee's confirmation of employment was done in accordance with requirement of the Church that mandated its employees to be members of the PCEA church when the said requirement was not indicated in the letter of employment.
31. It is the Claimant's submissions that the denial of confirmation of employment by the Respondent based on membership to the Church was in violation of Article 32 of *the Constitution* on freedom of religion and also violated Article 27 of *the Constitution* on freedom from discrimination. To support their argument the Claimant relied on the case of *Maasai Mara(SOPA) Limited V Narok County Government* [2016] eKLR where the Court held that;

“discrimination occurs where there is intention or direct differentiation on grounds related to personal character of the individual or group and which has the effect of imposing burdens, obligations or disadvantages on such individual or which withholds or limits access to opportunities, benefits and advantages available to other members of the society.”
32. He also relied on the case of *Jonathan Spangler V Centre for African Family studies(CAFs)*[2017] eKLR where the Court held that;

“the Court is interrogating whether the employee was discriminated and held that section 5 of the *Employment Act* has outlawed discrimination against any person directly or indirectly.



The Claimant should only establish a prima facie case and a presumption that there was discrimination leading to termination of employment or unfair action taken.”

33. On the second issue it was submitted that the Claimant was unfairly terminated because he was dismissed on allegation of failing to attend classes on time and failing to give satisfactory explanation of the allegation of the events of June 3, 2017. It was submitted that the delay to attend class on the June 26, 2017 was due to transport challenges it being Idd Ul Fitri Holidays and the delay on 30th June, 2017 was due to the fact that he was on duty and was tasked to carry out roll call on the said time eating up on his time to enter class. Also that the delay on the July 1, 2017 was due to transportation challenge it being a weekend which the Claimant remedied and moved to a house near the school. In any case that the Claimant was arriving at 7 for remedial classes, when the time for working as per the letter of employment is 8am which the Claimant has never arrived past. It was the Claimant’s submissions that the reason given was satisfactory in the circumstances therefore the reason for termination is not justifiable.
34. It was submitted that the termination of the Claimant was pre-meditated because the Claimant’s position was advertised on the November 20, 2017 before the disciplinary proceedings against him began as such the disciplinary hearing was merely used to cover up the actions of the Respondent, making the entire disciplinary proceedings a mockery and the subsequent termination was unfair for all purposes and intends as provided for under section 43, 45 and 47 of the [Employment Act](#).
35. On the reliefs sought, the Claimant submitted that he has proved his case on a balance of probability and urged this Court to allow the claim as prayed.
36. There were no submissions on record for the Respondents at the time of writing this judgement.
37. I have examined all evidence and submissions of the parties herein. From the evidence adduced by the Claimant, he was employed by the Respondent on January 1, 2015.
38. The appointment letter indicated that he was to be on probation for 1 year and then apply for confirmation in employment.
39. Section 42 (2) of the [Employment Act](#) 2007 states as follows;

42(2) “A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee”.
40. In as far as the appointment letter provided for a probation period of 12 months, this was in contravention of Section 42 (2) of the [Employment Act](#) 2007 and I find that the Respondents action of placing the Claimant on probation for 12 months was illegal and unfair.
41. It is also indicated that the Claimant was terminated vide a letter dated January 31, 2018 for reason of negligence in the discharge of duty by failing to attend classes in time and as scheduled and also for allowing a student to use his phone on 3/6/2017.
42. Before the Claimant’s termination he was invited for a disciplinary hearing on December 31, 2017 with the Sukari Parish Session Committee. Vide another letter dated 27th December, 2017 the Claimant was invited for a disciplinary hearing on December 31, 2017 with the Sukari Parish Session.
43. The Claimant acknowledges that he attended the disciplinary committee on this day December 31, 2017 and was dismissed on January 31, 2018.



44. It is however true as admitted by the Respondent witnesses that the Claimant was terminated on January 31, 2018 but the advertisement for his replacement was done on November 20, 2017.
45. With this admission, it is evident that the termination of the Claimant was pre-meditated and the disciplinary process was therefore a sham.
46. In the circumstances of the case the standard to be used before termination of an employee as envisaged vide Section 41 of the Employment Act was not met. It cannot be said that the validity of reason for termination was established when a decision to terminate the Claimant was made before he was subjected to the disciplinary process.
47. It is therefore my finding that the termination of the Claimant was unfair and unjustified as per Section 45(2) of the Employment Act 2007 which states as follows;

“ 45.

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- A termination of employment 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 employee’s 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”.

48. I therefore find for the Claimant and I award him as follows;
- 1. 1 Month’s salary in lieu of notice = 36,700/=
 - 2. Compensation equivalent to 10 months salary for the unfair and unjustified termination = 10 x 36,700 = 367,000/=
- TOTAL = 403,700/=
- Less statutory deductions.
- 3. Issuance of a certificate of service.
 - 4. The Respondents 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:

Mariga holding brief for Momanyi for Claimant – present

Mbaabu for respondent – present



