



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 190 OF 2018**

**VICTOR ONYANGO ADANJE.....CLAIMANT**

**VERSUS**

**KISUMU CHILDREN MINISTRIES T/A CHERRY**

**BRIERLY CHILDREN'S HOME.....RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 14/5/2018 seeking the following reliefs:

i. Certificate Service.

ii. Declaration that the termination of the Claimant's employment was unfair and wrongful.

iii. Payment of terminal benefits including one month's salary in lieu of notice Kshs.20,140 and unpaid salary for September, 2018 in the sum of Kshs.20,140.

iv. Compensation for the unfair termination.

2. Respondent filed a Memorandum of response on 14/6/2018 in which it denied all particulars of claim including that the respondent had employed the claimant as a deputy Manager on 2/9/2014 and that the respondent had unlawfully terminated the employment on 21/9/2015 by a letter of even date.

3. The claimant testified under oath as C.W.1 and adopted a witness statement dated 11/5/2018 as his evidence in chief.

4. C.W.1 testified that he was employed by the respondent on 2/9/2014 as a deputy manager and was placed on probation for 3 months. That the employment was confirmed on 1/12/2014 and received a letter of Employment dated 1/12/2014.

5. That C.W.1 worked diligently until the employment was terminated unfairly on 21/9/15. That the letter of termination dated 21/9/2015 purported that C.W.1 had resigned from employment. C.W.1 testified that he did not resign from his job and had no such intention.

6. That on 1/12/2014 one Mr. Philemon Oguna assigned C.W.1 extra duties such as handling staff disciplinary issues including issuing deserving staff warning and suspension letters.

7. C.W.1 stated that due to the disciplinary role he had, he had a very abrasive relationship with some of the staff members and this also led to a sour relationship between – Mr. Philemon Oguna and C.W.1.

8. That on 21/8/2015 the respondent served C.W.1 with a suspension letter and was ordered to go on compulsory leave pending a board meeting to deliberate on the way forward.

9. C.W.1 was accused in the letter of threatening workers, demeaning co-workers in the social media, having sour relations with teachers from a school where children under the care of the respondent attended and having difficulties in staff management.

10. C.W.1 denied these allegations.

11. C.W.1 testified that the suspension was indefinite since no date was given when the board would deliberate the matter.
12. That the respondent at the same time disconnected electricity to the house of C.W.1 and the house was severally locked to deny C.W.1 and his wife entry. Sometime in August 2015, thugs attacked C.W.1 near her house in the respondent's premises. C.W.1 decided to leave the house and reside elsewhere.
13. On 21/9/2015 a day before resumption of a new school term C.W.1 was served with a letter referenced "**resignation.**" In the letter the respondent purported that C.W.1 had resigned from the Children's home. The Chairman Mr. Odeny served the letter on C.W.1 and urged him to resign.
14. When C.W.1 went to Mr. Philemon Oguna, the Manager to seek clarification on the matter of resignation C.W.1 was informed that his services were no longer required.
15. That the respondent has to date not paid C.W.1 the salary for the month of September, 2015.
16. C.W.1 testified that the respondent unlawfully terminated his employment without any hearing and/or notice. That C.W.1 was not issued with a Certificate of Service to enable him get alternative employment. That C.W.1 is entitled to compensation and payment of terminal benefits set out in the Statement of Claim.

### **Defence**

17. R.W.1 Rev. Philemon Owino Oguna testified for the respondent. He stated that he was the manager of the respondent and that the Respondent ran a Children's home. That R.W.1 knew C.W.1 and that the C.W.1 was employed by the respondent as a Deputy Manager. That C.W.1 was suspended from employment and he subsequently resigned. R.W.1 adopted a witness statement filed on 14/6/2018 as his evidence in Chief.
18. Under cross-examination R.W.1 admitted that he suspended C.W.1 vide a letter dated 21/9/2015 which also required C.W.1 to show cause. That the respondent conducted a disciplinary hearing but he did not have minutes of the same.
19. Under re-examination however, R.W.1 admitted that the suspension was pending a Board meeting to make a decision. That the Board met after C.W.1 had left.
20. That C.W.1 must have plucked the minutes since he had access to the office.
21. R.W.2 Peter Otieno Oluoch testified that he was the facility Co-ordinator of the respondent. That R.W.1 was a child in the respondent institution since class four (4) in the year 2000 until the time he testified. That R.W.1 knew C.W.1 well. R.W.1 adopted a witness statement dated 14/6/2018 as his evidence in-Chief.
22. Under cross-examination R.W.1 stated that he was not part of the respondent staff when C.W.1 was there. R.W.2 also admitted that he was not part of management of the respondent.
23. R.W.1 Sila Ocheng Ayoo testified that he worked for the respondent since the year 2009, that he was still employed by the respondent as a security officer. That he knew the claimant well. That he adopted a witness statement dated 14/6/2018 as his evidence in Chief.
24. Under cross-examination R.W.3 stated that he was not aware of any letter of termination given to C.W.1. That R.W.3 only heard that C.W.1 had been dismissed from employment. R.W.3 stated that he did not know how and why C.W.1 left work.

### **Determination**

25. The parties filed their respective submissions and the issues for determination are:-

- a. Whether C.W.1 resigned from employment voluntarily or his employment was unlawfully terminated by the respondent.**
- b. Whether C.W.1 is entitled to the reliefs sought.**

26. The following facts have been proved on a balance of probabilities :-

- i. That the respondent employed C.W.1 on 2/9/2014 as a Deputy Manager on 3 months' probation and R.W.1 was confirmed to that position by a letter dated 1/12/2014.
- ii. That by a letter dated 21/8/2015 R.W.1 was placed on suspension and was ordered to proceed on compulsory leave pending a board meeting to deliberate on various allegations of misconduct levelled against him.
- iii. That no disciplinary meeting took place to give C.W.1 a chance to be heard on the various allegations made against him and no minutes of any such alleged meeting were produced by the respondent.
- iv. That by a letter dated 21/9/2015 the respondent purported that C.W.1 resigned from his employment voluntarily. C.W.1 has

demonstrated that the said resignation did not take place but instead the respondent terminated the employment of C.W.1 without holding any disciplinary hearing and without giving C.W.1 any notice.

v. It has also been proved that C.W.1 was not paid salary for September, 2015 in the sum of Kshs.20,140. Equally it has been proved that C.W.1 was not paid any salary in lieu of notice and is entitled to Kshs.20,140 in lieu of one month notice.

vi. It has also been established that the respondent did not provide C.W.1 with a Certificate of Service upon the termination of his employment which termination was verbally communicated to C.W.1 by R.W.1 Reverend Philemon Owino Oguna, the manager of the respondent. The termination was verbal and no formal letter of termination was served on C.W.1.

vii. Furthermore, the claimant has established how he was harassed and hounded with his wife out of a staff house he had been given by the respondent prior to the termination. C.W.1 proved unfair labour practice was meted on him by the respondent for no reasonable cause.

27. Accordingly, the claimant has proved on a balance of probabilities that the suit for unlawful and unfair termination has merit and the respondent violated Sections 36, 41, 43 and 45 of the Employment Act, 2007 in that the respondent terminated the employment of the claimant for no valid reason and without following a fair procedure.

28. The termination is therefore unlawful and unfair and the claimant is entitled to the terminal benefits sought in the statement of claim and in addition to compensation in terms of Section 49(1) (c) and (4) of the employment Act, 2007.

#### Compensation

29. With regard to compensation, the claimant had served the respondent diligently for a period of one year and had been confirmed to Permanent and Pensionable status. The claimant was unlawfully and unfairly terminated from his employment and he did not contribute to the termination. The claimant was not paid any terminal benefits including salary for September, 2015 and notice pay which is an aggravating factor. The respondent also engaged in deception by untruthfully alleging that the claimant had resigned when it was clearly not the case. The claimant lost prospects of career progression as a manager of the respondent and was not given a Certificate of Service to help him get alternative employment. The respondent did not compensate the claimant for the unlawful and unfair loss of his employment, housing and means of his livelihood. Instead Respondent hounded the claimant through unlawful means out of the staff house respondent had given him. The claimant suffered loss and damage.

30. Following the case of **Angela Wakiobi Muoki –vs- Tribe Hotel Limited (2016) eKLR** and the case of **Philemon Kiprotich Kirui –vs- Lessos Veterinary Suppliers Limited (Cicade Hotel) Cause No. 402 of 2013**, this Court awards the claimant the equivalent of three (3) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.(20,140 x 3) 60,420.

31. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:-

a. Kshs.60,420, compensation.

b. Kshs.20,140 in lieu of one month notice.

c. Kshs.20,140, being September, salary.

Total: Kshs.100,700.

d. Interest at Court rates from date of filing suit till payment in full for (c) above and from date of judgment for (a) and (b) above.

e. Costs of the suit.

f. Respondent to give the claimant a Certificate of Service within 14 days of this judgment.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of January, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Nthiga & Co. Advocates for the claimant

Moses J.A. Orenge Advocates for respondent

Chrispo: Court clerk