



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 295 OF 2018

ELIZABETH AWINO OTIENO.....CLAIMANT

v

GREAT LAKES UNIVERSITY OF KISUMU.....RESPONDENT

JUDGMENT

1. Elizabeth Awino Otiemo (the Claimant) was employed as an Assistant Registrar by Great Lakes University of Kisumu (the Respondent) on or around 15 June 2017.
2. On 9 April 2018, the Claimant gave the Respondent notice of resignation. The Claimant indicated her last day of work would be 31 July 2018. The primary reason given for the resignation was lack of support and breach of contract on the part of the Respondent.
3. The Claimant asked to be paid her dues.
4. Three days later, on 12 April 2018, the Respondent suspended the Claimant and gave her 2 weeks to respond to allegations that she had been sending defamatory messages to and inciting staff and students.
5. The Claimant responded on 10 May 2018, and on 21 May 2018, she was informed of the termination of her employment. The reason given was that the Claimant had declined to respond to the suspension/show-cause letter.
6. The Claimant sought legal advice, and a demand was sent to the Respondent. On 6 June 2018, the Respondent replied, stating that the Claimant's dues would be paid upon her clearing with the Respondent.
7. On 18 September 2018, the Claimant instituted these legal proceedings alleging breach of contract and unlawful termination of employment.
8. The Respondent filed a Response to the Claim on 18 January 2019, and the Claimant joined Issue with the Response on 21 January 2019. The parties also filed witness statements and documents.
9. The Cause was heard on 30 July 2019 when the Claimant testified and closed her case. The Respondent sought time to file and serve witness statements and documents, and the Court granted the leave to file witness statements within 21 days and scheduled the hearing of the Respondent's case to 12 March 2020.
10. The Respondent did not attend Court on 12 March 2020 when its case was scheduled for hearing, and the Deputy Registrar fixed the hearing for 23 July 2020, but because of COVID19, the hearing did not proceed.
11. The next time the Cause came up for hearing of the Respondent's case was on 14 December 2020. Despite having been served with a hearing notice on 1 October 2020, the Respondent did not attend, nor was it represented.
12. The Claimant applied to the Court to close the Respondent's case. Since there was evidence of service of a hearing notice, the Court ordered the Respondent's case closed and directed the filing and exchange of submissions.
13. The Claimant filed her submissions on 1 March 2021 (should have been filed and served by 14 January 2021), while the Respondent's submissions were not on file by agreed date of 14 February 2021.
14. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Substantive fairness

15. The reason given for the termination of the Claimant's employment was that she had failed to respond to the suspension/show-cause letter.

16. The Claimant produced in Court a copy of her response to the show-cause. The response was dated 10 May 2018.

17. The Respondent did not call any witnesses to confirm and /or deny whether the response was received.

18. Under section 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove that the Claimant did not respond to the show-cause. The Respondent did not discharge the burden.

19. The Court finds that the termination of the Claimant's employment was not for valid and fair reasons.

Procedural fairness

20. Section 41 of the Employment Act, 2007 requires an employer to afford an employee an opportunity to be heard before termination of employment.

21. The Respondent issued a suspension/show-cause letter to the Claimant, and she responded.

22. The Court is satisfied that the Respondent was in substantial compliance with the dictates of procedural fairness.

Compensation

23. The Claimant served the Respondent for about 1-year, and in light of the length of service, the Court is of the view that the equivalent of 1-month salary as compensation would be appropriate (gross wage in March 2018 was Kshs 94,200/-).

Salary in lieu of notice

24. The copy of the Claimant's appointment letter produced in Court did not have a clause on notice, and therefore the Court, relying on section 35(1)(c) of the Employment Act, 2007, will award the equivalent of 1-month salary in lieu of notice (basic salary was Kshs 63,000/-).

Breach of contract

25. The Claimant's testimony that she was owed salaries for the months February 2017, March 2017, April 2017, November 2017, December 2017, January 2018, February and 2018 March 2018 was not rebutted by the production of pay records.

26. The Respondent appeared to admit owing the Claimant salary arrears in paragraph 5 of the Response.

27. In consideration of the Claimant's testimony, the Respondent's admission, and section 10(7) of the Employment Act, 2007, the Court will find that the Respondent was in breach of contract in respect to timeous payment of salaries.

28. The head of the claim is allowed in the sum of Kshs 428,931/-.

Leave allowance

29. The general law of employment, the Employment Act, 2007, does not provide for payment of leave allowance.

30. If there was a contractual basis for leave allowance payment, the Claimant did not prove the same in Court.

Union and other contributions/deductions

31. The Claimant did not prove these heads of the claim(s) set out in paragraph 12(k) of the Statement of Claim, and relief is declined.

Conclusion and Orders

32. From the foregoing, the Court finds and declares that the termination of the Claimant's employment was unfair and further that the Respondent was in breach of contract.

33. The Claimant is awarded:

(i) Compensation Kshs 94,200/-

(ii) Pay in lieu of notice Kshs 63,000/-

(iii) Salary arrears Kshs 428,931/-

TOTAL Kshs 586,131/-

34. The sum to accrue interest at court rates from the date of judgment.

35. The Claimant filed her submissions way after the agreed timeline without offering any explanation. It is also not clear if the submissions were served. She is denied costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 31ST DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mwamu & Co. Advocates

For Respondent Anthony Kago & Co. Advocates

Court Assistant Chrispo Aura