



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO.473 OF 2016

RUTH NYABIO..... CLAIMANT

VERSUS

BEVERLY SCHOOLS OF KENYA LIMITED RESPONDENT

JUDGEMENT

The claimant filed suit on 23rd March, 2018 and the respondent filed defence on 19th April, 2016.

The claimant applied for leave to amend the claim and this was allowed and filed Amended Memorandum of Claim on 17th February, 2017.

By application dated 2nd May, 2018 the respondent's advocate applied for leave to cease acting for the respondent and which was allowed.

The court addressed various interlocutory matters and on 11th November, 2020 the main suit was placed for hearing on 9th February, 2021. the respondent was served in person and there is the Affidavit of Service to confirm service but there was no attendance at the hearing. The claimant was hear don her claim.

Claim

The claimant is a female adult and a teacher by profession. The respondent is a group of schools offering education services under the 8.4.4 and GCSE system and a registered company.

The claim is that on 4th January, 2016 the respondent employed the claimant as a senior school teacher at a monthly wage of ksh.35, 000 per month. Upon employment no employment contract was issued and the claimant was verbally informed that she would be issued with one setting out the terms and conditions of employment.

The claimant reported for work and the school principal Mr Akide appointed her as the class teacher From 3, the English teacher for year 10, form 4 and form 3.

The claim is also that After the appointment, Mr Akide begun signalling her in a suggestive and sexual manner and in particular on one occasion informed the claimant that;

“today your eyes are not as sexy as when you came for the interview”

In addition the principal Mr Akide insisted that the claimant should get into a sexual relationship with him and would on occasion summon her into his office and just stare at her without saying a word and when she sought to know the reason as to why she had been summoned, none would be given. When he persisted in his demands, the claimant informed him that he was not interested in a relationship and he proceeded to demote her from the positions she had been given including that of class teacher.

The principal then started inciting students against the claimant making then act in a disrespectful manner during her lessons and even enquired whether the claimant was a competent teacher despite the fact that she had a track record of excellence in her work.

At the end of one month, the claimant was not paid her wages and no contract was issued and was only paid Ksh.17, 000 out of the due Ksh.35, 000 that had been agreed upon. She was informed that the rest of her salary was sent to a recruitment agency that had recruited her which was not true or introduced to her as she had been directed recruited upon making an application to the respondent.

On 23rd February, 2016 the principal summoned the claimant into his office and issued her with a contract of employment and forced her to sign the same failure of which her employment would be terminated. The claimant reluctantly signed the contract and dated it but the principal crossed out the date and forged her signature and backdated the document to 1st January, 2016 from 23rd February, 2016.

Upon signing the contract, the claimant was issued with letter terminating her employment dated 22nd February, 2016 and noting that her services were no longer required by the respondent and was ordered to leave the respondent's premises within 7 days.

The claim is that upon employment the claimant was never informed that she was on probation and that her wage would be Ksh.30,000. Upon clearance, the respondent refused to pay her salary for February, 2016 save for ksh.5, 000 paid by the human resource officer from his personal account allegedly as final payment. The payment was purportedly paid vide a contract of employment which was non-existent and she felt bullied and intimidated by the principal to accept and due to financial strain.

The claim is further that employment was terminated in breach of the law and natural justice as her rights to fair labour practices were not protected and contrary to section 40 of the Employment Act and there was no hearing and which resulted in unfair termination of employment

The claimant is seeking the following dues;

- a) A declaration that the termination of employment on the grounds of redundancy was un-procedural and improper and claimant is entitled to terminal dues compensatory damages as pleaded;**
- b) An order for payment of the claimant's terminal dues and compensatory damages amounting to Ksh.2,842,000;**
 - i) Salary balance for January, 2016 Ksh.12,000;**
 - ii) Salary for February, 2016 Ksh.35,000;**
 - iii) Salary for 2 years contract unprocedurally terminated 35,000 x 24 months Ksh.840,000;**
 - iv) Damages for unfair termination of employment ksh.420,000;**
 - v) General damages for sexual harassment ksh.1,500,000;**
- c) Costs of the suit**
- d) Any other relief the court may deem fit and just.**

The claimant testified in support of her claims that she is a teacher by profession and the respondent employed her as a senior high school teacher from 4th January, 2016 upon application and being interviewed but was not issued with a written contract save her wage was agreed at ksh.35,000 per month. Upon reporting to work the principal Mr akide was her supervisor and allocated work with a promotion to a class teacher but he commenced sexual harassment by making sexual advances, comments and inviting her to his office seeking to have sexual relations which she declined and directly him to stop but failed to take heed. She reported these sexual harassment incidents to the human resource officer. The principal had become aggressive and hostile upon refusal of the sexual advances and who then turned into inciting students against the claimant.

The claimant also testified that end of January, 2016 she was paid ksh.17, 000 and told that the balance had been sent to a third party which was without her consultations.

On 23rd February, 2016 the claimant was called by the principal to his office and directed to sign a contract. She pleaded for time to read it but he insisted that she had to sign and which she did under duress as the condition was upon refusal to sign her employment would be terminated. The claimant signed the contract and dated it the same day, 23rd February, 2016 but the principal cancelled it and signed a different date.

The claimant was then issued with letter terminating her employment and directed to clear and leave the premises which she did but her due wages were not paid. No reasons were given as to why employment was terminated. No hearing and or payment of terminal dues.

The claimant also testified that the human resource officer later called her and they had a meeting on 29th February, 2016 and was informed that they were conducting investigations and issued her with letter of reinstatement and paid her Ksh.5, 000 which he said was from his personal funds.

The claimant did not resume duty due to the intolerable work conditions she had been subjected to and opted to move the court as herein done.

Defence

The defence is that on 10th December, 2015 the claimant was invited for an interview and upon which she was selected for the post of senior

school teacher. It was mutually agreed that her remuneration be ksh.30, 000 per month and to commence employment from 1st January, 2016.

The claimant was issued with her contract but returned it late.

The defence is also that the claimant reported to work on 12th January, 2016 and not 4th January, as alleged.

The claimant was accorded an opportunity to initiate an enquiry to enable the respondent conduct investigations with regard to sexual harassment claim which she failed to follow through and the same were subsequently dropped.

The claimant's demotion was not in any way hinged on the allegations made of sexual harassment but rather her failure to adequately and professionally discharge her duties as required. She did not take her role with the seriousness required; she failed to adequately prepare her teaching materials as was required; and she harboured a non-harmonious relationship with her students and other colleagues.

The claimant was paid her wages for January, 2016.

The defence is also that as a result of her performance coupled with her troubled discipline, the claimant was summoned to the office to the principal who demanded to be granted a copy of the contract before further action was taken but the claimant acted with haste and dated it the 23rd February, 2016a and then refused to rectify forcing the principal to correct and counter-sign the contract.

The defence is also that the respondent issued the claimant with letter terminating employment after several warnings and based on the terms of the contract.

The claimant is owed ksh.30, 000 for February, 2016 and which is ready for collection. Other claims should be dismissed with costs.

As noted above, the respondent did not attend the hearing. No witness was called and no witness statement is on the record.

The claimant filed her written submissions that her employment was wrongly terminated by the respondent on 23rd February, 2016 which was unfair and the claims made should be awarded. She was never issued with a written contract of employment as required under section 9 and 10 of the Employment Act, she was not

on probation and as held in **winnie Awuor Ochieng v Shah Lalji Nangpar Academy (2020) eKLR**, there was unfair termination of employment. the claimant was not given a hearing or good cause as to why her employment was terminated contrary to section 41 and 43 of the Employment Act. the alleged work performance leading to termination of employment was without proof as held in **Pooroosotum Bheekhoo v Linksoft Group [2015] eKLR**.

The claimant also submitted that section 6 of the Employment Act outlaw sexual harassment at the workplace and the actions of the respondent and the principal Mr Aide amounted to sexual harassment contrary to the law as held in **N.M. L v Peter Patrausch [2015] eKLR**. the claims made should be awarded.

Determination

In the ruling delivered on 1st February, 2017 the court at paragraph 20 the court held that there was no written contract issued to the claimant. That termination of employment came before the contract of service was signed.

The terms of employment remained verbal. Without any evidence called by the respondent, the court must believe the claimant in her assertion of facts with regard to her employment that employment commenced on 4th January, 2016 on verbal terms and her wage was mutually agreed at ksh.35, 000 per month. She was paid ksh.17, 000 in January, 2016 and on 29th February, 2016 she was paid ksh.5, 000 by the human resource officer.

Section 18 of the Employment Act, 2007 (the Act) require an employer to pay wages due to an employee as agreed and for work done. Section 18(2) requires that;

(2) Subject to subsection (1), wages or salaries shall be deemed to be due—

(a) in the case of a casual employee, at the end of the day;

(b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

(c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

(d) in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively.

In this case, parties agreed for a monthly wage of Ksh.35, 000 and for work done. The claimant had worked for two months in total and what was due was in total Ksh.70,000 but was paid Ksh.22,000 and a balance of ksh.48,000 save the claimant has claimed for Ksh.47,000 a

balance for January, 2016 at ksh.12,000 and unpaid wage for February, 2016 at ksh.35,000. The claim is justified and warded at ksh.47, 000.

By letter and notice dated 22nd February, 2016 the respondent terminated the claimant's employment with effect from 29th February, 2016 on the grounds that;

... we would like to inform you that the school will no longer require your services with effect from 29th February, 2017.

In line with termination clause, we are giving you a notice of 7 days (7) to terminate your services.

As noted above, there was no written contract of service. such finding has not been challenged.

In defence, the respondent at paragraph 17 introduced the aspect that the claimant's employment was terminated in her employment due to *work performance coupled with her troubled discipline.*

Where an employee's services are found superfluous, section 2 of the Act defines such as a redundancy. Upon the employer declaring a redundancy, the motions of section 40 of the Act must be followed as held in **Thomas De La Rue (K) LTD V David Opondo Omutela (2013) eKLR.** however, a redundancy cannot affect a single employee as held in **Jane Khalechi versus Oxford University Press EA Limited [2012] eKLR** that;

... an employer shall not be allowed to simply cite re-organisation [redundancy] as a sufficient reason to lay off an employee, due process demands that consultations be inclusive and documented. Otherwise, there will be nothing to refer back to as to how the decision to lay off staff was arrived at.

In this case, save to cite that the claimant's services were no longer required; the respondent did not submit any evidence as to how decision was arrived at. Even where section 40 of the Act was to apply, which is not the case here, section 43 of the Act required that the respondent terminate employment for a genuine and reasonable cause. Such is lacking and the result is there was unfair termination of employment.

Further to the above, the defence that the claimant work performance was coupled with a troubled discipline, that she was summoned to the principal's office and who demanded that she returns the employment contract is to muddle up issues. Whereas the court has since held there was no employment contract, where the claimant work performance was an issue coupled with a troubled discipline, section 41 (1) of the Act required the respondent to address the same as follows;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

An employee who is of poor work performance, who has misconducted herself and or the physical capacity is in issue must be issued with notice and allowed to attend and be given a hearing and allowed to defend herself in the presence of another employee of her choice. Such provisions are mandatory.

The court finds no evidence that the claimant was accorded the due process of section 41 of the Act. the resulting termination of employment was unfair pursuant to section 45 of the Act. compensation is due under section 49 of the Act.

The claimant worked for 2 months only. On the award of all her wages due, compensation is hereby found appropriate at one (1) month gross wage at ksh.35, 000.

As employment terminated without the due process of the law, notice pay is due pursuant to section 35 of the Act at one (1) months gross wage all at ksh.35, 000.

On the claims that there was sexual harassment of the claimant by an officer of the respondent and her supervisor the principal, Mr Akide; Section 6 of the Act defines sexual harassment as where an employer or a representative of the employer or a co-worker:

(a) directly or indirectly requests an employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express

(i) promise of preferential treatment in employment; (ii) threat of detrimental treatment in employment; or (iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;

(c) uses visual material of a sexual nature; or

(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

Section 6(2) of the Act also requires that an employer who employs more than 20 persons to have a policy statement on sexual harassment as follows;

(2) An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.

In the case of **Stellamaris Wanjiku Macharia v Hardware Trading Store Limited & another Cause No.26 of 2019 (Nakuru)** the court is addressing the provisions of section 6 of the Act held that;

*In addition, the same law requires that an employer with 20 or more employees to consult with the employees or their representatives if any, and to issue a policy statement on sexual harassment. Such a workplace policy should include among other matters a definition of sexual harassment; a statement that every employee is entitled to employment that is free of sexual harassment; a statement that the employer should take steps to ensure that no employee is subjected to sexual harassment; and a statement that the employer shall take disciplinary measures as they deem appropriate against any person who subjects any employee to sexual harassment. In addition to having a sexual harassment policy, the employer must ensure that the policy is implemented. Employers should and train their employees on the parameters of the policy as held in the case of **Lydiah Mongina Mokaya versus St. Leonard's Maternity Nursing Home Limited [2018] eKLR***

*It is the duty of the employer to protect all employees at the shop floor. Where it relates to sexual harassment, the employer has the duty to have a workplace policy, train the employees on the same and enforce/implement it as held in the case of **J W N versus Securex Agencies (K) Limited [2018] eKLR** that;*

The Court has also considered section 6(2) of the Act which imposed upon the respondent the duty, after consulting the employees or their representatives, to issue a policy statement on sexual harassment. Under section 6(3) such policy statement was to provide for definition of sexual harassment as provided for in the Act; employee entitlement to employment free from sexual harassment; steps taken to prevent sexual harassment; explain how to make or report to the employer complaints of sexual harassment; and non-disclosure of the complainant except for purposes of disciplinary process or investigating complaints.

Where an employee makes sexual harassment allegations, the employer is bound to conduct investigations and have these addressed instantly and to fail to do so impedes on the rights of an employee or employees at the shop floor.

The claimant testified that upon reporting on duty in January, 2016 she was promoted by her supervisor and principal Mr Akide and made a class teacher whereupon he commenced acts of sexual harassment and made demands against her which she resisted and he then became hostile and started inciting her students against her. The claimant reported such matter to the human resource officer Mr Wabwire and a meeting was held on 27th February, 2016 where she was reinstated back to her employment and advice as follows;

Re; Letter of Reinstatement

We refer to the conversation we had with you on 27th February, 2016 at the school head office in Nairobi of which you alleged that the school principal has been harassing you sexually.

This is a serious allegation on your supervisor which needs further investigations of which you will be called upon to substantiate further.

Due to this new development, we hereby reinstate you to your position. you are therefore required to report to your duty station by 1st March, 2016. Your new supervisor will be the senior teacher.

With regard to leave to attend your Aunt's burial, kindly refer to your employment letter in regards to compassionate leave. ...

On this invitation to allow for investigations, the claimant testified that she did not report back to work. Her advocate's advice that suit be filed. There is a demand letter dated 1st March, 2016. This was the date the claimant was due to report back to work.

As much as section 6 of the Act outlaw sexual harassment, an employee who makes complaints of being sexually harassed, upon a report to the employer and upon invitation to allow for investigations for the same to be addressed should oblige. Sexual harassment is serious workplace misconduct; any culprit should be removed from the shop floor upon the due process of the law.

Why did the claimant refuse the invitation of a reinstatement for the respondent to be able to address her complaints?

The claimant testified that she suffered greatly due to the sexual harassment she faced at work and upon termination of employment she could not secure new employment and suffered financially. She however made a report to the respondent as the employer and who went out to address the same with a reinstatement and offer that her new supervisor be the senior teacher.

The court finds no material reason as to why the claimant failed to attend and have the complaints made of sexual harassment be addressed to a conclusion. To rush and file suit for the court to address a matter which may have been resolved at the shop floor as the respondent was willing to address is without justification. Had the claimant attended as invited, there was a high possibility the same would have been resolved.

Accordingly, the court finds employment terminated on 23rd February, 2016 unfairly and judgement is hereby entered for the

claimant against the respondent in the following terms;

(a) Compensation Ksh.35,000;

(b) Notice pay Ksh.35,000;

(c) Unpaid salaries for January, and February, 2016 Ksh.47,000;

(d) Costs of the suit

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and