



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 53 OF 2020

GABRIEL MAINA.....CLAIMANT

VERSUS

SOS CHILDREN VILLAGES KENYA.....RESPONDENT

JUDGMENT

1. The Claimant herein instituted this claim against SOS Children Villages Kenya vide a Statement of Claim filed on 31st January 2020. He avers that he was employed by the Respondent as an Electrical Installation Instructor vide a letter of appointment dated 16th January 1998 and that his meticulous performance made him rise through the ranks to be Head Teacher in 2008 and finally to the position of Principal Technical Training Institute in 2011. He avers that on or about 19th August 2019, he was unexpectedly served with a Show Cause letter on why disciplinary action should not be taken against him and further requiring his answer to the following:

- a. Failing to provide supporting documents as requested on 2nd August 2019 as per the minutes, (bank account, minutes, list of students on bursary, Communication to the deputy principal, leave forms)
- b. Allowing teachers to collect cash from students directly not through the bank
- c. Failure to adhere to the Ministry of Education Guidelines on students' supervision outside the institution
- d. Requesting the students to prepare thank you letters for others yet each is supposed to write his/her own
- e. Borrowing money from PTA without seeking approval from SOS
- f. Failure to bank the money into the TTI running cost account
- g. Lack of adherence of the procurement process
- h. Failure to allocate classes for himself for the whole of 2019

2. He avers that he was also expected to appear for a disciplinary hearing on 27th August 2019 which was later postponed to 12th September 2019 and that despite his reservations on the process, he appeared before the disciplinary panel and rebutted the charges preferred against him as false, malicious and outrageous. The Claimant averred that true to his instincts, the disciplinary process was marred with irregularities such as: his immediate supervisor presiding over the process as the chairperson; several issues raised in his response letter being ignored; the employee who had accompanied him being kept out of the room for a larger part of the hearing process. The Claimant avers that his employment was terminated vide a letter dated 19th September 2019 served upon him through email on the same day after working hours for reasons given that he habitually and substantially neglected his duties. The Claimant averred that the termination letter together with another letter issued to him on 2nd October 2019 stipulated that he had a right to appeal within 5 working days and he was also given a copy of the minutes on 7th October 2019. The Claimant averred that he was however never informed of the procedure of appeal and the body to appeal to. The Claimant averred that termination of his employment was unlawful and wrongful and he thus prays for Judgment against the Respondent for:

- i. Damages for unfair and unlawful termination equivalent to 12 months' salary.
- ii. 12 month's salary as compensation for unfair/unlawful termination of the Claimant's contract of service

- iii. One month's salary in lieu of notice
- iv. Severance pay
- v. Costs of the claim.
- vi. Interest on i, ii, and iii above at court rates
- vii. The Respondent be directed to immediately issue the Claimant with a certificate of service
- viii. Any other relief this court may deem just and fit to give.

3. The Claimant stated during formal proof that he wished for the Court to consider the statement and bundle of evidence in his case. He stated that due to his performance, he rose to the rank of a Principal in 2012, which position he served until his termination and that at the time of termination he was earning Kshs. 94,912/- per month. He further stated that the accusation on collection of money is untrue as they had a rule that students pay into the bank account and that if any of the Teachers collected money, it was on own volition and behind his back. He stated that they were to take students to Thika who would also spend a night and he made arrangements for a teacher to spend a day with them and leave after the events. He testified that he borrowed money from the PTA account in the interest of the school and with knowledge of the management because they had not gotten money for many months and that all money from the PTA account was accounted for and the receipts are before Court. The Claimant submitted that the class allocated to him to teach had no quorum as there was no enrolment for diploma and he confirmed that he taught practicals in the technical class or diploma as per the timetable. He stated that he was unfairly terminated as his immediate supervisor was his accuser and also chair of the disciplinary committee and that his appeal was to the same committee. He prays that the Court considers the evidence and grants his prayers in the Claim as well as costs of the claim plus interest at court rates.

4. The Claimant filed his Written Submissions dated 29th June 2021 wherein he submitted that under Section 45 (2) of the Employment Act, a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and fair and that the termination of employment was in accordance with fair procedure. The Claimant submitted that therefore before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. He submitted that the Respondent's decision to terminate his contract of employment summarily was outside the confines of law. He invited this Court to examine the notice to show cause letter vis-à-vis the letter of summary dismissal. He submitted that the said dismissal letter states that the reason for termination was as a result of neglect for duties and which reason is not in any way aligned to the allegations in the Show Cause. The Claimant submitted that more fundamental is that the minutes given to him were not a true representation of what was discussed and were further were not signed by the members of the alleged panel. The Claimant submitted that the Respondent in response to the Claimant's demand letter vide a letter dated 31st October 2019, further departed from their reasons for terminating his employment and introduced new material not captured in the show cause letter or the unsigned minutes. The Claimant submitted that the Respondent has demonstrated that he was being subjected to a process whose outcome had been predetermined. He submitted that further, there were no allegations as to any money lost under the Claimant's watch and that the audit report which the Respondent seeks to find umbrage in does not state or make any finding on the culpability on the part of the Claimant or that any amount of money was lost. The Claimant submitted that factually, the charges in the show cause letter did not stem from the audit report. The Claimant submitted that in the prevailing circumstances, the Respondent had no valid reason to immediately terminate his contract and that he gave valid responses to each and every allegation levelled against him. The Claimant submitted that his decisions saved the Respondent from public uproar and ridicule had the school closed due to lack of funds, which was in fact a creation of the Respondent's management and that he deserved a thank you. The Claimant further submitted that the Notice to Show Cause letter also served as notice of the disciplinary hearing and set 27th August 2019 as the date for the hearing. He submitted that the said approach was faulty because the Respondent had not had the benefit of examining his response to ascertain whether there was need to subject him to a hearing. He further submitted that for his supervisor to seat in a disciplinary panel as a judge to determine on issues she had endorsed, amounts to a hyena being the judge in a case where a goat is the accused. That contrary to the provisions of Section 41 of the Employment Act that an employee facing termination of employment shall be entitled to have another employee or a shop floor union representative of his choice present, his representative was kept out during the hearing. The Claimant submitted that the damages to be awarded to him, if any, should be based on the gross pay and he implores this Court to award Kshs. 1,138,944/- as compensation for the unfair and unlawful termination. He submitted that he is also entitled to one-month notice pay since his contract provided for termination by either party upon issuance of not less than one (1) month notice or salary in lieu of notice. The Claimant submitted that having established liability on the part of the Respondent, he must be compensated with consideration that he successfully and diligently served the Respondent since 1998.

5. The Claimant sued his former employer seeking recompense and he stated in his evidence that the reasons were lacking. He had been accused of misuse and misappropriation of funds but no evidence was led on this. The disciplinary meeting held by the Respondent was a sham and was designed to only have one outcome. It was sad that despite the efforts the Claimant put in his service to the SOS Villages he was vilified and shunted out of a job. The failures of the Board were transferred to him as the Respondent failed to provide funding for the SOS Villages thus forcing the Claimant to borrow funds from one account to ensure the children under his care did not suffer. It is deplorable that an organisation that is to champion the rights of children would be this callous about their needs forcing the head of the homes to borrow money. Upon dismissal on 19th September 2019 he received the letter on 2nd October 2019 yet the letter of dismissal gave him 5 days to appeal!

6. As the Claimant amply proved there was no basis for his dismissal, he is entitled to compensation. However, given the Respondent is one that is intended to cater for young and vulnerable children I will cap the compensation to 6 months though the Claimant would be deserving of double that in compensation. He is entitled to one month's salary as notice. The Respondent must also pay the costs of the suit. In the final analysis, I enter judgment for the Claimant against the Respondent for:

- i. One month's salary in lieu of notice – Kshs. 94,912/-

ii. 6 month's compensation for the unfair and unlawful termination – Kshs. 569,472/-

iii. Costs of the suit

iv. Interest on the sums in i) and ii) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2021

NZIOKI WA MAKAU

JUDGE