



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 35 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

MONICA WANJA..... CLAIMANT

VERSUS

ROYAL KINGS EDUCATION CENTRE.....RESPONDENT

JUDGMENT

1. By her memorandum of claim dated 17th January 2018 and filed on the same date through Kenya Union of Pre-Primary Education Teachers, the Claimant avers that she was unfairly terminated by the Respondent. The Claimant filed an amended claim dated 15th June 2020 in which she seeks the following reliefs –

i) *THAT this honourable court be pleased to vary/regulate the terms of the contract of the Claimant pursuant to Section 37(4) of Employment Act 2007 as the contract was not in conformity with the dictates of the Employment Act 2007.*

ii) *THAT this honorable Court be pleased to compel the Respondent to pay the Claimant the accrued difference in salary paid for the entire period between January 2009 to January 2018. The difference between Kshs.9,200 and the salary under the minimum gazetted (general) order 2018 as an ungraded artisan earning Kshs.18,319.50, together with 15% house allowance being Kshs.2,747.95. bringing to a gross salary of (Kshs.21,067.45 – Kshs.9,200) = Kshs.11,867.45 per month.*

iii) *THAT this honourable court do order the Respondent to pay the Claimant the withheld wages of Kshs.2,000 for March 2017 and Kshs.2,770 for the month of November 2017.*

iv) *THAT this honourable court do order the Respondent to pay the Claimant salary of Kshs.21,067.45 for February in lieu of notice.*

v) *THAT this honourable court do order the Respondent to pay the Claimant 12 months' salary as compensation for unfair termination and loss of income.*

vi) *THAT this honourable court do order the Respondent to refund to the employee the amount deducted from the Claimants' wages and pay the N.S.S.F on behalf of the Claimant with the Respondent's own funds.*

vii) *THAT this honourable Court do order the Respondent to issue the Claimant with a certificate of service for the period worked.*

viii) *THAT this honourable Court do make a declaration that the Claimants' employment was unlawfully and unfairly terminated.*

ix) *THAT this honourable Court do make a declaration that the Respondent engaged in unfair labour practice.*

x) *THAT this honorable Court do order the Respondent to pay the Claimant 15 days (half month salary) for every completed year of service.*

xi) *THAT this honourable Court do order the Respondent to pay the Claimant 21 leave days with full pay for every 12 consecutive months of service.*

xii) *THAT this honourable court be pleased to order award for cost of the suit.*

2. Together with the claim, the Claimant filed a notice of motion in which she prayed that the matter be listed for hearing on priority and that costs of her application be provided for.
3. The Respondent filed a response to the memorandum of claim through S. O. Madialo and Company Advocates on 31st January 2018. It denies all the averments in the claim and avers that the Claimant was employed as a volunteer in 2013 to assist the ECDE Teachers in certain school activities not related to teaching in view of the fact that she was not a trained teacher.
4. It is the averment of the Respondent that the Claimant's employment was lawfully terminated under Section 44 of the Employment Act and she was paid one month's salary in lieu of notice following several warning letters on insubordination and unbecoming conduct which she failed to remedy.
5. The Respondent further filed a replying affidavit of Samuel Moseti Monyoncho sworn on 30th January 2018 in which he deposes that the Claimant was a volunteer engaged prior to 2009 on casual basis to work in the institution's kitchen department.
6. That in 2013, the Claimant was recruited as a volunteer to assist the pre-primary school teachers with other activities ancillary to children welfare and not teaching. That her employment was terminated on grounds of gross misconduct, insubordination and underperformance. He further deposes that the Respondent complied with all statutory deductions.
7. Samuel Munnyoncho further filed a witness statement dated 7th February 2018 in which he states that the Claimant was employed by the Respondent in January 2009 as an Assistant Cook, in 2013 she was contracted to assist pre-primary school teachers in activities ancillary to teaching.
8. That following complaints against the Claimant by staff members and parents, the said Samuel Moseti Munnyoncho was tasked by the Respondent's Board in his capacity as School Administrator to warn the Claimant of her unbecoming conduct which he did severally, but the Claimant did not heed the warnings.
9. That on the date of her dismissal, the Claimant acted rudely before the Chairman and Administrator and walked away prompting the summary dismissal. That all the Claimant's dues together with one month's salary in lieu of notice had been settled.
10. The Respondent also filed a witness statement of Sarah Wanjiku Weru, the Head Teacher of the Respondent's institution in which she deposes that the Claimant was employed in 2009 as an Assistant Cook.
11. She deposes that following complaints against her, the Claimant was warned severally with no improvement.
12. That the Claimant was terminated in January 2018 due to her increasingly unbecoming conduct and confrontational attitude that did not conform to the institution's Christian values.
13. The Claimant filed a reply to the response to claim in which she states that the Respondent has contradicted itself in alleging the Claimant was a volunteer while in the replying affidavit sworn by Samuel Moseti Munnyoncho on 30th January 2018 in response to the Claimant's application by notice of motion dated 17th January 2018 filed with the claim, it is deponed at paragraph 6 that the Claimant was prior to 2009, a casual working at the institution's kitchen department.
14. No response was filed to the amended claim. On 5th August 2020, the Court directed that the claim proceeds to formal proof.
15. In view of the fact that the matter was ordered to proceed by way of formal proof following withdrawal of Counsel for the Respondent and failure of the Respondent to respond to mention and hearing notices served upon it, the case was disposed of by way of affidavits, documents and written submissions.
16. The Claimant filed submissions but the Respondent did not.
17. The issues for determination are whether the Claimant was engaged, whether the termination of her employment was lawful and whether she is entitled to the reliefs sought.

Engagement

18. It is admitted by the Respondent in the affidavit of Samuel Moseti Munnyoncho sworn on 30th January 2018, in his witness statement dated 7th February 2018 and in the witness statement of Sarah Wanjiku Weru that the Claimant was employed by the Respondent in January 2009.
19. This is confirmed by the certificate of service filed with the Respondent's bundle of documents dated 12th February 2018 as document no. 3.
20. I thus find that the Claimant was employed by the Respondent in January 2009 and worked as an Assistant cook and later as an untrained ECDE Teacher at Royal Kings Education Centre (the Respondent) until her employment was terminated on 3rd January 2018.

Termination

21. It is the Claimant's case that she was unfairly terminated by the Respondent. That she was summoned to the office on 3rd January 2018 by the Respondent's Director Mr. Gitonga in the presence of Rev. Samuel Moseti the Administrator to a meeting at the school where she was informed that a decision had been made to terminate her employment. The reasons she was given were that she was untrained and that she was heard talking negatively about the Deliverance Church which operated the school.

22. This narrative is not denied by the Respondents who in the defence, witness statements and replying affidavit of Mr. Moseti state that the Claimant's employment was terminated under Section 44 of the Employment Act on grounds of gross misconduct, insubordination and poor performance.

23. It is not denied that the Claimant was never served with any charges that she was required to respond to. It is not denied that a decision was made without involvement of the Claimant and then she was called and informed about the same. There was thus no compliance with either Section 41 of the Employment Act which specifically provides that before termination under Section 44 an employee must be subjected to a fair hearing under the procedure as set out in the Section.

24. There was further no proof of reasons for termination as required under Section 43 of the Act. All that was pleaded by the Respondent is the grounds of termination. No mention was made of the said grounds having been proved. No letters of warning were presented to Court nor the particulars of the gross misconduct. The grounds of gross misconduct, insubordination and under performance were therefore never proved. They were mere allegations.

25. Under Section 45(2) of the Employment Act, any termination that does not conform to either or both Sections 41 and 43 is unfair. The termination of the Claimant's employment was therefore unfair and I declare accordingly.

Remedies

26. The Claimant prays for underpayments of salary between what was paid to the Claimant being Kshs.9,200 and the statutory minimum wage of Kshs.18,319.50 together with 15% house allowance. The statutory minimum wage of a cook according to the Regulation of Wages General (Amendment) Order 2018 (the General Order) was not Kshs.18,319.50 as prayed but Kshs.14,658.85. The Order took effect on 1st May 2018. The Claimant had by then long left employment and indeed had already filed the instant suit which was filed on 17th January 2018.

27. The Claimant's last salary according to the General Order was that applicable from 1st May 2017 being Kshs.13,960.80 plus 15% house allowance of Kshs.2,095.1 making a consolidated wage of Kshs.16,056. The same is payable less Kshs.8,770 paid by the Respondent as per deposit slip at document 3 of the Respondent's bundle of documents.

28. I grant the Claimant the said sum on account of pay in lieu of notice having found the termination of her employment unfair.

29. The Claimant is not entitled to service pay at 15 days' pay per year worked as she was a member of NSSF as reflected in the statement she filed together with her claim as document no. 7.

30. Any amount of NSSF not remitted by the Respondent would be a matter to be taken up with NSSF which has the statutory authority and the wherewithal to collect the same, including power to penalise default by an employer.

31. The prayer for leave fails as it was never pleaded in the claim nor was it mentioned in the Claimant's witness statement. It was thus not proved.

32. The Claimant is not entitled to withheld wages of Kshs.2,000 for March 2017 and Kshs.2,770 for November 2017 as the Respondent paid the Respondent paid the same as per deposit slips filed as Document 2 and 4 of the Respondent's bundle of documents.

33. The Claimant is not entitled to salary for February 2018 as her employment was terminated on 3rd January 2018.

34. The Claimant is awarded the difference between the salary she was paid being Kshs.8,7770 and the minimum consolidated wage of Kshs.16,056 being Kshs.7,286 for the period 1st May 2017 to December 2017 being 8 months at **Kshs.58,288.00**.

35. From 1st May 2015 to 30th April 2017, I award the Claimant the difference between her salary of Kshs.8,700 and the consolidated statutory minimum wage of Kshs.11,381.20 plus 15% being Kshs.1,707.15 making a total of Kshs.13,082.35. For this period the Claimant is entitled to 13,082.35 – 8,770) being Kshs.4,312.35. for 24 months. I award her **Kshs.103,496.40**.

36. From 2013 to 2015 the Claimant's salary should have been Kshs.10,563.60 plus 15% house allowance being Kshs.1,584.45 making a gross of Kshs.12,148.05. The difference between her earnings of Kshs.8,770 and the minimum statutory wage for this period is Kshs.3,378.05 for the 24 months being 1st May 2013 and 30th April 2015, I award her **Kshs.81,073.20**.

37. The total amount awarded to the Claimant on account of underpayment is therefore **Kshs.242,857.60**.

38. The Claimant having been unfairly terminated, I award her 10 months' salary in the sum of **Kshs.160,560.00** as compensation. I have taken into account her length of service, the manner in which her employment was terminated and all relevant factors under Section 49(4) of

the Employment Act in awarding the compensation.

39. In view of the fact that the Claimant was represented by the Union, I award the Union Kshs.20,000 on account of reasonable expenses and disbursements.

40. **The total award is therefore Kshs.646,275.20**

41. The Respondent shall issue a Certificate of Service to the Claimant in accordance with Section 51 of the Employment Act.

42. The decretal sum shall attract interest from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

MAUREEN ONYANGO

JUDGE