



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 907 OF 2015

MARIA MBALA SKOCK.....CLAIMANT

VERSUS

COAST STAR ACADEMY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd December, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 03.12.2015 through M/S Otieno Asewe & Company Advocates. The claimant was employed by the respondent in 2009 as a cleaner and she states the salary was Kshs. 6, 500.00 and later to Kshs. 8, 060.00. The claimant further case is as follows. On 01.01.2013 she received a letter of appointment and on 26.06.2015. She alleges that on 26.06.2015 the head teacher one Mrs. Najaa Omar alleged the toilets were not well brushed and on 30.06.2015 her services were terminated without prior notice. It is her case Articles that Articles 41 and 47(1) of the Constitution were violated as well as ILO Convention 158 of 1992 on termination of employment. Further there were no factual and genuine reasons for the termination per sections 41, 43 and 45 of the Employment Act, 2007. Her due monthly pay under the Regulation of Wages (General) (Amendment) Order No. 197 of 2013 her monthly pay was to be Kshs. 9780.50 but was paid Kshs. 8, 060.00 and per the Order of 2015 her monthly pay was to be Kshs. 10, 954.70 but was paid Kshs. 8060.00 and she claims underpayment. She claims:

- a) Notice payment Kshs. 10, 954.00.
- b) Leave pay for 7 years worked Kshs. 61, 932.00.
- c) Underpayment May 2013 to April 2014 Kshs. 41, 304.00.
- d) 12 months' compensation for unfair termination Kshs. 131, 448.00.
- e) Total claim Kshs. 131, 448.00.

The claimant prays for:

- a) Payment of Kshs. 131, 448.00.
- b) Costs of the claim.
- c) A declaration the termination was unfair and unjust.
- d) Any other relief that the Court may deem just and fit to grant.

The reply to memorandum of claim was filed on 01.02.2015 through M/s Sherman Nyongesa & Mutubia Advocates. The respondent pleaded as follows. At termination the claimant earned Kshs.9, 000.00 gross monthly salary. The respondent admits that on 01.01.2013 a letter of appointment issued. Further during employment, the claimant developed an arrogant, rude behaviour and displayed lack of commitment to her work and was on several occasions rude to her superiors. In that regard she wrote apology letters and was forgiven and allowed to continue working. In the instant occasion, during the disciplinary hearing she was asked to write an apology but she arrogantly refused and the respondent had no option to dismiss her per sections 41 and 44 of the Employment Act, 2007. The respondent denied all claims and prayers and prayed that the instant claim be dismissed with costs.

The claimant testified to support her case. The respondent's witnesses were the claimant's supervisor Philgona Erastus Abidha (RW1) and

the head teacher Najaa Omar Mohamed (RW2). Final submissions were filed for parties. The Court has considered all material on record and returns as follows.

First, there is no dispute that the parties were in a contract of service. The claimant was a cleaner and as per the pay slips exhibited for the respondent her last gross monthly pay was Kshs.9, 000.00.

Second, the evidence was that the claimant was dismissed on account that the toilets she cleaned were smelly.

Third, the claimant testified that she was summoned and told about the smelly toilets. While testifying that she performed as expected, she does not state whatever she did to improve following the summoning. The Court sees no ground to discredit the respondent's evidence that the claimant failed to perform as expected and was asked to explain and apologise and continue in employment but refused to apologise and the respondent made a decision they separate. The Court finds that the respondent has established the genuine reason for termination per section 43 and 45 of the Employment Act, 2007 and it cannot be said that the procedure adopted to terminate was unfair – as envisaged in section 45 of the Act, the claimant was given opportunity to apologise and continue working and the Court finds refusal to apologise meant she was unwilling to improve. The Court finds that the claimant was the author of her dismissal and she contributed 100%. The Court finds the termination was not unfair, the claimant is not entitled to compensation, and the respondent was entitled to dismiss with a shorter notice than was agreed (per section 44 of the Act) and notice pay is declined.

Fourth, the Court finds that there is no reason to doubt the evidence by RW2 that school closed during school holidays and public holidays and the claimant took leave during the school holidays as there was no policy for pay in lieu of notice. Leave claim will fail especially that there appears no grievance in that regard throughout the subsistence of the employment. The claimant has exhibited and relied on the Regulation of Wages (Agricultural Industry) (Amendment) Order 2015 which became operational on 01.05.2015. As submitted for the respondent the Order could not apply retrospectively for the period May 2013 to April 2014 as claimed. Further it is clear that the claimant worked in a school and the Order applying to Agricultural Industry Could not apply. As well, the General Order exhibited for 2015 could not apply retrospectively in view of underpayments claimed for 2013 and 2014. The claimant's suit will therefore fail. The Court has considered all the circumstances of the case including that prior to the written contract the claimant had been in respondent's service under terms that had not been documented and each party will bear own costs of the suit.

In conclusion judgment is entered for the respondent against the claimant for dismissal of the memorandum of claim with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 3RD DECEMBER, 2021.

BYRAM ONGAYA

JUDGE