



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 481 OF 2016

LEONIDA ORONGA AMANYA.....CLAIMANT

v

ST. NICHOLAS SCHOOL LIMITED.....RESPONDENT

JUDGMENT

1. Leonida Oronga Amanya (Claimant) was offered employment as a kindergarten teacher through a letter dated 8 February 2012 by St Nicholas School Ltd (Respondent).
2. On 9 July 2015, the Respondent issued a show cause to the Claimant to explain why disciplinary action should not be taken against her for exposing children under her care to unacceptable and deplorable hygienic conditions.
3. The Claimant responded on 10 July 2015 expressing sincere apologies for having been aware of the incident of pupil(s) having been exposed to unhygienic conditions on the day in question and also stating that the issue had been brought to the attention of the person in charge of cleanliness but she did not take any action.
4. On 6 August 2015, the Respondent suspended the Claimant without pay for 3 weeks pending the review of the case.
5. The Respondent thereafter notified the Claimant of the termination of her employment through a letter dated 19 August 2015 leading to the institution of these legal proceedings.
6. The Respondent filed a *Memorandum of Response* on 7 September 2016.
7. On 11 July 2018, the Court directed that this Cause be consolidated with Cause No. 1295 of 2015, Margaret Wanjiru Kieya v St. Nicholas School Ltd. Despite the consolidation, the Court will deliver separate judgments.
8. The Cause was heard on 3 July 2019 and on 11 November 2019.
9. The Claimant and the Respondent's Administrator testified.
10. The Claimant filed her submissions on 8 January 2020 (should have been filed before 29 November 2019. It was explained that the advocate on record fell ill), while the Respondent's submissions were not on file by this morning.

Whether Claimant was an employee of the Respondent

11. Although stated as Issue 1, the Respondent had admitted that the Claimant was an employee from 8 February 2012.

Unfair termination of employment

Procedural fairness

12. Section 35(1)(c) of the Employment Act, 2007 provides for a *written notice of termination of employment* while section 41 of the Act envisages a hearing.
13. The Claimant was issued with a show cause and she responded to the same.
14. The Court in the circumstances finds that the Respondent was in substantial compliance with the statutory requirements of sections 35(1)

(c) and 41 of the Employment Act, 2007.

Substantive fairness

15. An employer is under a burden to prove the reasons for terminating the employment of its employees, and that the reasons are valid and fair, pursuant to the provisions of sections 43 and 45 of the Employment Act, 2007.

16. The Claimant stated in her response to the *show cause* and in Court that she was not aware of the dirty toilet and was only informed about it by a colleague and that the cleaning of toilets was not part of her responsibilities as there were 2 cleaners employed for that purpose.

17. The Claimant's primary function was to serve as an early childhood development educator. She had some responsibilities over the hygiene of the pupils under her care.

18. The Respondent's witness admitted that there were cleaners specifically employed to clean the toilets. She also confirmed that the Claimant was suspended for 3 weeks without pay because of the incident.

19. In the circumstances, was it fair to terminate the employment of the Claimant?

20. There were cleaners who were expressly under instructions to clean the toilets, most probably during regular intervals. Why they failed to carry their primary task was not explained despite having been informed of the state of the toilets. There was no disclosure as to any action taken against them.

21. The Claimant also testified that she was not aware of the dirty toilet until the next day. The Respondent did not prove that the Claimant was privy to the question or that her responsibilities included the cleaning of toilets.

22. The Claimant was also suspended without pay. The authority to suspend was not disclosed. Under the common law, the suspension of an employee without pay is unlawful (*McKenzie v Smith* (1976) IRLR).

23. The text and spirit of the suspension letter suggest it was a sanction, a penalty.

24. The Court, therefore, concludes that the termination of the Claimant's employment was not fair as a sanction of suspension without pay had already been meted, and the decision also did not accord with justice and equity in terms of section 45(4)(b) of the Employment Act, 2007 as there were employees expressly employed to clean the toilets.

Compensation

25. The Claimant served the Respondent for 3 years.

26. Considering the length of service, the Court is of the view that the equivalent of 4 months gross wages as compensation would be fair (the Claimant's salary at the time of separation was Kshs 20,000/-).

Pay in lieu of notice and earned wages for August 2015

27. The Claimant was offered 1-month salary in lieu of notice and 6 days earned wages for August 2015 and nothing turns on these heads of claim.

Gratuity

28. The Claimant sought Kshs 40,000/- as gratuity but did not provide any contractual or evidential foundation to gratuity.

29. This head of the claim was not proved to the required standard.

30. If by gratuity the Claimant meant *service pay*, the Court notes that the termination of employment letter suggests that the Claimant was a contributor to the National Social Security Fund. In terms of section 35(5) & (6) of the Employment Act, 2007, she would not be eligible for *service pay*.

Conclusion and Orders

31. The Court finds and declares that the termination of the Claimant's employment was unfair and also not in accord with justice and equity and awards her

(a) Compensation **Kshs 80,000/-**

32. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 17th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant - Ms. Sabastian instructed by Ngetich, Chiira & Associates Advocates

For Respondent - Mr. Amalemba instructed by Amalemba & Associates Advocates

Court Assistant - Lindsey/Judy Maina