



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1925 OF 2015

MARGARET WANJIRU KIEYACLAIMANT

v

ST. NICHOLAS SCHOOL LIMITED.....RESPONDENT

JUDGMENT

1. Margaret Wanjiru Kieya (Claimant) was offered employment as an Assistant through a letter dated 2 June 1986 by St Nicholas School Ltd (Respondent). The Claimant rose to the position of teacher.
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 (a) pupils having been exposed to unhygienic conditions on the day in question but not taking 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 20 January 2016.
7. On 11 July 2018, the Court directed that this Cause be consolidated with Cause No. 481 of 2016, Leonida Oronga Amanywa v St. Nicholas School Ltd.
8. Despite the consolidation, the Court will deliver separate judgments.
9. The Cause was heard on 3 July 2019 and on 11 November 2019.
10. The Claimant and the Respondent's Administrator testified.
11. The Claimant filed her submissions on 8 January 2020 (should have been filed/served 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

12. Although stated as Issue 1, the Respondent had admitted that the Claimant was an employee from 2 June 1986.

Unfair termination of employment

Procedural fairness

13. 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.
14. The Claimant was issued with a show cause and she responded to the same.

15. 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

16. 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.

17. The Claimant admitted in her response to the show-cause notice that the pupils were exposed to unhygienic conditions.

18. 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. One of the pupils under her had soiled herself in the toilets leaving one toilet dirty on 7 July 2015.

19. 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.

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

21. The Court does not think so.

22. 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. There was no disclosure as to any action taken against them.

23. 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).

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

25. The Court, therefore, concludes that the termination of the Claimant's employment was not fair as a sanction had already been meted, and that the decision did not also 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

26. The Claimant served the Respondent for 29 years. Considering the length of service, the Court is of the view that maximum compensation would be appropriate and fair (the Claimant's salary at the time of separation was Kshs 21,000/-).

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 304,500/- 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 not only unfair but not in accord with justice and equity and awards her

(a) Compensation **Kshs 252,000/-**

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