



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO 459 OF 2017**

**MARTHA WANJIRU MUNGAI .....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT PIONEER SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for her alleged wrongful dismissal and refusal to pay her terminal benefits. The Claimant averred that she was employed by the Respondent on 1<sup>st</sup> May 2015 as an English –Literature teacher. She averred that she worked diligently for one year nine months before she was summarily dismissed on 31<sup>st</sup> January 2017. The Claimant averred that though there was no minimum set grade a teacher ought to have achieved, she always ensured that her students scored good grades. The Claimant averred that on 30<sup>th</sup> January 2017 she was given a letter indicating that her services had been terminated with effect from 1<sup>st</sup> February 2017 due to non-performance. The Claimant averred that she has never been given any warning nor had there been any complaint against her regarding her performance. The Claimant averred that the termination of her employment was unfair, unprocedural, wrongful and illegal as she was not issued with notice. The Claimant averred that she used to work overtime and during holidays and weekends and thus sought compensation and judgment against the Respondent, to wit:- a declaration that the termination of employment was unfair, unprocedural, wrongful and illegal; a declaration that the failure by the Respondent to pay her terminal dues amounted to breach of the terms of employment; twelve months' salary as compensation for unfair dismissal – Kshs. 480,000/-; payment in lieu of notice – Kshs. 120,000/-; overtime worked for 12 months (@8 hrs per day); public holidays worked – Kshs. 14,663/-, NSSF deductions Kshs. 12,400/- all making a grant total of Kshs. 627,063/-. She also sought the costs and interest of the suit.

2. The Respondent filed a response to the claim and in it averred that the Claimant's performance in the subject that she was employed to teach was below par and way below the set and agreed targets for the set subject. The Respondent averred that due to that reason she was issued with several warning letters and had discussions in meetings with the head of department and the principal. The Respondent averred that the Claimant's students achieved the lowest marks and rated her lowly in their written opinions. The Respondent averred that the Claimant was in breach of the Teachers Service Commission (Code of Conduct and Ethics for Teachers) Regulations, 2015 as she would dress indecently while in school despite the fact that she was teaching in a boys' school, and the dressing would distract both the students and the co-workers, she failed to adhere to the Code of Conduct despite warnings from the principal and other teachers. The Respondent averred that the Claimant had inappropriate relationships with students while outside the school and that immediately after termination she attended a party arranged by current and former students of the Respondent which was inappropriate for a teacher. The Respondent averred that parents of the school got wind of the said party and obtained obscene photographs that the Claimant and taken with students at the said party. The Respondent averred that the Claimant was accorded sufficient opportunity to defend herself but she refused, ignored and neglected to remedy the situation. The Respondent denied that the termination of the Claimant's employment was unfair, unprocedural, wrongful or illegal and that she is not entitled to 12 months pay for unfair termination or any payment whatsoever. The Respondent denied dismissing the Claimant without notice. The Respondent also denied that the Claimant used to work between 5.00am and 9.40am. The Respondent averred that the Claimant is not entitled to any overtime payment and it denied that it did not remit the NSSF deductions as alleged by the Claimant and put her to strict proof. The Respondent averred that the Claimant is not entitled to any of the prayers sought and this claim should be dismissed with costs.

3. The Claimant adopted her statement and her list of documents and stated that the classes she used to teach were the best performing classes. She testified that in 2016 she taught form 2N and it performed well as it was position 1 out of the 5 streams. She stated that the performance by form 4W class was also the best in 2016 as it was position 4 out of 6 with a mean grade of 6.395 while the entire school had a mean grade of 6.458 and it was the best in Murang'a County and placed at top 20 in English countrywide. She stated that the highest school had a score of 8.0. She stated that English subject was poorly performed nationwide in the year 2016 KCSE which is a matter of public knowledge. She testified that due to her exemplary performance she was appointed the class manager which position one cannot be appointed without performing diligently. She stated that she has never dressed indecently even though there was no dress code and/or any warning that she was aware of. She testified that the Respondent has the authority to dismiss under TSC Code after the stipulated hearing. She denied being in the photos with students as she was in one photo with someone she said was not a student at the Respondent's school. She stated that she was never called to a review and that it was impossible to teach the form fours when one has a bad review. She stated that she was handed the class in May 2016 when they had performed poorly but after picking them she was able to push them from number 6 out

6 to number 4 out of 6. She stated that she worked for 8 hours overtime outside the recommended time by TSC and that she never faced the principal, the head of subject or class manager for being late or issued with a warning. In cross-examination she confirmed that the class she had dropped from a mean grade of 10.5 the previous year to 6.5. She maintained that she had never been summoned for dressing inappropriately. She said that she is a mentor in her church, born again and she does not know where the photos were taken and how the school got the photos.

4. The Respondent's witness John Gichiengo stated that he was the Respondent's principal. He adopted his statement as his evidence in chief and testified that the Claimant did her duties very well in the first year but her services deteriorated. He stated that her class dropped and her mode of dressing changed as she began wearing miniskirts. He testified that he received complaints of her dressing from teachers and students and he called her and informed her of the concern and reminded her of the TSC Code on dressing. He testified that the meeting on performance was held and the teachers who had performed poorly were warned. He stated that after the KCSE exam of 2015, the target for 2016 was 11 but the Claimant's class scored a mean of 6.33. He stated that the Claimant was given a chance to explain herself in his office. He stated that the Claimant only attended an overtime class on Tuesday and Thursday a week and she was paid a bonus for the same. He said that the NSSF was deducted but it was unable to reflect the funds deposited, however the same was updated for everyone. He stated that the Claimant was paid one month's salary in lieu of notice after termination. In cross-examination he confirmed that the performance was not very good in the Country in the year 2016 when CS Matiang'i took over. He also confirmed that the Claimant's class was number 4 out of the 6 streams in the school with a score of 6.395 with the highest score being 6.52. He testified that the Claimant had been appointed a class manager on account of the performance and conduct in the year 2015 which later deteriorated.

5. The Claimant submitted that the Respondent violated Section 41 of the Employment Act as she was not issued with any notice nor was she accorded a hearing. She submitted that the termination notice was issued on 31<sup>st</sup> January 2017 terminating her services with immediate effect. The Claimant submitted that though the Respondent's witness had insisted he had issued warnings and according to the Claimant an opportunity to be heard, he never produced any documentary evidence in support thereof. She submitted that he who alleges must prove. The Claimant submitted that the meetings alluded to by the Respondent were general staff meetings and not in any way a disciplinary hearing. The Claimant relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR**. The Claimant submitted that Section 45 of the Employment Act was violated as the Respondent failed to prove that her termination was for a fair reason. The Claimant submitted that the Respondent alleged reason of poor performance was ambiguous as it was not clear which results the Respondent relied on in deciding that she had performed poorly. She submitted that if it is the 2016 results then that was not a fair reason as the difference in marks was negligible and the Respondent's witness admitted that it was not a requirement nor was it practical for all classes to record uniform or equal scores. The Claimant submitted that it was public knowledge that there was poor performance in the English subject in 2016. The Claimant decision to terminate her on account of poor performance was discriminatory in the sense that the three English teachers for the last streams were not dismissed. She submitted that an analysis of her performance throughout her employment showed that she always achieved outstanding results. She submitted that it was alleged that she was always late for classes and no time sheet was produced to show what time the Claimant reported or left her classes. The Claimant submitted that the allegations by the Respondent on her dressing and behavior is unfounded and brought in bad faith to tarnish her name as no evidence was produced to support the allegation. The Claimant submitted that the Respondent's witness could not also explain what action he took after receiving the alleged complaints before terminating her employment. If indeed the allegations were true, it was submitted, the Respondent should have reported to the relevant authority as is required of him by Section 37(2) of the Teachers Service Commission Act. The Claimant submitted failure to do so can only be construed to mean the claim was malicious and an afterthought. She relied on the case of **Jane Samba Mukala v Ol Tukai Lodge [2013] eKLR** and submitted that in light of the evidence adduced in court, she did not contribute to her termination. The Claimant submitted that the Respondent on the other hand had failed to show that in arriving at the decision of noting the poor performance of an employee, they had in place an employment policy or practice on how to measure good performance. The Claimant submitted that the Respondent therefore failed to establish the effort leading to the decision of poor performance. The Claimant submitted that taking into consideration all factors under Section 49(4) the Respondent is solely responsible for the dismissal and is liable for all remedies prayed for. The Claimant submitted that she had proved her case to the required standards, demonstrated that the termination was unfair, unlawful and due process was not followed and submitted that she is entitled to the reliefs sought as there was no evidence adduced to controvert her claim.

6. The Respondent submitted that the Claimant's termination was fair as she was made aware of the set targets and that job promotions and retainer depended upon satisfactory performance which included meeting the set targets for the respective subjects and maintenance of high standards of professionalism. The Respondent submitted that the Claimant met her target the first year of employment and this motivated the principal to promote her to the position of class manager of form 4C. However, this changed in the year 2016 as her class failed to meet the set mean and as a result the Claimant was issued with a warning letter. The Respondent submitted that further meetings were held on 2<sup>nd</sup> and 5<sup>th</sup> September 2016 to discuss strategies to improve the English subject grades but the Claimant's class never improved. The Respondent submitted that the terms of employment were clear from the onset that the employment relationship would only exist as long as the Claimant diligently and satisfactorily performed her duties. The Respondent submitted that the Claimant's unprofessional conduct which extended to her mode of dressing and inappropriate relations with students violated Regulation 12(2) and Regulation 22(1)(c) of the Teachers Service Commission (Code of Conduct and Ethics for Teachers) and thus warranted her termination. The Respondent relied on the case of **Gideon Akwera v Board of Governors Church on the Rock Academy [2015] eKLR** and submitted that the Claimant did not bother to respond to the letter addressed to her raising concerns of lateness and poor performance. The Respondent submitted that she was accorded enough time to correct her ways but she chose to ignore, and thus it would be a miscarriage of justice if the court punished the Respondent for the Claimant's poor performance, unethical conduct and negligence of duty. The Respondent cited the case of **Stephen Wasike Waku & Another v Security Express Ltd [2006] eKLR** and submitted that it acted in accordance with the law and should not be punished on account of the Claimant's mistake. The Respondent submitted that the Claimant never tendered any evidence to support her claim and the reliefs sought and is thus not entitled to any of the reliefs sought. The Respondent submitted that the Claimant's claim for Kshs. 627,063/- is unjustified and it is clear that she is attempting to extort the Respondent and such attempts should not be entertained by this court. The Respondent submitted that he who comes to equity must come with clean hands and that the Claimant's claim is dishonest and an attempt to mislead the court, lacks merit and ought to be dismissed with costs.

7. The Claimant was an English teacher at the Respondent. It was asserted that she performed less than was required, dressed inappropriately and thus was fit for dismissal. On her part, the Claimant asserts she was dismissed with no notice and without a hearing contrary to the law and the Code of Regulation for Teachers. Section 43 of the Employment Act, 2007 provides that:

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the Act provides that:

45.(2) A termination of employment by an employer is unfair if the employer fails to prove-

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason -
  - (i) related to the employee's conduct, capacity or compatibility; or
  - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure

8. The Claimant was dismissed for poor performance and misconduct. It there had to be demonstrated that there was cause for termination. The alleged poor performance was not determined by a set of parameters in a policy but were determined on the strength of the performance of the students in the classes the Claimant taught. In the case before me, there were teachers who performed worse than the Claimant and there was no indication that they too suffered the same fate. If that was not enough the dismissal was to accord with Section 41 of the Employment Act and the Code of Regulations for Teachers. Section 41 of the Employment Act provides as follows:-

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

There is no evidence that the Claimant was given a hearing before dismissal. The meetings adverted to in the Respondent's pleadings and witness testimony were regular or special staff meetings where performance was discussed. Under Section 41 of the Employment Act there was an imperative to hear the teacher before dismissing her for her alleged poor performance. Despite there being some allegations of misconduct bordering on indecency, there was nothing the Respondent showed that was done to take the teacher through the disciplinary process under the TSC Code of Regulation. Nothing was shown to this end and therefore the allegations remain just that, allegations. There was no letter issued or warning recorded in the evidence adduced. The Claimant proved that her dismissal was without notice and without affording her the procedural and substantive fairness envisioned in Section 41. As this was not adhered to, the dismissal was unlawful and unfair within the meaning of Section 45. In determining what measure of remedy to give under Section 49 of the Employment Act, the Court has to consider various factors. Under the said Section, I have to consider the wishes of the employee; the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the employee's length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; the opportunities available to the employee for securing comparable or suitable employment with another employer; the value of any severance payable by law; the right to press claims or any unpaid wages, expenses or other claims owing to the employee; any expenses reasonably incurred by the employee as a consequence of the termination; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee. The Claimant herein did not seek reinstatement and therefore the remedies she would be entitled to would be monetary. She earned Kshs. 120,000/- a month and because she did not receive any notice she will be entitled to notice, 3 months salary as compensation and costs of the suit. In the final analysis, judgment is hereby entered for the Claimant against the Respondent for:-

- (a) Kshs. 120,000/- as notice
- (b) Kshs. 360,000/- as compensation for the unlawful dismissal
- (c) Costs of the suit
- (d) Interest on the sums in (a) and (b) above at Court rates from date judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 12<sup>th</sup> day of February 2020**

**Nzioki wa Makau**

JUDGE