



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1866 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

RICHARD MICHOSI MWASARU.....CLAIMANT

VERSUS

BEVERLY SCHOOLS OF KENYA LIMITED.....RESPONDENT

JUDGMENT

In January 2015, the Claimant was engaged by the Respondent as a senior school teacher for a two-year contract at a monthly salary of Kshs.40,000.00. On 20th June 2016, the Respondent issued the Claimant with a termination letter.

Aggrieved by the circumstances surrounding the termination of his employment and the Respondent's failure to remit statutory payments, the Claimant filed the claim herein on 9th September 2016, seeking the following reliefs-

- a. *An order for payment of the Claimant's dues as tabulated below –*
 - i. *Salary up to 20th June 2016 of Kshs.26,660.00.*
 - ii. *Salary in lieu of notice of Kshs.40,000.00.*
 - iii. *Money remitted to Octagon Pension scheme as at May 2016, amounting to Kshs.48,000.00.*
 - iv. *Money remitted to E-Kenya Co-operative Society as at May 2016 amounting to Kshs.7,000.00.*
 - v. *Damages for unfair termination equivalent to 1-year salary, totaling to Kshs.480,000.00.*
 - vi. *Damages for unfair premature termination of contract equivalent to 12 months' salary, totaling to Kshs.480,000.00.*
- b. *An order for the Respondent to issue the Claimant with a certificate of service.*
- c. *An order for the Respondent to pay costs of this suit plus interest thereon.*
- d. *Any other relief as the Court may deem fit.*

The Respondent filed its response to the claim on 14th October 2016 in which it denies that the termination of the claimant's employment was unfair and urges the Court to dismiss the claim with costs.

Claimant's Case

The Claimant avers that he carried out his teaching duties diligently and that the grounds set out in his letter of termination were untrue. It is his case that he was never issued with a letter to show cause or given an opportunity to be heard and that the Respondent made the decision to terminate his employment based on its own assessment.

The Claimant posits that efforts to engage the Respondent on the reasons for termination did not yield fruits as he was denied audience. The Claimant avers that the Respondent made PAYE, NSSF and NHIF deductions but failed to remit the same.

It is the claimant's further averment that the Respondent made a deduction to allegedly make contribution to E-Kenya Co-operative Society on the Claimant's behalf but declined to avail the relevant information to him.

During trial, the Claimant testified as CW1. It was his testimony that on 20th June 2016, he was called by the principal to receive his termination letter. He stated that the reason for his termination was opening a Facebook account and giving his pupils his personal phone to communicate with their parents.

He testified that he created a Facebook account to provide agricultural knowledge to the youth. He denied being aware of the Respondent's page: Future Young Farmers. He also denied opening an account to compete with the Respondent. It was his contention that his summary dismissal was not related to his performance. He admitted that a student by the name George Ngugi, used his phone to call his parents. According to him, his contract was terminated prematurely.

It was his testimony that he had paid Kshs.7,000.00 to the society and had tried to reclaim it from the Respondent.

Upon cross examination, he admitted that his pupils were primary school children who were below the age of 18 years. He admitted to publishing their pictures without seeking permission. He conceded that his contract barred him from disclosing confidential documents to third parties. He denied the assertion that students could not use a phone in school and maintained that the Respondent had verbally allowed teachers to give pupils their phones.

He stated that he had paid Kshs.24,000.00 to Octagon Pension. It was his concession that he signed to be a member of E-Kenya Co-operative society and further conceded that the Respondent was not liable for his contribution. He denied being issued with a certificate of service despite requesting for the same.

Upon re-examination, it was his testimony that he did not know which part of the confidentiality clause he violated as the allegations in the letter of termination were general. He stated that the Respondent accused him of leaking confidential information on his Facebook account yet his account was limited to the Respondent's students.

Respondent's Case

The Respondent contends that the Claimant was issued with several warnings regarding his performance, particularly, giving his pupils his personal phone, contrary to the school regulations.

The Respondent avers that the Claimant opened a Facebook account where he shared confidential information about the Respondent and uploaded pictures of pupils. This was in contravention of the Children's Act and clause 11 of his Employment Contract.

The Respondent further avers that when the Claimant was approached by the school principal regarding the matter, he marshalled his colleagues to usurp the principal's authority. Consequently, the Respondent invoked the provisions of Section 44(c) and (g) of the Employment Act and summarily dismissed the Claimant.

It is the Respondent's case that it has approached the relevant statutory bodies to clarify the discrepancies in remittances from statutory deductions from April 2016 to June 2016 and the discrepancies shall be resolved at that level. The Respondent avers that the Claimant was a member of Octagon Pension for a year and is entitled to employee contribution of Kshs.24,000.00 which shall be paid upon the Board's approval, a fact which has been communicated to the Claimant.

As regards E-Kenya Co-operative Society, the Respondent contends that the same was mismanaged and its members were advised to withdraw their savings. The Respondent is of the position that any dispute arising from the same ought to be resolved by the Co-operatives Tribunal.

The Respondent contends that its response to the demand letter was on a without prejudice basis hence the Court should not have been informed of its contents.

The Respondent filed the witness statement of Alice Agam Mudiri on 14th October 2016, but failed to present her in court for the hearing.

Claimant's Submissions

The claimant filed his submissions on 14th October 2019. The Claimant submits that the termination of his employment was unfair and unlawful for want of due notice as provided under the Employment Act and clause 14 of his Employment Contract.

The Claimant further submits that his employment was terminated without giving him the opportunity to be heard as required by section 41 of the Employment Act. It is submitted that the reasons for the termination were unfounded hence the Respondent has failed to discharge the burden of proving that the allegations were true.

The Claimant relies on the case of **Alphonse Maghanga Mwachanya v Operations 680 Limited [2013] eKLR** where the Court held that an employer must comply with the procedures set out in section 41 even in circumstances under summary dismissal.

The Claimant submits that he is entitled to notice pay as his employment was terminated without the issuance of a notice. The Claimant submits that he is entitled to the amount remitted to the pension scheme as the same has been admitted by the Respondent. The Claimant further submits that the Respondent has failed to adduce evidence that the members of the society were advised to collect their savings hence is liable to pay the sum claimed.

The Claimant submits that he is entitled to the claim for damages for unfair premature termination of contract and damages for unfair termination as his employment was unfairly terminated. The Claimant submits that he is entitled to a certificate of service as he was not issued with the same. Lastly, he submits that the Respondent should be condemned to bear the costs of this suit for failing to adhere to the provisions of law regarding termination of employment.

Analysis and Determination

I have carefully considered the pleadings filed in this cause, the Claimant's testimony and the evidence adduced by the parties, together with the Claimant's submissions. The issues for determination before this Court are –

- a. Whether the termination of the Claimant's employment was fair and lawful.
- b. Whether the Claimant is entitled to the reliefs sought.

Unfair Termination

Section 45(2) of the Employment Act provides that –

- (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.**

In the present case, the respondent admits in both the response to claim and the witness statement that the claimant was not subject to a hearing but was dismissed under Section 44(1)(c), (e) and (g) of the Employment Act summarily without notice. The grounds of dismissal are stated in the letter of dismissal as reproduced below –

20th June 2016

Richard Mighosi Mwasaru

P.O. Box 824 – 00200

Nairobi

Dear Mr. Mwasaru

RE: TERMINATION OF EMPLOYMENT

Reference is made to your letter of employment dated 1st January 2015 "clauses 10 and 11."

Confidential matters:

"Any information, original or copies of documents pertaining to the business of Beverly Schools of Kenya Ltd, its agents or clients should not be removed from the company's premises nor disclosed to any unauthorized parties".

In reference to the above clause, you have created a link in your face book account and posted school images and clients (Students) without the consent of the Principal or Management at large, thus disclosing school information to Unauthorized parties.

This is gross misconduct which may result to suits against the school by parents of students posted on the internet without their consent.

Conflict of Interest:

"You must devote the whole of your time, attention and abilities during your hours of work to your duties for Beverly Schools of Kenya Limited. You may not under any circumstance, whether directly or indirectly undertake any other duties, of whatever kind, during your hours of work at Beverly Schools of Kenya limited.

You may not without the prior written consent or Beverly Schools of Kenya Ltd engage, whether directly or indirectly, in any business or employment which is similar or in any way connected or competitive what the Company does".

In reference to the above clause, by creating a link in your face book account and calling it "Teens In Agriculture" visa vey the school one Which is "Future Young farmers", this is a direct competition with the Beverly School program which causes a lot of conflict of interest.

You have been advertising your program using school resources i.e. Camera, students, Buildings without the consent of the school.

This is a violation of staff code of conduct which the school cannot tolerate, it is an act of insubordination to the Authority.

Your action calls for a summary dismissal as per clause 15 of your employment letter.

Please make necessary arrangements to hand over all school property under your custody to your immediate supervisor (The Principal). You are also advised to delete the link with immediate effect.

We thank you for the contribution you have made to the school for the time you have been with us and wish you all the best in your future endeavours.

Yours Faithfully

SIGNED

Alice Mudiri

Executive Director"

In Industrial Cause No. 146 of 2012, **Alphonse Maghanga Mwanchanya v Operations 680 Limited**, Radido J. stated that;

"The doctrine of natural justice on procedural fairness is now essential part of the employment relationship. An employer must comply with procedures set out in section 41 even in circumstances under summary dismissal or what the Respondent referred to as instant dismissal is contemplated."

In **Alphonse Maghanga Mwanchanya** case above, Radido J. also stated that;

"...in order for an employer to meet the legal requirements of procedural fairness of section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following;

- i. Explained to the employee in a language understood the reason why it was considering the termination.*
- ii. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reason*
- iii. Heard and considered any explanation by employer or his representatives,*
- iv. ..."*

Having failed to give the claimant an opportunity to be heard or even to state his case vide a show cause letter, the respondent breached the provisions of both Section 41 on procedural fairness and Section 43 on proof of reasons for termination. The termination of his employment was therefore unfair in terms of Section 45(2) of the Act.

Remedies

The Claimant seeks payment of salary for days worked until 20th June 2016 as well as salary in lieu of notice. The Respondent admitted to summarily dismissing the Claimant and has not adduced any evidence to show that the Claimant was paid salary in lieu of notice. Further, the Claimant's assertion that he was not paid salary for the days worked in June, has not been controverted. As such, the Claimant is entitled to the same as claimed.

The Claimant is seeking Kshs.48,000 being the amount remitted to the Octagon pension scheme. The Respondent admitted that the amount remitted by the Claimant would be paid to him once approved by the board. The amount is confirmed by the claimant's payslips for the months of February and May 2016 at page 13 and 14 of the claimant's bundle. The respondent's averments in the response to the claim and witness statement that the claimant is only entitled to his contributions of Kshs.24,000 was not proved as no rules of the scheme were produced. Under the RBA Regulations an employee is entitled to 100% of employer's contributions to a pension or provident fund scheme

upon completion of one year. The claimant worked for one and a half years and is thus qualified for 100% of employer's contributions. I therefore award the claimant the said sum of **Kshs.48,000**.

The claimant is also entitled to a refund of his co-operative contributions of **Kshs.7,000** as confirmed in the payslips. The respondent's averments about the sum being available at the co-operatives offices was not backed by any proof, nor did the respondent prove that it remitted the same to the co-operative.

Having been terminated unfairly the claimant is entitled to compensation which I award him at 4 months' salary in the sum of **Kshs.160,000**. The compensation is based on the claimant's length of service and the manner in which his employment was terminated.

In conclusion I enter judgment for the claimant against the respondent as follows –

1. Amount remitted to the Octagon pension scheme.. Kshs.48,000
2. Refund of co-operative contributions..... Kshs.7,000
- 3.4 months' salary as compensation..... Kshs.160,000

Total **Kshs.215,000**

4. Certificate of service

The respondent shall pay the claimant's costs for this suit and interest shall accrue at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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 has 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