



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1923 OF 2014

(Formerly HCCC No. 89 of 2007)

Before Hon. Lady Justice Maureen Onyango

ANNE KAHIRI..... CLAIMANT

VERSUS

RUSINGA INVESTMENTS COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant herein was employed by the Respondent as a teacher. She avers that on 28th June 2006 the Respondent terminated her employment with effect from 30th June 2006. She avers that as a result of the termination, she cleared with the school and was ordered to stay away from the school and report on 1st July 2006. She further avers that on 5th July 2006, her termination was substituted with a summary dismissal that was effective from 30th June 2006.

She contends that summary dismissal was unlawful, in breach of natural justice and the terms of her contract of employment. She prays for

1. Kshs.22,808,248 made up as follows: -

- a).. 3 months' salary in lieu of notice..... Kshs.168,388
- b).. Head of Department allowance..... Kshs.892,800
- c).. Class allowance..... Kshs.226,800
- d).. Gratuity..... Kshs.112,232
- e).. Salary up to age 55..... Kshs.10,100,880
- f).. Employer pension lost..... Kshs.301,500
- g).. Employer NSSF lost..... Kshs.36,000
- h).. medical cover per annum..... Kshs.2,250,000
- i)... 80% reduction on 2 children's transport.. Kshs.317,000
- j)... Tuition for 2 children..... Kshs.6,640,400
- k).. Leave not taken..... Kshs.56,116
- l)... One year contract on retirement..... Kshs.673,393

Total Kshs.22,808,248

2. General Damages
3. Interest on (a) from the date of filing suit until payment at commercial rates of 24%
4. Costs of this suit and interest thereof.

In its Memorandum of Reply, the Respondent avers that the termination of the Claimant's employment followed an incident in her class where she pulled down a boy's pants. That after investigations and consultations it was decided that she be summarily dismissed for gross misconduct. It contends that the Claimant's dismissal was in accordance with the terms and conditions of her employment.

The respondent further contends that the Claimant was paid all her dues.

Claimant's case

The Claimant testified that she was employed by the Respondent as a teacher in February 2002 and was thereafter promoted to Head of Learning. She testified that in 2006, there was restructuring and heads of departments were instructed to step down and reapply for the positions. She testified that due to the changes, she returned to class and that the atmosphere was not good.

She testified that on 21st June 2006 she noticed that a 9-year-old boy was not properly dressed and pulled up his pants which were sagging. She testified that the following day, she was informed that the head teacher wanted to speak to her. She testified that she was accused of pulling down a child's pants. She testified that she was told to pack her bags and go home but was not issued with any letter.

She testified that she was never invited to a disciplinary meeting and that she went back to school when she was called by the headmaster on 28th June 2006. She testified that she was issued with a termination letter and a clearance form. She testified that on 30th June 2006 she was recalled by the head teacher, Mr. Mbithi, and was issued with a letter of summary dismissal. She testified that the dismissal letter was dated 30th June 2006 but was issued to her on 5th July 2006.

She testified that she was paid 3 months' salary in lieu of notice and gratuity which was computed based on her initial salary as opposed to her then salary of Kshs.56,116.

In cross-examination, she testified that in her Witness Statement she stated that she pulled down the boy's shorts. She testified that though she sought transport in her claim, she resided with her children in school thus they did not need transport. She testified that she was terminated as part of the restructuring process but the restructuring was with respect to non-teaching stuff.

In re-examination, she testified that pursuant to the contract of employment, she was entitled to 3 months' notice conditional upon being given a 1st and 2nd warning. She testified that they had been cautioned against allowing the children to dress shabbily.

Respondent's Case

PATRICIA ECHOES KARIUKI the Principal of the Respondent testified as RW1. She adopted and relied on her Witness statement dated 31st October 2019.

In cross examination, she testified that investigations were conducted prior to the Claimant's dismissal by having witnesses record statements. She testified that the Respondent did not produce an independent report of the investigations.

She testified that the terms and conditions of employment provided for gross misconduct which included careless and improper performance of work. It was her testimony that subjecting the child to ridicule constituted gross misconduct.

She testified that there was restructuring after July 2006 while the claimant was dismissed in June 2006. She denied knowledge of any other letter save for the dismissal letter dated 30th June 2006.

Claimant's Submissions

The claimant submitted that clause 17 of her employment contract and conditions provided for recommendation by the Headmaster before termination. She submitted that the circumstances of her case do not constitute justifiable or lawful grounds for summary dismissal. She relied on the case of **The Principal BOG Machakos Teachers College v Wambua Muange Civil Appeal No. 15 of 2009** where the Court held that unfair dismissal is one where there is no substantive justification or where procedural fairness is not observed.

She submitted that she is entitled to the reliefs sought and 12 months' compensation subject to Section 15 of the Trade Disputes Act (repealed).

Respondent's submissions

The Respondent submitted that the Claimant was dismissed pursuant to clause 17 of the Employment Contract and that she failed to adhere to ethical and professional standards required of her as a teacher.

It submitted that the Claimant was paid all her dues. It relied on the case of **Mary Wakhabubi Wafula v British Airways PLC [2015] eKLR** and submitted that even where dismissal or termination is wrongful, the damages payable to the employee terminated before the enactment of the Employment Act, 2007 and the Employment and Labour Relations Act was the salary which would have been paid in lieu of notice.

It submitted that the Claimant is not entitled to salaries up to the date of retirement. That anticipatory salaries and allowances are not only speculative, unfair but also unreasonable. It relied on the decisions in **Leonard Odindi v Kenya Ports Authority [2011] eKLR** and **Hassan Maginya Kiage v Attorney General & Another [2017] eKLR**.

Determination

The termination of the claimant's employment occurred in 2006 before the coming into operation of the Employment Act 2007. Under the repealed Employment Act (1976) there was no requirement for a hearing before termination. All that the Act provided for with respect to termination of employment was notice by either party, or pay in lieu thereof. The employer was under no obligation to assign a reason for the termination.

In **Rift Valley Textiles Limited v Edward Onyango Oganda [1994] eKLR** the Court of Appeal held:

“With respect to the learned Judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise... As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot find a cause of action.”

The termination clause in the claimant's terms and conditions of service provided as follows –

“16. Termination of Employment:

The school may at any time terminate your engagement by giving you 'notice in writing by paying you three month's salary in lieu of notice. Such termination will normally follow 1st and 2nd written warnings from the Headmaster. Such warnings remain valid for 12 months.

In exceptional cases, the school may terminate your services by giving you a written notice of three months or three months' salary in lieu of notice.

You may terminate your services with the school by giving a notice as indicated below or three month's salary in lieu of notice. This notice is applicable when your employment is confirmed upon successful completion of the six months' probationary period. Notice during the probationary period is as indicated above.

- 1. For termination at the end of term 1 (December 31st), notice to be given by 30th September.*
- 2. For termination at the end of term 2 (March 31st), notice to be given by 31st December.*
- 3. For termination at the end of term 3 (August 31st), notice to be given by 31st May.*

Termination of services at any other time without the required notice will require three months' notice or three months' salary in lieu of notice.

17. Misconduct:

If you shall at any time after the signing of this contract neglect or refuse or from any cause (except in case of ill-health not caused by your own misconduct) become unable to perform any of your duties or to comply with any order or shall improperly disclose any information concerning the affairs of the school to any unauthorized person, or shall in any other manner misconduct yourself, the school may on a recommendation from the Headmaster terminate your engagement forthwith, and thereupon all rights and advantages reserved to you by this agreement shall cease.

Misconduct is defined in the Employment Act of laws of Kenya Cap 226. Any of the following matters constitute justifiable or lawful grounds for summary dismissal in accordance with Section 17 of the above Act:

- 1. If, without leave or other lawful cause, you absent yourself from the place proper and appointed for the performance of your work.*
- 2. If, during working hours, by becoming or being intoxicated, you render yourself unwilling or incapable properly to perform your work.*
- 3. If, you wilfully neglect to perform any work which it was your duty to have performed, or if you carelessly and*

improperly perform any work which from its nature it was your duty, under your contract, to have performed carefully and properly.

4. If you use abusive or insulting language, or behave in a manner insulting, to your employer or to a person placed in authority over you by the employer.

5. If you knowingly fail, or refuse, to obey a lawful and proper command which it was within the scope of your duty to obey, issued by your employer or a person placed in authority over you by the employer.

6. If, in the lawful exercise of any power of arrest given by or under any written law, you are arrested for a cognizable offence punishable by imprisonment and you are not within ten days either released on bail or on bond or otherwise lawfully set at liberty.

7. If you commit, or on reasonable and sufficient grounds you are suspected of having committed, a criminal offence against or to the substantial detriment of your employer or his property.”

The claimant testified that she was first issued with a letter of termination on 28th June 2006 but the letter was withdrawn on 30th June 2006 and replaced with a letter of dismissal. She was

later, after filing suit, paid 3 months' salary in lieu of notice.

Other than the 3 months' salary and gratuity, the claimant's prayers for HOD allowance and class allowance were not proved. The other prayers being salary to 55 years, lost pension and NSSF, lost medical cover, children's school transport and tuition and leave not taken are all future earnings which are not payable in an employment contract after the termination thereof.

The prayer for underpayment of gratuity was not proved.

Although I sympathise with the manner in which the claimant's employment was terminated which would have been unfair under the 2007 Employment Act, the law applicable at the time of the termination of her employment did not provide for compensation for unfair termination. The employer was only obliged to give notice, or pay in lieu, and was under no obligation to give reasons for termination or to hear the employee.

The claimant having been paid her 3 months' salary in lieu of notice and gratuity as provided for in her terms of employment, there is nothing more that she is entitled to.

This claim is thus dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court 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