



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 705 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

CATHERINE WAWIRA NDWIGA.....CLAIMANT

VERSUS

BOARD OF TRUSTEES, STAREHE GIRLS' CENTRE.....RESPONDENT

JUDGMENT

Vide her statement of claim dated 22nd April, 2016 and filed in Court on 26th April, 2016, the claimant herein avers that her employment was wrongfully and unfairly terminated by the Respondent.

Her case is that she was first employed by the respondent on or about September, 2010 in the position of office assistant, a position she held until the year 2011 when she was reassigned to the position of Secretary and was stationed at the Respondent's main office.

The Claimant maintained that she performed her duties diligently and to the Respondent's satisfaction until on or about 12th April, 2016 when the Respondent unlawfully and illegally terminated her employment on alleged grounds of refusing to take orders and/or refusing to do work assigned to her.

She averred that she had no difficulties at any time during the subsistence of her employment with the Respondent to perform her duties as and when required of her and did so in an exemplary manner.

She further averred that she was never served with notices and no warnings had ever been issued to her by the Respondent for unsatisfactory work or misconduct. She further maintained that even though she informed the Respondent of her pregnancy she was not paid any salary during the period she was on maternity leave.

Aggrieved by the decision of the Respondent to terminate her employment unfairly, the Claimant filed the instant Claim in which she seeks the following reliefs:

a. Kshs.697,474/- as tabulated hereunder:

i. Salary for the remaining period as compensation for unfair termination leading to the Claimant's inability to secure a job due to early retirement (Kshs.27,067.00 x 12 = Kshs.324,804/-)

ii. Compensation for wrongful termination in the sum of Kshs.81,201/-

iii. Salary in lieu of notice in the sum of Kshs.27,067/-

iv. Unpaid severance for each year worked

v. Unpaid gratuity of one month's current basic salary for each year worked for 6 years

(6 years x Kshs.27,067/- = Kshs.162,402/-)

vi. Compensation for days worked for and not paid in the sum of Kshs.9,000/-

- vii. Outstanding leave days
 - viii. Outstanding commuter allowance in the sum of Kshs.39,000/-
 - ix. Unpaid leave (maternity) days in the sum of Kshs.54,000/-.
- b. A declaration and finding that the termination of employment was null and void for all intents and purposes
 - c. Compensation for loss of employment
 - d. Pre mature termination of the Claimant Contract of employment by the Respondent amounted to unfair termination.
 - e. General Damages for breach of the Claimant's rights.
 - f. The Respondent be compelled to issue the Claimant with a Certificate of Service.
 - g. Costs of this suit and interest thereon until payment in full.
 - h. Damages and the footing of aggravated or exemplary damages
 - i. Any other relief that this Court may deem just and fit to grant.

The Respondent in its Reply to the Memorandum of Claim dated on 15th June, 2016 and filed in Court on even date admits having engaged the Claimant from 16th September, 2010 in the position of Office Assistant. It however denied that the Claimant was later deployed to the position of Secretary as alleged in her Statement of Claim.

The Respondent maintained that on several occasions during the subsistence of her employment with the Respondent, the Claimant failed and/or refused to perform duties assigned to her, which duties fell within her job description, forcing the Respondent to outsource at additional costs and time.

The Respondent further maintained that contrary to the Claimant's allegation of denied salary during the period she was on maternity leave she was duly paid her full monthly pay. It avers that her employment contract did not provide for a leave allowance as contended.

The Respondent further averred that the Claimant was paid all her commuter allowances as required under her employment terms and that she has no claim pertaining to non-payment of the same.

The Respondent maintained that the Claimant was summarily dismissed for wilful neglect to perform work that was within her duty to perform. It further contended that the dismissal was indeed lawful by dint of the provisions of Section 44 (4) of the Employment Act, 2007 and she is therefore not entitled to compensation as prayed in her Statement of Claim.

In conclusion the Respondent urged this Court to dismiss the Claim with costs.

Evidence

The suit was heard on 6th February, 2020 with the Claimant testifying on her own behalf. She sought to have her witness statement filed in Court on 26th April, 2016 adopted as her evidence in chief.

In her statement, the Claimant reiterated the averments made in her Statement of Claim. She further relied on the list and bundle of documents dated and filed in Court on 20th March, 2017 in support of her Claim.

The Claimant testified that her job description as provided in her Appointment letter was to type exams and any other duties as assigned to her by her supervisor. She further maintained that she had a good working relationship with the Respondent until she joined the union in 2015 and subsequently notified the Respondent of her unionization.

The Claimant testified that her performance was above board and she was even named best performer in the year 2013 by the Respondent.

The Claimant testified that she received a Notice to Show Cause letter from the Respondent on 4th March 2016 requiring her response within 24 hours for allegedly declining to perform duties assigned to her. That she responded and denied the allegations as levelled against her by the Respondent maintaining that instructions from the Respondent's Director's office were that any exam given for typing past deadlines should be typed by the respective teachers.

The Claimant averred that she subsequently agreed to type the exams upon the intervention of the Bursar and assurance that no complaint would be raised against her for the delay in typing. She contended that her explanation to the Respondent was not considered.

It was her evidence that on 12th April 2016 she received a termination letter from the Respondent, which letter required that she clears with

the Respondent. That she was not allowed into the Respondent's compound thereafter.

The Claimant maintained that the termination was unfair as she was not accorded a fair hearing and further that the Respondent failed to consider her Appeal against the decision to terminate her employment as she was not allowed access into the school premises. She further averred that she was not able to clear with the school as she was denied entry into the compound.

On the issue of maternity, the Claimant stated she proceeded on maternity leave on 22nd November 2011 and resumed duties on 10th January 2012 earlier than expected and she was paid her salary or allowance during the period she was on leave.

The Claimant averred that she has made out her case for unfair and unlawful termination as against the Respondent herein and therefore urged this Court to allow her Claim in terms of the reliefs sought in her Statement of Claim.

The Respondent failed to attend Court for hearing despite the date being fixed by consent. The Respondent's case was thus closed and the Claimant directed to file her written submissions.

Claimant's Submission

In her submissions the Claimant maintained that she did not at any point breach any of the Respondent's rules and that despite working under immense pressure from the Respondent she still managed to deliver what was expected of her.

She further submitted that there was no gross misconduct on her part to warrant the unlawful, illegal and wrongful termination of her employment by the Respondent. Further that the Respondent failed to act within the confines of the law when it terminated her employment.

The Claimant further submitted that no notice was issued by the Respondent prior to her alleged termination and that she was actually a victim of discrimination as the Respondent's acts were precipitated by her involvement in union activities. The Claimant relied on the case of **Scientific Research International Technical & Allied Workers Union v Kenya Agricultural Research Institute & Another (2013) eKLR**.

The Claimant further submitted that her termination was unfair and unlawful as the Respondent failed to follow the procedure as laid down in Section 41 and 45 of the Employment Act, 2007. For emphasis the Claimant relied on the Court's findings in the cases of **Kenfreight (E.A) Limited v Benson K. Nguti (2016) eKLR**, **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** and **Daniel Kiplagat Kipkebut v Smep Deposit Taking Micro Finance Limited (2016) eKLR** where the Courts maintained that for a termination of employment to pass the fairness test there must be both substantive justification and procedural fairness.

The Claimant submitted that the Respondent had no valid reason to terminate her employment rendering it unfair and wrongful. She further contended that the termination was contrary to the provisions of Section 41 of the Employment Act, 2007 as no hearing was accorded to her prior to the termination. The Claimant relied on the cases of **National Bank of Kenya v Samuel Nguru Mutonya (2019) eKLR** and **Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010** where the Courts maintained that the Respondent must accord a Claimant a fair hearing prior to termination to pass the fairness test.

The Claimant maintained that she is entitled to the reliefs as sought in her Statement of Claim and therefore urged this Court to allow the same as prayed.

The Claimant emphasised that she is entitled to compensation for unfair and unlawful termination of her employment by the Respondent and placed reliance on the findings of the Court of Appeal in the case of **Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR** where the Court awarded the Claimant 12 months' salary as an award for damages for unfair termination.

She further maintained that she is also entitled payment of the balance of Kshs.1,000/- per month as commuter allowance for the period worked.

In conclusion the Claimant urged this Court to allow her Claim in terms of the reliefs sought therein.

Determination

I have considered the pleadings, the evidence adduced by the claimant and the written submissions. The issues arising for determination are whether the claimant's employment was unfairly terminated and if she is entitled to the remedies sought.

Unfair termination

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the

grounds for the termination of employment or wrongful dismissal shall rest on the employer.

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer's burden is to justify the reasons for such termination.

Reason for termination

The reason cited for the termination of the Claimant's employment herein as stated in her letter of termination dated 12th April, 2016 as her alleged failure to follow instructions issued to her by her supervisors by failing to type draft mathematics examination paper as handed to her by the Respondent's Deputy Director.

The Claimant averred that the instructions from the Respondent's Director's office were that any exam given to her for typing past deadlines would be done by the respective teachers.

She averred that it was on this basis that she declined typing the mathematics draft examination as handed over to her as it was given past deadline. She further maintained that she later on accepted to type the examination paper following intervention by the Respondent's Bursar and upon agreement that no complaints would be levelled against her as the delay was not occasioned by her.

The Claimant maintained that the Respondent failed to consider her explanation and nonetheless proceeded to terminate her employment for the alleged refusal to type the mathematics draft exam paper.

The Respondent on the other hand maintained that the Claimant was duly accorded an opportunity to make her presentations and that this was not the first instance that the Claimant failed to perform her assigned duties. It contended that due to the Claimant's failure to perform her duties as required it was forced to incur additional expenses as it was forced to outsource from the institution at an additional cost and time for services that were meant to be rendered by the Claimant.

The Respondent further maintained that it was justified to terminate the Claimant's employment under Section 44(4) of the Employment Act and that no dispute resolution mechanism is available to the Claimant under the said provision of the law.

The Claimant's Appointment letter dated 14th September 2010 reads in part:

“ JOB DESCRIPTION

Working directly under the guidance of the school Bursar, you will be expected to:

- Typing of Examination
- Operation of office machine in the machine room
- Any other duties as may be assigned to you by your supervisor...”

There is no evidence availed on any changes in the Claimant's job description. The claimant admitted refusing to type examination papers presented to her for typing. She did not produce the instructions that she should not accept exam papers for typing beyond the deadline. It is clear from the foregoing that the Claimant's refusal to type the examination paper amounted to insubordination and therefore the Respondent had a valid reason to terminate her employment.

Procedure followed

The Claimant maintained that she was not accorded a fair hearing prior to the decision to terminate her employment. She contended that the Respondent failed to consider the explanation given in her response to the show cause letter issued and that further the Respondent failed to consider her appeal to the decision to terminate her employment.

Indeed, it is clear from the evidence adduced in this matter that the Claimant was not accorded a hearing prior to the termination of her employment as no minutes of any disciplinary hearing conducted have been availed to this Court. Further, there is no mention of a disciplinary hearing. Indeed, in her appeal this was one of the issues raised by the Claimant.

In the absence of any evidence of a disciplinary hearing, I find that the Claimant's termination was unlawful and unfair as it failed to comply with the mandatory provisions of Section 41 of the Employment Act, 2007.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

Further, Section 45(2) provides that where the employer fails to prove either procedural fairness or validity of reason the termination of employment is unfair.

Whether the Claimant is entitled to the reliefs sought

The claimant prayed for the following reliefs: -

i. Compensation for unfair termination

Having found the Claimant's termination unfair, she is entitled to compensation for the same. I have considered the provisions of Section 49 of the Employment Act, 2007 and find that 4 months' salary will be reasonable compensation in the circumstances of the Claimant's case. I thus award the Claimant the same in the sum of **Kshs.101,316/-** based on a gross pay of Kshs.25,329 as reflected in her last payslip for the month of February 2016.

ii. Salary in lieu of notice

The Claimant in her pleadings and evidence maintained that she is entitled to payment of salary in lieu of notice.

Despite being itemised as one of her entitlements, no evidence was adduced to confirm payment of the same. In the circumstances I find that the Claimant is entitled to payment of salary in lieu of notice as provided for in Section 36 and 49(1) of the Employment Act, 2007. I award the claimant **Kshs.25,329/-** as notice pay.

iii. Unpaid Severance pay for each year worked.

The Claimant is not entitled to the above relief as her termination was not as a result of redundancy as provided under Section 40 of the Employment Act, 2007.

iv. Unpaid gratuity of one month current basic salary for each year worked 27,067/- x 5 years = Kshs.135,335/-

The Claimant is entitled to this relief by dint of the CBA between the Claimant's Union and the Respondent. This being one of the benefits granted to the claimant in her letter of termination, I accordingly award her **Kshs.126,645/-** as prayed

v. Compensation for days worked and not paid (x Kshs. 27,067 = Kshs. 9,924.56/-)

The Claimant is entitled to compensation under this head as no evidence was tendered to prove payment of salary for the 11 days worked prior to her termination. I award her **Kshs.10,716.12/-** being the correct tabulation based on the formula (x Kshs.25,329).

vi. Outstanding leave days earned being 8 days totalling to Kshs.9,842.55/-

The Claimant is entitled to this relief the Respondent having conceded in its letter of termination dated 12th April, 2016 that the Claimant had 8 pending leave days. No evidence has been availed to prove settlement of the said amount. I thus award the Claimant the sum of **Kshs.7,793.54/-** being 8 days' salary (based on the formula (x Kshs.25,329).

vii. Outstanding Commuter allowance at Kshs.39,000/-

The Respondent in its termination letter dated 12th April, 2016 makes an admission of the Claimant's entitlement to compensation under this head. Similarly, no evidence has been adduced to confirm payment of the same, I award the Claimant **Kshs.39,000/-** as prayed.

viii. Unpaid leave (maternity) days in the sum of Kshs.54,000/-

The Claimant in her pleadings and evidence averred that she proceeded for maternity leave but was not paid during the period she was on leave forcing her to cut short the leave and report back to work.

The Respondent maintained that the Claimant was paid her salary during the period she was on maternity leave and that her employment contract did not provide for any maternity leave allowance.

The claim for unpaid maternity leave days fails as it was not proved. In her letter dated 17th January 2011 appended to the Respondent's Bundle of Documents at Document No. 7, the Claimant did not complain about not being paid salary during her maternity leave. The letter reads –

“Catherine Wawira Ndwiga,

P.O. Box 6847 – 00200,

NAIROBI

17th January, 2011.

Director,
Starehe Girls Centre,
P.O. Box 6847 – 00200,
NAIROBI

Dear Madam,

RE: EARLY DUTY RESUME FROM MATERNITY LEAVE

I This is to inform you that my Maternity leave was to end 22nd February, 2011. However, due to the misfortune that I encountered of losing the baby, I have decided to resume back to my duty on 10th January, 2011. This is because I do not have any responsibility care that can keep me home till the end of my official leave days.

I wish to take this opportunity to thank you very much for the co-operation and care you extended to me during that difficult time. I appreciated very much and felt part of the Starehe Community even though I had not lasted long then.

Yours faithfully,

Catherine Wawira Ndwiga.

Office Assistant”

Even assuming that the claimant was not paid the same, the claim is statute barred having arisen in January 2011.

ix. Damages

The claim for aggravated or exemplary damages is dismissed for want of proof.

In conclusion judgment is entered in favour of the Claimant against the Respondent in the total sum of Kshs.310,800.00/-

x. The Respondent to issue the Claimant with a Certificate of Service forthwith as she is entitled to the same by dint of Section 51 of the Employment Act, 2007.

xi. The claimant is awarded costs of the suit.

xii. Interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 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, the 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 the 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