



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 115 OF 2016

(Before Hon. Justice Mathews N. Nduma)

DINAH BULUMA.....CLAIMANT

VERSUS

CHURCH OF GOD EAST AFRICA.....1ST RESPONDENT

MAHIAKALO CHILD DEVELOPMENT CENTRE.....2ND RESPONDENT

J U D G M E N T

1. This suit was brought by a Memorandum of Claim dated 27th March, 2012 seeking compensation for wrongful dismissal and payment of terminal benefits which include –

- a. Arrear salary for August 2010 Kshs.28,316.
- b. One month's salary in lieu of notice Kshs.28,316.

Facts of the Claim

2. The Claimant relied on a witness statement dated 4th June, 2018 which was adopted by consent of the parties as the evidence in the matter together with the pleadings, list of documents and written submissions.

3. The Claimant was employed by the Respondent as a social worker in 1997. By a letter dated 16th August, 2004, the Claimant was seconded in the same capacity to the 2nd Respondent, an Affiliate of the 1st Respondent church. Secondment was accompanied by a letter of recommendation from the 1st Respondent dated 31st August, 2004.

4. By a letter dated 27th September, 2007 the Claimant was promoted to the position of a Project Accountant, though the Respondents were well aware that the Claimant did not possess accountancy qualifications.

5. On 9th May 2009, the Claimant was suspended for a period of one (1) month for poor work performance. The Claimant responded to a show cause letter to explain the shortcomings in her work. The Claimant pointed out that she had no accounting qualification but was pursuing an accountancy course to improve her performance.

6. By a letter dated 16th August, 2010 the services of the Claimant were terminated based on an Audit Report done on 20/7/2010 citing lapses which had been indicated in the letter of suspension.

7. The Claimant wrote a demand letter vide her advocate on 9th September, 2010. The Respondent's stated in their response to the demand letter that the Claimant's employment was terminated for misappropriating Kshs.37,954, which reason the Claimant states was false.

8. The Claimant prays to be awarded as prayed.

Response

9. The 1st and 2nd Respondent filed statement of defence and counter claim on 7th June, 2012 in which the Respondent admits having employed the Claimant as a social worker and thereafter seconded her to the second Respondent as a social worker and later project accountant.

10. The Respondent states that the Claimant was expected to handle her new portfolio with diligence and integrity in so far as the finances of the project were concerned.

11. The Claimant was warned for laxity and lack of commitment on 10th November, 2008. The Claimant was further warned that her scheme of work and lesson plans were not up to date.

Childrens' records were not well handled; there was lack of follow up with children's problem cases; she was unable to make home/school visitation and information on folders was not up to date.

12. On 9th May, 2009, the Claimant received a letter of suspension which stated that following the C.I.K audit on 7th May, 2009, the C.P.C had observed that lesson plans were not available for audit; April Monthly report was not ready; monthly reports were always late; unacceptable documents were posted on the vouchers filed; she did not seem to enjoy her work, the formal and the petty cash were not balancing; she was not a competent accountant; and that she had received two previous letters of warning.

13. The Claimant was asked to give a detailed explanation how she planned to work in future and was placed on one month suspension. She was also required to state how she would stream line the financial vouchers and any other transactions on finances.

14. The Claimant responded on 18th May, 2009 to the letter of suspension detailing how she intended to work in future. She told the Respondent that she was pursuing an accounting course to be competent in that field.

15. The Respondent wrote to the Claimant on 4th June 2009, in which it accepted the explanation by the Claimant. The Claimant was recalled back to work starting from 6th June, 2009.

16. On 16th August, 2010, the Claimant got a letter of termination on the basis that an audit report done on 20th July, 2010 revealed a repeat of some of the inefficiencies earlier noted in the two previous warning letters. The termination was for unsatisfactory performance of work.

17. The Respondent states that the claimant did not hand over upon her termination and they were forced to break down the locks to access the office.

18. Respondent alleges that the Claimant misappropriated Kshs.37,953 and counterclaims the same and offers Kshs.18,678 to the Claimant as the balance of terminal benefits due to her. The Respondent responded to the letter by advocates of the Claimant on 22nd September, 2010 stating that the employment of the Claimant was terminated for misappropriation of finances. The Respondent prays that the suit be dismissed and the counter claim be allowed with cost.

Determination

19. The issues for determination are as follows:-

- i. Was the employment of the Claimant terminated for a valid reason and in terms of a fair procedure?
- ii. Is the Claimant entitled to the reliefs sought?
- iii. Is the Counter Claim meritorious?

Issue (i)

20. The Claimant worked for the Respondent as a social worker from 1997 to 2007, a period of nine (9) years without blemish.

21. The Respondent promoted the claimant to the position of project accountant while knowing very well that the Claimant had no accounting qualification at all.

22. The Claimant was unable to perform accounting work satisfactorily and when queried on the shortcomings she explained to the Respondent that she had no accounting qualification and had registered with an accounting school to get relevant qualification.

23. The Respondent continued to keep her in the new position knowing well she had capacity to do social work well but had no capacity yet to resolve accounting issues.

24. The Respondent deliberately set up the Claimant for failure and terminated her services for poor work performance instead of deploying her to do other work she was capable of doing.

25. The conduct by the Respondent is equivalent to a repudiation of employment contract in that, there is an implied term that the employer employs an employee to work he/she is qualified to do. The Respondent unlawfully and unfairly breached this term by deliberately setting up

the claimant for failure. The Respondent had no valid reason to terminate the employment of the claimant who had served it diligently and productively as a social worker and no reason was given for deploying her to a position she could clearly not serve effectively.

26. The Respondent violated sections 41; 43 and 45 of the Employment Act.

27. The termination was both substantively and procedurally unfair.

Employers ought to take into account a reasonable explanation given by an employee and rectify the situation for the mutual benefit of both parties but not to push an employee to a *fait accompli* as happened in this case.

28. The claimant is entitled to compensation in terms of section 49 of the Employment Act.

29. In this regard, the Claimant served the Respondent diligently over 9 years and was forced to serve in an impossible position for a further 3 years. The Claimant suffered mentally as a result of the predicament she was placed in. The claimant lost her job unfairly and suffered loss and damages. In the court's view, the Claimant did not contribute to the loss of her job because she was presented a *fait accompli*. The Claimant was not compensated for the loss of employment and she wished to continue working. She suffered loss of future prospects of earnings and career growth.

30. The court relies on the case of **David Gichana Omuya v Mombasa Maize Millers Limited {2014} eKLR** and **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR** to find that the claimant is entitled to the equivalent of ten (10) months' salary for the unlawful and unfair termination of employment in the sum of Kshs.28,316 x 10) – 283,160.

Terminal Benefits

- a. The Claimant is entitled to one month salary in lieu of notice in the sum of Kshs.28,316 and same is awarded accordingly.
- b. The Claimant is also entitled to payment of salary arrears for August 2010 in the sum of Kshs.28,316 and same is awarded accordingly.

Counter Claim

31. During the purported disciplinary proceedings against the Claimant as seen from the two show cause letters and responses by the claimant, the issue of misappropriation of funds was not raised at all. That is why the Claimant was reinstated and immediately thereafter subjected to double jeopardy on the same allegations and her services were terminated. The purported counter claim does not indicate how much money was allegedly lost and how it was lost. A bare claim of impropriety and misappropriation of funds is made in the statement of defence and counter claim. The same has not been proved on a balance of probabilities and is dismissed.

32. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

- a. Kshs.283,160 being equivalent of 10 months salary in compensation.
- b. Kshs.28,316 in lieu of notice.
- c. Arrear salary for August 2010 Kshs.28,316.

Total award Kshs.339,792.

- d. Interest at court rates for date of Judgment in respect of (a) above and from date of filing suit in respect of (b) & (c) above till payment in full.
- e. Respondent to pay costs of the suit.

Judgment Dated, Signed and Delivered in Kisumu this 24TH day of JANUARY, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Wesutsa for Claimant

Mr. Wekesa for Respondent

Chrispo – Court Clerk