



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 37 OF 2018

(Before D. K. N. Marete)

REUBEN KIPKOECH.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

MOI KIPSITET GIRLS SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

This matter was originated by a Statement of Claim dated 23rd April, 2018. The issues in dispute are therein cited as;

- 1. Whether the claimant was unlawfully, unprocedural and unfairly terminated from employment by the respondent.*
- 2. Whether the reason given by the respondent for termination of the claimant amounts to a FAIR REASON.*
- 3. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this statement of claim;*
- 4. Whether the claimant is entitled to an award of a certificate of service;*
- 5. Who should pay costs and interests of the suit?*

The respondent in a Respondent's Response (Defence) dated 28th June, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he was permanently employed by the respondent as a cook. This was from March, 2010. He earned Kshs.9,500.00 at the time of termination.

The claimant's further case is that he served the respondent dedicatedly, unsavoury and blemish free until the time of his unfair termination from service in September, 2017 without any lawful reason or justification. The termination was oral, unexplained and was effected by denying him entry into the institutions premises. This is expressed as follows;

- 6. That the aforesaid termination was unfair, unprocedural and unlawful as the Respondent did not grant the claimant a fair hearing and neither did the Respondent explain in an understandable manner the reason for termination;*
- 7. The claimant case is that his dismissal was illegal, unfair and/or unlawful and it violates the provisions of sections 41 (1), 44 (2) and 43 of the Employment Act No.11 of 2007.*

It is his further case that the termination was unlawful and unprocedural for the following reasons;

- a. No notice of termination of employment was issued to the Claimant as envisaged under section 35 of the Employment Act, 2007;*
- b. No notice of termination was issued to the Claimant Union as envisage under section 40 (a) of Employment Act, 2007;*

- c. No Notice was issued to the Local Labour Officer as envisaged under section 40 (b) of the Employment Act, 2007;*
- d. The Claimant was not given their pay in lieu of the notice pursuant to Section 36 and 40 (f) of the Employment Act, 2007;*
- e. The Claimant was not issued with notice as envisaged under Section 40 (1) (a) and (b) of the Employment Act, 2007 and*
- f. That the Respondent did not comply with Section 40 (e) (g) and section 49 (c) of the Employment Act, 2007.*

The claimant's further case comes out thus;

14. The Claimant avers that the Respondent offends her basic rights and specifically article 41 and 47 of the Constitution that calls for fair labour and administrative action to all citizenry a basic and a non-negotiable human rights on grounds that;

- i) The Respondent working environment was reasonable as the Claimant was subjected to witch-hunt and ill motive;*
- ii) The Claimant was never issued with a warning for negligence on duty if at all there was any;*
- iii) The claimant was unfairly terminated without a valid reason.*

He prays as follows;

- a) A declaration that the termination of claimant's employment on account of negligence was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant;*
- b) The sum of Kshs.4,596,736.98/= as tabulated herein below*
- c) A maximum compensation as per Section 49 (c) of the Employment Act, 2007;*
- d) A Certificate of Service as per Section 51 of the Employment Act;*
- e) Costs and interest of this Suit;*
- f) Any other award as the honorable court deems fit to grant in the circumstance of this case.*

The respondent's case is a denial of the claim.

It is her further case that the claimant was never a permanent employee but a casual worker earning Kshs.10,100.00 a month and not 9,500.00 as pleaded.

The respondent's further case is that the claimant;

- i) Tendered his written resignation letter in his own handwriting dated 3rd October, 2017 on his own volition which letter of resignation was received and accepted by the respondent.*
- ii) Is not sincere when he says that he had not received any warning letter in his employment record whereas his employment record has several warning letters.*
- iii) In the month of September 2017 when he alleges to have been terminated from employment he was in employment and he earned salary as per the records and claimant shall be put to strict proof thereof.*

Further;

5. The respondent denies paragraph 6 of the claim and more specifically denies that, the claimant was terminated unfairly; unprocedurally, and unlawfully and denies that the claimant was not given a hearing or given the alleged reasons for his alleged termination and terms the said statement as absurd because the claimant tendered his handwritten resignation in person and the claimant shall be put to strict proof thereof.

The matter came to court variously until 11th October, 2018 when it was heard. Here, the claimant testified in reiteration of his case. The respondent was absent. This is despite service.

The issues for determination in this cause therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.

3. Whether the claimant is entitled to the relief sought.

4. Whether the claimant is entitled to the costs of the cause.

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. The claimant did not file any written submissions in respect of his case.

The respondent in her written submissions dated 29th January, 2019 submits a case of no termination of the employment of the claimant, or at all. It is her case that the claimant on his own volition resigned from his casual employment with the respondent vide a letter dated 3rd October, 2017 – Marked as BOM 1 in the respondent's annexures to the defence. Annexures BOM 2, BOM 3, BOM 4 and BOM 5 of the respondent's annexures to the said defence come out as follows in that order;

- The school principal's covering letter on the claimant's letter of resignation.
- The principal's acknowledgement of receipt of the letter of resignation.
- Clock in clock out register for the month of September and October, 2017 (This disapproves the claim of the employment in September, 2017).

The respondent further discounts the claimant's allegations of having had a blemish free stint of service by producing warning letters to the claimant in respect of his misconduct at the work place.

Overall, the respondent produces the following in his list of documents dated 28th June, 2018;

1. *Letter of resignation in own handwriting by the principal dated 5.10.2017.*
2. *Letter of acknowledgement of resignation by the bursar on behalf of principal dated 04.10.2017.*
3. *Letter of acceptance of resignation by the principal dated 5.10.2017.*
4. *Certified copy of clock in/out register for staff daily attendance for month of September 2017 and October, 2017.*
5. *Bank employees monthly salary payment schedule advice to Imarisha Sacco for August 2017, September, 2017 and October, 2017.*
6. *Warning Letters*
 - a) *Letter dated 25/10/2013*
 - b) *Letter dated 21/10/2015*
 - Apology letter from claimant dated 23/10/2015*
 - c) *Letter dated 28/10/2015*
 - d) *Letter of insubordination dated 28/10/2015.*

This matter is won on a preponderance of evidence. It squarely falls (not tilts) but falls in favour of the respondent. This is because she ably and in a compelling manner demonstrates a case of no termination of employment and further destroys the claimant's case of a blemish free stint of service. The claimant was, according to the evidence adduced by the respondent, a rogue employee.

The claimant has failed to establish a case of unlawful termination of employment

as is required of the opener in section 47 (5) of the Employment Act, 2007 the all of which provides as follows;

47 (5) "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"

His case therefore without ceremony collapses and falls by the way side. I therefore find a case of no termination of employment of the claimant by the respondent in the circumstances. This answers the 1st issue for determination.

On a finding of a case of no termination of employment, the other issues for determination dissipate into oblivion. They die.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirui instructed by Cheruiyot Kirui & Company Advocates for the claimant.
2. Mr. Akinyi instructed by Akinyi & Company Advocates for the respondent.