



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.327 OF 2014

JOSEPH GIDRAF WANJALA.....CLAIMANT

VERSUS

JANE HAMRICK..... 1ST RESPONDENT

UNITED METHODIST MISSION SCHOOLS (NAKURU)....2ND RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 24th July, 2014 together with application under certificate of Urgency and a Notice of Motion seeking urgent orders. Interim orders were issued to the effect of the claimant being reinstated back to his position as Principal and Secretary to the 2nd respondent school and Board respectively.

2. The respondents filed application dated 18th August, 2014 seeking to set aside the orders of reinstatement of the claimant and by ruling delivered on 14th November, 2014 the application was dismissed.

3. Despite the dismissal of the application seeking to set aside the orders of reinstatement, there was no compliance by the respondents; the claimant remained locked out of the work place. The claimant did not take any effort to assert his rights and ensure compliance.

Claim

4. The facts leading to the claim are that the claimant was employed by the 2nd respondent as the Principal and member of the Board as Secretary where the 1st respondent was the Chairperson of the board. Vide letter dated 10th January, 2013 the claimant was appointed by the 2nd respondent Board.

5. The 1st claimant was the chairperson of the Board until 19th July, 2014 when the Resident Bishop of the 2nd respondent appointed a new Board and the chairperson was Patrick Gatheri.

6. The 1st respondent purported to terminate the employment of the claimant on 19th July, 2014 by locking his office and changing the padlocks. The 1st respondent had no such powers as the position held had changed with the appointment of a new chairperson. Such resulted in constructive termination of employment which is contrary to proper procedures of effecting termination of employment.

7. The claimant is seeking reinstatement on the grounds that the office of a chairperson has no power to terminate his employment.

8. In the alternative the claimant is seeking to be paid his terminal dues as follows;

- a) Pay for days worked Ksh.25,333.33;
- b) On month notice pay Ksh.40,000.00;

- c) Payment for salary for remainder of contract for 1 year and 5 months ksh.680,000.00;
- d) Leave days balance 20 days Ksh.20,000.00;
- e) Gratuity/severance pay at 15 days Ksh.20,000.00; and
- f) Compensation for unfair termination Ksh.480, 000.00.

9. The claimant testified that he was a member of the Board and served as Secretary. He was called for a meeting and sent out mid-way and 1st respondent was the chairperson of the Board at the time. On 21st July, 2014 the firm of Waiganjo & Co. Advocates wrote to the District Education officer notifying him of appointment of new Board member and according to the letter the chairperson was Patrick Gutheri.

10. The claimant also testified that he was not subjected to disciplinary action or told the reasons for termination of employment which was unlawful. He had worked for 1 ½ years and was not paid any dues. Was entitled to annual leave which he did not take as he was on duty all the time. 1st respondent summoned a meeting of the teachers but the claimant was not aware of what was discussed. The allegations that money was stolen only arose after this case was filed and unpaid to him is balance of wages for the term contract period, notice and leave days not taken.

11. The claimant also testified that he has an on-going criminal case. It is Nakuru Criminal Case No. 2656 of 2014. The charges are theft by servant. He was also charged with receiving and not remitting money from students. The dismissal letter contains the reasons for the dismissal.

12. The claimant called his witness Daniel Wanjau Nyambura a pastor and was member board of the 2nd respondent and on 16th July, 2014 during a board meeting there were 6 agenda and he was asked to leave the meeting due to conflict of interest.

Defence

13. Only the 1st respondent replied to the Memorandum of Claim.

14. The defence by the 1st respondent is that she is the chairperson of the 2nd respondent and the claimant was dismissed for misconduct after a disciplinary meeting held by the parents on 17th July, 2014 following complaints that he had taken and retained Ksh.100, 000.00 belonging to the school with Ksh.80, 000.00 being school fees paid to him in cash or by Mpesa by the parents and ksh.20, 000.00 coming from proceeds of a seminar at the school in December, 2013.

15. The defence by the 1st respondent is also that alleged termination of employment on 18th July, 2014 is not correct. The 1st respondent is still the chairperson of the 2nd respondent contrary to what the claimant has alleged in his claim. The claims made for the payment of Ksh.1, 289,230.77 are without proof and should be dismissed.

16. The 1st respondent testified that she is an American and in Kenya on short periods to give support to the work of the 2nd respondent a school registered by the Ministry of Education. there is the Church, United Methodist Church which has a different management and has 3 representatives on the 2nd respondent board. She seats on the board of the 2nd respondent as chairperson, does fundraising and pays the teachers. A non-governmental organisation (NGO) was registered in the year 2009, which owns the 2nd respondent which NGO is not made part of these proceedings as a party.

17. The 1st respondent also testified that she allowed the Bishop of the Church to appoint Board members but there has been a tag of war between the church and the school, the 2nd respondent. as the chairperson of the board she appointed the claimant who was reporting to her as the Bishop was not involved in the management of the school and only advisory role to the Board.

18. Rev. Kephias Otieno Oloo testified that he is project coordinator for United Methodist Church in

Kenya and has worked with the claimant who was given duty to oversee projects within his district and work closely with the 1st respondent to verse the spiritual welfare of the 2nd respondent school. He was appointed a board member of the 2nd respondent and on 17th July, 2014 he was absent with apologies.

19. Ephantus Waweru Wachira testified that he is director of Partners in Children and Family Support organisation (NGO) where the 1st respondent is the chairperson. He also serves as board member of the 2nd respondent and has a full time job elsewhere. The funds raised by the NGO go to support the 2nd respondent work for salaries, bills, food supplies and other matters. The church is invited to seat at the board of the 2nd respondent as advisory and not management. The NGO is the registered sponsor of the school, the 2nd respondent.

20. Daniel Wandabula testified that he is resident bishop of Burundi and East Africa United Methodist Church and is aware the claimant was principal and manager of 2nd respondent. the 1st respondent helps with fundraising for the school. He appointed the 1st respondent and has since appointed new board members. He directed the claimant to continue working as he had not been dismissed.

21. Daniel Wanjau Nyambura also testified that he is principal and manager of the 2 nd respondent which has a board of management which is appointed by the Bishop, United Methodist Church. He seats on the board of the 2nd respondent and represents the interests of the Church. There is a criminal case on-going against the claimant for stealing school fees. The claimant is seeking reinstatement and has a case of unfair termination of his employment. He was reinstated by the court order but has not been allwo3d back into office. The church has not received any money since his dismissal. The 1st respondent signed the letter of dismissal

Determination

From the pleadings, the evidence and submissions by the claimant, the court finds the following issues for determination;

Whether termination of employment was unfair;

Whether the remedies sought should issue; and

Who should pay costs?

22. Before delving into the issues set out above, in the evidence of the 1st respondent on 23rd February, 2015 she asserted that the claimant was employed by the 2nd respondent which is registered as an NGO and such NGO Is not a party herein. However the letters of appointment and payment statements are issued by the entity of the 2nd respondent and not an NGO.

23. The 2nd respondent did not file any defence to defend the claims made. The 2 nd respondent is properly sued herein.

24. What stands out in the evidence and assessment of the court is that there are leadership wrangles between the respondents and the United Methodist Church which wrangles for the suit herein have no bearing as the claimant was appointed by the 2nd respondent vide letter 10h January, 2013 singed by the 1st respondent, as the chairperson. Employment terminated under the same entity (entities), the respondents.

25. On the evidence of Daniel Wandabula that he did not appoint the 1st despondent as chairperson of the 2nd respondent and that the claimant should remain in office, the contradiction in this proceedings is that the letter o appointment issued to the claimant on 10th January, 2013 is singed by the 1st respondent for the 2 nd respondent. Where employment of the claimant is not challenged as having been done by the respondents herein, equally on the same breath, termination does by the parties should suffice.

26. The emerging employment and labour issues shall be addressed on their merits.

27. With the issue of reinstatement having been addressed in the interim, by the orders of Ongaya, J. on 30th July, 2014 the court addressed a substantive issue however there was no compliance and the claimant did not seek for enforcement or the order of reinstatement. As correctly noted by Radido, J. in the ruling delivered on 18 th August, 2014 the order of reinstatement is best addressed as a final order as it relates to specific performance.

28. The above put into account, the court takes it that the position prevailing when the matter went for hearing was the claimant had an order of reinstatement, there was no compliance and this order has remained empty. Not used. No application.

29. Effectively the claimant remained out of the work place from 19th July, 2014 when he states that the 1st respondent locked him out of work.

30. In the minutes of the 2nd respondent board attached to the 1st respondent's defence, on 16th an 17th July, 2014 meetings were held and part of the agenda was *the issues concerning the principal Joseph Wanjala*.

31. The meeting was taken through the various allegations made against the claimant with regard to a sum of ksh.100, 000.00 he had received irregularly and the records states that the Board agreed to allow the claimant appear to give his defence.

32. Before the board the claimant is recorded to have defended himself and accepted that he had used the ksh.100,000.00 for office purposes but had no records on the use and that these amounts should be deducted from his pay each month at Ksh.10,000.00 and he admitted Ksh.80,000.00 was used without informing the bursar. Such funds related to school fees he had collected from parents. About Ksh.20, 000.00 had been received from a seminar held at the school in December, 2013.

33. After hearing the claimant, the board asked him to step out for deliberations and it was agreed that since the claimant had denied the allegations made against him save for taking the Ksh.100, 000.00 witnesses should be called and this was immediately done with the call of Purity, Njoroge, Ngugi, Francis, Faith, Pastor Wafula and the claimant was given a chance to respond to the allegations made.

34. The board then held discussions and agreed that the claimant was not accountable and could not protect the school as an administrator and the respondents had no confidence in him and voted that he be terminated from his employment; on lost schools fees this amounted to criminal conduct for police intervention and reason for termination of employment; the claimant had divided the teachers and this was good reason for termination of employment. Other agreed matters were that the claimant had agreed to wrongdoing by keeping school fees collected for own use and for these failures, the Board resolved to terminate employment.

35. Of the ten (10) Board members, eight (8) were present.

36. By letter dated 18th July, 2014 the Managing Director and Chairperson of the Board of Governors Diane O. Hamrick the 1st respondent wrote to the claimant on behalf of the 2nd respondent and noted the claimant had admitted taking money and property of the school, the 2nd respondent for own use and had offered to repay through a salary deduction and which action amounted to criminal conduct and gross misconduct to warrant summary dismissal. The 1st respondent also noted that the claimant had continued to expel students from the school and failed to obey lawful command issued by the employer which was gross misconduct, and based on Board investigations and hearing the claimant and the witnesses it was resolved that his employment be terminated by summary dismissal.

37. The 1st respondent also noted that the claimant had failed to inform the employer and respondents of a letter dated 1st July, 2014 from Waiganjo & Co. Advocates which appointed him as Principal and Manager of the schools and which removed the 1st respondent as person in authority to act from the school. Such conduct was contrary to the terms of employment.

38. The claimant was then directed to leave the 2nd respondent premises immediately with his personal belongings and to hand over the keys.

39. There is no reply to this defence save for the various affidavits filed following the various application filed to address interlocutory matters herein.

40. Summary dismissal is a matter addressed under section 44 of the Employment Act, 2007. Summary dismissal is permissible in law where the employee is in breach of the employment contract or commits acts of gross misconduct. Section 44(4) (e), (f) and (g) provides as follows;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

41. The procedural safeguard for the employee where he is accused of breach of contract of gross misconduct is outlined in various cases by the court. In the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Company Ltd [2013] eKLR** it was held as follows;

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

42. The Court of Appeal in the case of **Philip Amwayi Wokinda versus Rift Valley Railways Limited [2018] eKLR** held as follows; **Section 44** of the Employment Act which was invoked covers '**Summary Dismissal**' and in **subsection (3)** thereof allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service. **Subsection (4)** then sets out various acts that may amount to gross misconduct so as to justify summary dismissal. **Section 44 (4)**...

The Act goes further in **section 41** to lay out the procedure to be followed in matters of termination of employment, thus:-

"1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4)

hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
[Emphasis added].

43. Well set out as above, the claimant was invited to attend before the Board on 16 th July, 2014, the allegations made against him were addressed, he was allowed to examine the witnesses who were called and by the end of the hearing he admitted to various misconduct relating to the personal use of ksh.100, 000.00 the property of the 2nd respondent.

44. The letter of summary dismissal has set out the grounds leading to the same and the requirement for the claimant to vacate his office immediately. Well addressed on the merits, the reinstatement claimed, through addressed in the interim ought not to have issued.

45. As the reinstatement has not taken effect, the failure by the respondent to comply with court orders not addressed. Such remedy is therefore addressed.

46. This is however not an invitation to parties to violate court orders. To the contrary. A sanction shall issue against the respondent in costs for the apparent disobedience of the court orders.

47. On the other remedies sought by the claimant, notice pay is not due in a case where summary dismissal is found justified.

48. For days worked up and until the 18th July, 2014 when the claimant was issued with letter of summary dismissal, the wage is due. there is no defence that such pay was advanced to the claimant. The wage of ksh.25, 333.33 based on the due gross wage is awarded.

49. On the claim for salary for the period of contract not spent at 1 year and 5 months, on the findings that summary dismissal was justified, this I not due.

50. Leave days earned is a right under section 28 of the Employment Act, 2007. The claimant of ksh.20, 000.00 for earned leave is not challenged in any material way and is hereby confirmed.

51. Claim for gratuity and severance pay are matters premised under different and distinct provisions of contract, agreement or the law. Gratuity is only due where agreed by contract whereas severance pay is only due in a case of redundancy.

52. In the letter of appointment to the claimant dated 10th January, 2013 the payment of gratuity is not contemplated by agreement of the parties. Such is not due.

53. From the evidence before court, this did not stand out as a case where redundancy dues are payable and claims for severance are declined.

Accordingly, the claims made are hereby found without merit save for the payment of ksh.25, 333.33 for 18 days worked in July, 2014 and Ksh.20, 000.00 for leave days earned. Such monies shall be paid less what the claimant has admitted as owing to the respondents in the amount of Ksh.100, 000.00 in accordance with section 19 of the Employment Act, 2007.

The claimant is also awarded costs.

Delivered at Nakuru this 28th day of March, 2019

M. MBARU

JUDGE

In the presence of:

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