



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 204 OF 2013

(Before Hon. Justice Mathews N. Nduma)

FRANCISCA BOKE SAMUEL.....CLAIMANT

VERSUS

BOARD OF GOVERNORS ISEBANIA BOYS HIGH SCHOOL....RESPONDENT

JUDGMENT

1. By a letter dated 11th January 2010, the claimant was employed by the respondent as a 'kitchen hand' with effect from 1st February 2003 at a monthly salary of Kshs 6,292.

2. The claimant continued to work as a cateress until she was interdicted by a letter dated 20th June 2012. On 21st June 2012, the principal phoned the claimant and informed her that she had been summarily dismissed. No letter of dismissal was served on the claimant. The claimant appealed the dismissal by a letter dated 21st February 2013, but same was not responded to.

3. The claimant prays for orders that the dismissal of the claimant was wrongful and unfair and the respondent to pay the claimant:-

(i) Kshs. 8,309.30 for 20 days worked in June 2012.

(ii) Overtime from March 2003 to June 2012 in the sum of Kshs. 567,109.

(iii) Severance pay for 9 years calculated at 15 days salary for each completed year of service – Kshs. 56,087.10.

(iv) 3 months salary in lieu of notice – Kshs. 27,000.

(v) Compensation for unfair termination and general damages.

(vi) Certificate of service.

(vii) Costs.

4. The claimant rely on the amended statement of claim filed on 26TH March 2015, the testimony by the claimant and documents produced as exhibits during the sworn testimony by the claimant. The claimant filed witness statement dated 24th March 2015 which was supplemented by a further witness statement dated 13th April 2015 and filed on 27th April 2015.

5. Claimant told court that she reported to work at 8.00 am and worked until 5.00 pm and at times worked upto 7.00 pm. That she was not paid overtime. That the respondent did not pay the claimant salary for 20 days worked in June 2012 and was not given notice or paid in lieu of notice. That she had worked diligently for 9 years and had no oral or written warning.

6. That allegations by the principal of misconduct and insubordination are fictitious and without basis.

7. RW1 Thomas Rungu, the principal of the respondent's school testified for the respondent. He told the court that he joined the respondent's school from January 2016. That he relied on the record he found at the school. RW1 told the court that there was no evidence that the claimant was dismissed from employment. That the claimant was placed on suspension but did not return to work. That suspension was on 20th June 2012 and she was to return on 21st July 2012 but she did not return.

8. RW1 was unable to answer questions under cross examination on matters he was not aware of since he was away when the claimant was separated with the respondent. RW1 was in particular unable to refute the specific reliefs sought by the claimant including salary for June 2012, notice pay and overtime. RW1 denied that the letter of suspension dated 20th June 2012 was posted to the claimant after the suit had been filed.

9. RW1 stated that the claimant deserted work and the suit lacks merit and it be dismissed with costs.

Determination

10. The issues for determination are:-

- (i) Whether the claimant was summarily dismissed from work unlawfully or she deserted work.
- (ii) Whether the claimant is entitled to the reliefs sought.

Issue 1.

11. The claimant testified under oath that on 20th June 2012 the principal suspended her from school. That on 21st June 2012, the principal phoned the claimant and told her that she had been summarily dismissed. That on 21st February 2013, the claimant wrote a letter to the respondent appealing her dismissal but the appeal was not responded to hence the suit.

12. The claimant testified that she was a good worker. Had a good record as cateress for 9 years and had no warning letter nor had she been summoned for any disciplinary action by the Board.

13. The claimant seeks a declaration that the summary dismissal was unlawful and unfair.

14. RW1 Thomas Rungu was unable to rebut the testimony by the claimant regarding how she was suspended and summarily dismissed because he was unaware of the facts since he had gone to the school after the claimant had left.

15. RW1 did not produce any documentation showing that the claimant was subjected to any disciplinary process before she was summarily dismissed. RW1 insisted without sound basis that the claimant had absconded work after the suspension.

16. It is the court's finding that the claimant has discharged the onus placed on her by *Section 107 and 108 of the Evidence Act Cap 80 laws of Kenya as read with Section 47 (5) of the Employment Act, 2007* to demonstrate on a balance of probabilities that she was summarily dismissed and the summary dismissal was not for a valid reason and the respondent did not subject her to a fair procedure before the termination. The court disbelieves the evidence by RW1 that the claimant failed to return to work upon suspension on 20th June 2012. The court is satisfied that the claimant received a telephone call from the principal on 21st June 2012 summarily dismissing her from work.

17. The court declares that the summary dismissal of the claimant was unlawful and unfair and in violation of Sections 41, 43 and 45 of the

Issue 2

18. The 2nd issue for determination is whether the claimant is entitled to the reliefs sought. The court has declared the summary dismissal of the claimant unlawful and unfair. The natural consequence of the finding is that the claimant is entitled to compensation in terms of *Section 49 (1) (c) and (4) of the Employment Act 2007*. In addition the claimant is entitled to payment of one month salary in lieu of notice. The court relies on the decision by ***Radido – J. in Alphonse Maganga Mwachanya vs Operation 680 Limited MBSA – ELRC Cause No. 146 of 2012*** in which the claimant was awarded 12 months salary in compensation for unfair dismissal in addition to payment of one month salary in lieu of notice.

19. In this case, the claimant had served the respondent for a period of 9 years without blemish. She was summarily dismissed without notice and did not contribute to the dismissal. The claimant initially wished to be reinstated to her work but passage of time made the prayer untenable. The claimant suffered loss of income and damage. The claimant was not paid any terminal benefits upon dismissal including salary for days worked. This is an aggravating circumstance. The court awards the claimant 10 months salary in compensation for the unlawful and unfair dismissal and one month salary in lieu of notice in the sum of Kshs 90,000.

Other terminal benefits

20. **Arrear salary for June 2012.** The claimant is awarded Kshs 8,309.30 for 20 days worked in June 2012.

Overtime

21. The claim for overtime was not specifically proved on a balance of probabilities and is dismissed.

Severance pay

22. The claimant was not retrenched and was not entitled to severance pay. The claim has no merit and is dismissed. The pay slip produced

by the claimant shows that NSSF and NHIF were paid on her behalf. The claimant is therefore not entitled to service gratuity under *Section 35 of the Employment Act*.

23. The claim for award of general damages over and above compensation for unfair dismissal is not merited and is also dismissed.

24. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:-

(a) Compensation – Kshs 90,000

(b) Notice pay – Kshs. 9,000

(c) Arrear salary for June 2012 – Kshs. 8,309.30.

Total award – Kshs. 107,309.30

(d) Cost of the suit.

Judgment Dated, Signed and delivered this 21st day of March, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Omariba for the claimant

Mr. Kisera for respondent

Chrispo – Court Clerk