



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.474 OF 2017**

**CONSOLATA KEMUNTO AMING'A.....CLAIMANT**

**VERSUS**

**MILIMANI HIGH SCHOOL ..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent on 7<sup>th</sup> May, 2013 as a Cook and issued with letter of appointment on equal date. The monthly wage was Ksh.9, 830.00.

On 21<sup>st</sup> February, 2017 the respondent issued the claimant with a show cause notice to which the claimant responded over alleged issuing threatening messages to the school bursar and insubordination. The claimant denied these allegations.

On 28<sup>th</sup> March, 2017 the claimant was issued with letter of summary dismissal.

The claim is that the summary dismissal was not justified; it was unlawful as there was no notice, hearing of good reasons for such action. The respondent was in breach of contract.

The claimant is seeking reinstatement back to employment and or payment of one month notice, issuance of certificate of service. other claims are that the respondent should pay the following dues;

- a) Notice pay Ksh.9,830.00;
- b) Untaken leave for 3 years ksh.29,490.00;
- c) 10 months pro-rated leave ksh.8,191.67;
- d) Service pay Ksh.14,747.00;
- e) Unpaid house allowance Ksh.67,960.00;
- f) Damages for wrongful and unfair termination of employment Ksh.117,960.00;
- g) Unpaid salary for March, 2017 Ksh.9830.00;
- h) Unfair deductions in September and October, 2016 Ksh.7,330.00;
- i) Certificate of service;
- j) Costs and interests.

The claimant testified and relied on her filed Statement. This statement is not signed.

The claimant also testified that she was accused of threatening the bursar by abusing him on the phone which was not true. She was also accused on allowing a form one student in school irregularly and issued with a show cause notice whereby she explained what had happened.

The claimant had asked the bursar why he had made deductions on her wages amounting to ksh.4, 360.00 without giving reasons. She called

him to ask for reasons of such deduction.

On 28<sup>th</sup> March, 2017 the claimant was called by the principal together with another employee and informed that a decision had been taken to terminate her employment. She was then issued with a cheque of Ksh.17, 000.00.

The wage due for March, 2017 was paid together with service for 3 years.

The claimant also testified that during school holidays she worked in shifts. There was a rotational duty where each employee had a week at work from 6am to 5pm or 7am to 4pm.

The claimant denied ever allowing a student into school without paying school fees or before being cleared by the school to go to class. Admissions were done by the bursar and she had no role in admissions.

Upon cross-examination the claimant testified that she was employed under a contract of 3 years from the year 2013 to 2016 and a new contract had been issued where she served for 10 months. At the end of the first contract she was paid gratuity.

A student LK was her niece. She was left by the father in school and the claimant given her documents for admissions. She then took her to the class teacher after being cleared.

After the show cause and reply the claimant was not given a hearing and what followed was the letter of summary dismissal.

While at work the claimant fell and got injured and went to hospital. The principal sent to her ksh.4, 000.00 for medication.

#### Defence

The defence is that the summary dismissal of the claimant was lawful and justified. On 18<sup>th</sup> February, 2017 the claimant sent abusive, insulting and threatening phone text message to the school bursar. On 21<sup>st</sup> March, 2017 the claimant was absent from work without leave or lawful cause until 28<sup>th</sup> March, 2017 when she collected her letter of summary dismissal. Such dismissal from employment was lawful and based on a lawful cause.

The claimant was issued with show cause and allowed to file a response. The board of management met and found the response not satisfactory and dismissed the claimant. The claimant was paid her March, 2017 wage and notice pay at Ksh.9, 830.00.

Reinstatement is not due as the claimant was dismissed for a lawful cause. Notice pay has been paid. The claimant took all her annual leave and nothing owes in this regard. Service pay is not due as the respondent complied with section 35(5) of the Employment Act, 2007 and registered her with the NSSF.

Apollo Kamau the Principal of the respondent testified that that the respondent is a public school managed by a board of management and he was posted to the school by the Teachers Service Commission.

The claimant had a contract from the year 2013 to 2016. The contract was renewed. Under the contract, In case of indiscipline the respondent was allowed to terminate the contract. At the end of the first contract the claimant was paid gratuity at ksh.17, 400.00.

Mr Kamau also testified that the claimant got sick and called him while at the hospital. She borrowed ksh.4, 000.00 and upon return she was required to repay. A deduction of the same was to be done from her wage and upon deduction, the claimant sent an abusive message to the bursar and a notice to show cause was issued. the claimant apologised for her conduct. She never returned to work. She went to the labour officer to report the matter. Such absenteeism was not approved.

When the respondent was following up on the claimant's absenteeism, it was noted that she had allowed a student Lk into school without following the procedures of admission. The student had not been cleared and this was with the facilitation of the claimant.

Mr Kamau also testified that the claimant deserted duty and when the board of management met on 27<sup>th</sup> March, 2017 the claimant was not at school. The supervisor and cateress did not know where the claimant was. there was no approval of such absence. The board of management decided to pay the claimant for notice and dismiss her from employment.

The claimant withdrew the cheque but failed to clear and return the school keys. The stores had to be broken into for access. A meeting was held with the labour officer and the claimant paid her dues.

At the close of the hearing both parties filed written submissions. In the judgement the court has put into account the pleadings, the evidence and written submissions. The issues which emerge for determination are summarised as follows;

Whether summary dismissal was wrongful, unlawful and or unfair;

Whether the remedies sought should issue;

Who should pay costs.

The claimant admitted the payment of Ksh.9,830.00 notice pay and wage due for March, 2017. These are settled.

The claims left on the admitted payment are;

- a) Untaken leave for 3 years ksh.29,490.00;
- b) 10 months pro-rated leave ksh.8,191.67;
- c) Service pay Ksh.14,747.00;
- d) Unpaid house allowance Ksh.67,960.00;
- e) Damages for wrongful and unfair termination of employment Ksh.117,960.00;
- f) Unfair deductions in September and October, 2016 Ksh.7,330.00;
- g) Certificate of service;
- h) Costs and interests.

By letter dated 28<sup>th</sup> March, 2017 the respondent cancelled the contract of employment with the claimant. The same arose from a decision of the board of management and upon such decision the claimant was paid in lieu of notice and the due gratuity for the period of service.

The claimant has on his basis claimed for damages for wrongful and unfair termination of employment.

Damages are payable for breach of contract. In this regard, this being a remedy available at common law, the claimant must plead the particulars of damage and give evidence in this regard.

Unlike a claim for unfair termination of employment where the remedies are set out under section 49 of the Employment Act, 2007 a claim for damages must arise from facts pleaded and particularised in the memorandum of claim.

The claimant has not pleaded any breach of her contract save for setting out matters ordinarily which related to unfair termination of employment.

By a show cause notice dated 21<sup>st</sup> February, 2017 the claimant was required to show cause why her employment should not be terminated for alleged issuing threatening messages and insubordination of the bursar and also for allowing LK Form one her relative to join the school without clearing school fees during the 2017 form one admission.

The claimant replied and the court reading of the same is that the claimant felt victimised by the bursar for matters unrelated to what she was required to respond to. The entire response of over three handwritten pages go round various issues and matters but fail to tackle the issue at hand, the threatening messages and admission of LK Form one into the school.

Summary dismissal is allowed under the provisions of section 44(3) and (4) of the Employment Act, 2007 for a fundamental breach of the employment contract and for gross misconduct. such gross misconduct comprises insubordination and use of abusive language.

The finding that an employee is insubordinate is subjective. The one alleging to have been insubordinate should give evidence for interrogation by the subject employee.

The rationale is that Where there is a fair reason for terminating an employee's service fair procedure demands the employer does it in a procedure that conforms with the provisions the statute. Section 41 of the Employment act, 2007 gives the antecedent procedures.

With regard to alleged insubordination, the Court of Appeal in the case of **Standard Group Limited versus Jenny Luesby [2018] eKLR** held as follows;

*There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be an unfair labour practice*

Unfairness in the termination of employment is to be found in the failure to abide statutory provisions as held in the case of **CMC Aviation Limited versus Mohammed Noor, Civil Appeal No. 199 of 2013** that;

*Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the*

*employer does it in a procedure that does not conform with the provisions of a statute, which still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.*

In this case, the claimant is seeking damages for wrongful and unfair termination of employment. Upon the show cause and despite the written response, the feedback given was the termination of contract. With regard to the adopted procedures by the respondent, there was no adherence to the provisions of section 41 of the Employment Act, 2007. The claimant should have been called to give her defence in the presence of a fellow employee to urge her case.

The above put into account, the other matter raised in defence was that from 21<sup>st</sup> to 28<sup>th</sup> March, 2017 the claimant was absent from work without due cause and or permission by the respondent. When the board of management met to discuss the claimant's case, she could not be found. Upon payment of her wage and dues she failed to report to work and opted to report the matter to the labour officer.

The claimant did not explain her whereabouts from 21<sup>st</sup> to 28<sup>th</sup> March, 2017. Absence from work without good cause and without the permission of the employer is a matter categorised as gross misconduct under section 44(4) of the Employment Act, 2007.

However, the action taken by the respondent was not summary dismissal but termination of contract.

Under the contract of employment, termination was agreed upon with notice pay of one month. On the claim for damages for wrongful termination and the action taken by the respondent being the termination of the employment contract and noting analysis above on the failure to plead any breach, damages are not payable.

Absence from work was not justified and summary dismissal should have issued.

The payment of notice pay for one month paid to the claimant is a generous payment in the circumstances of a case which summary dismissal ought to have issued.

On the claim for untaken leave for 3 years, the claimant was under a contract for 3 years and at the end gratuity was paid. She testified that during the school holidays she would attend duty by a rotation of one week each. For the three official school holidays, work for one week leaves that claimant with nine (9) weeks off work each year on a very conservative tabulation of such time.

Without an account for the rest of the time the claimant was not at work during the school holidays and under the rotational order, to seek payment for annual leave would be an unjust enrichment. Such is declined.

This logic applies with regard to claim for 10 months pro-rated leave claims. Such claim is lost.

Service pay is due where the employer has not complied with the provisions of section 35 of the Employment Act, 2007. In this case the claimant was registered with the NSSF. The claim for service pay is not due.

The claimant has since been paid a gratuity of Ksh.17,400.00 which was not due as this was not envisaged under her contract and the respondent had complied with the law under section 35 of the Employment Act, 2007.

On the claims for house allowances, the defence is that the claimant's wage was all inclusive. The contract for the period of 2013 to 2016 ended on its terms and the claim for unpaid house allowance is made within time under the claim filed on 1<sup>st</sup> December, 2017.

Under the claimant's contract the wage is Ksh.9,130.00 paid to the claimant under her contract from 7<sup>th</sup> May, 2013 there was an underpayment as the Regulation of Wages (General) (Amendment) Order, 2013 provided for a wage of Ksh.9,372.15. In her evidence and written submissions, the claimant stated that she was paid ksh.9,830.00 per month. This is the wage paid in lieu of notice and therefore in tandem with her evidence and written submissions. There is no claim for underpayments.

On the paid wage of ksh.9,830.00 which are above the Wage Orders, to claim for house allowance outside such wage are not justified.

As noted above, the claimant was paid notice pay at Ksh.9,830.00 without good basis. There was payment of a gratuity of Ksh.17,400.00 without good basis. Such amount is Ksh.27,230.00. Even where there is any claim due such is covered.

There is a claim for unfair deductions of Ksh.7,330.00. Mr Kamau for the respondent testified that the claimant was advanced Ksh.4,000.00 for medical treatment and this was to be deducted from her wage. This amount was refunded in the final dues paid to the claimant vide cheque dated 15<sup>th</sup> May, 2017 for Ksh.13,830.00 for failure to comply with the provisions of section 41 of the Employment Act and refund of medical fees.

The respondent has also produced the bank statement for the period of April, 2017. The only payment made to the claimant is for Ksh.9,830.00 on 19<sup>th</sup> April, 2017. The claim made related to deductions made in September and October, 2016 for Ksh.7,330.00. With ksh.4,000.00 explained as being a deduction with regard to medical advance the balance of ksh.3,330.00 is not explained. The claimant too does not give an account as to how such a deduction arose. There is no outline as to how the deduction is accounted for. In the reply to the show cause dated 21<sup>st</sup> February, 2017 the claimant is not specific as to how she arrives at the total claim for ksh.7,330.00 and specifically ksh.3,330.00 as against the claim of Ksh.4,000.00 advanced to her while in hospital.

To award a claim that is ambiguous would not meet the ends of justice. Such is declined.

Based on the findings above, the claims made are without merit. The claimant should pay costs.

**Accordingly, the suit is hereby dismissed save a Certificate of Service shall be issued in accordance with section 51 of the Employment Act, 2007. The claimant shall pay 50% costs due to the respondent.**

Delivered in open court at Nakuru this 29<sup>th</sup> day of April, 2019.

**M. MBARU JUDGE**

In the presence of: .....