



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2017 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 28<sup>th</sup> May, 2019)

**JANET MUNGUTI.....CLAIMANT**

**VERSUS**

**MARIONSON HOLDINGS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed her Memorandum of Claim on 6<sup>th</sup> November 2015 contending that her summarily dismissal by the Respondent, on grounds of causing emotional breakdown to one of her pupils, was wrongful. She therefore seeks the following reliefs:-

- a) A finding that the termination of the Claimant's contract of employment was unfair and unlawful.*
- b) Compensation in the sum of Kshs. 400,000 as more particularly set out in her Memorandum of Claim.*
- c) Interest on (b) above at court rates from 4<sup>th</sup> June 2015 until payment in full.*
- d) Certificates of service*
- e) Costs of these proceedings and interest therein at Court rates from the date of judgment until payment in full.*

2. The Respondent filed its Statement of Reply on 18<sup>th</sup> January 2016 in which it avers that the Claimant had been severally warned of her conduct of mishandling and mistreating children and her performance. In addition, she had been accorded a chance to show cause why disciplinary action was not to be taken against her.

**Claimant's case**

3. The Claimant, Cw1, testified that she was employed by the Respondent on 24<sup>th</sup> October 2013 and was confirmed to employment on 15<sup>th</sup> May 2014. She testified that she was teaching Kindergarten and was also the Head of Kindergarten earning a monthly salary of Kshs. 25,000.

4. She testified that on 4<sup>th</sup> June 2015, after mid-term, she was issued with a letter of termination. She testified that the kids had a problem of taking themselves to the toilet. She testified that during this time she did not have an assistant. She testified that she called the parents to inform them of the kids problems and also wrote in the kids diaries. She testified that she had an assembly with the kids when she reminded them of how to go to the toilet.

5. She testified that she was handed a letter by a lady while teaching which upon reading was a summary dismissal letter and the reasons stated therein were that she had scolded a pupil in front of others. It is the Claimant's case that it was not true that that incident happened. She testified that she was not asked to respond to the letter and she was not paid her June salary.

6. She testified that the Respondent avers that there was a problem with her performance but according to her this was not true as she was appraised though the appraisal letter was not given to her. She testified that the letter dated 25<sup>th</sup> November 2014 was never served upon her and the summary dismissal letter did not make reference to the issue of performance. She further testified that the Internal Memo of 20<sup>th</sup> May 2015 was never served upon her.

7. She confirmed that they were summoned on the issue of toilets that they were not tidy but she could not leave the kids alone to go clean the toilet. However, there was a toilet inside her class which she personally maintained. She further testified that her job description did not include cleaning the toilet.

8. In cross-examination she testified that the confirmation letter made reference to gross misconduct and that she was liable to summary dismissal. She testified that she was summarily dismissed for what she did not do. She testified that she was aware that scolding a child was subject to summary dismissal.

9. She denied that she was unwilling to do her work. She confirmed having written the letter dated 25<sup>th</sup> May 2015 but did not receive the Internal Memo. Hence, she did not ignore instructions. She testified that she never received any letter on her poor performance.

#### **Respondent's case**

10. Anne Muhiti Ng'ang'a, RW1, testified that she is both a teacher and the Head of the Respondent School.

11. She testified that the Claimant worked under her and that the Claimant received a number of letters on her performance and discipline as a teacher. She testified that the appointment letter highlighted the expectation of the Respondent's policy. She stated that the Claimant was summarily dismissed for handling a child inappropriately. She further stated that the Respondent does not subject a child to emotional pain.

12. In cross-examination, she testified that the Claimant scolded a child during assembly. She testified that she was not at the assembly but the Director was at the assembly though he did not record a statement.

13. She testified that the incident happened on 2<sup>nd</sup> June 2015 but there are no minutes indicating what happened on that day. She testified that the case did not require a disciplinary process. She further testified that an appraisal was conducted on the Claimant but the report was not produced in Court. She testified that the letter dated 25<sup>th</sup> November 2015 was not signed by the Claimant and confirmed that the summary dismissal letter did not refer to the Claimant's performance.

14. On the issue of the cleaning toilets, she testified that she was a teacher by profession and still cleaned toilets. She testified that the toilet in the Claimant's class was not in use and that she is the one who complained on the issue of scolding the child.

15. In re-examination, she testified that the Claimant was to take responsibility of cleaning toilets.

#### **Claimant's submission**

16. The Claimant submitted that the Respondent terminated her employment without any justifiable cause, notice or evidence and without according her a chance to defend herself against the allegations contrary to section 41 and 44 of the Employment Act. She relied on the case of **Niel Kiplagat Kipkeibut v Smeep Deposit Taking Micro Finance Limited** where the Court cited the decision in **Aplhonce Machanga Mwachanya v Operations 68 Limited [2013] eKLR** which summarized the legal fairness requirements for termination of employment on grounds of misconduct, poor performance or physical incapacity as set out in Section 41 of the Employment Act. The Claimant further relied on the Court of Appeal decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR**.

17. The Claimant submitted that her contract of service and confirmation letter dated 15<sup>th</sup> May 2014 provided for terms that are inconsistent with the Employment Act.

18. The Claimant submitted that she is entitled to 12 months compensation as provided under Section 49 (1) of the Employment Act. She submitted that she seeks one month salary per working year as her service pay as she was not enrolled to any retirement scheme. She further submitted that she is entitled to one month salary as notice pay as provided in her confirmation letter and her salary for the month of May 2015 which was never paid to her.

#### **Respondent's submissions**

19. The Respondent submitted that the reasons for the Claimant's summary dismissal was having grossly mistreated a child under her charge. The Respondent relied on Sections 13 (1) and 20 of the Children's Act and submitted that a child is entitled to protection for psychological abuse and neglect. The Respondent submitted that the institution had to act summarily to protect itself and other children.

20. The Respondent submitted that Section 47 of the Employment Act relates to complaints of summary dismissal and RW1 proved that there were grounds for the Claimant's dismissal as provided under Section 47 (5) of the Employment Act.

21. I have examined all the evidence and submissions of the parties. The issues for determination by this Court are as follows:-

***1. Whether the dismissal of the Claimant was fair and justified.***

***2. Whether the Claimant is entitled to the remedies sought.***

22. On the first issue, the Claimant was dismissed on 4/6/2015 on the ground that she scolded a pupil in her class after the pupil peed on herself and therefore caused the pupil emotional breakdown. The Claimant denied ever committing the act as alleged.

23. In her evidence, RW1 also alluded to the fact that the Claimant's performance was poor. The Claimant denied that her performance was poor and denied ever accepting a letter dated 25/11/2014 warning her on poor performance.

24. The Claimant also denied ever receiving a memo dated 20/5/2015 asking her to show cause why disciplinary action should not be taken against her for not cleaning the toilets as directed by the Managing Director.

25. On the issue of unclean toilets however, the Claimant averred that she is a teacher and cleaning of toilets is not part of her duties.

26. It is true that the issue of cleaning toilets is not part of a teacher's responsibilities and this was also not spelt out in the Claimant's letter of appointment nor in duties she was to undertake. She cannot be held liable for not cleaning toilets in the circumstances.

27. However, on the issue of scolding a child, the claimant has explained that she never committed this act.

28. The Respondent despite insisting that the Claimant scolded a child in the presence of others and that she was caught in the act by the School Managing Director, the said Managing Director never gave evidence before Court.

29. The Claimant was also never taken through the disciplinary process as envisaged under Section 41 of Employment Act 2007 which states as follows:-

**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".**

30. The Claimant was therefore condemned unheard contrary to Section 41 of Employment Act.

31. Section 45(2) of Employment 2007 states as follows:-

**(2) A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure".**

32. In the case of the Claimant, there is no evidence that she committed the offence complained of and neither was she accorded an opportunity to be heard. In the circumstances, I find the termination of the Claimant unfair and I declare that so.

33. On the issue of remedies, Claimant asked Court to order compensation to her for unfair termination, payment of service pay, 1 months' salary as notice pay and salary for the month of May. I award her as follows:-

**3. 1 Month salary as notice = 25,000/=**

**4. Salary for the month of May 2015 = 25,000/=**

**5. Service pay for 1 year worked =  $\frac{1}{2} \times 25,000 = 12,500$**

**6. 6 months salary as compensation for unlawful termination =  $6 \times 25,000 = 150,000/=$**

**Total = 212,500/= less statutory deductions**

**7. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 28<sup>th</sup> day of May, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties