



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1798 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JENNIFER NJERI.....CLAIMANT

VERSUS

PARKLANDS ARYA GIRLS' HIGH SCHOOL.....RESPONDENT

JUDGMENT

Vide her Memorandum of claim dated 8th October and filed on 14th October 2014, the claimant alleges that the respondent wrongfully and unlawfully terminated her employment. She prays for judgment against the respondent For terminal dues included:-

i. Terminal dues of Kshs.674,875 as tabulated below –

- a. 3 months' salary in lieu of notice (Kshs.20,995/= x 3) Kshs.62,985
- b. Service for 5 years (Kshs.20,995/= x 5) Kshs.104,975
- c. Leave allowance for 5 years (Kshs.20,995 x 5) Kshs.104,975
- d. General damages for unlawful termination equivalent to 12 months' pay (Kshs.20,995/= x 12 months) Kshs.251,940
- e. N.S.S.F for 5 years {deducted but not remitted) Kshs.100,000
- f. N.H.I.F for 5 years (deducted but not remitted) Kshs.50,000
- g. Public holidays and house allowance (to be agreed by the parties)

Total Kshs.674.875

ii. Detailed Certificate of Service.

iii. Costs and interest of this claim.

The respondent filed a reply to the memorandum of claim on 25th November 2014 denying the averments in the claim.

The claim was heard on 25th September 2017 when the claimant testified. The case was adjourned to 17th May 2018 for hearing of the respondent's case. However, on the hearing date the respondent failed to secure the attendance of its witness and was forced to close its case. The parties thereafter filed and exchanged written submissions.

The main facts of the case are not disputed. The claimant was employed by the respondent on 3rd January 2009 as a school cook and her employment was terminated by letter dated 12th November 2013.

The claimant was first suspended from duty by letter dated 9th September 2013, which states the reason for suspension. The letter is

reproduced below

“September 9, 2013

Jeniffer Njeri

Dear Njeri

Re: HANDLING AN ILLEGAL PHONE FROM A STUDENT

After an intensive meeting and investigation with the Disciplinary Committee concerning you handling a phone from a student, you kept this phone from 7th September 2013 to 14th September 2013 before you were asked to surrender it. These girls who gave you the phone were on this very day involved in an arson attack on the Principal's house. It has been decided that you be suspended from school from 9th September 2013 to 25th September 2013. This is gross misconduct.

Further decisions concerning you shall be made then.

Yours Faithfully

SIGNED

Mrs E. Odhambo

PRINCIPAL/BOG SECRETARY”

The suspension was on the same date that the claimant wrote a statement in which she admitted keeping a cell phone for a student.

In the statement written in Kiswahili she states that on 7th August 2013 at around 11 am a student approached her in the school kitchen and asked her to keep the cell phone for the student. She at first refused but after the student left, she heard the student discuss with another student whom she told she was going to throw the cell phone in the fire. At this point she decided to assist the student, called her back and took the phone. She then left the school as she was due to go off duty. While on the way she was called by a workmate who told her the student had come to collect the phone as she had been sent home for attempting to burn the school Principal's House. When she arrived she met a different student who asked for the phone. She inquired where the owner of the phone was and was told she had already left the school after being sent home. She then decided to keep the phone to wait for the owner to come for it so that she could report her to the Teacher.

The statement is hand written and signed by the claimant on 9th September 2013.

The claimant was invited for a disciplinary hearing at the meeting of the Executive Board of Management held on 7th November 2013. The minutes of the meeting which are part of the documents filed at page 3 of the respondent's bundle state that the claimant admitted to keeping a student's phone for 7 days (a week) and asked to be pardoned and be given a second chance. The Board however decided that her employment should be terminated for gross misconduct and for lack of integrity and reliability. She was paid one month's salary in lieu of notice.

At the hearing, the claimant testified that she was accused of conspiring with students to burn the school. That she was not taken to the police, did not record a statement with the police and was not charged. She testified that she was called to a disciplinary hearing and explained what happened. She was then sacked without notice.

Under cross-examination, she admitted receiving the letter of suspension dated 9th September 2013. She further admitted that she was called for a disciplinary hearing and explained herself. She however stated that she was forced/coerced to write a letter of apology, that the letter was not voluntary.

She testified that her last gross salary was Kshs.20,995.

Determination

I have considered the pleadings and evidence adduced in court. I have further considered the submissions by the parties.

The issues for determination are whether the termination of the claimant's employment was unfair and if she is entitled to the remedies sought.

Section 45(2) of the Employment Act provides that –

(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.**

The claimant submitted that her evidence is unchallenged because the respondent did not call any witness and filed witness statements from cooks who are not at the respondent.

The claimant prays that judgment be entered in her favour.

I do not agree with the claimant’s submissions. The respondent filed a reply to memorandum of claim and a bundle of documents, which were put to the claimant in cross examination.

Under Rule 21 of the Employment and Labour Relations Court (Procedure) Rules (2016) parties are allowed to dispose of a case by way of pleadings, documents and written submissions. In this case the claimant had on 11th July 2017 requested to proceed by way of written submissions but this was disallowed as the respondent did not consent to the same. The claimant can therefore not state that because the respondent did not call a witness it did not present any evidence.

From the evidence on record there was valid reason to terminate the claimant’s employment contract. She admitted during cross-examination that it was an offence to keep a student’s phone. She further admitted keeping the phone in her statement dated 9th September 2013 and again during the disciplinary hearing on 7th November 2013. I therefore find that the respondent had valid reason to take disciplinary action against the claimant.

I further find that the claimant was taken through disciplinary process during which as stated by herself in her testimony that “*I explained myself.*”

The reasons for termination were well understood by the claimant as expressed in her statement dated 9th September 2013 and in both the letter of suspension and the letter of termination.

I therefore find that the termination was based on a valid reason and fair procedure and was therefore fair and in accordance with the provisions of the Employment Act.

Remedies

The claimant prayed for notice. The claimant’s letter of termination states that she would be paid one month’s salary in lieu of notice.

She is not entitled to three months’ notice as her letter of appointment provides for one month’s notice for which she was paid.

The claimant is further not entitled to service pay as she was a member of NSSF as reflected in the payslips that she produced in her bundle of documents. She is further not entitled to leave or leave allowance as the respondent filed both leave forms and evidence of payment of leave allowance of Kshs.4,000 per year.

The respondent further attached records of payment of both NSSF and NHIF. It is therefore not true as alleged by the claimant that the same was deducted from her salary but not remitted. She is thus not entitled to refund of either NSSF or NHIF deductions.

Having found that the termination of the claimant’s employment was not unfair she is not entitled to general damages as claimed or to compensation.

The entire claim therefore fails with the result that the same is dismissed.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE