



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 86 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PETER WESONGA OPAKA.....CLAIMANT

VERSUS

HILLTOP PREPARATORY SCHOOL.....1ST RESPONDENT

HILLTOP COMPANY LIMITED.....2ND RESPONDENT

JUDGMENT

Vide his statement of claim dated 1st April 2016 and filed on even date the claimant avers that the 1st respondent, Hilltop preparatory School, a private learning institution registered under the Ministry of Education, Kenya and carrying on business in Kitale, and the 2nd respondent, a limited liability company registered under the Companies Act, terminated his contract of employment unprocedurally and without probable cause. He prays for the following remedies –

- a) Termination be declared unlawful.
- b) Three months' salary in lieu of notice of Kshs.231,000
- c) Damages for unfair termination of Kshs.77,000
- d) Un earned leave of Kshs.77,000
- e) The respondent to pay the claimant the sum of
- f) $Kshs77,000.00 \times 12 \times 3 = Kshs.2,772,000$
(being the salary for the remainder of the contract period)
- g) The respondent to pay to the claimant overtime –
 - i. From 7:00 am to 9:00 pm daily for 30 hours per week for
48 weeks totalling that is Kshs.196.44 per hour
totalling Kshs.282,873.60
 - ii. On weekends from 7.00 am to 4.00 pm making a total of 9 hours and 3 hours on Sundays a total of 12 hours per every fortnight
 $24 \times 12 = 288 \text{ hours} \times Kshs.196.44 \text{ totalling } Kshs.56,574.72$
- h) Costs and interest.

In its response dated 7th December and filed on 9th December 2016, the respondents deny the averments in the statement of claim.

At the hearing the claimant testified on his behalf while the respondent called EVANS MOGOI OTWERE, the Head Teacher of the 1st respondent.

The claimant testified that he is a teacher by profession, with a Bachelor of Arts in Education. He was employed by the respondents as Head Teacher with a salary of Ksh.77,000 per month from May 2014, on a four year contract. He testified that he was surprised when the Executive Director went to his house on 9th May 2015 with an envelope and told him that the letter in the envelope was bad, but he had to do what the Board had decided. He opened the envelope and read the enclosed letter dated 2nd April 2015. It was a letter of summary dismissal. The grounds given in the letter was that the claimant had relationships with several ladies including a member of staff, and that the claimant absented himself without permission especially during weekends, that the Board had asked him to prepare strategy plan on 7th February 2015 which he had not done. That he had also not responded on reforms to be conducted on the ECD Section and on recruitment of new staff to the school all of which had caused concern to the Board.

He denied having a relationship with many ladies as alleged. He stated that he was resident at the school and his son was in the same school in class 4. That he was requested to prepare a strategic plan by the Vice Chairman but he had not been able to meet with the Deputy Head Teacher and Senior Teacher to do the strategic plan due to other commitments of the other teachers. He testified that he was unable to recruit new staff because all candidates who applied were Luhyas and he had instructions not to recruit any Luhyas.

The claimant testified that a lady by the name Mildred Macheso who frequented his house was a wife to his cousin.

The claimant testified that the letter of dismissal stated that his conduct had been investigated but he was never called by the Board to present his case.

The claimant testified that he worked for the respondent for 11 months and some days and had not taken annual leave. He was required to work extra hours, from 6.30 am to 9 pm on weekdays and on Saturdays from 7 am to 4 pm on alternate weekends, alternating with the Deputy Head Teacher. On Sundays, he worked from 1.30 to 4 p.m.

The claimant testified that he was not paid terminal dues after the date of dismissal.

He denied giving false information about his previous employment as he had not been asked about the same.

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e) The respondent to pay the claimant the sum of

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g) The respondent to pay to the claimant overtime –

iii. From 7:00 am to 9:00 pm daily for 30 hours per week for

48 weeks totalling that is Kshs.196.44 per hour totalling Kshs.282,873.60

iv. On weekends from 7.00 am to 4.00 pm making a total of 9 hours and 3 hours on Sundays a total of 12 hours per every fortnight

$24 \times 12 = 288$ hours \times Kshs.196.44 totalling Kshs.56,574.72

h) Costs and interest.

RW1 EVANS MOGOI OTWERE, testified that he was a Senior Teacher at Hilltop Preparatory School when the claimant was the Head Teacher and worked under the claimant. At the time of testifying he was the Head Teacher. He testified that investigations of allegations against the claimant were carried out by the Board of Management who found the claimant guilty of gross misconduct.

He testified that the claimant was absent from school most of the days. That the claimant was provided with a furnished house which he did

not fully stay in. That in a week the claimant could be absence once or twice or thrice. That the Management Board talked to the claimant on several occasions but did not see any changes.

RW1 testified that the claimant was involved in sexual relationships with Mildred Macheso in the school compound. That Macheso was found in his house wearing a night dress severally and would be seen leaving at 6 am in the morning.

RW1 testified that the Board talked to the claimant severally and carried out investigations before dismissing the claimant on 2nd April 2015.

Under cross examination he testified that there was an investigation report but he did not have a copy in court. He further stated that the claimant was summoned by the Board of Management but he did not have minutes. He testified that the claimant was not given notice of three months. Further that the claimant was not given a warning.

Claimant's Submissions

In the submissions filed on behalf of the claimant he submits that there was no justification for the termination of his employment as the woman he is alleged to have had an inappropriate relationship with was a relative.

It is further submitted that the respondent did not adduce any evidence to support its grounds for dismissal of the claimant.

It is further the claimant's submission that the dismissal was unlawful as no notice was issued to the claimant as provided under Section 35(1) of the Employment Act, no warning was given to the claimant to improve his performance and the respondent did not demonstrate that the claimant was subjected to a disciplinary hearing. It is further submitted that RW1 who was junior to the claimant was not involved in the disciplinary proceedings of the claimant.

On the remedies the claimant submitted as follows –

1. That the termination be declared unlawful as the procedures followed were repugnant to the provisions of the Employment Act, 2007 relying on the case of **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eKLR** where the issue in dispute was unfair and unlawful termination and the court determined that Section 43 and 45 of the Employment Act 2007 require the Employer to demonstrate valid reason or reasons in justifying termination supported by substantial evidence on the same.

2. Three months' salary in lieu of notice of Kshs.231,000/=. The claimant relied on the case of **GMV -VS-Bank of Africa Kenya Limited [2013] eKLR**, where the claimant sought loss of three months maternity leave entitlement as an employee at Kshs.540,000 and was compensated accordingly.

3. Damages for unfair termination of Kshs.924,000 (Kshs.77,000 x 12) as was held in the matter of **Abisalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR** where the claimant sought compensation as damages for unfair termination of his contract by his employer and was awarded Kshs.124,392/= which was 12 months' salary as damages for unfair termination.

4. Un-earned leave of Kshs.77,000/=. The claimant testified that he never went for leave for the entire period he worked. He relied on in the case of **Abisalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR** where the claimant was awarded leave pay by the court.

5. That the respondent to pay the claimant the sum of Kshs. 77,000/= x 12 x 3 = Kshs.2,772,000/= as salary for the remainder of the contract period.

6. The respondent to pay the claimant overtime: It is submitted that the claimant testified that he used to work for extra hours without pay, yet under the regulation of employment act, the claimant was to work for 48 hours. That he worked an excess of 30 Hours per week on week days and 12 hours extra per every fortnight on weekends i.e. Saturdays and Sundays. The need for claimant to work overtime was corroborated by the defence who felt offended that he travelled to Mumias on some weekends.

i. From 7:00 am to 9:00 am daily for 30 hours per week for 48 weeks totalling that is Kshs.1964.40 per hour, amounting to Kshs.2,828,736

ii. On weekends from 7.00 am to 4.00 pm making a total of 9 hours, and 3 hours on Sundays, totalling to 12 hours per every fortnight; 24 x 12 = 288 Hours x Kshs.1964.4 amounting to Kshs.565,747.20.

7. Costs and interests.

Respondent's Submissions

The respondent submitted that the claimant's services were lawfully terminated as there was valid reason for the termination, the reason for termination was fair and related to the claimant's conduct and based on the operational requirements of the respondent and that the termination was in accordance with fair procedure.

Determination

I have considered the pleadings, evidence and submissions of the parties. I have further considered the law and authorities cited. The issues for determination are whether the termination was fair and whether the claimant is entitled to the reliefs sought.

It is now settled law that for termination to be fair the employer must prove both fair procedure and valid reason.

In the present case RW1 testified that there were investigations into the conduct of the claimant and the claimant was summoned by the Board. The respondent did not submit a copy of the investigation report or evidence by way of a letter invitation the claimant for disciplinary hearing or the minutes of such meeting.

Under Section 47(5) of the Employment Act the burden of proof for the employee and employer are provided for as follows –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The respondent has not discharged its burden of proof of fair procedure either under Section 41 or 47(5) of the Act. The respondent further has the obligation under Section 43 to prove valid reason for termination. As submitted by the claimant, RW1 did not participate in the disciplinary process. He was therefore not able to confirm that there was of hearing. There was thus no rebuttal of the claimant's evidence that he was not guilty of the charges mentioned in the letter of dismissal.

From the foregoing, the court finds and declares the termination of the claimant's contract unfair both substantively for want of proof of valid reason and procedurally for failure to prove fair procedure.

Remedies

The termination of the claimant's employment contract having been unfair, the claimant is entitled to notice. The claimant's contract provided for three months' notice. I therefore award him the same in the sum of Kshs.77,00 x 3 being Kshs.231,000.

The claimant further prays for damages in the sum of Kshs.77,000 and salary for the unexpired term of his contract.

I agree with the respondent's submissions that the claimant is not entitled to payment of the unexpired term of the contract as the contract does not provide for the same. Further it would be unproportionate to the injury suffered by the claimant who testified that he got another job three months after he was dismissed from the respondent's employment. This was the finding in the cases cited by the respondent as follows –

Robert Kennedy Moi v Attorney General and Another [2014] eKLR. The Court held as follows:

"The Claimant prayed for payment of salary for the unexpired period of contract.

*Payment for Salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. Section 49(4)(e) requires that employees mitigate their losses. Being able bodied, the Claimant was expected to move on with his life after the termination of his employment. This was the decision of Rika J. in **D.K. Njagi Marete V Teachers Service Commission [2013] eKLR, High Court Civil Case No. 1139 of 2002 Menginya Salim Murgani V Kenya Revenue Authority and Industrial Court Cause No 87 of 2011 Olgha Auma Adede V New Kenya Cooperative Creameries Ltd.***

The Claim for payment of salary for the unexpired period of the contract is therefore without merit and is dismissed."

In the case of **Linnet Ndolo vs Registered Trustees of the National Council of Churches of Kenya 120141 eKLR** the Court held as follows on the question whether the Claimant therein was entitled to salary for unexpired term of the contract:

"The remedies that can be awarded by this court are donated by Section 12(3) of the Industrial Court Act at Section 12 and includes

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

Compensation and damages are expressed to be 'in circumstances contemplated under this act or any written law.

The claimant has not stated the legal justification for award of this prayer. Neither the law nor the contract provides for damages equivalent to the unexpired term of the Contract."

In the case of **Gabriel Kariuki Chomba vs Top Image Limited [20141 eKLR** the Court held as follows:

"The Claimant seeks payment of salary for the unexpired term of his (1) one year contract in the sum of Shs.330,000, costs of Shs.45,975 and interest.

There is no law that provides for payment of unexpired term of contract. The Claimant has also not stated how he arrived at one figure of Shs.45,975 as costs.

Since the summary dismissal was unfair, I award the Claimant Shs.30,000 being one month's salary in lieu of notice in terms of Section 49(1)(a) of the Employment Act. The Claimant is also entitled to reimbursement of court fees and refund of proven fees for service of summons, hearing and mention notices as per notices filed in the court file to be confirmed by the Registrar.

His claim for payment for salary for unexpired term of contract is dismissed."

The claimant is however entitled to compensation for loss of employment which I award him in the sum of Kshs.231,000 being three months' salary. In doing this I have taken into account the relevant factors set out in Section 44(4) of the Act and especially the length of service of the claimant, the fact that he was bundled out of employment without notice or hearing and without payment of terminal dues, his position as Head Teacher, the fact that after termination he could not immediately get another job as Head Teacher and the fact that there was no valid reason for the termination and thus the claimant had not contributed to the termination.

The prayer for overtime is dismissed as the claimant as Head Teacher had a duty to ensure that the school was running properly and his salary took into account the responsibilities including the fact that he would have to work outside normal working hours.

The claimant further did not prove that he did not take leave during school recess as provided in his contract. He has thus not proved the prayer for annual leave.

In the end I make orders as follows –

1. I declare the termination of the claimant's employment contract by the respondent unfair.
2. I award the claimant Kshs.462,000
3. The respondent shall pay claimant's costs of the suit.
4. The respondent shall pay interest on decretal sum from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 16TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 8TH DAY OF JULY 2019

MATHEWS NDERI NDUMA

JUDGE