



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1156 OF 2014

PETER SIRO NYARIKI.....CLAIMANT

VERSUS

TANGAZA COLLEGE (THE CATHOLIC

UNIVERSITY OF EASTERN AFRICA.....RESPONDENT

JUDGMENT

1. Peter Siro Nyariki (Claimant) was offered employment as a Deputy Principal, Finance around 1 August 2011 by Tangaza College (the Catholic University of Eastern Africa), (Respondent) for a period of 4 years with an option of renewal.
2. On 28 April 2014, the Respondent wrote to the Claimant to notify him of the termination of his employment.
3. The letter did not give any reasons for the action save to state that 3 months' salary in lieu of notice and terminal dues would be paid.
4. The Claimant was aggrieved and on 14 July 2014, he instituted these proceedings wherein he stated the Issues in Dispute as
 1. Wrongful dismissal of Peter Siro Nyariki
 2. Refusal to pay damages for termination of contract.
5. The *Memorandum of Claim* was filed together with a motion under certificate of urgency seeking that the Respondent to be compelled to pay compensation and a certificate of service.
6. The Respondent filed a *Response* on 13 March 2015 and on 17 March 2015, the Claimant withdrew the application in order to facilitate the hearing of the Cause on the merits.
7. The Cause was heard on 24 October 2018 and 19 March 2019. The Claimant testified and was cross examined while the Respondent decided not to lead/call any evidence.
8. The Claimant filed his submissions on 15 May 2019 (should have been filed/served before 18 April 2019) while the Respondent filed its submissions on 14 June 2019.
9. The Court has considered the pleadings, evidence and submissions, and identified the Issues for determination as:
 - (i) Whether the termination of the Claimant's employment was unfair and
 - (ii) Appropriate remedies/orders.

Unfair termination of employment

Procedural fairness

10. The Claimant was paid by the month, and in terms of section 35(1)(c) of the Employment Act, 2007 was entitled to a *written notice of termination* of at least 28 days.

11. The Respondent did not give any notice as contemplated by the provision.
12. In terms of contract, the termination clause in the employment contract of 1 August 2011 required the giving of 3 months written notice or pay in lieu of notice.
13. Apart from the *notice requirement*, section 41 of the Employment Act, 2007 obligates the employer to conduct a hearing (informing the employee of the allegations to confront and affording the employee an opportunity to make representations).
14. The process may be met by issuing a *show cause/charge* to the employee and asking him to make a response thereto.
15. In the instant case, there was no evidence that a *show cause* was issued or that the Claimant was required to respond to any allegations of *gross misconduct* or *insubordination*, or was invited to appear before a *Disciplinary Panel*.
16. Although the Respondent opted to offer the Claimant 3 months' pay in lieu of notice, still the statute provides the bare minimum rights and conditions of service which include a hearing, which was not conducted.
17. The Court finds that the Respondent was in breach of statute, and therefore its action did not meet the procedural fairness test as envisaged by sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

18. If the Respondent had valid and fair reasons to terminate the employment of the Claimant as required by sections 43 and 45 of the Employment Act, 2007, it did not discharge the burden expected of it as it did not present any witness or lead evidence.
19. The Court therefore is also of the view that the statutory provisions override the legal principle outlined in *Mombasa Maize Millers Ltd v James Munene Kamau* (2005) eKLR which was cited by the Respondent.

Wrongful and unfair termination dichotomy

20. The Respondent contended in its submissions that the Claimant had set out a cause of action for wrongful dismissal in the pleadings but had instead veered off to one of unfair termination of employment in his submissions and therefore was not deserving of any relief.
21. The gravamen of the Claimant's pleaded case was set out in paragraphs 5, 6 and 7 of the Memorandum of Claim.
22. The Memorandum of Claim, in the view of the Court was inelegantly drafted but it broadly brought out a plea that the termination of employment was in violation of the provisions of the Employment Act, 2007.
23. During testimony, the Claimant stated that he was not afforded an opportunity to be heard.
24. The right to be afforded an opportunity to be heard constitutes a *minimum entitlement* in cases of *misconduct, poor performance or incapacity*, and the concept of *wrongful dismissal* would not detract from the provision. It applies even in cases of summary dismissal, for that is the import of section 41(2) of the Employment Act, 2007.

Remedies

Pay in lieu of notice

25. The Respondent offered the Claimant 3 months' pay in lieu of notice and therefore nothing turns on this.

Compensation

26. The Claimant was on a fixed term contract which had about 13 months to expiry. The Claimant's performance Appraisal for 2011-2012 had an outstanding rating.
27. In consideration of the length of service, expectation by the Claimant to serve out the full tenure of the contract, and that the Claimant had not secured alternative employment by time of hearing, the Court is of the view that compensation equivalent to 12 months' gross salary would be appropriate and fair (the Claimant's pay slip for October 2013 show gross salary was Kshs 237,375/-).

Certificate of Service

28. A *certificate of service* is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days if one was not issued.

Conclusion and Orders

29. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(a) Compensation **Kshs 2,848,500/-**

30. Respondent to issue *certificate of service* within 15 days.

31. Claimant did not file submissions within agreed timelines and is therefore denied costs.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Achach instructed by Ochieng, Achach & Kaino Advocates

For Respondent Mr. Ogonji instructed by Onsando Ogonji & Tiego Advocates

Court Assistant Lindsey