



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 190 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JUDITH ACHITSA OMANI.....CLAIMANT

VERSUS

THE CHAIRMAN AND SECRETARY OF THE BOARD OF MANAGEMENT

ST. CHARLES LWANGA SECONDARY SCHOOL MUKUMU.....RESPONDENT

JUDGMENT

1. The claimant seeks reinstatement to his job and in the alternative General damages for unlawful termination of employment. The claimant further seeks terminal benefits including service gratuity and unpaid salary, interest and costs.
2. The claimant testified as CW1 and adopted a witness statement dated 5th May 2017 and produced documents annexed to the statement of claim filed on 5th May 2017 and a further list of documents dated 2nd June 2017. CW1 testified that he was employed by the board of Management as a school nurse on 4th January 2004 and worked continuously until 18th December 2016 when she received an “SMS” message informing her that her contract of employment had been terminated.
3. The “SMS” was by the Principal of the school. That at the time the claimant earned Kshs. 9,000 per month. That the claimant did not get any reasons for the termination. That claimant had not been charged with any disciplinary offence nor had she been given a notice to show cause. That the claimant was not paid for days worked nor was she paid any terminal benefits. That the claimant had no previous warning for a period of 12 years whether written or verbal. The claimant stated that she was underpaid. That she did get a letter of appointment, but same was retained by the Principal. The claimant was still unemployed and sought reinstatement to her job since the termination was unlawful and unfair. That she is an Assistant Nurse with a certificate in nursing from Kakamega Highway Nursing Home. That she was also a trained counselor. That she had tried to apply for a job in vain. That she did not get a certificate of service or any recommendation letter. That is why she could not get alternative job.
4. The claimant denied under cross examination that her employment contract had expired. That she did not sign any fixed term contract of employment. That she saw the purported fixed term contract for the first time in court and the same was not signed by her.
5. The claimant denied having received any letters from the respondent. The claimant denied charges of insubordination alleged by the respondent in court.
6. The claimant stated that she did not receive purported warning letters and minutes produced were purportedly done after her dismissal. Claimant denied having attended any disciplinary hearing. The claimant admitted that her qualification had not been accredited by the nursing council. Claimant stated that she was trained in First Aid also. The claimant denied that the Board had requested to see her certificates. The claimant stated that she trained in private institutions except the counselling course whose certificate was accredited and she was registered as No. KAPC/MN0934/05/18. That membership was renewed annually. That she had valid membership in the year 2016 when she was unlawfully terminated from employment on 18th December 2016.
7. RW1, Reverend Father Francis Okaye testified for the respondent. RW1 said that the claimant was not a permanent employee of the respondent. RW1 said he did not know how long the claimant was in the employment of the respondent. RW1 stated that the fixed term contract of the year 2015 did not bear the claimant’s signature. RW1 said that they employed staff on one year contract basis. RW1 stated that the claimant’s contract expired and was not renewed.
8. That in February 2016, RW1 wrote to all staff to bring their certificates. That the claimant did not produce her certificates. RW1 stated that the claimant was negligent on duty in that she did not take a student who was sick to hospital. That the boarding master instead took the student named MO to hospital. That the respondent had communicated to the claimant verbally and by memoranda to improve her services.

That the claimant received memo through the Bursar who was head of the Department in which she served the same to him. That the letters were returned undelivered.

9. RW1 stated that the claimant was registered with NSSF and that all her terminal dues were paid. That the claimant's contract simply expired and was not renewed. That the termination was not unlawful nor unfair. That the suit be dismissed.

10. RW1 did not know when the claimant was employed. RW1 under cross examination stated that he was aware she was a nurse and only wanted to confirm her qualifications. RW1 told the court that the claimant's application to renew her contract was not successful. RW1 insisted that the claimant attended a Board meeting on 9th December 2016. RW1 said claimant's work was questionable. That she had not signed the contract that expired.

Determination

11. The issues for determination are:

- (i) Whether the contract of employment of the claimant expired by effluxion of time or her employment was terminated.
- (ii) If answer to (i) above is that contract was terminated, whether termination was for a valid reason and followed a fair procedure.
- (iii) Whether the claimant is entitled to the reliefs sought.

Issue (i) and (ii)

12. The testimony by the claimant is that on 18th December 2016 she received an "SMS" message from the Principal terminating her employment. That no notice, notice to show cause or reason was given to her before the termination. That the claimant was not charged with any disciplinary offence nor did she attend a disciplinary hearing before the said termination. The claimant states that the termination was unlawful and unfair and she seeks reinstatement to her job.

13. RW1 on the other hand gave contradictory testimony as to the events leading to the separation of the claimant. On one hand RW1 stated that the claimant's fixed term contract that had not been signed by the parties had expired and was not renewed.

14. At the same time, RW1 stated that the claimant's work was wanting in that she had failed to take a student who was sick to hospital and had been warned verbally and in writing to improve her work. That the claimant was called to a Board meeting on 9th December 2016 to answer charges and she attended. That on 18th December 2016, he sent the claimant an "SMS" informing her that her application for renewal of her contract was not successful.

15. The court has carefully considered the evidence by the parties and is satisfied that the claimant did not have a signed fixed term contract with the respondent at the time her employment was terminated without notice, notice to show cause or having been found guilty of a disciplinary offence by the respondent.

16. The termination of the employment of the claimant, who had served the respondent continuously from 4th January 2004 to 18th December 2016, a period of 12 years, was not for a valid reason and the termination did not follow a fair procedure. The termination was therefore unlawful and unfair and in violation of *Sections 36, 41, 43 and 45 of the Employment Act, 2007*. The court so finds:

Issue iii

17. The claimant is entitled to reliefs under Section 49(1), (2) (3) and (4) of the Employment Act, 2007.

18. The claimant states that she is qualified Assistant Nurse and counsellor and has been unable to get alternative employment because the respondent failed to give her a certificate of service. That she did not also get a letter of recommendation. That she desires to continue serving the respondent. That respondent only states that her fixed term contract expired and gave no adverse reason for the termination. That she did not contribute to the termination therefore. That she was not paid terminal benefits including salary for days worked. That there will be no conflict with the employer if she was to return to work as a nurse at the school. That there is no evidence that the claimant has been replaced by another employee at the school.

19. The court has considered all the above factors and the case of *Kenya Airways Ltd vs Aviation and Allied Workers Union Kenya and 3 others (2014) eKLR* in which the court of Appeal analyzed considerations a court should make before reinstating an employee. The court is satisfied that the considerations made above and the fact that three (3) years have not expired from the date of termination make this a suitable case to order reinstatement of the claimant to her previous job without loss of any salary or benefits.

20. Accordingly, the court enters judgment in favour of the claimant as against the respondent as follows:

- (a) The respondent is to reinstate the claimant to the position of school nurse forthwith without loss of any salary and/or benefits from the date of termination on 18th December 2016.
- (b) The arrear salary to attract interest at court rates from date of filing suit till payment in full.

(c) Costs of the suit.

Judgment Dated, Signed and delivered this 16th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Osango for the claimant

Mr. Shifwoka for Respondent

Chrispo – Court Clerk