



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 866 OF 2016

ZIPPORAH MACHOCHO.....CLAIMANT

VS

BADALA NURSERY & PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

Introduction

1. This is a mixed grill claim of unlawful termination, discrimination and occupational disease. The Claimant's case is documented by a Memorandum of Claim dated 10th November 2016 and filed in court on 11th November 2016. The Respondent filed a Response on 26th May 2017.
2. At the trial, the Claimant testified on her own behalf and also called Dr Ajoni Adede. The Respondent called Nuru Awuor, Francis Onyango Oguda, Zainab Mohamed Sumra and Dr Stephen Ndegwa. The parties further filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 6th September 2003, as a subordinate staff. She worked as such until 31st March 2015, when her employment was terminated. The termination was to take effect on 30th April 2015.
4. The Claimant claims that her employment was terminated due to an occupational disease. She states that the disease, which was in the form of a skin allergy, was caused by chemicals she used in her work. The Claimant accuses the Respondent of unfairly terminating her employment, on the allegation that her skin disease was likely to lead to loss of clients.
5. The Claimant goes on to state that she began experiencing allergic reaction in March 2013, upon which she notified the Respondent. The Respondent however continued assigning her duties which exposed her to the skin allergy triggering chemicals, without supplying her with safety equipment.
6. The Claimant claims to have suffered loss and damage due to the Respondent's negligence. She cites the following particulars of negligence on the part of the Respondent:
 - a) Exposing the Claimant to risk of contracting an occupational disease and as a result unfairly terminating her employment;
 - b) Discriminating against the Claimant on the ground of the occupational disease and proceeding to terminate her employment;
 - c) Requiring the Claimant to handle chemicals while performing her duties, without issuing her with safety apparatus and terminating her employment on the allegation that her condition was likely to lead to loss of clients;
 - d) Failing to assign the Claimant light duty.
7. The Claimant's claim against the Respondent is as follows:
 - a) 12 months' salary in compensation.....Kshs. 120,384

- b) Overtime for 12 years.....180,576
- c) Leave allowance @ Kshs. 10,032 per year.....120,691
- d) General damages on account of occupational disease
- e) Damages for discrimination
- f) Special damages of Kshs. 2,000 for medical report
- g) House allowance
- h) Certificate of service
- i) Costs plus interest

The Respondent's Case

8. In its Response dated 26th April 2017 and filed in court on the same date, the Respondent admits having employed the Claimant but denies that her employment was unlawfully and unfairly terminated.

9. The Respondent states that the Claimant's employment was terminated due to misconduct, persistent lateness and absenteeism and not as a result of an occupational disease.

10. The Respondent denies that the Claimant contracted an occupational disease due to chemicals handled by her in the course of her duty. The Respondent states that the Claimant used soaps, detergents, gloves and air fresheners to do her work. The Respondent denies the particulars of negligence set out by the Claimant.

11. The Respondent adds that the Claimant suffered from a skin infection/disease or allergy which was not related to her employment or the soaps and detergents she used for cleaning.

12. The Respondent states that it had no discomfort with the Claimant's skin infection/disease or allergy as it was not contagious. The Respondent therefore denies that the Claimant's employment was unfairly terminated due to the alleged occupational disease.

13. The Respondent further states that the Claimant's designated hours of work were from 7.15 am to 12.15 pm and 2.00 pm to 5.00 pm from Monday to Friday and from 8.00 am to 12.30 pm on Saturday. The Respondent maintains that the Claimant was not required to work beyond her designated working hours.

14. The Respondent avers that the Claimant's claim is highly exaggerated and offers the sum of Kshs. 65,208 in full settlement.

Findings and Determination

15. There are four (4) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant has proved a case of occupational disease;
- c) Whether the Claimant has proved a case of discrimination;
- d) Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 31st March 2015 stating as follows:

"The management regrets to inform you that your services have been terminated.

You are therefore dismissed from your duties w.e.f 1st April 2015 your last day in school will be 30th April 2015.

Kindly arrange to return all the school items in your possession to the secretary on/or before 31st March 2015 in order to facilitate preparation of your final dues required.

On behalf of the Education Board I would like to take this opportunity to thank you for the services you have given to this school. We

wish you luck in your future endeavors.

Thanking You,

(Signed)

Z.M. SUMRA

H/MISTRESS”

17. The termination letter does not disclose the reason for termination. The Respondent’s Head Teacher however told the Court that the Claimant’s employment was terminated on account of her rudeness and lateness. The Respondent produced three warning letters dated 21st May 2012, 5th February 2015 and 10th March 2015. The Claimant acknowledged having received two of these letters. Nevertheless, no link was established between the issues raised in the warning letters and the reason why the Claimant lost her job.

18. More important is the Claimant’s testimony that due to her medical condition, she was forced to first go to hospital in the mornings before reporting to work. Having admitted that the Claimant had a medical condition, the Respondent ought to have demonstrated the support offered to the Claimant towards recovery.

19. In the final submissions filed on behalf of the Claimant on 1st April 2018, reference was made to the decision in ***Kennedy Nyagucha Omanga v Bob Morgan Services Limited (Cause No 1983 Of 2011)*** where this Court stated the following:

“While employers are entitled to terminate employment on the ground that an employee is too ill to work it must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to specific medical examination aimed at establishing the employee’s ability to resume work in the foreseeable future.”

20. If the Respondent had allowed the Claimant an opportunity to defend herself before terminating her employment, the reason as to why she was reporting late in the morning could well have been explained.

21. The Respondent’s Head Teacher, Zainab Mohamed Sumra initially told the Court that sometime in mid 2014, she transferred the Claimant verbally from the Play Group Class to Upper Primary because she used to report late to work. Sumra however cracked under cross examination and stated the following:

“I confirm that I moved the Claimant to prevent customers from running away from the School. I moved her because she was sick.”

22. The Court was perturbed that a person in the position of Head Teacher could be so uncaring and callous towards an employee at the lowest rank of subordinate staff, who was battling an illness. To admit this before the Court was even more stunning.

23. If the Claimant was transferred because she was sick, she could well be terminated for the same reason. That said and in view of the fact that the allegations of lateness were not proved at the shop floor, the Court finds and holds that the termination of the Claimant’s employment was substantively and procedurally unfair and she is entitled to compensation.

Occupational Disease?

24. It is not in contest that the Claimant suffered from a skin disease, which Dr. Ajoni Adede for the Claimant and Dr. Stephen Ndegwa for the Respondent referred to as ‘*chronic urticaria*’. What is in issue is whether the Respondent was responsible for this condition.

25. A determination of this crucial question revolves around the issue of causation. In addressing this issue, **Visram J** (as he then was) in ***Statpack Industries v James Munyao [2005] eKLR***, stated the following:

“It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone’s negligence. An injury per se is not sufficient to hold someone liable for the same.”

26. Looking at the medical reports by the two Doctors who appeared before the Court, as well as the treatment notes submitted by the Claimant, the Court did not find any link between the Respondent’s action or inaction and the Claimant’s condition. I say so for two reasons; one, the Claimant did not identify any particular chemical to which she was exposed in the course of her work which may have caused her to contract ‘*chronic urticaria*’, second, none of the Medical Officers who saw the Claimant when she was unwell, recommended withdrawal from exposure.

27. Instructively, by the time Dr. Adede and Dr. Ndegwa saw the Claimant, she had fully recovered and had no residual disability.

28. For the foregoing reasons, I find that that the Claimant failed to establish a causal link between her work at the Respondent and her illness. The claim for damages on account of occupational disease was unproved and is dismissed.

Discrimination?

29. The Claimant accuses the Respondent of discriminating against her on the ground of her medical condition.

30. Article 27 of the Constitution of Kenya, 2010 outlaws discrimination on the ground of health status, among others. In the foregoing parts of this judgment, I have set out the exact words of the Respondent’s Head Teacher as to the reason why she moved the Claimant from the Play Group Class to upper Primary. They bear repetition:

“I confirm that I moved the Claimant to prevent customers from running away from the School. I moved her because she was sick.”

31. By uttering these words before the Court, the Respondent’s Head Teacher confirmed that the Respondent indeed discriminated against the Claimant on account of her health condition. The Claimant is therefore entitled to damages on this score.

Remedies

32. Pursuant to the finding that the termination of the Claimant’s employment was substantively and procedurally unfair, I award her twelve (12) months’ in compensation. I further award the Claimant Kshs. 100,000 in damages for discrimination.

33. In making these awards, I have taken into account the Claimant’s long service with the Respondent as well as the Respondent’s callous conduct in terminating her employment.

34. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides that:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

35. From the Claimant’s pay slip for March 2015, which was filed by the Respondent, it is evident that the Claimant earned a basic salary without house allowance. I therefore award her house allowance at 15% of basic salary and adopt the resultant figure of Kshs. 11,868 as her monthly salary for purposes of tabulating her claim.

36. Regarding the claim for leave pay I have this to say; the Claimant told the Court that she used to take leave in the month of April. She however added that during her notice period in April 2015, she was required take her leave.

37. Notice and leave pay are two mutually exclusive employee rights and there was no legal basis for the Respondent to trade off one for the other. That being the case, I allow leave pay for 24 days.

38. The claim for Kshs. 2,000 being fees paid for medical report was evidenced by a receipt issued by Dr. Adede and is allowed.

39. The claim for overtime was not proved and is dismissed.

40. Finally, I enter judgment in favour of the Claimant as follows:

a) 12 months’ salary in compensation.....	Kshs. 142,416
b) Damages for discrimination.....	100,000
c) House allowance for 139 months (1,548x139).....	215,172
d) 24 days’ leave pay (11,868/30x24).....	9,494
e) Medical report.....	<u>2,000</u>
Total.....	469,082

41. This amount will attract interest at court rates from the date of judgment until payment in full.

42. The Claimant is also entitled to a certificate of service plus the costs of the case.

43. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER 2019.

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JUDGE

Appearance:

Mr. Otwere for the Claimant

Mr. Abdalla for the Respondent