



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 544 OF 2015

(Consolidated with 545 and 546 of 2015)

MWANAHAMIS ATHMAN ALI.....1ST CLAIMANT

KIBIBI RAMADHANI MBURIA.....2ND CLAIMANT

MWANA JUMA W. MUHAMED.....3RD CLAIMANT

VERSUS

ABBAS MUHSIN ,HUSSEIN B. SALIM ,ALMAS NASSIR

sued in their capacity as the Chairman, Secretary and

Treasurer of MUUNGANO SOCIAL CLUB t/a ALI BIN ABI

TALIB NURSERY SCHOOL.....RESPONDENT

J U D G M E N T

Introduction

1. The Claimants were employed by the Respondent from different dates as nursery school teachers but they were all terminated on account of redundancy by letter dated 17.2.2015. They brought separate suits on 4.8.2015 contending that the said termination was unfair and praying for payments of salary for April and May 2015, salary in lieu of notice, severance pay for 26 years, house allowance for 26 years, leave allowance for 26 years and compensation for unfair termination of their contract of service.

2. The Respondent admitted that the Claimants were employed by her but only from January 2012 after serving as volunteers from October 2001. She further admitted that she terminated the Claimants employment and paid them all their rightful dues. She therefore denied the alleged unfair termination and averred that she prayed for suit to be dismissed with costs.

3. The four suits were consolidated under this file by the consent of all the parties on 16.5.2016 and 27.11.2017 when the third Claimant testified as CW1, 1st Claimant as CW2 and 2nd Claimant as CW3 while the Respondent called Mr, Hussein Salim and Mr. Muhamed Mbarak as RW1 and RW2 respectively. Thereafter only, the Claimant filed written submissions, which I have carefully considered herein.

Claimants' Case

4. CW1 testified that she was employed by the Respondent on 16/2/1989 as a nursery school teacher and worked continuously until 4.5.2015 when she stopped by the caretaker at the school gate while reporting back to work from April vacation. She was surprised to see new employees already employed in the school. She then called the Head teacher who came to the gate followed by the Treasurer who gave her an envelope containing a termination letter and another letter alleging a standoff. The termination given to her was dated 17.2.2015 while the other letter was dated 6.4.2015. The reason cited for the termination was that the school had been sold to a new owner.

5. According to CW1 there was no prior notice of the termination and therefore prayed for the reliefs sought in the suit because they are her rights as an employee. She denied ever serving the Respondent as a volunteer and maintained that she was a teacher employed for monthly salary of Kshs.11,250 exclusive of house allowance. She further denied that she threatened to storm the school.

6. However on cross-examination, she admitted that she signed the school Delivery Book on 27.2.2015 to acknowledge receipt of the termination notice dated 17.2.2015. She further admitted that she used to go for vacation 3 times a year but denied that the vacation was not her annual leave. Finally, she admitted that the termination letter indicated 2.4.2015 as her last day at work.

7. CW2 testified that she was employed by the Respondent on 1.10.2001 as a nursery school teacher for a monthly salary of KShs.8,000 and worked continuously until 4.5.2015 when she was denied access to the school by the caretaker while reporting back to work from April vacation and told that her services had been terminated. She was surprised to see new employees already employed in the school. She accused the Respondent of unfair labour practices and prayed for the reliefs sought in the suit.

8. CW3 testified that she was employed by the Respondent in November 1992 as a nursery school teacher and worked continuously for 23 years until 4.5.2015 when she denied access to the school compound and told that her services had been terminated. She was surprised to see new staff already employed in the school. She therefore accused the Respondent of unfair labour practices and prayed for the reliefs sought in her suit.

Defence Case

9. RW1 testified that the club started a nursery school in its compound. According to him, the school was non-profit making and it was funded by well wishers who equipped it with furniture and equipment. He further stated that teachers in the school were sourced on volunteer basis from the community nursery school including the Claimants who served as such from October 2001 until January 2012 when the club resolved to employ them on permanent basis and registered them with the NSSF and NHIF. However, with time the pupils' enrollment dwindled and the operation expenses became so much that the club was forced close the school and terminated the Claimants' services by the letter dated 27.2.2015 but the Claimants became difficult and stole school equipment and records. He therefore contended that the termination of the Claimants' employment was done fairly after being served with one month notice as required by section 35 of the Employment Act and after being paid all their due salary inclusive of housing allowance. He denied the claim for leave because the Claimants were benefiting from 3 months of vacation every year.

10. On cross-examination, RW1 admitted that the first Claimant was given appointment letter dated 1.10.2001 providing for payment of salary. He admitted that the Claimants' terms of service after the appointment to permanent basis remained the same as when they were volunteer teachers. He contended that he served the termination letters on 27.2.2015 by a Delivery book and the Claimants were to work up to 2.4.2015. The reason for the termination was because the school had few pupils but he admitted that the area Labour officer was not served with the termination notice.

11. RW2 testified that the respondent is a social club for addressing social issues in the community. He stated that the club started the nursery School as a non-profit making institution at the social club to offer tuition on part time basis using teachers recruited on volunteer basis. He further stated that the head teacher was collecting fees from the pupils but at the start it was not enough to run the institution and as she paid only tokens to teachers and cleaners until January 2012 when she resolved to employ them. However with time the institution became a total failure due to low enrollment and on 27.2.2015 the club served the Claimants with termination letters and closed the school altogether and released the school to another person. Thereafter, the Claimants threatened to frustrate its operation and he reported the matter to the police but that did not stop them from causing commotion on the opening day of the second term in May 2015.

12. He maintained contended that the termination of the Claimants' employment was done fairly after being served with one month notice as required by section 35 of the Employment Act and after being paid all their due salary inclusive of housing allowance. He further contended that they held meetings with the Claimants to discuss the shutting down of the school because it was no longer beneficial to the society. He denied the claim for leave because the Claimants were benefiting from 3 months of vacation every year. He however admitted that the area labour officer was never served with notice of termination of the Claimants' employment.

Analysis and Determination

13. There is no dispute that the Claimants were employed by the Respondent from January 2012 and that they were terminated by letters dated 17.2.2015. The issues for determination are:

- (a) Whether the termination of the claimant's contract of service was unfair.
- (b) Whether the claimants are entitled to the reliefs sought.

Unfair termination of employment contract

14. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the termination was redundancy and the procedure followed was one month notice in writing.

Reasons for the termination

15. The reasons cited for the termination of the claimants in the termination letters dated 17.2.2015 was redundancy because the letter stated that the school was no longer viable and had become a loss making venture. The claimants have not contested the alleged reason for the termination of their employment. I therefore find that the respondent has proved on a balance of probability that there existed a valid and fair reason for terminating the Claimants' employment being redundancy, as required by section 45 (2) (a) & (b) of the Employment Act.

Procedure followed before termination

16. The Claimants have however faulted the procedure for their termination but the respondent has maintained that a fair procedure was followed. The procedure for terminating employment on account of redundancy is laid down in mandatory terms by section 40 of the Act. The Section provides that before terminating the services of an employee on account of redundancy, the employer shall first serve the employee (or his trade union) and labour officer with at least one month written notice, followed by fair selection process, then payment of salary in lieu of notice, accrued benefits plus severance pay to the employees selected for the redundancy. Failure by the employer to comply with the said mandatory procedure renders the termination unfair within the meaning of section 45 of the Act.

17. After careful consideration of the material presented before me, I find that the claimant has proved on a balance of probability that the respondent did not comply fully with the said mandatory procedure provided by of section 40 of the Act and that rendered the termination unfair. Firstly, she never served the termination notice on the area labour officer as required by subsection (1)(a). Secondly, she failed to pay salary in lieu notice as provided under subsection (1)(f). In my considered view, the employer's obligation to serve redundancy notice under subsection (1)(a)&(b) is not in the alternative to the obligation to pay salary in lieu of notice under subsection (1)(f). Thirdly, she never paid severance pay to the Claimants as required by subsection (1) (g).

Reliefs sought.

18. In view of the foregoing finding that the termination of the Claimants' employment on account of redundancy was procedurally unfair, Under section 49 of the Act, I award each of them one month salary in lieu of notice plus twelve months' salary as compensation for the unfair termination. I have awarded the maximum compensation because the Claimants served the respondent for many years and that they did not contribute to their termination through misconduct.

19. The claim for severance pay is however dismissed because the termination has herein been deemed unfair and adequately compensated. Likewise, the claim for leave is dismissed because the Claimants enjoyed three months' vacation every year. The claim for salary for April and May 2015 is also dismissed because by then the Claimants' employment had ended. Finally, the claim for house allowance is dismissed for lack evidence.

First Claimant (Mwanahamisi Ali.)

Notice Kshs. 8,000

Compensation Kshs. 96,000

Kshs.104, 000

Second Claimant (Kibibi Mburia)

Notice Kshs. 10600

Compensation Kshs. 127,200

Kshs.137,800

Third Claimant (Mwajuma Muhamed)

Notice Kshs. 11,150

Compensation Kshs. 133,800

Kshs.144,950

Disposition

20. For the reasons that the claimants were unfairly terminated, I enter judgment for them in the aggregate sum of Kshs.386,750 plus costs and interest from the date hereof. The said award is subject to statutory deductions.

Dated and signed at Nairobi this 12th February 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE