



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 637 OF 2016

JOSEPHINE KHAMISWA NYAITO.....CLAIMANT

VS

ZUBEDA ALI T/A JUHUDI JUNIOR SCHOOL...RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by Memorandum of Claim dated 19th April 2016 and filed in court on even date is for unfair termination of employment. The Respondent filed a Statement of Response on 2nd August 2016.

2. When the parties appeared before me on 25th September 2017, they agreed to dispense with the matter by way of written submission.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent as a Baby Class Teacher at an initial monthly salary of Kshs. 17,000 effective May 2013.

4. On 31st October 2015, after the closing day ceremony, the Respondent called all the staff members for a meeting, at which the Claimant was accused of having stolen bed sheets from the School. The Claimant states that after the staff meeting, she was notified that her services were not satisfactory and she was therefore being terminated.

5. The Claimant reported the matter to the Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions (KUEPCAI) who wrote a letter to the Respondent. On 25th November 2015, upon visiting the Respondent in the company of a union leader, the Claimant was served with a termination letter dated 7th November 2015.

6. The Claimant avers that the termination of her employment was unlawful and unfair as no charges were brought against her and she was not given an opportunity to be heard. She now claims the following:

- a. 12 months’ salary in compensation.....Kshs. 204,000
- b. 1 month’s salary in lieu of notice.....17,000
- c. House allowance @ 15% of basic salary.....76,500
- d. NSSF deductions.....6,000
- e. NHIF deductons.....4,800
- f. Certificate of service
- g. Costs plus interest

The Respondent’s Case

7. In its Statement of Response dated 1st August 2016 and filed in court on 2nd August 2016, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim.

8. While denying the claim for unlawful and unfair termination, the Respondent avers that the Claimant was dismissed for gross misconduct which was in contravention of the terms and conditions of her employment. The Respondent cites the following particulars of gross misconduct:

- a. Perpetual absenteeism from duty without any justifiable cause;
- b. Continuously reporting late for work without lawful cause;
- c. Engaging in theft of property from the School.

9. The Respondent states that after several verbal and written reprimands, the Claimant was issued with a show cause letter. A meeting was convened and she was given an opportunity to exonerate herself. The Claimant did not offer any sufficient reason to cause the Respondent to arrive at arrive at any other verdict other than dismissal for gross misconduct.

10. The Respondent states that the Claimant was not a unionisable employee and was not a member of any Trade Union.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

12. The Claimant was dismissed by letter dated 7th November 2015 stating as follows:

“RE: SUMMARY DISMISSAL

Reference is made to the Show Cause letter Ref HR/20865307 dated October 7, 2015 which you failed to respond to as well as the meeting of November 7th, 2015 when you were called in briefly and asked why you did not respond to the contents of the letter of which you denied (sic) having stolen the student's beddings.

After investigation and statements from several witnesses, it has been established that you indeed stole all the students' beddings on September 26th 2015 while you were the teacher on duty after having absented yourself two (2) days prior (sic) without notice.

We regret to inform you that with effect from October 21, 2015, your services as a class teacher for Juhudi Junior School is no longer required.

Kindly hand over all the children's files, schemes of work, library items, keys, stationery and any other school property that is in your possession with immediate effect.

For and on Behalf of Juhudi Junior School.

(Signed)

Zubeda Ali

Director”

13. According to the documents produced by the Respondent, the letter of summary dismissal was preceded by a show cause letter dated 7th October 2015 by which the Claimant was required to respond to the allegations of theft within 48 hours. The Respondent states that the Claimant did not respond to the show cause letter but was nevertheless called to a meeting on 7th November 2015, where she was asked to explain why she had stolen the children's linen.

14. None of the parties testified before the Court, meaning that none of the contentious issues was proved. In this regard, the substance of the allegations made against the Claimant was not laid before the Court. From the record, it would appear that the decision to dismiss the Claimant was informed by incriminating statements made against her by the Respondent's cleaner, Lorna Angai and security guard, Torophine.

15. The Court was unable to understand why the Respondent chose not to call the two individuals to testify. In their absence, their statements

were worthless and the Respondent therefore failed to discharge her burden under Section 43 of the Employment Act, 2007 which requires an employer to demonstrate a valid reason for terminating the employment of an employee. Additionally, the Respondent failed to prove compliance with the procedural fairness requirements set out under Section 41 of the Act.

Remedies

16. From the foregoing, the Court arrived at the conclusion that the Claimant's dismissal was substantively and procedurally unfair and she is entitled to compensation. I therefore award her five (5) months' salary in compensation. This award is informed by the Claimant's length of service and the Respondent's conduct prior to the dismissal. I further award the Claimant one (1) month's salary in lieu of notice.

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

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).

18. The Claimant filed her salary voucher for May 2015 showing that she was paid a basic salary of Kshs. 17,000 without house allowance. The Respondent did not produce either a letter of appointment or an alternative salary voucher showing the contrary.

19. The responsibility to document the employment relationship lies with the employer and as held by **Mbaru J** in **Robai Musinzi v Safdar Mohamed Khan [2012] eKLR** where an employer fails to discharge this responsibility, it falls upon the shoulders of the Court to interpret the applicable terms and conditions of employment.

20. From the evidence placed before the Court, I did not find any expressed intention of the parties that the salary paid to the Claimant would be inclusive of house allowance. I therefore award the Claimant house allowance at 15% of her basic salary and adopt the resultant figure of Kshs. 19,550 as her monthly salary for purposes of this claim.

21. The claims for unremitted NSSF and NHIF deductions were not proved and are dismissed.

22. In the end, I enter judgment in favour of the Claimant in the following terms:

a. 5 months' salary in compensation.....Kshs. 97,750

b. 1 month's salary in lieu of notice.....19,550

c. House allowance for 29 months.....73,950

Total.....191,250

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

24. I award the costs of this case to the Claimant.

25. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF MARCH 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Miss Muhanda for the Claimant

Mr. Rotich for the Respondent