



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 388 OF 2013

ALICE NANDWA.....CLAIMANT

VERSUS

ST. MARY'S CATHOLIC CHURCH (KWA NJENGA).....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 21.3.2013 alleging unfair termination of her employment contract by the respondent and praying for Kshs.218,290 as her terminal benefits. The Respondent, however filed her defence on 3.5.2013 denying any employment relationship with the claimant and prayed for the suit to be dismissed with costs.
2. The suit was heard on 2.11.2017 and 14.2.2018 when the claimant testified as Cw1 and the respondent called Mr. Nicholas Nzomo as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

3. Cw1 testified that she was employed by the respondent as a Nursery School Teacher in January 2007 earning a salary of Kshs.4,000 per month. The contract was never reduced into written form. She however stated that the school was a project by Women's Group in the Church and her salary was being paid by the chairlady of the Group. In 2009, the Nursery School project got funding from a sponsor and her salary was increased to Kshs.8,000 per month from April 2009.
4. Cw1 testified further that in 2012, the management of the Nursery School was taken over by the church and thenceforth her salary was paid by the Rw1 who was the chairman of the church. In November 2012, the chairman told Cw1 and the other employees of the Nursery school to re-apply for their positions in school and they complied. Thereafter she was called for an interview but sadly she was told that she had failed and as such her employment ended. Her claim for terminal dues was however not granted until she served demand letter from her counsel and the parish priest offered her Kshs.20,000 which she declined. She maintained that the termination of her employment was unfair and prayed for the dues sought in her statement of claim.
5. On cross examination, Cw1 admitted that in 2007, she was employed by a Women's Group in the respondent's church and worked for it for 6 years. She further admitted that the church took over the school in 2012 but she was never given any appointment letter. She however denied knowledge of the month when the church took over the school but contended that she was paid salary by the church chairman until November 2012. She also contended that she was being paid salary from school fees.

Defence Case

6. Rw1 was the chairman of the respondent in 2012. He confirmed that the claimant was employed as a Nursery School Teacher by a Women Group who had rented space in the Church compound. He contended that the school belonged to the Women's Group and not the Church. He further contended that in 2012, the Women's Group could no longer manage the school and they abandoned it leaving the teachers and the children stranded in the church compound.
7. As a result of the said developments, the church took over the burden of operating the school in 2012 after first interviewing the teachers. He contended that the claimant failed interview and the church did not employ her. He denied the alleged offer of kshs20,000 to the claimant after failing in her interview. He prayed for the suit to be dismissed because she was never employed by the respondent.
8. On cross examination, Rw1 contended that the church took over management of the school in August 2012 after conducting interviews for

the teachers. He stated that the interviews were announced in June 2012. He however admitted that the church stated paying teachers' salaries in June 2012 on interim basis because they were suffering. He maintained that the claimant failed the interview due to lack of academic qualification in teaching.

Analysis and Determination

9. After careful consideration of the evidence and submissions, it is clear that the claimant was employed by Women's Group as a Nursery School teacher which operated within the respondent Church premises. There is also no dispute that in June 2012 Women Group stopped operating the school and the respondent took over the operations of the school but after conducting interviews of the existing staff, the claimant failed due to lack of academic qualification. The issues for determination are:

- (a) Whether the parties herein had employment relationship;
- (b) If, (a) is affirmed, whether the said employment was unfairly terminated by the respondent
- (c) Whether the claimant is entitled to any remedy.

Employment relationship

10. Cw1 has contended that she was not employed by the respondent until the Women Group left the management of the school to the respondent. She further contended that she continued working until November 2012 when she was terminated after failing interview. Rw1 has contended that the respondent took over the school in June 2012 and started to pay the teacher salaries. He further alleged that all the staff vacancies were advertised in the same month of June 2012 and interviews were done in August 2012 but the claimant failed due to lack of academic qualifications.

11. After careful consideration of the evidence before me, it is my finding that there existed employment relationship between the parties herein from June 2012 to November 2012. The said relationship was continuous and the consideration was payment of a monthly salary for the services rendered by the claimant. Section 2 of the Employment Act defines contract of service and an employees as follows:

“an agreement, whether oral or in writing, and whether express or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of this Act applies;

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner.”

12. In this case, the contract of service was implied from the conduct of the parties. They never made any express agreement whether verbal or written. The respondent just saw the school staff and pupils abandoned by the Women Group and rushed to fill the loophole as the proprietor and employer. After a couple of months, she decided to interview the staff to verify their competence to continue serving and the claimant failed in the interview in November 2012 when the father in charge of the church gave her the sad news. Although Rw1 alleged that the takeover was after the interviews of staff conducted in August after advertisement in June 2012, that allegation has not been proved by any documents. He never produced copies of the advertisement published in June 2012 or the minutes of the interviews conducted in August 2012. In addition, the respondent has not called as a witness the father in charge of the church to rebut the allegation by the claimant that she was discharged in November 2012. Consequently, this Court finds that the claimant has proved on a balance of probability that she was employed by the respondent as Nursery school teacher from June 2012 to November 2012 for a monthly salary of Kshs.8,000.

Unfair termination

13. Under section 45 of the Employment Act termination of an employee's contract of service is unfair if the employer 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 cited as lack of academic qualifications and the procedure followed was re-advertisement of her position and conducting of interview which she failed. The claimant has not denied the alleged lack of academic qualification. She also admitted that she reapplied for the position and attended the interviews but she failed.

14. In my view the termination was founded on a valid and fair reason as contemplated by section 45(2) (b) of the Act. Under the said provision, a reason for termination is valid if it relates to the employees conduct, capacity and compatibility; or the employer's operational requirement. Lack of academic qualification by the claimant related to her capacity to serve and operational requirement of the respondent.

15. However, the procedure followed in terminating her was not fair. In my view, after the employer found her unqualified for the job, she was bound by section 41 of the Employment Act to follow fair procedure before discharging her. Section 41 of the Act provides that before terminating the employee's contract of service on account of misconduct, physical incapacity or poor performance must first explain to the employee the reason for which termination is being considered. The explanation must be in a language of the employee's understanding and in the presence of another employee or shop floor union representative of his choice. Thereafter the employee and his chosen companion must be given a chance to air their representations for consideration before the termination is decided. Consequently, I hold that the failure to follow fair procedure before terminating the contract of service as required by section 41 of the Act, the termination of the claimant's contract of service was rendered unfair within the meaning of section 45 of the Act.

Reliefs

16. Under section 49 of the Act, the claimant is awarded one month salary in lieu of notice being Kshs.8,000. She will also get Kshs.16,000 for unfair or wrongful dismissal as prayed. She is further awarded leave for 5 months she worked for the respondent on prorate basis being

$Kshs.8,000 \times 5 \times 1.75 = Ksh.2,692.30$

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Conclusion and Disposition

17. For the reasons and findings made herein above in respect of the issues for determination, I enter Judgment for the claimant in the sum of Kshs.26,692.30 plus costs and interest at Court rates from the date hereof until payment in full.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE