



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 714 OF 2016

JOSEPHINE MUTETE KIILU.....CLAIMANT

VS

KINGDOM HERITAGE MODEL SCHOOL.....RESPONDENT

JUDGMENT

Introduction

1. Josephine Mutete Kiilu, the Claimant in this case worked for the Respondent Kingdom Heritage Model School from 19th November 2011. She brought this claim following her dismissal on 14th July 2016.
2. The claim is documented by a Statement of Claim dated 23rd September 2016 and filed in court on 26th September 2016. The Respondent filed a Statement of Reply on 28th November 2016. When the matter came up for hearing, the Claimant testified on her on behalf and the Respondent called its Head Teacher, Bobson Mwasaha and Board Chairlady, Nancy Mwanzia. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent as a cleaner and baby minder on 19th September 2011. She earned a monthly salary of Kshs. 8,000. She claims that the Respondent unlawfully terminated her employment on 14th July 2016 and withheld her terminal dues. She therefore seeks the following:

- a) 1 month’s salary in lieu of notice.....Kshs. 8,000
- b) Leave balance for 2014 (3 days) leave pay for 1 year (2015)
& prorata leave for 2016.....19,360
- c) Leave travelling allowance.....6,450
- d) Service pay for 4 years.....15,600
- e) Underpayment for 57 months.....218,367
- f) House allowance for 57 months.....148,200
- g) 12 months’ pay in compensation for unfair termination.....96,000
- h) Certificate of service
- i) Costs plus interest

The Respondent’s Case

4. In its Statement of Reply dated 25th November 2016 and filed in court on 28th November 2016, the Respondent admits having employed the Claimant as a cleaner and baby minder effective 19th November 2011.

5. The Respondent states that in the month of June 2016, the Claimant was directed by the Head Teacher to clean a stair case leading to class 8. The Claimant is said to have refused to do the assigned duties and dared her supervisor to sack her. The Claimant confirmed this by her letter dated 30th June 2016.

6. On 1st July 2016, the Claimant was served with a show cause letter and on the same day she attended a hearing. By letter dated 4th July 2016, the Claimant was suspended for a period of two (2) weeks. During her suspension, the Respondent's Board met and discussed her conduct and a decision was made to summarily dismiss her on account of insubordination. On 14th July 2016, the Claimant was issued with a letter of summary dismissal.

7. In response to the specific claims made by the Claimant, the Respondent states that the Claimant was a member of the National Social Security Fund (NSSF) and that she took her leave as and when it fell due. The Respondent further contests the claims for underpayment and house allowance.

8. The Respondent avers that the Claimant's dues were computed and a cheque of Kshs. 6,400 forwarded to her Advocate.

Findings and Determination

9. 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

10. The Claimant was dismissed by letter dated 14th July 2016 stating as follows:

"RE: DISMISSAL

Calvary greetings.

Following your recent acts of insubordination already communicated to you, the LSB does not find you fit to drive the core values of the school. This letter serves to inform you that you have been summarily dismissed from service at Kingdom Heritage Model School, Mombasa Branch with effect from the date of this letter. This is in line with KHMS Operational Manual guideline Chap. 5:11(i) page 49 on the subject.

The board therefore requires you to return all school property in your possession forthwith.

We however wish you well in all your endeavors.

God bless you.

Yours faithfully,

(Signed)

DCNS. NANCY MWANZIA

KHMS LOCAL SCHOOL BOARD

11. The summary dismissal letter accuses the Claimant of insubordination but does not give details. However, from the evidence adduced before the Court, it is evident that the Claimant's woes sprang from additional duties of cleaning a flight of stairs assigned to her by the School Principal in June 2016.

12. According to the Respondent, the Claimant blatantly refused to take up the assigned duties. On her part, the Claimant states that she was unable to take up the new duties due to poor health. She told the Court that she had explained this to both the Principal and the Disciplinary Committee. In this regard, the Claimant produced her letter addressed to the Head Teacher stating inter alia:

"The main reason why am complaining is my chest. Carrying Eric in and out of the bus is not something easy. After transport all the windows upstairs are waiting for me including the dormitory (sic) nets which I clean three times a week. So if now I start cleaning it will be impossible for to (sic) do some duties. I don't have problem with mopping the only problem is my chest because for the few months since I joined transport I have been having chest problem but I've just been quiet. Please consider my problem concerning my health and may God bless you in advance."

13. The Claimant's letter was received on 30th June 2016 and on 1st July 2016, she appeared before a Disciplinary Committee chaired by the

then Deputy Head Teacher, Bobson Mwasaha. From the minutes of the disciplinary meeting produced by the Respondent, the Claimant reiterated that she had chest problems and could not therefore take up the extra duties assigned by the Principal. Members of the Disciplinary Committee asked whether the Claimant had a medical report to that effect but the Claimant is reported to have said that the report was lost.

14. Instructively, the Claimant did not sign the disciplinary proceedings. Further, she testified that she was not given time to produce her medical report. The report which is dated 3rd June 2014, was filed as part of the Claimant's supporting documents. It states:

“JOSEPHINE MUTETE

27 YRS F

TUDOR

RE: MEDICAL REPORT

The above named patient has been treated in our Clinic since 15/1/2012. She has been on & off with recurrent chest problem & Tachycardia.

Medication has been given with little success. We realized is a Repeated Recurrent Condition.

We urge the respective Administrators to ALLOW her work under light duty free from DUSTY ENVIRONMENT.

ASSIST WHERE POSSIBLE TO ALLEVIATE THE CONDITION.

Thanks in advance”

15. The Respondent did not offer any evidence to contradict the medical report produced by the Claimant. It would appear however that the Respondent was not convinced by the Claimant's submission that she had a medical condition which prevented her from taking up the assigned additional duties. I say so because, at the end of the disciplinary meeting held on 1st July 2016, the Disciplinary Committee reached the conclusion that the Claimant *“had to take up the new assignment as instructed.”*

16. The record of the disciplinary meeting does not show whether the Claimant's explanation as to why she could not take up the assignment was ever considered. Following this meeting, the Claimant was suspended for two weeks from 4th July 2016. She was subsequently dismissed on 14th July 2016.

17. The question then is whether the Respondent has demonstrated a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act, 2007. The next question is whether in effecting the dismissal, the Respondent observed the procedural fairness requirements set out in Section 41 of the Act.

18. If the Respondent had doubts regarding the Claimant's claim of ill health, the correct thing to do would have been to subject her to medical examination by an independent medical officer. Neither the Principal nor the Disciplinary Committee had capacity to discredit the Claimant's medical report. Regarding production of the medical report before her dismissal, the Claimant told the Court that she had no prior notice that she would be required to appear before the Disciplinary Committee. This was confirmed by the Respondent's first witness, Bobson Mwasaha who testified that he notified the Claimant of the disciplinary meeting at 8.00 am of the same day.

19. The Court was referred to its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* where the following was stated:

“In order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

20. In the instant case, it is evident that the Respondent not only ignored the Claimant's explanation as to why she could not take up additional duties but also failed to avail her time to defend herself against accusations of insubordination. As held in *George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR* even in cases of summary dismissal, the right to be heard is guaranteed.

21. The Respondent having failed to avail this right to the Claimant, the Court finds that no valid reason for the dismissal has been established and further, that the mandatory procedural fairness requirements were violated. The resultant dismissal was consequently substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

22. Pursuant to the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in effecting the Claimant's dismissal. I further award the Claimant one (1) month's salary in lieu of notice.

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

(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).

24. The Claimant's letter of appointment dated 23rd March 2012 provides for a consolidated monthly salary. It seems to me therefore that the parties had expressly agreed that the Claimant's salary would be inclusive of house allowance. Consequently, the claim for house allowance fails and is dismissed.

25. The Claimant claims leave pay for 2015 and 2016. However, according to leave records produced by the Respondent, the Claimant took 19 days' leave in April 2016 leaving a balance of 3 days to her credit for 2015. Having worked for part of the year 2016, the Claimant is entitled to prorata leave for the completed months of service.

26. The claims for leave travelling allowance and underpayment were not proved and are dismissed.

27. The Claimant told the Court that she was a contributing member of the National Social Security Fund (NSSF). She is therefore not entitled to service pay.

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

a) 10 months' salary in compensation.....	Kshs.80,000
b) 1 month's salary in lieu of notice.....	8,000
c) 3 days' leave pay for 2015 (8,000/30x3).....	800
d) Prorata leave pay for 2016 (8,000/30x1.75x6).....	<u>2,800</u>
Total.....	91,600

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

30. The Claimant is also entitled to a certificate of service and costs of the case.

31. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

Appearance:

Miss. Kimuli for the Claimant

Mr. Mutugi for the Respondent