



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO. 1429 OF 2013

MARY WANGARI NYAMU.....CLAIMANT

VERSUS

BOARD OF GOVERNORS ST. JOSEPH FRIENADEMETZ.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 5.9.2013 contending that her contract of service was unfairly terminated by the respondent in December 2012 and prayed for terminal dues plus compensation for unfair termination of her employment.

2. The respondent filed his defence on 26.6.2018 with leave of the court.

She admitted employing the claimant a fixed term contract from 1.1.2012 to 31.12.2013 but denied the alleged unfair termination. She averred that it is indeed the claimant who terminated her contract by absconding her duties. In addition, she averred that the claimant was paid all her salary and took or cashed all her leave days. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 9.10.2018 when the claimant testified as Cw1 but the respondent never called any witness. Thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 testified that she was employed by the respondent as a Teacher and also the Head teacher of a Primary School. She produced a bundle of documents to prove the said employment relationship. She further testified that sometimes in December 2012, the school manger Father Joseph Ole Sambe convened a staff meeting thereafter she was called to another meeting with Father Ole Sambe where he praised her performance after which he told her that it had been decided that services be terminated.

5. Cw1 contended that the said verbal termination was unfair for lack of a valid reason and she reported the matter to the Labour Office. After conciliation, the dispute was never resolved and she brought this suit. She denied the allegation by the defence witness that she absconded duty and contended that Father Martin Njihia was not in the parish when she was dismissed.

6. On cross examination, Cw1 maintained that on 27.11.2012 she was informed by father Sambe that the Parish Council (PBC) had decided to replace her with someone else. She denied the allegation that she absconded duty and contended that had she done that, the employer could have written a letter to her. She stated that she in fact did handing over to Father Ole Sambe, School Chairman Mr. Mbarogo and the Deputy Head Teacher after the termination but a release was not given to her despite her request. She maintained that she is entitled to reliefs set out in the amended claim but admitted that she was contributing to the NSSF.

Analysis and determination

7. There is no dispute that the claimant was employed by the respondent until 27.11.2012. The issues for determination are:-

a) Whether the claimant deserted her employment or she was unfairly terminated.

b) Whether she is entitled to the reliefs sought.

Desertion or Unfair termination

8. The respondent never adduced any evidence to prove that the claimant deserted work as pleaded in the defence. Consequently, the allegation of desertion is dismissed for lack of evidence. It follows therefore that the claimants evidence that Father Ole Sambe verbally dismissed her on 27.11.2012 is not challenged and I therefore hold that she was terminated as she alleges, for no valid reason and without prior hearing. She contended that on the 27.11.2012 she was called to a meeting by the manager of the school Father Ole Sambe and she was informed that the Parish Council (PBC) had already decided to replace her with some else.

9. Under section 45(2) 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 valid and fair reason and that a fair procedure was followed. In this case, it is obvious that the respondent never discharged that burden because she never called any witnesses to rebut the claimant’s evidence. Consequently, I return that the claimant has proved on a balance of probability that she was unfairly terminated on 27.11.2012.

Relief

10. Under section 49(1) of the Employment Act, I award her one month salary in lieu of notice plus 5 months salary compensation for the unfair termination. In awarding the said compensation, I have considered the period of service being 5 years from 2008 and also the fact that she never contributed to the termination through misconduct. Finally I have considered her expectation to work and earn during the remainder of her contract term.

11. The claims for overtime, public holidays, accrued leave and severance pay are however dismissed. As correctly submitted by the defence, the particulars for the public holidays were not pleaded and proved. That severance is only available in a claim for redundancy and the claimant is presumed to have gone for her leave during school holidays.

12. The claim for salary for the remainder of the contract term is disallowed because the award of compensation above sufficiently remedied the claimant. Likewise the claims for transport costs and statutory dues are dismissed for lack of particulars and evidence.

13. However, claim for salary for November 2012 is allowed being Kshs.26,000 but the salary for December 2012 is not payable to her because she was dismissed on 27.11.2012 as per testimony under oath.

-Finally, I grant the prayer for certificate of service as prayed.

Conclusion and Disposition

14. I have found that the claimant has proved that her contract of service was unfairly terminated by the respondent. I therefore enter judgment for her in the following terms:

Notice	26,000.00
Compensation.....	130,000.00
Salary November 2012.....	<u>26,000.00</u>
	182,000.00
	=====

The said sum shall be paid subject to statutory deduction. The claimant will also have certificate of service costs and interest at court rate from today.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU

JUDGE