



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 877 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF DOMESTIC HOTELS, EDUCATION,
INSTITUTION AND HOSPITAL WORKERS.....CLAIMANT**

VERSUS

BABA DOGO CATHOLIC CHURCH SCHOOL.....RESPONDENT

JUDGMENT

The Claimant filed suit on 25th May, 2012, against the Respondent seeking damages for wrongful, unprocedural and unfair termination on behalf of 5 Grievants namely:

1. Millicent Adika employed on 1st January 1997 at a basic salary of 6,765
2. Helen wanjiru Kimani, employed on 1st January 2004 at a basic salary of 6,500
3. Christopher Ndungu employed on 1st January 2004 at a basic salary of 6,500
4. Benard Nzioki employed on 1st April 2010 at a basic salary of 8,000 and
5. Phillip Wanyama employed on 1st September 2010 at a basic salary of Kshs. 8,000.

The Claimant avers that the Grievants were employed on diverse dates by Kariobangi Catholic Service as teachers from the year 1997, who in 2003 handed over the running of the school to the Respondent. That the Grievants were issued with Certificates of Service and were handed over to Babadogo Catholic Church. That the Respondent was an out station of Kariobangi Catholic Service.

The claimant avers that in 2004 the Grievants were given letters of appointment which were renewed every year from 2004 to 2007. For all these years they worked continuously and the working relationship was very cordials. That in 2012 they were issued with a 5-year contract starting from 23rd January 2012 with salary adjustments as follows:

1. Millicent Adika – 14,850.00
2. Helen Wanjiru Kimani – 13,150.00
3. Christopher Ndungu - 12,500.00
4. Benard Nzioki - 11,500.00
5. Phillip Wanyama – 11,500.00

That upon signing the new contracts they were requested by the Respondent to go and pick letters at which point they were issued with end of probationary period review forms.

They did not understand the forms and they sought clarification on the said form. They allege they were told that the form only applied to the new teachers and therefore they did not sign. As a result they were issued with several warning letters but still refused to sign. They were initially 14 teachers who refused to sign the said forms but later on after the warning letters were sent 9 of the Teachers signed. Thereafter the grievants were issued with termination letters dated 30th June 2012. They pray for the Claim to be allowed as drawn.

The Respondent in the Response admitted the employment relationship and the termination which they effected on 30th June, 2012. They deny employing Millicent Auma Adika and state that she was employed by Kariobangi Catholic Church for a fixed term contract of 3 years.

They however admit that prior to 1st January 2012, the Grievants were on annual contracts renewable at the end of each year but in 2011, employees requested the Respondent to consider its policy of employing teachers on an annual basis as this did not give them job security. The board in response decided to issue 5 year contracts.

That the new contracts which were signed voluntarily came with a probation clause and when the grievants were asked to sign the end of probation review form they refused, an act the respondent considered as a show of gross insubordination leading to their termination. They contend that several warning letters were sent to allow the Grievants time to consider the review but they remained adamant. The Respondent prays for the Claim to be dismissed.

Evidence

The 1st Grievant, Millicent Auma Adika testified on behalf of the other Grievants. She reiterated what is set out in the pleadings and stated that the termination was unfair. She urged the Court to grant the orders as prayed.

The Respondent called two witnesses one Brother Nibert Oduor Okumu, RW1 and Nicholas Kilonzo, RW2.

RW1 stated in evidence that the final 5 year contract that is subject of this suit had a probationary clause which the Grievants refused and after several warning letters they still did not fill the probationary period review forms. That the grievants came to him and were rowdy wanting clarification on the probation clause and he explained that it was to evaluate performance. That the Grievants were sent on a 6 week suspension. He stated that due process was followed and as such the suit should be dismissed.

RW2 led evidence that he was a former employee who was faced with the same situation as the Grievants but in his case he acceded and signed the probation forms. That thereafter the Respondent was able to harness his skills and he was trained further at the expense of the Respondent. That the probation forms were not meant to lead to termination as imputed by the Grievants.

Submissions

The Claimant submits that the termination of the Grievants was unjustified for the reason that each of the Grievants had served for more than one year and the requirement for probation did not apply.

That according to the provisions of Section 42(2) and (3) of the Employment Act, the Respondent acted illegally in terminating the Grievants services on account of failure to fill an end of probation form. The claimant cites the case of **Abraham Gumba vs Kenya Medical supplies Authority (2012)eKLR** where the Court observed that:

“Probation is served by a new employee to provide adjustment opportunity for both the new Employee and the Employer to determine whether to continue with the employment relationship, probation is not for old dogs.”

The claimant further submitted that the probation assessment was meant to be carried out with a view to terminate employees as the initial 9 of 14 grievants who signed the forms were nevertheless terminated.

On the procedure followed to effect the termination it is submitted that the same was flawed as the grievants were never issued with show cause letters, they were not called for a hearing or allowed to call witnesses as required of the law and thus the termination was unlawful contrary to Article 41 of the constitution and section 42, 43, 45 of the Employment Act 2007. They urge the Court to allow the Claim.

The Respondent on the other hand submitted that the Contracts were terminated while the Grievants were on probation and thus the protection afforded for regular employees under the unfair termination provisions are not available to employees whose contracts are terminated while on probation. They cite the provisions of section 42 of the Employment Act and the case of **Carole Nyambura Thiga Vs. Oxfam (2013) eKLR**, to buttress this position.

That under section 43(2) of the Employment Act, 2007, the reason for termination of contract are the matters which the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. They cite the decision of **BA Imonikhe Bus Unity Bank PLC S.C.68 of 2001** where it was held:

“Accusing an employee of misconduct, etc. by way of a query and allowing the employee to answer the query and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was terminated.”

They also submit that a probation period was necessary as it constitutes a trial period in which the employees are tested before full admission into the enterprise as was stated in the case of **Dixon Amdama Amadam V Amani Tiwi Beach Resort (2015)Eklr**. By refusing to subject

themselves to probation that the Respondent was justified to terminate the Grievants services. They pray for the suit to be dismissed with costs.

Determination

Issues for determination are the following –

1. Whether the termination of the Grievants was lawful
2. Whether the Grievants are entitled to the prayers sought

Issue No. 1

The Grievants allege they were dismissed after refusing to sign probationary review forms. They were issued with several warning letters and later sent on compulsory leave for allegedly being rowdy. They were sent on a six week suspension during which period they were issued with 3 warning letters; a first, second and final warning letter. The Grievants responded seeking clarification on the end of probationary period questionnaire which elicited no response. The Respondents issued the claimants with a last chance of hearing which was held on 30th June, 2012, and the same day they were terminated on the grounds of failing to obey lawful command.

From the foregoing it is clear that there was a misunderstanding between the Grievants and the respondent which was not resolved and ended up in their termination. The reason advanced for termination is that the Claimants refused to obey a command to sign end of probationary period questionnaire. The question thus is, whether the probationary period was a necessary requirement.

In *Carole Nyambura Thiga v Oxfam [2013] eKLR*:

Termination on 1st April 2011 took place during probation. Although the Claimant was not a new employee, she was subjected to probation of 4 weeks. This according to the Respondent's evidence is the Policy of Oxfam. An old employee working under a new contract must undergo probation and is treated as a new employee under this Policy held:

“This is a strange Policy that under the Kenyan Labour Law regime amounts to an unfair labour practice. The Claimant had been working for the Respondent from 2008. She was discharging the same role in continuity. There was only a short break of 23 days between her two written contracts.

Probation is served by new employees to provide job adjustment opportunity for both the new employee and the employer, to determine whether to continue with the employment relationship. Under Section 42 [1] of the Employment Act 2007, an employee who is on probation, is not entitled to the minimum statutory procedural guarantees created under Section 41, upon termination of the contract of employment. Employment during probation is at-will. The protections afforded to regular employees under the unfair dismissal laws are not available to employees whose contracts are terminated while on probation.

The Claimant was not a new employee on 25th March 2011 when the Respondent offered to employ her for 3 months. There was nothing new she was being called upon to learn. She was not a stranger at Oxfam, and needed no induction. There was no need to ask her to serve probation. Such a perpetual probation clause has no place in the Kenyan Labour Law. Employees would be denied the right to claim remedies under the unfair termination law, even after years of service, if such a policy is allowed to take root. The Court completely rejects the evidence of the Respondent that the Claimant was on valid probation at termination, and therefore disentitled to claim for unfair termination.”

From the foregoing case and the many more cited by the Claimant it is clear that probation period is meant for new employees. The Respondents have not disputed the fact that all the Grievants had been in their employment for more than a year in which case the probation period does not apply however, refusal to sign the same amounted to insubordination and thus causing a breakdown in the working relationship. There was therefore no justification in termination of the employment of the grievants. Section 41 makes it the responsibility of the employer to explain the reason for termination. The misunderstanding herein arose due to the failure of the respondent to give sufficient explanation.

Procedure

From the chronology of events leading to termination set out herein, it is clear that the Respondent procedure was flawed. The requirements under section 41 and 45 of the Employment Act, 2007, were not followed and therefore the termination was unfair.

Prayers Sought

Reinstatement

This prayer is not tenable since 3 years having lapsed since dismissal

Payment for the remainder of the contract period

This prayer is equally not tenable as the Grievants did not offer any services to the Respondent

Damages for unlawful termination

Having found the termination of employment unfair, the grievants are entitled to compensation for unfair termination.

Millicent Adika had worked for the respondent from January 1997 to January 2012, a total of 15 years. I award her 12 months' salary.

Hellen Wanjiru worked from April 2004 to January 2012, a period of about 8 years. I award her 10 months' salary.

Christopher Ndung'u had worked from 2006 to 2012, a period of 6 years, I award him 8 months' salary.

Benard Nzioki had worked for the respondent from April 2010 to January 2012, a period of just under 2 years, I award him 3 months' salary.

Philip Wanyama had also worked for just over one year period from September 2010 to January 2012. I award him 3 months' salary.

In awarding the compensation, I had taken into account the highhanded manner in which the grievants were treated by the respondent, the fact that they were not at fault and only wished to get clarification on the contracts they were required to sign, the fact that their suspension was unlawful as it was not provided for in their contracts and length of service of each of the grievants.

Conclusion

In conclusion I find the termination of the employment of the grievants unfair and award them the following –

Millicent Adika – Kshs.178,200

Hellen Wanjiru Kimani – Kshs.131,500

Christopher Ndung'u – Kshs.75,000

Benard Nzioki – Kshs.34,500

Philip Wanyama – Kshs.34,500

The respondent shall pay the claimant's costs which I assess at Kshs.75,000 to cover reasonable expenses and disbursements.

The decretal sum shall attract interest at court rates from date of judgment to payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE