



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CIVIL CASE NO. 2427 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2018)

ENOCK NDONGA.....CLAIMANT

VERSUS

BOARD OF DIRECTORS PIONEER SCHOOL.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim in this case on the 4th December 2012 in person contenting unlawful, unprocedural and unfair termination of his employment. He sought the following prayers.

a) Declaration that the termination of the Claimant was unlawful, unfair, un-procedural and unconstitutional.

b) Declaration that the failure to pay the Claimant due allowances was unlawful.

c) Declaration that the failure to issue the Claimant with a certificate of service was unlawful and commits the Respondents to a fine of Kshs. 100,000.00 and/ or commitment to a civil jail of 6 months.

d) An Order committing the Respondents to a civil jail of 2 years for failing to issue to the Claimant a Statement of Particulars of Employment and/ or to a fine of Kshs. 100,000.

e) Orders directing the Respondents to pay the claimant due allowances, maximum compensation and general damages amounting to a total of Kshs. 12,165,000.00.

f) Orders that the Respondents bear the costs of the suit.

2. The Claimant later filed an Amended Memorandum of Claim on 28th October, 2013 through the firm of Edwin Maina and Associates.

Claimant's case

3. This matter arises out of an employment relationship between the Claimant and the Respondent. The Claimant case is that he was employed as a Lab Assistant by the Respondent on 11th January 2002 and served the Respondent up to 24th August 2012. He avers that he served the Respondent diligently and his salary was 20,000 Kshs per month.

4. He avers that he was never paid any house allowance and also never went on leave. He testified that he was diligently performing his duties when he was summoned and issued with a termination letter. No reasons were given to him.

5. He stated that he had had a clean work record and was never involved in any disciplinary issues. He denied ever receiving a letter dated 16.2.2012, which is a NTSC. He stated that the letter was send to the Respondent's address and he never received it or signed anywhere acknowledging its receipt.

6. He contended that he was never given any hearing before his termination. He stated that he had a child schooling in the Respondent's school but the child was sent away for carrying sweets to school. He states that his attitude never changed after this. In cross-examination, he stated that he did not have a house in the school compound. He also stated that the Respondent never remitted his NSSF and NHIF remittances.

The Respondent case

7. The Respondent filed their Amended Response to Amended Claim on 20nd June 2014 through the firm of Mukele Ngacho and Company Advocates. The Respondent in its reply controverted all the facts as stated in the Claim.

8. The Respondent called one witness, J.M Gichengo, the Principal at the School who testified that the Claimant was absent from duty on the 9th of August 2012. He was issued with a NTSC but he did not appear. He was then issued with a termination letter. In cross-examination, the witness stated that he had no evidence that the Claimant was provided with a house in school nor that he was served with NTSC. He also admitted that NSSF and NHIF was not paid.

Issues Arising

9. I have considered the evidence and submissions of the parties and the issues for this Court's determination are as follows:

a. Whether the termination was fair and justified.

b. Whether the Claimant is entitled to any remedies sought.

a) Whether the termination was fair and justified.

10. On this issue, the reason given for termination of the Claimant is absenteeism. The Respondent did not produce before this Court their attendance register as proof that the Claimant was absent as alleged. The Respondent also failed to show that the Claimant was subjected to a fair disciplinary process as envisaged under Section 41 of the Employment Act 2007 which states as follows:-

1) "Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

11. The Respondent attempted to state that they invited the Claimant to a disciplinary hearing. There was however no evidence that they served him with the invitation, as the letter was sent to the Respondent's own address.

12. Section 45(2) of the Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

13. Given that there were no valid reasons to terminate the Claimant and that no due process was followed, I return the verdict that his termination or dismissal was unfair and unjustified.

b) Whether the Claimant is entitled to any remedies sought

14. On remedies sought, I find that the Claimant established he was unfairly dismissed. He also established that he was not housed by the Respondent. No NSSF and NHIF dues were ever made. I therefore find for the Claimant as follows:-

1. 8 month salary as damages for unlawful dismissal= 8 x 35000=280,000/=

2. Unpaid house allowance for the last three years=15% of 35,000 x 30 months=189,000/=

3. Withheld salary for August 2012=35,000/=

4. 1 months' salary in lieu of notice =35,000/=

TOTAL 539,000/= - less statutory deductions

5. Issuance of a certificate of service.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 3rd day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nafula holding brief for Kamau for Claimant – Present

Gathugu for Respondent – Present