



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 726 OF 2016

STANLEY MGHAMBWA MAKEOCLAIMANT

VERSUS

ARABUKO FOREST HIGH SCHOOL.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of employment contract on 31/7/2015. The respondent has denied the alleged unfair termination and averred that the termination was fair and justified because the claimant had failed to avail the necessary academic certificate and TSC Number in addition to being negligent in the performance of his duties.

2. The suit was heard on 7/11/2016 and 16/1/2017 when the claimant testified as CW1 and the respondent called her principal Mr. Alawi Alamin Rashid as RW1. Thereafter the parties filed written submissions.

CLAIMANT'S CASE

3. CW1 stated that he was employed by the respondent as a teacher from 10/5/2013 for a fixed term contract of 2 years ending 10/5/2015. His salary was ksh.25000 per month. The contract was renewed on 7/5/2015 for 2 years upto 7/5/2017. His salary was increased to ksh.30300 per month plus ksh.1000 token for heading the languages and humanities department. During the interview for the job, he presented all his academic testimonials except his degree certificate from Kenyatta University (KU). He however presented the letter dated 20/3/2013 from the university explaining that the degree certificate had been withheld due to fees balance. The board meeting held on 11/7/2014 appreciated the issue and wrote to him on 14/7/2015 giving him 3 months from August 2015 to avail the degree certificate.

4. On 27/7/2017 he was given a show cause letter dated the even date charging him with neglecting of duty, namely failing to return exam transcripts for end of term 1 of 2015. The letter gave him 7 days to respond to the charges. On 1.8.2015 and before the lapse of the said 7 days period, CW1 was served with a termination letter dated 31/7/2015. The letter informed the claimant that the board had met on 26/7/2015 and resolved to terminate his employment contract with effect from 1/8/2015 in the interest of the institution. The letter also offered to pay his unspecified terminal dues as soon as the director of studies confirmed in writing that the claimant handed over all the school property in his possession including objectively marked examination scripts.

5. The claimant was not pleased with the decision made against him even before responding to the show

cause letter and without being given a chance to defend himself. He denied ever leaving exam transcripts in an abandoned room and averred that after receiving exam transcripts from the relevant teachers, he certified the results and returned them to the respective teachers to hand over to the students. As regards the degree certificates, CW1 contended that he was dismissed before the time given to present the same that is December 2015 had lapsed.

6. CW1 contended that after clearance and handing over as directed, he was never paid his rightful terminal dues and therefore he served demand letter followed by this suit. He prayed for the dues and compensation as prayed in the suit.

7. On cross examination CW1 admitted that the contract was terminable by a notice of one month or payment in lieu of notice. He further admitted that the contract entitled him to leave during school holidays. He also admitted that he had no TSC Number and the degree certificate as required under the Basic Education Act. He however contended that there were other teachers without degree certificates and TSC Numbers who were not terminated like him.

DEFENCE CASE

8. RW1 joined the school on 27/8/2016. He confirmed that Cw1 was employed by the respondent from 10/5/2013 under a contract of 2 years which lapsed but it was renewed for an equal term on 7/5/2015. RW1 further confirmed that the new contract was terminated on 1/8/2015 by the letter dated 3/7/2015. He cited the reason for the termination as negligency of duty and lack of professional documents including TSC Number and Bachelor of Education Degree certificate.

9. RW1 contended that the claimant was only entitled to one month salary in lieu of notice after termination of his contract and nothing more. He denied that claim for leave and averred that CW1 went for leave during the school holidays. He prayed for the suit to be dismissed because the claimant was paid one month salary in lieu notice but declined.

10. On cross examination Rw1 admitted that the respondent knew that at all material times the claimant did not leave his professional testimonials. He further admitted that the termination was done before the lapse of the 3 months given to the claimant to avail his professional testimonials. He also admitted that the termination was done before the lapse of the 7 days period given by the respondent to respond to the show cause letter dated 27/7/2015. Finally he admitted that he had no evidence to prove that the claimant was invited to the board meeting on 26/7/2017 and whether he was heard.

ANALYSIS AND DETERMINATION

11. There is no dispute that the claimant was employed by the respondent as a teacher from 10/5/2013 till 31/7/2015 when he was terminated. The issues for determination are:

- (a) Whether the termination was unfair
- (b) Whether the damages sought should be granted.

Unfair termination

12. Under Section 45(2) of the Employment Act, termination of employment by the employer 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.

Reason for termination

13. In this case the reason according to the respondent was that the claimant had neglected duty by failing to return exam transcripts to students and leaving them in an abandoned room. The second reason is that he lacked TSC Number and degree certificate.

14. The claimant has admitted that he lacked TSC Number and that his degree certificate had been withheld by the university due to fees balance. As regards negligence of duty, the claimant has denied the same and averred that all the transcripts he received from teachers, he certified them and returned them to the respective teachers.

15. After careful consideration of the evidence and submissions, it is clear that the respondent had valid and fair reason to terminate the claimant's services. The said reasons were the lack of TSC Number and the failure to present a degree certificate. The claimant has admitted that he lacked the TSC Number and that his degree certificate had been withheld by the university due to fees balance. The misconduct of negligence of duty has however not been proved on a balance of probability. No student or teacher testified in this case to confirm that the claimant failed to return exam transcripts to students and instead dumped them in an abandoned office room.

Procedure followed

16. In this case the board meeting that resolved that the claimant's services be terminated was on 26/7/2015. The claimant was not invited to defend himself before the termination of his services was decided. The said termination came as a surprise to the claimant because it was done before the lapse of the 3 months period given to him to avail his degree certificate and before the 7 days period given by the show cause letter to defend himself on the charge of negligence of duty. The decision by the board to terminate the claimant's services without giving him hearing was wrong.

17. Under Section 41 of the Act, before employer terminates the services of his employee on ground of misconduct, physical incapacity or poor performance, he must first explain to the employee in a language he understands, and in the presence of a fellow employee or shop floor union representative, the reason for which he contemplates to terminate his services and thereafter invite the employee and his chosen companion to air their defence. The said mandatory procedure was not followed in this case and that rendered the termination unfair.

RELIEFS

18. Although the contract of employment was a fixed term one, it provided for a termination clause of one month or salary in lieu of notice. In this case the termination letter was a kin to summary dismissal. Under Section 49 of the Act, I award him ksh30300 as one month salary in lieu of notice. I also award him ksh.21200 being salary for 4 months as compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant expected only to work between August to December 2015 without the TSC Number and the degree certificate as per the respondent's letter dated 14/7/2015.

19. The claim for gratuity is however not supported by any evidence and it is therefore dismissed. Likewise the claim for leave is dismissed because the claimant went for the school holidays. He has also not proved that he applied for the leave and was denied under clause 7, the claimant was notified that leave would not be carried forward. The claim for salary for the remainder of the contract term is dismissed because as held above the contract provided for premature termination of the contract by service of one month notice or payment of salary. In addition the respondent has proved that there were valid reasons for terminating the contract. Finally, I dismiss for lack of evidence the claim for ksh1000 monthly token for heading departure.

DISPOSTION

20. For the reasons that the termination of the claimant's contract of employment was procedurally unfair, I enter judgment for him in the sum of ksh.151500 plus costs and interest.

Dated, signed and delivered this 2nd June 2017

O.N. Makau

Judge