



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.887 OF 2013

DORCAS KARIMI NDWIGAH.....CLAIMANT

VERSUS

DELIVERNACE CHUCRCH KAYOLE.....1ST RESPONDENT

REV. ROBERT THIMBA.....2ND RESPONDENT

KING'S EDUCATION CENTRE.....3RD RESPONDENT

JUDGEMENT

1. The claimant filed the memorandum of claim on 11th June, 2013 and the defence was filed on 26th June, 2013. The claimant invited the respondent to take a hearing date but failed to attend and the claimant was allocated the 1st of March, 2017. The respondent was served with Hearing Notice and accepted the same on 31st January, 2017 and Affidavit of Service filed on 22nd February, 2017 is evidence of such service. On the due date the respondent did not attend. The claimant was heard in the absence of the respondent.

Claim

2. The claimant is a female adult, the 1st respondent is registered under the Societies Act and the 2nd respondent employed the claimant to work at the 3rd respondent as established under the Education Act and part of the 1st respondent. The claimant was employed by the respondents to work as a Teacher by letter of appointment dated 21st January, 2005.

3. The claimant was earning Kshs.5, 500.00 per month. She rose through the ranks to become the Head Teacher of the 3rd respondent at a monthly salary of kshs.22, 000.00. During the claimant's employment with the respondent the school performance improved.

4. On 27th August, 2012 the 2nd respondent relieved the claimant of her duties as head Teacher and subsequently reduced her salary by letter dated 22nd October, 2012 to Kshs.13, 500.00. This was without notice of lawful cause.

5. By letter dated 1st November, 2012 the respondent issued the claimant with notice of termination of her employment with them. Such was without payment of terminal dues. The claim is that this was irregular and unlawful for the reasons that the claimant had been demoted without justification; her salary was reduced for no good reason; the claimant was humiliated before her students and public; the respondent

failed to heed advice from the Labour Officer over the matter and failing to pay terminal dues. This was in breach of the employment contract and the law.

6. The claims are for;

a) Loss of salary from September, 2012 to June, 2013 at kshs.198, 000.00;

b) 3 months' notice pay kshs.66, 000.00;

c) Severance pay for 8 years kshs.88, 000.00.

7. The claimant is also seeking costs, interests of due amounts and damages for unfair termination of her employment with the respondent.

8. In evidence the claimant testified that upon employment by the respondent she worked diligently and the performance of the school and 3rd respondent improved. She was promoted and made head teacher and her salary was reviewed.

9. The claimant also testified that in August, 2012 matters changed when she was demoted and her salary reviewed downwards without any justification or notice to her. The claimant made a complaint and sought advice from the Labour Officer but the respondent failed to abide. Her union also wrote to the respondent but there was no response.

10. The claimant also testified that in defence the respondent's case is that she was demoted due to poor performance but this was not true as results in the school were at best during this time of her demotion. The respondent also enjoyed high enrolment during the time the claimant was the head teacher as she had good relations with parents. There is therefore no evidence of poor records or performance to justify the action taken by the respondent.

Defence

11. In defence filed by the respondents there is admission that the claimant was earning Kshs.22, 000.00 per month while in their employment and was relieved of the duties of head teacher to ordinary teacher. The increase in salary was solely and mainly based on inflation and economic reasons rather than performance. The claimant demotion was not prompted for ulterior motive or malice and was done in good faith as parents and pupils made verbal complaints against the claimant. These complaints were raised with the claimant and she was required to show cause why she should not be disciplined but her explanations were not satisfactory. The claimant's demotion was necessary to save the 3rd respondent from insolvency as parents had started withdrawing pupils due to the claimant's attitude and which led to poor management of the 3rd respondent.

12. The defence is also that the demotion of the claimant was lawful as the claimant had been given a chance to be heard and she was given another position of ordinary teacher. Upon review of the claimant's position, it became necessary to review her terms so as to tame her arrogance to staff and students.

13. The demotion of the claimant was justified and her termination from employment was lawful as the claimant had been given notice for gross misconduct for reasons verbally given to her. The claimant had failed to follow lawful instructions and thus guilty of misconduct.

14. Upon termination, the claimant was paid 3 months' notice pay, salary arrears and severance pay all at kshs.65, 400.00. The claim for damages is not due as the termination of the claimant was lawful. The claim should be dismissed with costs.

15. There was no call of evidence by the respondents as there was no attendance on the hearing date.

16. The claimant filed her written submissions.

Determination

17. In defence the respondents have admitted that the claimant was their employee and that she was demoted from the position of head teacher to ordinary teacher due to inflation and economic reasons. The respondents also admit that the claimant was earning Kshs.22, 000.00 before her demotion and that her termination followed verbal complaints from parents and pupils.

18. The defence is also that the respondent issued the claimant with show cause to explain why her employment should not be terminated due to misconduct and that the claimant failed to give a satisfactory explanation. That the decision to demote the claimant and review her salary downwards was prudent and necessary due to the reasons of the 3rd respondent's continued effective delivery of its services.

19. The review of an employee's terms and conditions of employment are matters to be treated very carefully and cautiously in employment relations. The rationale is that every contract of employment is entered into with full knowledge and consent of each party to remain bound to its terms and conditions.

20. Where the respondents issued the claimant a letter of employment, such employment, the terms and conditions attached to the employment remained binding to both parties. Where the claimant was appointed head teacher of the 3rd respondents and she went ahead to undertake such duties, the terms and conditions attendant thereto bound the parties.

21. Where the respondents required to make changes to the continued employment of the claimant, section 10 (5) of the Employment Act, 2007 required the respondents to;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

22. For the demotion and review of the claimant's salary to take legal effect, the respondents was thus required in law to issue the claimant with a revised letter of appointment, revised contract of employment or a letter with revised terms of employment to reflect the change. Such changes are required to be in writing and notified to the claimant in writing.

23. Changes in an employment contract are further regulated as under section 13 of the Employment Act, 2007 as follows;

13. Statement of changes

(1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

24. The requirements that an employment contract be in writing and a copy be issued to the employee and that any change(s) to the written contract should be communicated in writing are mandatory. The employer thus has a duty where the employee challenges the non-issuance of written changes to the employment contract to submit the details and particulars with the court. Such is a statutory requirement articulated under section 10(6) and (7) of the Employment Act, 2007 as follows;

(6) The employer shall keep the written particulars prescribed in subsection

(1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

25. In this case, the defence is devoid of any evidence to show written changes to the claimant's employment contract. The assertion by the respondents that there were inflation and economic reasons leading to the demotion of the claimant and for the review of her salary is without any evidence.

26. The claimant testified that she was unlawfully terminated from her employment without notice or justification. The respondents has confirmed such termination and sought to justify the same on the grounds that there were verbal complaints made by parents and pupils against the claimant and the claimant was given a show cause and chance to give her defence. However, where an employee is accused of misconduct touching on performance, section 41 of the Employment Act, 2007 requires the employer to issue the employee with written notice setting out the allegations made against the employee and also give the employee a hearing and present as such a hearing must be another employee identified by the employee subject of the hearing. Section 41 provides as follows;

41. Notification and hearing before termination on grounds of misconduct

(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.

27. Such notice and hearing of an employee before termination of employment is to ensure that the employee is given procedural justice and where there are valid reasons to justify the termination, and then the court must assess the same on their merits. Without the employee ensuring the procedural justice to the employee, the resulting decision to terminate the employment is procedurally unfair.

28. In this case, I find no evidence that the claimant was accorded the mandatory procedures required in law and under section 41 of the Employment Act, 2007. Even where there may have been complains from pupils or parents and he respondents felt they required to take action against the claimant, as an employer the duty is vested upon the respondents to ensure both substantive and procedural justice to the claimant. Such is wanting in this case and the termination amounted to being unfair.

29. Of interest is the claim for severance pay for 8 years. The respondents also avers that in paying the claimant her terminal dues, she was paid *severance* pay.

30. Severance pay is due to an employee in terms of section 40 of the Employment Act, 2007 and in a matter of redundancy. In defence the respondents asserted that due to inflation and economic reasons rather than performance, the claimant's terms of employment were changed. I take it this was not by error and such are matters that speak to what is defined in law as forming part or in a series of redundancy as under section 2 read together with section 40 of the Employment Act, 2007. In this regard therefore, the claimant's termination will be assessed for payment of compensation for unfair termination and her due severance pay due to the economic reasons facing the respondents at the time of her termination of employment.

Remedies

31. The claimant is seeking due payments following her demotion. Without any justification for the demotion and variation of the claimant's terms of employment, he failure to pay the claimant her due salary at Kshs.22, 000.00 the balance unpaid is due. The claimant is hereby awarded the sum of Kshs. 198,000.00.

32. On the claim for 3 months' notice pay, the letter of appointment issued to the claimant and dated 21st January, 2005 the condition given was that each party was to terminate the contract by notice of 3 months. As such, on the finding that there was no procedural justice in the termination of the claimant's employment notice pay due is to be computed on the due salary of kshs.22, 000.00 as this was reviewed without justification. The claimant is hereby awarded Kshs.66, 000.00 in notice pay.

33. Severance pay is claimed on the basis that the claimant worked for 8 years and was not paid such dues. On the salary of kshs.22, 000.00 due to the claimant at the time of termination of employment and in terms of section 40(1) (g) for 15 days' pay for the 7 full years of service, the claimant is hereby awarded a sum of kshs.77,000.00 in severance pay.

34. For the unfair termination of employment, the claimant is hereby awarded compensation equivalent to 6 months gross pay all at kshs.132, 000.00.

Accordingly, judgement is hereby entered for the claimant against the respondents jointly and severally as follows;

- a) compensation award of Kshs.132,000.00;**
- b) Notice pay Kshs.66,000.00;**
- c) Severance pay kshs.77,000.00;**
- d) Underpayments of Kshs.198,000.00;**
- e) The monies due above shall be paid less what has been advanced and acknowledged by the claimant as terminal dues.**
- f) The claimant is awarded costs.**

Dated and delivered in open court at Nairobi this 27th day of July, 2017.

M. MBARU JUDGE

In the presence of:

Lillian Njenga and David Muturi – Court Assistants

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