



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE NO. 239 OF 2014
(Consolidated with 241 of 2014)

1. MARGARET NDUNGE DANIEL

2. JANE NASIKE NANJALA.....CLAIMANTS

VERSUS

UDHABITI EDUCATIONAL TRUST, KENYA.....1ST RESPONDENT

DR. WOLFGANG PUTS.....2ND RESPONDENT

CAROLINE PUTZ3RD RESPONDENT

JUDGMENT

Introduction

1) The Claimants brought separate Suits seeking:-

- a) Declaration that their contract of service was wrongfully/unfairly terminated.
- b) One month salary in lieu of Notice.
- c) Compensation for unfair termination.
- d) Salary for 5 days worked in March 2014.
- e) Night shift allowance for 3 days per week for 4 years 2 months and 5 days starting 1.1.2014.
- f) Public holidays worked
- g) Accrued leave.
- h) Service pay.
- i) Certificate of service.

j) Costs and interest.

2) The first Respondent has denied the alleged unfair termination and averred that the Claimants were dismissed fairly for gross misconduct and after being accorded a chance to defend themselves. On the other hand the second and third Respondents have denied any employment relationship with the Claimants and averred that all what they did was in their capacity as Trustees and officers of the first Respondent who was the Claimants' employer. They filed a Notice of preliminary objection to this Suit alleging that the court lacks jurisdiction to try them but the objection was never prosecuted.

3) The two suits were consolidated on 12.1.2017 when the suits came for pretrial directions. On that day the parties agreed that the unpaid salary for 5 days worked in March 2014 and Certificate of Service were undisputed reliefs. The parties also agreed that the rest of the reliefs sought by the Claimants were disputed and therefore the matter was fixed for hearing on 10.4.2017.

Claimant's Case

4) Margaret Ndunge Daniel, first Claimant, testified as CW1. She testified that she was employed by the first Respondent from October 2009 as a casual employee. Subsequently, she was appointed matron and on 1.8.2011 she was given a formal contract for 2 years. On 1.8.2013, the contract was extended for a further 2 years. Initially her salary was Kshs. 13200 but it was later increased to Kshs. 15693 per month. She worked faithfully, according to her, but on 6.2.2014, she was served with a warning letter accusing her of breaking Rules and Regulations of the first Respondent. She admitted that on the said date she left work one hour before the scheduled time but explained that she had completed her duties and notified her colleagues that she had received an urgent call.

5) On 4.3.2014, she was on night shift but before signing out in the morning of 5.3.2014, she was called to the office by third Respondent. She found the Respondent with the Administrator Mr. Nelson Omido and she was handed a termination letter dated 5.3.2014. The reasons for the termination were, disrespect of Rules/Orders of Management, Corporal punishment and negligence of children entrusted to her and misuse of property of the first Respondent. She was offered Kshs. 18000 by the second Respondent as final terminal dues but she declined. She contended that the termination was unfair because she was never given a chance to defend herself and therefore prayed for compensation.

6) On cross examination, she admitted that paragraph 7 of the contract of service provided for summary dismissal if she showed violence to the children in the Home. She admitted to endorsing in handwriting on the termination letter that she beat children the previous years. She admitted further that after termination she was given a schedule calculating his terminal dues as including 23 public holidays being Kshs. 15,851 plus salary for 5 days worked in March 2014 being Kshs. 2,616 but she refused the same.

7) Jane Nasike Wanjala, second Claimant testified as CW2. She stated that she was employed by the first Respondent in January 2010 as Deputy Matron but on 1.8.2011, she was given 2 years formal contract. Her salary was Kshs. 11200 but it increased to Kshs. 13,455.55 per month on 31.7.2013 when the contract was extended for another 2 years. She contended that she worked faithfully but on 6.2.2014, she was served with a warning letter accusing her of breaking the Rules and Regulations of the Children's Home and her scholarship withdrawn by the first Respondent.

8) On 5.3.2014, she was to report to work at 4pm but at 8.00 am she received a call from the 3rd Respondent requiring her to report to the Children's Home immediately. On arrival she met the 2nd and 3rd Respondent and Mr. Nelson Omido, the Administrator of the Home. The 3rd Respondent gave her termination letter and thanked her for her services to the children's home. The 3rd Respondent then asked her to call another employee to countersign the termination letter for her. CW2 called Mr. Athman Kinono, Gateman for the Home. CW2 further contended that the 3rd Respondent told Mr. Kinono that his role was only to witness the peaceful termination of the employment and payment of Kshs. 9000 as terminal dues. He signed somewhere on the termination letter and left. CW1 then signed and collected the Kshs. 9000. She was however denied a chance to collect her personal effect at the children's home. She contended that the termination was unfair because it was without prior hearing or notice and it was

for invalid reasons. She denied the reasons cited on termination letter being, disrespect of Rules/Orders of management, corporal punishment and negligence of children entrusted on her and misuse of the property of the children's home.

9) On cross examination, CW2 admitted that on 5.3.2014, she was called by the 3rd Respondent and asked to come with a colleague. She then called Athman Kinono and she was served with a termination letter accusing her of leaving work before the scheduled time, beating children and misusing property of the children's home. She admitted receipt of Kshs. 9000 after the dismissal but denied knowledge whether it included salary for 5 days worked in March 2014 and 6 public holidays worked. She further admitted receipt of Certificate of Service.

Defence Case

10) Mr. Athman Muhamed testified as RW1 for the defence. He confirmed that he works as security guard for the first Respondent. He further confirmed that on 5.3.2014, he was called by the second Claimant to be a witness at a hearing at the 3rd Respondent's office. On arrival the 3rd Respondent handed over a dismissal letter to the second Claimant and he signed it on her request. He was then instructed by the 3rd Respondent to supervise the Claimant as she took her personal belongings and thereafter escorted her to the gate where she signed the logbook and departed. On cross examination he admitted that when he arrived at the 3rd Respondent's office with the second Claimant they found the dismissal letter already written and signed. All what they did with the second Claimant was only signing the letter and left.

11) Mr. Joseph Ongaki (RW2) is a security guard for the first Respondent. He stated that on 10.1.2013, he was on duty and he saw the first Claimant beating Emily (a child) at 7 pm while inside the house but he never intervened. Again on 12.2.2013 at 6.15 pm, he saw the first Claimant beating another child called Anna at the sitting room. When he intervened, she told him that she was warning the child from climbing trees. He further stated that on 25.11.2012 at 7pm, he saw the second Claimant walking out of the house with two boys Albert and Mureithi and upon enquiry as to where she was taking the boys, she responded that the boys had taken Anna to a water tank and removed her pants and urinated on her. He again stated that on 26.8.2013, he saw the second Claimant walk out with a boy called Hassan and brought him to the guest pavilion and when he asked her where she was taking the boy, she said the boy had become rude and she wanted to punish him and beat the boy with a plastic pipe. He therefore reported the matter to his employer, (then Factory Guards) that the Claimants were assaulting the children. He never reported to the Respondents because by that time he was not working for them.

12) Caroline Putz (3rd Respondent) filed an affidavit sworn on 30.5.2017 as his testimony. She stated that she is a Trustee of the first Respondent and the Claimants were employed there. She further stated that on 6.2.2014, the Claimants were served with warning letters for later reporting and early leaving and failure to fill the attendance log book. She further stated that on 14.2.2014, she held a meeting with the second Claimant and the manager of the Home Mr. Omido to warn her for failure to assist in cooking some meals. She added that in March 20-14, she received a call from Mr. Joseph Ongaki telling her that the Claimants were beating the children and they had alleged that they were authorized to do so.

13) She then called the Claimants for separate meetings to defend themselves of the alleged misconduct of corpora; punishment of the children entrusted to them. She stated that she notified each Claimant to bring along a fellow employee of her choice to the meeting but the first Claimant indicated that she did not wish to call any one. However, the second Claimant was accompanied by Mr. Athman kimono to the hearing. The meetings were attended by her, 2nd Respondent and the Administrator Mr. Omido. After hearing the denials of the offence by the Claimants, they discussed them and allowed them to pick their belongings from the home. The second Claimant collected her terminal dues but the first refused to collect.

Analysis and Determination

14) There is no dispute that the Claimants were employed by the Respondent between 2010 and 5.3.2014

when they were summarily dismissed. The issues for determination are:-

a) Whether the termination was unfair.

b) Whether they are entitled to the reliefs sought.

Unfair Termination

15) Under section 45 of the Employment Act, termination of employee's by employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the Claimants were dismissed for breach of Rules/order by Manager by late reporting and leaving work earlier than the scheduled time, and for beating and abusing the children entrusted to them at the children's home. The first Claimant admitted that on 6.2.2014, she left work one hour earlier than scheduled. She was also seen by the RW2 beating Emily and Anna at the children's home. She did not give any evidence to show why RW2 who was an outsourced guard would accuse her of such grave offence. Likewise the second Claimant was seen by RW2 taking out boy children from their house at night and when asked by RW2 where she was taking the boys, she said she wanted to discipline them for misconduct. That on 26.8.2013, RW2 saw her beating a boy called Hassan with a plastic pipe on allegation that she was warning him against climbing trees. The said incidences were clearly explained by RW2 the detail and again the second Claimant did not demonstrate any reason why RW2 would want to see her in trouble with the employer. Consequently, I find and hold that the Respondents herein have proved on a balance of probability that there existed a valid and fair reason to warrant summary dismissal as required by the section 43 and 45 2(2) and (b) of the Act.

16) However, after careful consideration of the evidence and submission presented to the court, I find that the Respondents here failed to prove that they followed a fair procedure before terminating the services of the Claimants. Section 41 of the Act requires that before the employer terminates the services of the employee on account of misconduct, poor performance and physical incapacity, he must explain to the employee he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated and there after accord the employee and his chosen companion to air their defence for consideration before the termination is decided.

17) In this case, the Claimants contended that when they were called by the 3rd Respondent to the office, they found their dismissal already decided and termination letters already signed pending their collection and acknowledgement signature for them and their witnesses. That evidence was corroborated by the RW1 who testified that when he arrived for the hearing with the second Claimant, they found the dismissal letters already signed by the Respondents and all they were required to do was to sign on it. That he signed on the letter of the request of the second Claimant to confirm that he witnessed her receive the letter. With due respect to the defence, the procedure followed before discussing the Claimant was not in consonance with the mandatory provisions of section 41 of the Act and it smacks of mischief. Consequently, I find and hold that the failure by the Respondents to follow fair procedure before dismissing the Claimants rendered the termination unfair within the meaning of section 45 of the Act.

Reliefs

18) Under section 49 of the Act, I award each Claimant one month's salary in lieu of notice plus four months gross salary as compensation for the unfair termination of their employment contract. In granting the said compensation, I have considered the fact that the Claimants contributed to their termination through misconduct. The first Claimant will also get cash for the accrued public holidays worked plus salary for 5 days worked as computed by the employer. The second Claimant was paid her salary for the 5 days worked in March 2014 plus pay public holidays worked after termination. The claim for accrued leave is dismissed because the leave records produced by the defence show that no leave was left outstanding. The claim for service pay is dismissed because the Claimant admitted being contribution of the NSSF during their employment and as such they are disqualified from that benefit by dint of section 35(6) of the Act.

19) The award for each Claimant is therefore worked out as follows:-

First Claimant..... Margaret Ndunge Daniel

Notice.....Kshs. 15,693

CompensationKshs. 62772

Salary for 5 daysKshs. 2616

Public holidays.....Kshs. 15852

Kshs. 96933

Second Claimant..... Jane Nasike Nanjala

Notice.....Kshs. 13,455.45

CompensationKshs. 53,821.80

Kshs. 67,277.25

Disposition

20) For the reason that the dismissal of Claimants was unfair, I enter judgment for them against the first Respondent in the aggregate sum of Kshs. 164,210.25 plus costs and interest from the date hereof. The claim against the 2nd and 3rd Respondent is dismissed with no order as to costs.

Signed, Dated and Delivered at Mombasa this 24th day of November 2017.

ONESMUS MAKAU

JUDGE