



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

CAUSE NO 671 'A' OF 2014

PATRICIA KIILU.....CLAIMANT

VERSUS

HWAOCK IM.....1ST RESPONDENT

SCHOOL OF THE NATIONS.....2ND RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 10th April 2014 and filed in court on 23rd April 2014, the Claimant has sued the Respondents for unlawful and unfair termination of employment.

2. The Respondents filed a joint Reply to Memorandum of Claim as amended on 4th June 2014, but did not attend the trial, in spite of due notification. The Claimant responded to the Amended Reply to Memorandum of Claim on 11th June 2014. She also testified at the trial. Both sides filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed as a teacher in the Respondents' institution known as International Christian Kindergarten, at a net monthly salary of Kshs. 24,722, effective January 2006.

4. The Claimant worked for the Respondents until 7th February 2013, when she was instructed by the Respondents not to report for duty unless otherwise advised. By letter dated 18th December 2013, the Claimant's employment was terminated effective 7th February 2013.

5. It is the Claimant's case that the termination of her employment was unlawful and unfair. Specifically, the Claimant states that there was no valid reason for the termination and that she was not given an opportunity to be heard.

6. The Claimant further states that the Respondents have unlawfully withheld her salary from 1st February 2013 to 18th December 2013. She adds that the Respondents have failed to remit her pension contributions deducted from her salary over the same period.

7. The Claimant's claim is as follows:

a) Salary arrears for 1.2.2013 to 18.12.2013.....	Kshs. 262,053.20
b) 3 months' salary in lieu of notice.....	74,166.00
c) Employer's pension contribution @1,820 pm.....	19,292.00
d) Claimant's pension contribution @ 1,820 pm.....	19,292.00
e) Leave days not taken in regard to 10 months & 18 days.....	21,896.00
f) Service pay for 7 years.....	91,000.00
g) Compensatory damages for unfair termination	
h) Costs plus interest	

The Respondents' Case

8. In their Amended Reply to Memorandum of Claim dated 4th June 2014 and filed in court on even dated, the Respondents admit that the Claimant was employed as a teacher on a two year contract of service, from 1st September 2011 until 1st September 2013. The Claimant was entitled to a gross monthly salary of Kshs. 32,020 or a net salary of Kshs. 24,722.

9. The Respondents state that the Claimant's contract was terminable as provided therein and was also subject to the employer's Human Resource Policies and Procedures. The Respondents aver that the Claimant was in breach of the stated terms of her contract. In particular, the Claimant was accused of converting school materials to her personal use without permission or any lawful excuse.

10. The Respondents admit the existence of a pension scheme as pleaded by the Claimant and further state that all dues payable on the Claimant's account were duly remitted to the Pension Administrator.

11. Regarding the accusation of converting school material, leveled against the Claimant, the Respondents state the following:

- a) On 7th February 2013, the 1st Respondent acting on information, conducted a search in the claimant's class room and found various items of stationery and other class materials, the property of the 2nd Respondent, under circumstances the Claimant was not able to explain;
- b) As a result of the above, the 1st Respondent instructed the Claimant not to report for work, until otherwise advised;
- c) By a letter dated 25th February 2013, the Claimant through her lawyers, demanded payment of her terminal dues from the Respondents, the contents of which letter shows that she was well aware of the allegations leveled against her;
- d) By a letter of reply dated 20th March 2013, from the Respondent's Advocates, N.K. Mbae Associates, the Claimant was informed of her employer's intention to terminate her services and was given 3 days to respond to allegations of gross misconduct as stated in the said letter. The Claimant was also instructed to arrange to meet with the Principal for purposes of a disciplinary meeting in accordance with the law and the Human Resource Policy and Procedures Manual. In spite of the said letter having been delivered to her lawyers on 20th February 2013, the Claimant failed and/or refused to respond or to meet the Principal;

e) By her refusal to respond to the said letter and to attend to the Principal as requested, the Claimant was guilty of deserting her employment effective 7th February 2013;

f) The Respondents issued a letter of termination on 18th December 2013.

12. The Respondents admit owing the Claimant salary for 7 days worked in February 2014 and 3 months' salary in lieu of notice.

Findings and Determination

13. There are two (2) issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

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

The Termination

14. On 18th December 2013, the Respondents wrote to the Claimant as follows:

"Dear Patricia

RE: TERMINATION OF CONTRACT

We refer to your lawyers' letter dated 25th February 2013 and our lawyer's replies dated 20th March 2013 and wish to address you as follows.

With reference to paragraph 5 of your lawyer's letter, we confirm that your employment was terminated with effect from 7th February 2013.

In accordance with paragraph 2.0 of your contract, you will be paid as follows...

Due salary for 7 days in February 2013 Ksh. 8,652

Three months' pay in lieu of notice Ksh. 74,166

Total due: Ksh. 82,818

Please take up the matter of your pension dues with the service provider.

This is therefore to request you to avail yourself in order to collect your cheque and a letter of discharge. You are also requested to remove all your personal possessions from the school and to surrender any property of the school still in your possession.

We wish you all the best in your future endeavors.

Yours faithfully

(Signed)

Mrs. Hwaock Im

Principal"

15. Prior to this letter, the Claimant had been accused of being in unlawful possession of school material.

She was therefore asked to stay away from work from 7th February 2013 until further notice. It would appear that she was never called back to work. The Respondents however state that by their Advocates' letter dated 20th March 2013, the Claimant was given three (3) days to respond to the allegations made against her. The letter also invited the Claimant to book an appointment with the Principal of the School for purposes of a disciplinary hearing.

16. The disciplinary procedure adopted by the Respondents in this case is unknown in law. First, the Claimant was sent on an indefinite suspension without pay from 7th February 2013. Second, there was no evidence that the administrative charges leveled against her, which she contests, were ever put to her at the shop floor. Third, by asking the Claimant to book an appointment for her own disciplinary hearing, the Respondents abdicated their responsibility to take the Claimant through a disciplinary process as required under Section 41 of the Employment Act, 2007.

17. The overall effect is that the accusations made against the Claimant were untested and unproved as required under Section 43 of the Employment Act. Moreover, the mandatory procedural fairness requirements under Section 41 of the Act were not complied with. The Court therefore finds that the termination of the Claimant's employment was substantively and procedurally unfair and she is entitled to compensation.

Remedies

18. Before dealing with the remedies sought by the Claimant, I need to address myself to the collateral question of the effective date of her employment. On her part, the Claimant states that she began her employment on 1st January 2006. The Respondents on the other hand pleaded 1st September 2011 as the effective date of the Claimant's employment. The Respondents' assertion in this regard, was however not supported by any documentary evidence.

19. Section 9(2) of the Employment Act places the responsibility of documenting the employment relationship on the employer and as held in ***Samson Kimani Gachara v Auto Springs Manufacturers Limited [2015] eKLR*** where an employer fails to discharge this responsibility, the burden of proving or disproving an oral contract rests with that employer.

20. In the case before me, the Respondents alluded to a contract which they did not place before the Court and the Claimant denied ever having signed any contract with the Respondents. The logical conclusion in the circumstances, is that there was in fact no written contract between the parties and the Court therefore invokes Section 10(7) of the Employment Act, 2007 and adopts the Claimant's position regarding the effective date of her employment.

21. That settled, I now award the Claimant twelve (12) months' salary in compensation for unlawful and unfair termination of employment. In making this award, I have taken into account the Claimant's length of service as well as the Respondents' conduct in this case, with specific focus on the illegal action of sending the Claimant on an indefinite suspension and failure to subject her to a credible disciplinary process.

22. The claim for 3 months' salary in lieu of notice and salary for days worked in February 2013 are admitted and are payable.

23. From the evidence on record, the Claimant did not work after 7th February 2013. The claims for salary arrears, pension contribution and leave pay which are derived from the Claimant's employment, are therefore anticipatory in nature and are consequently unpayable. The claim for service pay was abandoned in final submissions.

24. Finally I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....Kshs. 384,240

b) 3 months' salary in lieu of notice..... 96,060

c) Salary for 7 days in February 2013 (32,020/30x7)..... 7,471

Total..... 487,771

This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant will have the costs of the case.

27. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF NOVEMBER 2017

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JUDGE

Appearance:

Mr. Mwanthi for the Claimant

Mr. Tebino for the Respondents