



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 435 OF 2014

ZACKARIA KIARIE GATHENGERA

CLAIMANT

v

EAST AFRICAN MISSION ORPHANAGE

RESPONDENT

JUDGMENT

1. Zackaria Kiarie Gathengera (Claimant) sued the East African Mission Orphanage (Respondent) on 11 September 2014 alleging unfair termination of employment and breach of certain employment rights. The Respondent filed a Response on 28 October 2014.
2. On 13 November 2014, the Claimant filed an Amended Memorandum of Claim. The Respondent indicated that it did not wish to file an amended Response and therefore the Cause fixed and was heard on 30 June 2015 and 29 October 2015.
3. The Respondent filed written submissions on 10 November 2015 while the Claimant filed his submissions on 25 November 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies*. The remedies include entitlements arising out of the employment relationship.
5. However, before examination of the identified issues, the Court notes that although the legal status of the relationship between the parties appeared to be in contention, the Respondent in its submissions admitted that the Claimant was treated as an employee.

Whether dismissal was unfair

Procedural fairness

6. The Respondent issued the Claimant with a Notice of Intent to Terminate dated 14 June 2013. The reasons set out in the letter were unsatisfactory performance and conduct.
7. The Claimant was requested to tender written or oral representations within 7 working days.
8. Instead of responding directly to the notice, the Claimant consulted the Kenya Building, Construction, Timber, Furniture & Allied Industries Employees Union and its Branch Secretary wrote to the Respondent on 15 June 2013 seeking the setting aside of the Notice to Terminate and the holding of a meeting.
9. A meeting was held on 30 July 2013, but no resolution was reached concerning the case of the Claimant, and the dispute was referred to the County Labour Officer. A settlement was reached, but it appears the Respondent reneged on it.
10. From the material placed before Court, the Court is satisfied that the Respondent informed the Claimant that his dismissal was under contemplation and the reasons thereof. He was equally afforded an opportunity to make representations in writing and orally.
11. The Claimant involved his Union but no resolution was reached.

12.The process followed before the dismissal, in the view of the Court meets the statutory threshold envisaged by section 41 of the Employment Act, 2007.

Substantive *fairness*

- 13.The reasons given for the dismissal of the Claimant were related to performance and conduct. The Claimant was more of a watchman/caretaker.
- 14.The Respondent's proprietor told the Court that the Claimant was accessing the hostels for the orphans without authority past 9.00pm. Despite instructions not to access the hostels, he persisted. The hostels had minors.
- 15.Vegetables were also stolen from the greenhouse under the charge of the Claimant.
- 16.There was also testimony that the Claimant and some unknown person were found felling trees in a property leased by the Respondent.
- 17.The Claimant did not challenge or controvert the testimonies of the 3 witnesses produced by the Respondent as to the reasons for the termination of employment.
- 18.The reasons constitute valid and fair reasons for an employer to terminate the services of an employee, and the Court in this instance finds that the Respondent had and has proved the reasons as valid and fair.

Appropriate remedies

Contractual/statutory entitlements accruing out of employment relationship

- 19.The parties herein went through conciliation and an agreement was signed on 18 October 2013. The agreement agreed on leave, overtime, off duties and public holiday entitlements due to the Claimant.
- 20.The Claimant is entitled to the dues, as no reasons were advanced as to why the agreement should not be enforced.

Pay in lieu of notice/compensation

- 21.Considering the conclusion that the termination of employment was fair, pay in lieu of notice and compensation are not tenable.

Conclusion and Orders

- 22.The Court finds and holds that termination of the Claimant's employment was fair, but that the Claimant is entitled to certain dues accruing from the employment relationship as agreed before the Labour Officer.
- 23.The Court therefore awards the Claimant Kshs 62,922/- as agreed before the Labour Officer on 18 October 2013.
- 24.Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 19th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Nyaribo instructed by B.M. Nyaribo & Co. Advocates
For Respondent	Mr. Githui instructed by Githui & Co. Advocates
Court Assistants	Nixon/Kosgei