



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 226 OF 2013**

**FIDELIS MWENDWA.....CLAIMANT**

**VS**

**B.O.G MACKNON-ROAD SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as an Accounts Clerk cum Computer teacher from January 2012. His salary was kshs.20,000/= per month. On 6.6.2012 she went on a maternity leave for two months and when she reported back to work on 24.8.2012, the school principal verbally dismissed her summarily on allegation that she had committed fraud and lost some receipt books. The claimant considered the said dismissal to be unfair because the allegations were untrue and that she was denied a chance to defend herself. She now brings this suit to recover her separation dues plus compensation for wrongful dismissal amounting to kshs.80,000/=.
2. The respondent has denied liability as pleaded in the suit. She avers that during the period of her service, the claimant engaged herself in fraudulent act that led to loss of money by the respondent. That when she was confronted with the fraud allegation, she disappeared and has never returned to work at the school.
3. The suit was heard on 1.10.2015 and 18.11.2015 when the claimant testified as Cw1 and M/S Zani Mwanaisha Hassan, the School Principal testified as Rw1 for the defence. Thereafter both parties filed written submissions.

**Analysis and Determination**

4. After careful consideration of the pleadings, evidence and submissions, it is clear that the claimant was employed by the respondent between January and August 2012 as an Accounts Clerk and Computer teacher earning kshs.20,000/= per month. That when she reported back to work after her maternity leave in August 2012 she was dismissed summarily for misconduct involving loss of school money and Receipt Books. The issues for determination are whether the termination of the employment contract was wrongful and unfair and whether the relief's sought should be granted.

**Wrongful and unfair termination**

5. The claimant's evidence that she was denied a chance to defend herself before dismissal was not rebutted. As an employee for the Respondent, the Board ought to have heard her case and made a decision whether to dismiss or not. The accusation and the decision were made by the Secretary to

the Board alone who also testified as Rw1. She was both the accuser and the Judge. She stated in evidence during cross examination that

**“When Cw1 returned from leave, I told her that she could not continue working because I did not want her to continue stealing from the school. I never called her to defend herself”.**

That admission of unfair procedure rendered the summary dismissal unfairly within the meaning of Section 45 of the Employment Act (EA) read together with Section 41 of the Act.

6. Section 45 Employment Act provides that termination of employment of an employee is unfair unless the employer proves that it was founded on a valid and fair reason and that it was done after following a fair procedure. Section 41 of the Act, on the other hand provides that before an employer terminates the services of an employee on ground of misconduct, he shall first explain the reason for the termination and accord him a chance to defend himself. That the said proceedings must be done in a language of the employees understanding and in the presence of a fellow employee of his choice. The above procedure was not followed before dismissing the claimant and the dismissal was procedurally unfair.
7. As regards the reason for the dismissal, the burden of proving the same was not discharged. The schools Auditor never testified and the report produced was never discussed by the Board and signed by Rw1 and the Chairman. The claimant was therefore wrongfully dismissed without any just cause and without any prior written notice.

### **Reliefs**

8. The claimant prayed for two months salary arrears plus compensation for wrongful dismissal totaling to kshs.80,000/=. She later gave evidence and submitted on unpleaded items which will not be granted for simple reason that parties are bound by their pleadings. The court will however grant her 2 months salary for the period she was on leave being kshs.40,000/=. She is also awarded kshs.20,000/= being one month salary in lieu of notice. She will further get one month salary as compensation for wrongful and unjustified dismissal being kshs.20,000/=. The reason for granting only one month salary compensation is because she had only served the respondent for a short period of time before the termination.

### **Disposition**

9. For the reasons stated above judgment is entered for the claimant in the sum of **kshs.80,000/=** for salary arrears and unlawful dismissal as prayed. The claimant will also have costs. No counter claim was filed and as such the alleged loan to the claimant will not be considered in this award.

**Dated, signed and delivered this 6<sup>th</sup> day of May 2016**

**ONESMUS MAKAU**

**JUDGE**