



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 301 OF 2014

BETWEEN

MERCY HARRIET MIHEGWA CLAIMANT

VERSUS

KEFA KEVIN NYONGESA t/a

KEVIN HILL SCHOOLS RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wachira King'ang'ai & Company Advocates for the Claimant

Sichangi Partners, Advocates for the Respondent

JUDGMENT

1. Ms. Mihegwa states she was employed by the Respondent School as its Cashier, in January 2012. Her salary was Kshs. 15,500 per month. She reported to work as expected, at the end of the school vacation in May 2014. She found another Employee had occupied her workstation. On enquiring about the intrusion from her Supervisor Mr. Morara, she was told there was no more work for her. It was alleged by the Respondent that some cheque, paid on account of school fees by Pupils, were missing. She was advised the books of account were being audited, and that she should cease working, unless she availed to the Respondent the missing cheques. She was not given a notice of termination. She was not paid her terminal benefits. She prays for:-

- a) 1 month salary in lieu of notice at Kshs. 15,500.
- b) Salary for the months of March and May 2014 at Kshs. 31,000.
- c) Annual leave pay for 2012 and 2013 at Kshs. 31,000.
- d) Pro-rata annual leave for 2014 at Kshs. 15,500.
- e) Unremitted N.S.S.F contributions at Kshs. 11,200.

f) Unremitted N.H.I.F contributions at Kshs. 4,560.

g) Damages for unlawful termination at Kshs. 186,000

Total Kshs. 294,760

h) Certificate of Service.

i) Costs, Interest and any other suitable relief.

2. The Respondent opposes the Claim. Its position is that the Respondent did not terminate the Claimant's contract. She was only called upon to answer an audit query. She absconded when asked to give an explanation. Her Claim has no merit.

3. The Claimant testified on 6th February 2015. The Respondent testified through its Inspector, Daniel Barasa Othieno on 1st March 2016. The matter was last mentioned in Court on the 11th July 2016, when Judgment was reserved for 14th October 2016.

Claimant's testimony

4. The Claimant testified she would take the books of account to the Respondent's Branch at Nyali, Mombasa, at the end of every term. She took the books at the end of the 1st term. She was to remain in School over the vacation. She received School fees from Parents. She received the fees in form of bank slips, and would also receive cash. She issued receipts immediately, on receiving cash payments. In case payment was through cheque, she would delay issuing receipts until the cheques cleared. The cheques were banked by the Accountant.

5. In May 2014, she found another Cahier at her desk. She was told by the Head Teacher on enquiry, that her books of accounts were not audited. The books were verified, and she was told they were okay.

6. The Chief Accountant however said there were deposit slips which he required. Mr. Sudi and Mr. Odera, who were the Accountants who made the particular deposits, had already been dismissed. Odera had left the Claimant with only a few of the banking slips. The Chief Accountant demanded the Claimant avails all the slips. She consulted the School's Director. She was told she would not be dismissed but should leave until the end of May 2014, when she would be reassigned to another Branch. She was not reassigned; she was instead asked by the Respondent to report to the Respondent's Advocates Sichangi Partners, who demanded the Claimant pays a sum of Kshs. 146, 300, allegedly embezzled from the cash office. It was not the Claimant's duty to deposit money in the Bank. She was not charged with any criminal offence.

7. Her N.S.S.F and N.H.I.F contributions were remitted in part. This is supported by Statements of Account from the relevant Bodies. She did not abandon her duties.

8. Cross-examined, Mihegwa told the Court she is presently employed by English Point Marina, earning Kshs. 28,800 per month. Her contract with the Respondent was for 1 year beginning February 2014, expiring February 2015.

9. Clause 4 provided that the Claimant would undergo probation of 6 months. She signed the contract. The contract was terminated in May 2014. She was still on probation on the date. She signed attendance register when the School was in session. Her name was not shown in the registers of March – May 2014. Her main Employer was the Director, not the Chief Accountant. The Director never told her, her contract had been terminated. She insisted on being given a letter of transfer, and sought communication on termination to no avail. No letter of termination issued. On redirection, she confirmed she had worked since the year 2012. The contract was renewed annually. She had worked for 2 years as of May 2014. She found her workstation taken over by another Person. She was told to go home and wait. She did not

receive a letter of transfer. She was not recalled. She was stopped from working at the beginning of May. She was not charged with any criminal offence. She prays the Court to allow her Claim.

Respondent's testimony.

10. Othieno emphasized that the Respondent did not terminate the Claimant's contract of employment; it only called for an explanation on the books of account, from the Claimant. She abandoned her position instead.

11. He explained on cross-examination that the Claimant was to receive cheques from Parents, and deposit in the Respondent's Bank Account. She was asked by the Accountant and the Director, in April 2014, to explain where she deposited 3 cheques. She left work. The Respondent did not see her again until May 2014, when she went to collect her April salary. The Director entrusted the Claimant's salary with the School's Advocates, insisting however, that she gives an explanation to the Advocates, about the missing cheques. She did not explain. The Respondent still does not know where the cheques are. From the Claimant's Bundle of Documents presented before the Court, Othieno confirmed 2 cheques were banked.

12. Odera and Sudi left employment. They were part of a scheme which defrauded the School. It is not true that Parents earlier on, used to pay cash. It is not true that the Claimant was under instructions to pass on the cheques to the Accountants for banking, and to issue receipt only after the cheques cleared.

13. The Claimant did not return to the School after May 2014. She received her April 2014 salary and left. The Respondent called her twice after this, to explain about the cheques. She did not respond. She was advised to see the Respondent's Advocates. She was told in the Advocates' letter of demand to her, that absconding, would result in a letter to her to show cause why disciplinary action against her should not issue.

14. The Respondent had been remitting N.S.S.F contributions, but had not carried evidence of this to Court. Certificate of Service had not issued. Even at the time Othieno gave evidence, the Respondent had not terminated the Claimant's contract. The Respondent did not sue her for any money it alleged she owed the Respondent. The Respondent urges the Court to dismiss the Claim.

The Court Finds:-

15. The Claimant was employed by the Respondent as the School Cashier, in January 2012, on a monthly salary of Kshs. 15,500. She explained the Respondent placed her on annual contracts, the last which commenced February 2014, to lapse February 2015.

16. It was suggested by the Respondent in cross-examination of the Claimant that this last contract provided for a probation period of 6 months. The Claimant left employment at the beginning of May 2014, during probation. The implication would be that termination would be deemed to fall within the provisions of Section 42[1] of the Employment Act 2007, which validates termination of probationary contracts, so long as this is preceded by issue of a notice of 7 days, or payment of 7 days' salary, by the Party occasioning termination.

17. The Court rejected this line of thought, in ***Carol Nthiga v. Oxfam [2013] e-KLR*** and ***Abraham Gumba v. KEMSA [2014] e-KLR***. The Court held that probation serves to provide job adjustment opportunity, for both new Employer and Employee, to determine whether to continue with the employment relationship. Probation is not for old dogs. In Mihegwa's case, probation was not necessary in the contract beginning February 2014. She was doing the same job in 2012 and 2013. There was nothing new. Section 42 [1] of the Employment Act 2007 would therefore not apply in any of her contracts after 2012. The probationary clause was not legally sustainable, and would not have effect on the alleged termination of May 2014.

18. The Respondent's explanation on the circumstances surrounding the Claimant's departure was that it

did not terminate her contract of employment; she absconded. There were questions raised about 3 cheques paid by Parents at the cash office. According to the Respondent, the Cheques were not accounted for. The Respondent demanded the Claimant explain the whereabouts of these cheques. She was told to visit the offices of the Respondent's Advocates and give an explanation there. She did not have an explanation and never went back to work. The Respondent did not terminate her contract.

19. The Claimant's position is that she collected cheques, and cash in form of fees. She would forward the cheques to the Accountants for banking, and issue receipts when the cheques went through. The role of banking cheques belonged to the Accountants. Two Accountants, Messrs Sudi and Odera had been dismissed over the scheme to defraud the School. The Claimant had been availed some of the banking slips by the two gentlemen. The School's Director insisted the Claimant produce all the banking slips. She was referred by the Respondent to Sichangi Partners, Advocates for the Respondent, who demanded the Claimant pay Kshs. 146,300 alleged to have been embezzled from the School. She was initially told she would not be dismissed. She would be transferred to another Branch. She had been asked to leave until the end of May 2014 when she would be recalled. She was not transferred or recalled.

20. The Court has formed the view that the Claimant's version of the circumstances surrounding her departure was more persuasive. There were gaps in the rendition told by the Respondent. It is not convincing that the Respondent did not terminate the Claimant's contract of employment.

21. She found another Cashier at her desk when she reported at the end of April vacation. She was not paid her April salary until she made a demand. The Respondent appears to have had some apprehension that money paid as school fees had been lost through its Employees. However, it was not shown that the Claimant was liable for the loss. The Court found her truthful when she testified that her role was to receive cash and cheques and issue receipts after the cheques cleared. Banking of the cheques was made by Sudi and Odera, the two Accountants who had been dismissed by the Respondent over the incident. Two of the 3 cheques were shown to have been deposited. It was not proper for the Director to demand the Claimant account for all the banking slips in view of the demarcation of roles. It was not proper to demand the Claimant pay Kshs. 146,300 allegedly lost in the scheme. The Respondent seems to have been pressing the Claimant to account for the offences committed by Sudi and Odera.

22. Although there was no express decision terminating the Claimant's contract, the conduct by the School toward the Claimant made it clear her service to the School was at end. The Claimant was right in considering herself constructively dismissed, and in moving on to another job. The Respondent engaged another Cashier and insisted the Claimant pay the sum of Kshs. 146,300. It did so without establishing that the Claimant stole this money or caused theft of this money. She was intimidated by being asked to report to the Respondent's Advocates to explain the missing cheques. The Employer should have taken the explanation from her, without engaging its Advocates to intimidate the Claimant. Investigations and disciplinary processes ought to have been confined to the workplace. She was not expressly dismissed, but the conduct of the Respondent led the Claimant to consider herself dismissed. The intention by the Respondent seems to have been to remove the Accountants and the Cashier as a collective unit, without assigning individual responsibility.

23. There were no charges drawn against the Claimant. She was not called to any disciplinary hearing, in the manner prescribed under Section 41 of the Employment Act. The Respondent's Advocates threatened the Respondent would initiate legal proceedings and report the Claimant to the Police, if she did not pay the amount said to have been plundered. There were no proceedings against the Claimant on the subject in a Court or at the workplace. Her involvement in a criminal offence, or an employment offence, was not established. No offence of any form was shown to have been committed by the Claimant. Aware that no such offence was shown, the Respondent resorted to disowning termination decision, alleging the Claimant absconded. Even assuming she absconded, no evidence was given showing the Respondent tried her for the employment offence of absconding. The Court is satisfied termination was at the instigation of the Respondent, and was made without regard to the Claimant's substantive and procedural protections granted under Section 41, 43 and 45 of the Employment Act. It was an unfair termination. ***She is granted compensation the equivalent of her 8 months' gross salary at Kshs. 124,000.***

24. The Court does not think that if there are unremitted N.S.S.F and N.H.I.F contributions, these should revert to the Claimant. These were deductions made on her salary on the authority of written laws. The contributions should be forwarded to the respective Statutory Bodies to enable the Claimant derive the full benefit intended by her subscription to these Bodies. It is for her to pursue full payment of the contributions, invoking the enforcement mechanisms available under the Acts of Parliament constituting the respective Bodies.

25. The Claimant did not show that she was not paid her salary for March 2014. As for May 2014, it is the view of the Court that she did not serve in May 2014. This is borne out in her own evidence which is that she returned to work at the beginning of May 2014, to find her position had been taken up by another Cashier.

26. The Respondent did not bring any records to show the Claimant utilized her annual leave, or was paid in lieu of such utilization. She testified she was normally on duty during school vacations. Her contract appears not to give the number of annual leave days she was entitled to. She worked in 2014 for 4 months and is entitled to 7 days of annual leave for the 4 months. The Court adopts the minimum 21 days allowed by the law as her annual leave entitlement. ***She is allowed the prayer for annual leave pay for 2012/2013/2014 of 28 days = Kshs. 15500 divide by a maximum 26 working days in a month = Kshs.596 per day x 28 days = Kshs. 16,688.***

27. She is allowed the prayer for 1 month salary in notice pay, certificate of service, costs and interest.

IN SUM, IT IS ORDERED:-

a) Termination was initiated by the Respondent and was unfair.

b) The Respondent shall pay to the Claimant 8 months' gross salary in compensation at Kshs. 124,000; 1 month salary in notice pay at Kshs. 15,500; and annual leave pay at Kshs. 16,688- total Kshs. 156,188.

c) The Respondent shall release to the Claimant her Certificate of Service forthwith.

d) Costs to the Claimant.

e) Interest granted to the Claimant at 14% per annum from the date of Judgment.

Dated and delivered at Mombasa this 14th day of October 2016.

James Rika

Judge