



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1029 OF 2014

POLLY JENNIFER MWONJARU.....1ST CLAIMANT

MILDRED KAGURE MACHARIA.....2ND CLAIMANT

VERSUS

VISION EMPOWERMENT TRAINING INSTITUTE.....1ST RESPONDENT

PEARLS OF KNOWLEDGE (NGO).....2ND RESPONDENT

JUDGMENT

1. The Claimants herein sued the Respondents and averred that they were employed as tutors by the 1st Respondent in the Departments of Community Health and Business respectively. The 1st Claimant averred she was employed on permanent basis on 3rd March 2014 and the 2nd Claimant averred she was employed on similar terms on 6th January 2014. The 1st Claimant earned a salary of Kshs 10,000/- a month while the 2nd Claimant earned Kshs. 9,500/- a month. The Claimants averred that the Respondents failed, refused and or remained stoic to settle the Claimant's April salary despite requests to do so. The Claimants averred that they continued serving the Respondents and were subjected to sudden time-table changes leading to insults. The Claimants averred that they were unceremoniously sent packing on 16th May 2014 through an Internal Memo without any legal basis. The Claimants thus sought salary arrears, notice pay, compensation for unlawful dismissal, interest, costs of the suit, general and aggravated damages including exemplary damages as well as a certificate of service.
2. The Respondents did not appear or file a defence in spite of service of summons and the Claim. The suit therefore proceeded as an undefended cause and entry of judgment was made on 28th October 2014. The case was to be determined on the basis of documents filed in terms line with provisions of Rule 21 of the Industrial Court (Procedure) Rules 2010. The Claimants filed written submissions on 19th November 2014. They submitted on the various aspects of the claim and attached judicial authorities. They relied on the Constitution, the Employment Act, and the cases of **Joseph D. Baraza v United (EA) Warehouse Limited [2013] eKLR**, **Philip Oluoch Rasare v Mombasa Apparel EPZ Unit 2 [2014] eKLR**, **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**, **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** and **John Wilice Opot v Starehe Boys Centre [2013] eKLR**. The authorities cited have been considered in coming to this decision.

3. The Claimants Memorandum of Claim filed on 20th June 2014 attached only the Internal Memo dismissing the 2 Claimants and the Bank statement of the 1st Claimant Polly Jennifer Mwonjaru.
4. Through the Internal Memo dated 16th May 2014 the College Principal Kituto J.M. communicated as follows:-

From: Management

To: All students

RE: PUBLIC NOTICE

This is to inform all vision empowerment training institute students that;

MS. MILDRED MACHARIA, STAFF CODE NO. [2] AND – BUSINESS DEPARTMENT

MS. POLY MWONJARU JENNIFER, STAFF CODE NO. [5] HEALTH & NUTRITION DEPARTMENT

Are no longer staffs of V.E.T.I They have no authorization to transact any business on behalf of V.E.T.I and we will not honor or be liable for any transactions.

Thanks for cooperating.

Kind regards

From

(signed)

KITUTO J.M.

COLLEGE PRINCIPAL

5. The import of the Internal Memo is clear. The services rendered by the 2 Claimants were terminated through the Memo. In the bank statement attached by the 1st Claimant, there is an entry on 7th April 2014 indicating a sum of Kshs. 10,000/- was paid as salary to the 1st Claimant. This means that April salary was paid and thus not recoverable as unpaid salary as claimed in the Memorandum of Claim. There was no attachment of the NSSF or NHIF statements by the 2nd Claimant to show the non-payment of the statutory deductions claimed. He who asserts must prove.
6. There is no indication as to whether the employer accorded the Claimants any modicum of procedure in terms of the Employment Act prior to the termination on 16th May 2014.
7. Section 41 of the Employment Act makes provision on the termination of an employee as follows:-

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

8. The Respondent is required under Section 43 of the Employment Act to prove the reasons for the termination were proper.

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

9. The termination was thus contrary to the law and unfair within the meaning of Section 45 of the Employment Act. What remedies would lie? The 1st Claimant it would seem was not paid for days worked in May and was not given notice. In the premises she would be entitled to pay for May (half month) as well as notice. For the 2nd Claimant there was no evidence of non payment of salary and her claim on arrears would fail. However she would be entitled to one month salary in lieu of notice. The Claimants services were terminated in a manner reminiscent of the dark days of labour practice and thus would be entitled to compensation for the gross violation of their rights and the unlawful termination. I would award the maximum compensation of 12 months salary.

10. In the final result I enter judgment for the Claimants as follows:

1st Claimant

- a. Salary for days worked in May 2014 Kshs. 5,000/-
- b. One month salary in lieu of notice Kshs. 10,000/-
- c. 12 months salary compensation Kshs. 120,000/-

2nd Claimant

- d. Salary for days worked Kshs. 4,500/-
- e. One month salary in lieu of notice Kshs. 9,500/-
- f. 12 months salary compensation Kshs. 114,000/-

11. The Claimants will also have costs of the suit together with interest on the sums above from date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of January 2015

Nzioki wa Makau

JUDGE